19-1048-cr

United States Court of Appeals
For the Second Circuit

Docket No. 19-1048-cr

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSHUA ADAM SCHULTE,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REDACTED BRIEF FOR DEFENDANT-APPELLANT JOSHUA ADAM SCHULTE

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STATEMENT OF JURISDICTION

Defendant-Appellant Joshua Adam Schulte appeals from two orders, entered on April 15 and 16, 2019, in the United States District Court for the Southern District of New York (Crotty, J.), denying his post-indictment motion to make public the search warrants and search-warrant applications (collectively, the "Search Warrant Materials") that were executed in this case in 2017 but remain under a protective order. On April 17, 2019, Mr. Schulte filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–47 (1949). *See, e.g.*, *United States v. Erie Cnty., N.Y.*, 763 F.3d 235, 238 n.5 (2d Cir. 2014) (order denying motion to unseal documents is immediately appealable). The district court had jurisdiction under 18 U.S.C. § 3231.

STATEMENT OF THE ISSUE

Whether, in light of the presumption of public access to judicial documents, the district court erred in denying Mr. Schulte's motion to make the Search Warrant Materials public where the court (a) failed to apply the correct legal standards under the common law and the First Amendment; (b) improperly placed the burden on Mr. Schulte to show why public disclosure is necessary for his defense; and (c) did not address Mr. Schulte's argument that publicly disclosing a

redacted version of the materials would adequately serve any countervailing interests in keeping sensitive information secret.

STATEMENT OF THE CASE

A. Overview

Joshua Adam Schulte is awaiting trial in the Southern District of New York on charges that he, *inter alia*, illegally accessed and transmitted classified information belonging to the CIA, possessed child pornography, and violated federal copyright laws by sharing movies and television shows over the Internet. On March 26, 2019, Mr. Schulte filed a letter motion asking the district court to remove from the scope of a protective order—and thereby make public—six search-warrant applications and eight search warrants issued and executed in 2017. On April 2, 2019, the government filed a letter with the district court opposing the motion. On April 10, 2019, the district court granted Mr. Schulte leave to reply to the government's opposition by April 15, 2019. But, on April 15, 2019, without awaiting Mr. Schulte's reply, the court entered a two-page order denying the motion. The next day, after receiving Mr. Schulte's reply, the court entered a second order denying the motion again. Neither order cites any of the principles or precedents relevant to the public's presumptive right to access judicial documents. Mr. Schulte appeals.

B. Factual and Procedural Background

According to the government, on March 7, 2017, WikiLeaks published classified information stolen from the CIA. Mr. Schulte, a former CIA employee with no criminal record, quickly became the target of the FBI's investigation into the theft. As a result, between March 13 and May 17, 2017, the FBI obtained and executed numerous search warrants for Mr. Schulte's home, electronic devices, and online accounts.

The six search-warrant applications

On March 13, 2017, a magistrate judge signed a warrant authorizing the FBI [redacted] *See* Sealed Appendix ("A.") 60–67. Portions of the affidavit in support of the warrant contain [redacted] including vague descriptions about the [redacted] *See* A. 25–53. For example, the affidavit states that the classified information released by WikiLeaks [redacted] which was [redacted] and [redacted] *See* A. 30–31. It states that there was a [redacted] which created [redacted] A. 32. It explains that [redacted]

[redacted] A. 33. The affidavit does not reveal the real names of the [redacted] the [redacted], or any people, apart from Mr. Schulte, who had [redacted]

As the government has subsequently acknowledged, significant portions of the information in this search-warrant affidavit were [redacted]. In a letter pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the government detailed [redacted] *See* A. 393–403. The errors included the [redacted] *See* A. 394–400. The government has, therefore, now admitted that [redacted]

Based in part on subsequent affidavits repeating the same general and incorrect information about [redacted], the FBI also procured search warrants for [redacted]. *See* A. 125–73. The subsequent affidavits provided no new information about [redacted]

On March 14, 2017, the FBI procured a warrant to seize and search [redacted] volume of electronic devices found in Mr. Schulte's apartment. *See* A. 72–73. During these exhaustive searches, the FBI found a [redacted] which the FBI claimed [redacted], and also discovered [redacted] *See* A. 176. As a result, on April 14 and May 10, 2017, the FBI obtained additional warrants to search [redacted] *See* A. 246, 324.

On May 17, 2017, the government obtained another warrant to seize [redacted] relating to the [redacted] *See* A. 369–75. The Google warrant affidavit contained the same general information about the [redacted] *See* A. 330–68.

Protective order to keep the Search Warrant Materials and other discovery secret

On September 6, 2017, the government indicted Mr. Schulte, charging him solely with three counts relating to child pornography. *See* A. 376–78. Nine months later, and over a year after the last search warrant was executed, the government filed a superseding indictment, adding charges relating to the leak of classified information, as well as one count of copyright infringement. *See* A. 404–17. On October 31, 2018, the government filed a second superseding indictment adding two additional counts for offenses Mr. Schulte allegedly committed while incarcerated. *See* A. 418–32.

Shortly after the initial indictment, on September 15, 2017, the government filed a one-sentence motion for a "protective order relating to discovery in this matter." A. 382. The proposed order, drafted by the government, sought to prevent the dissemination of discovery materials that, in the government's view, could (a) "jeopardize the safety of others and national security," and (b) "impede ongoing investigations." *See* A. 383. It also authorized the government to unilaterally designate discovery materials as "USG-CONFIDENTIAL" and thus subject to the protective order. *See* A. 384. In order to "expedit[e] the discovery process" and obtain the information needed to defend himself against the charges (A. 389), Mr.

Schulte's prior counsel consented to the proposed protective order, which the court entered without change on September 18, 2017. *See* A. 388–92.

Accordingly, the government designated the Search Warrant Materials "USG-CONFIDENTIAL" and produced them to defense counsel pursuant to the protective order. As a result, the materials can be viewed only by Mr. Schulte and his defense team and, if included in public filings, must be filed under seal. *See* A. 389–90, 391–92. The order did not state that Mr. Schulte may never move to modify the protective order. Indeed, the district court explicitly told Mr. Schulte: "If you want to vary the terms of the protective order … have your lawyer come into court and explain why there should be a modification to the order." A. 442.

Motion to make the Search Warrant Materials public

On March 26, 2019, long after he was indicted, over a year after the protective order was entered, and almost two years after the warrants were executed, Mr. Schulte filed a motion with the district court requesting that the Search Warrant Materials be removed from the scope of the protective order and made public. *See* A. 433–34. The motion argued that the Search Warrant Materials are judicial documents "entitled to a strong presumption of public access" and that no good cause exists to overcome that presumption. A. 433.

On April 2, 2019, the government opposed Mr. Schulte's request, maintaining that public disclosure of the Search Warrant Materials could harm

national security and impede its investigation, which it claimed was "ongoing." A. 453. The government did not provide any further details as to the harm, other than asserting that the warrant materials describe "the way that a U.S. Intelligence Agency maintained one of its sensitive computer systems" and that the harms are "real and significant." A. 455. It also did not explain what remained to be investigated, but offered to provide the district court with additional information ex parte. A. 454 n.1, 455. The government further argued that public disclosure is not "necessary for the purpose of preparing the defense in this case." A. 456 (citing Protective Order ¶ 5[1]).

The district court's ruling denying the motion

On April 10, 2019, during a court conference, the district court asked the government if all the warrant materials, including the child-pornography search warrant materials—which appear on their face to be completely unrelated to "national security"—were "subject to the government's same arguments [about] not producing the search warrant and affidavit in support of the search warrants." A. 463. The government responded, without elaboration, "Yes, your Honor. That's correct." *Id*. Mr. Schulte's counsel requested leave to file a reply to the

[1] The cited paragraph of the protective order provides: "Defense counsel may seek authorization of the Court to show (but not provide copies of) certain specified discovery materials to persons whose access to discovery materials is otherwise prohibited by the preceding paragraphs, if it is determined by the Court that such access is necessary for the purpose of preparing the defense of the case." A. 391.

government's position by April 15, 2019. *Id*. The court granted that request and said it would "rule promptly on [the motion] thereafter." *Id*.

On April 15, 2019, without awaiting Mr. Schulte's reply, the court issued a two-page order denying his motion to make the Search Warrant Materials public. A. 477–78. The order did not analyze whether the materials are entitled to a presumption of public access under the common law or First Amendment. Indeed, the court did not mention the First Amendment or the public's right of access at all. The court did not state that it had reviewed any ex parte submissions from the government articulating the factual basis for continuing to keep the materials secret. Instead, the order stated that, "[h]aving signed the protective order," Mr. Schulte "is not free to walk away from his agreement." A. 477–78 (citing *U.S. ex rel. Reilly v. New England Teamsters and Trucking Indus. Pension Fund*, 737 F.2d 1274, 1278 (2d Cir. 1984)). It then held that the Search Warrant Materials are properly designated as "USG-Confidential" because (a) "[t]he materials describe the Intelligence Agency's use of computers in its intelligence gathering operations" which "[s]urely … impacts the national security interests of the country," and (b) "[t]he Government represents that its investigation is continuing." A. 478.

The court did not provide any further detail as to how it determined that disclosure of the Search Warrant Materials would undermine the government's investigation or the nation's security. The order concluded that, because the

defense already has access to the documents, "[t]here is no evidence or argument" that Mr. Schulte's "ability to defend against the charges pending against him would be aided or assisted in any way" by the public disclosure of the Search Warrant Materials. A. 478. It cited no other cases.

Roughly ten minutes after the order was issued, Mr. Schulte filed his timely reply. *See* A. 479–82. It argued that the government had not met its burden of showing good cause sufficient to outweigh the presumption of public access to the Search Warrant Materials. A. 479–80. The reply also argued that continued blanket secrecy is unnecessary because only a small portion of the Search Warrant Materials contains information about the CIA computer system. A. 481. Finally, the reply argued that the protective order does not preclude Mr. Schulte from seeking to make the Search Warrant Materials public because they are judicial documents, and the protective order should not last longer than necessary. *See* A. 481–82.

The next day, on April 16, 2019, the district court issued a one-page order, again denying Mr. Schulte's motion. A. 483. The court reiterated that disclosure of the Search Warrant Materials "would implicate national security," and found that Mr. Schulte "has not shown need" for public disclosure of the materials. *Id.* The court once again did not address the First Amendment or common-law right-of-access principles and cited no cases. *See id.*

SUMMARY OF ARGUMENT

This Court should reverse the district court's orders because they fail to analyze Mr. Schulte's motion under the proper legal standards and incorrectly conclude that the Search Warrant Materials must remain secret in their entirety, apparently indefinitely. The Search Warrant Materials are judicial documents that the public has a strong presumptive right to access under both the First Amendment and common law, and that Mr. Schulte has a related First Amendment right to share and discuss publicly. The court, however, did not properly evaluate Mr. Schulte's claims. Instead, it cursorily dismissed them by erroneously relying, in large part, on the fact that Mr. Schulte has access to the documents, a factor immaterial under the common law or First Amendment. The court also failed to consider whether a less restrictive alternative to blanket secrecy—such as publicly releasing a redacted version of the Search Warrant Materials—would adequately serve any countervailing interests in keeping sensitive information confidential.

Using the correct legal analysis, the Search Warrant Materials should be made public because no countervailing interests overcome the strong presumption favoring openness and transparency of judicial proceedings, especially in criminal cases. This Court should, therefore, reverse the district court's orders and direct that the Search Warrant Materials be filed publicly. Alternatively, the Court should

remand the case for reconsideration under the proper constitutional and common-law analyses.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY DENIED MR. SCHULTE'S MOTION TO MAKE THE SEARCH WARRANT MATERIALS PUBLIC.

"The notion that the public should have access to the proceedings and documents of courts is integral to our system of government." *United States v. Erie Cnty., N.Y.*, 763 F.3d 235, 238–39 (2d Cir. 2014). Federal courts base this right of public access on the common law and the First and Sixth Amendments. *See Newsday LLC v. Cnty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013); *In re Application of WP Co.*, 201 F. Supp. 3d 109, 117 (D.D.C. 2016). The Sixth Amendment expressly grants a criminal defendant the right to a "public trial." U.S. Const. amend. VI.

Mr. Schulte sought the public release of the materials that authorized the government to search his home, belongings, and online accounts. Some of the warrant materials, which sought evidence of child pornography and copyright violations, contain seemingly no information relating to national security. Others contain only general, broad descriptions of the [redacted] as it existed in 2016, some of which appear to be inaccurate. Nonetheless, the government argued and the court accepted that there were vague, but significant, security

concerns if any of the warrant materials were released even in redacted form. These materials are judicial documents that the public has a presumptive right to access, and Mr. Schulte has a presumptive right to discuss, and the government did not show a sufficient countervailing interest to keep them secret. Thus, the court erred in denying Mr. Schulte's motion for their release.

A. This Court reviews legal issues de novo and closely scrutinizes the sealing of judicial documents.

"[T]he First Amendment concerns implicated by the sealing of proceedings or documents mandate close appellate scrutiny." *Newsday LLC v. Cnty. of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013). In reviewing a district court's order to keep court records secret, this Court examines the district court's factual findings for clear error, its legal determinations de novo, and its ultimate decision to seal for abuse of discretion. *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016). A district court necessarily abuses its discretion when it makes an error of law, such as applying the wrong legal standard. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996). And because a district court's discretion to seal documents "is significantly circumscribed by constitutional principles set forth by the Supreme Court," this Court's review "is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted." *United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995) (internal quotation marks omitted); *see also Newsday LLC*, 730 F.3d at 163 (stating that this

Court has "traditionally undertaken an independent review of sealed documents, despite the fact that such a review may raise factual rather than legal issues").

B. The Search Warrant Materials are entitled to a strong presumption of public access under the common law.

A court considering whether materials should be kept from the public must analyze the right to access under the common law and the First Amendment. The "common law right of public access to judicial documents is said to predate even the Constitution itself." *Erie Cnty.*, 763 F.3d at 239. Under the common law, judicial documents are "presumed to be publicly accessible." *Id*. The court must first determine whether the documents at issue are "judicial documents" to which a common-law right of presumptive access attaches. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). If so, the court must then determine the weight of that presumption. *Id*. "[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quoting *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995)). Finally, the court must balance the weight of the presumption against any countervailing interests against disclosure. *Id*. at 120 (citing *Amodeo*, 71 F.3d at 1050). "Only when competing

interests outweigh the presumption may access be denied." *Erie Cnty.*, 763 F.3d at 239 (citing *Lugosch*, 435 F.3d at 119–20).

This Court has already held that search warrant materials are judicial documents subject to at least the common-law right of access. *In re Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (search warrant materials are public documents "subject to a common law right of access"); *see also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64–65 (4th Cir. 1989) ("affidavits for search warrants are judicial records" to which the press and public "have a common law qualified right of access"). The presumption of access to the Search Warrant Materials is, therefore, strong and "carries the maximum possible weight." *In re Sealed Search Warrants Issued June 4 & 5, 2008*, 2008 WL 5667021, at *3 (N.D.N.Y. July 14, 2008); *see also United States v. Cohen*, 366 F. Supp. 3d 612, 621 (S.D.N.Y. 2019) ("Like other courts in this circuit, this Court concludes that search warrants and search warrant materials are entitled to a strong presumption of public access") (collecting authorities); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004) (courts "have generally invoked the common law right of access to judicial documents in support of finding a history of openness").

C. The Search Warrant Materials are entitled to a strong presumption of public access under the First Amendment.

To determine whether a First Amendment right of access attaches, this Court applies the "experience and logic" test, which asks (a) whether the documents in

question "have historically been open to the press and general public," and (b) whether "public access plays a significant positive role in the functioning of the particular process in question." *Lugosch*, 435 F.3d at 120 (citing *Pellegrino*, 380 F.3d at 91). If a First Amendment right is found, the documents may be sealed only if "specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Erie Cnty.*, 763 F.3d at 239 (citation and internal quotations omitted).

This Court has not yet squarely decided whether, or under what circumstances, the First Amendment guarantees a right of access to search warrants and search-warrant applications. *See, e.g.*, *In re Application of New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (finding no First Amendment right of access to statutorily protected wiretap warrants, noting that Title III wiretap proceedings are historically secret); *In re Application of Newsday, Inc.*, 895 F.2d 74, 75 (2d Cir. 1990) (declining to decide if newspaper had a constitutional right of access to search-warrant applications, but upholding district court's release of redacted copy of documents under common-law right of access).

In this case, both "experience and logic" demonstrate that the First Amendment guarantees access to the Search Warrant Materials, especially given that the searches were completed more than two years ago and the indictment has

been unsealed. Warrant materials "have historically been available to the public" and therefore meet the "experience" prong of the First Amendment right-of-access test. *In re Application of New York Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008) (recognizing First Amendment right of access to search warrant materials after investigation had concluded); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (holding that First Amendment right of access extends to warrant materials even during an ongoing investigation because such materials "are routinely filed with the clerk of court without seal" and "[u]nder the common law judicial records and documents have been historically considered to be open to inspection by the public"). The common-law tradition of access to warrant materials also weighs strongly in favor of a First Amendment right of access. *See Pellegrino*, 380 F.3d at 92 (courts "have generally invoked the common law right of access to judicial documents in support of finding a history of openness").

The Search Warrant Materials also satisfy the "logic" prong of the test because "[s]pecifically, with respect to warrants, openness plays a significant positive role in the functioning of the criminal justice system." *In re Application of New York Times*, 585 F. Supp. 2d at 90 ("Public access to warrant materials 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.") (citing *United States v. Leon*, 468 U.S.

897, 917 n.18 (1984)); *see also Gunn*, 855 F.2d at 573 ("[P]ublic access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct."). In this case, disclosing the Search Warrant Materials would allow the public to learn, among other things, that [redacted] to see [redacted] and to assess the legitimacy of the government's investigation and prosecution of Mr. Schulte.

This Court should, therefore, hold that the First Amendment protects both the public's right to access the Search Warrant Materials and Mr. Schulte's related right to disseminate and speak about them.

D. The district court erred by failing to apply the common-law and First Amendment analyses.

The district court used the wrong legal standards to evaluate Mr. Schulte's motion. The court did not address, as it must, *see Erie Cnty.*, 763 F.3d at 239, the threshold issue of whether the Search Warrant Materials are judicial documents to which a qualified common-law right of access presumptively attaches. It did not determine, as it must, *see id.*, the weight of the presumption of access, or balance that weight against any countervailing interests. It also did not examine, as it must, *see Lugosch*, 435 F.3d at 120, whether historical practices and public-policy

concerns support a First Amendment right of access. In fact, the court did not even acknowledge the existence of a common-law or First Amendment right of public access to judicial documents. Instead, the court cursorily held—with less than three pages of discussion—that all of the Search Warrant Materials must remain secret indefinitely, basing its decision in large part on factors irrelevant under either the common law or the First Amendment.

First, the court ruled that, "[h]aving signed the protective order," Mr. Schulte "is not free to walk away from his agreement." A. 477–78. But Mr. Schulte did not attempt to "walk away" from any agreement—he properly made a motion to modify the protective order to accommodate the important constitutional and common-law rights at stake, which was exactly what the district court told him to do if he wished to modify the order. A. 442.

Moreover, Mr. Schulte's prior counsel stipulated to the protective order in order to "expedit[e] the discovery process." A. 389. Counsel agreed to the order before even seeing the Search Warrant Materials. This agreement was not perpetual, nor does it negate the common-law or First Amendment right of access to the materials or the government's burden to overcome the strong presumption of public access. The "inherent pressures of litigation will often provoke parties to consent to protective orders during discovery" without "tak[ing] into consideration the public's interest in such matters." *In re Application of Akron Beacon Journal*,

1995 WL 234710, at *12 (S.D.N.Y. Apr. 20, 1995) (the requirement that litigants show why particular documents should be sealed "acts as a guardian of the public's right to access to discovery documents").

The only case cited by the district court, *U.S. ex rel. Reilly v. New England Teamsters and Trucking Industry Pension Fund*, 737 F.2d 1274, 1278 (2d Cir. 1984), is not applicable. *Reilly* stands for the general proposition that a "party to a stipulation is not entitled to withdraw from its agreement unilaterally." *Id*. The case does not mention or address modifying a protective order in a criminal case.[2] Indeed, the protective order here, unlike a factual stipulation, was not an agreement about the existence of facts. Under this Court's precedents, the district court was required to carry out the threshold step under the presumption-of-access analyses and determine whether the Search Warrant Materials are judicial documents, instead of reflexively concluding that, because the protective order is the status quo, it must remain in place indefinitely. The court failed to do so.

Second, the court erred by focusing on whether public disclosure of the Search Warrant Materials is necessary to Mr. Schulte's ability to defend against the

[2] Even in civil cases involving protective orders that create some sort of reliance interest by the parties, "any presumption that may exist against modifying a protective order is reversed" and "does not apply" when "the materials involved constitute 'judicial documents,'" as the Search Warrant Materials surely do. *Lown v. Salvation Army, Inc.*, 2012 WL 4888534, at *4 (S.D.N.Y. Oct. 12, 2012) (citing *S.E.C. v. TheStreet.com*, 273 F.3d 222, 231 (2d Cir. 2001)).

charges. The court held that the materials need not be made public because Mr. Schulte has them—though he cannot share them or their contents with the public—and "has the ability to prepare whatever defense might spring from the search warrants and affidavits in support." A. 478.

But Mr. Schulte's motion was not based on his right to present a defense. It was based instead on his separate right—and that of the public—to open and transparent judicial proceedings, especially in criminal cases. *See Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 12 (1986) (discussing right of public access as "essential to the proper functioning of the proceedings in the overall criminal justice process"); *Erie Cnty.*, 763 F.3d at 242; U.S. Const. amends. I & VI. The motion was also based on his First Amendment right—as a speaker—to discuss the searches that led to his prosecution. *See United States v. Pickard*, 676 F.3d 1214, 1219 n.2 (10th Cir. 2012) ("[T]here is little doubt that Defendants have Article III standing to seek the unsealing of documents in the file because [Defendants] claim a First Amendment interest in communicating information that they already have.") (citing *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172–73 (10th Cir. 2006)).

Contrary to the district court's apparent view, the right of the public to access judicial documents—like the related right of a defendant to share and discuss those materials publicly—does not depend on whether public disclosure of

the documents is necessary for a party's defense, but "on the need for federal courts … to have a measure of accountability and for the public to have confidence in the administration of justice." *Amodeo*, 71 F.3d at 1048, 1050 (holding that motive of party seeking access is "generally … irrelevant to defining the weight accorded the presumption of access"); *see also In re Sealed Search Warrant*, 2006 WL 3690639, at *2 (N.D.N.Y. Dec. 11, 2006) (in evaluating a presumption-of-access claim, "[t]he central focus of the inquiry is the relationship of the documents to the judicial process, not the particular motivations of those seeking access") (citing *Lugosch*, 435 F.3d at 123).

Thus, under the common-law analysis, "the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Amodeo*, 71 F.3d at 1049. The fact that Mr. Schulte has the Search Warrant Materials does nothing to vindicate these important values. If the law required only that the parties to a criminal proceeding be granted access to the materials involved, *all* records of criminal proceedings could be kept secret from the public.

Third, the district court incorrectly placed the burden on Mr. Schulte to show that public disclosure of the Search Warrant Materials is necessary, saying that Mr. Schulte "has not shown any need for public disclosure." A. 483. But "[p]lacing the

burden on Defendants to show a compelling reason why the documents should be unsealed is contrary to the presumption favoring public access to judicial records." *United States v. Pickard*, 733 F.3d 1297, 1304–05 (10th Cir. 2013) (reversing denial of motion to unseal records) (citation omitted). Instead, "[t]he party seeking to overcome the presumption of public access to the documents"—here the government—"bears the burden of showing some significant interest that outweighs the presumption." *Helm v. Kansas*, 656 F.3d 1277, 1292–93 (10th Cir. 2011) (citation and internal quotations omitted) (denying motions to seal because moving parties "have not come close to meeting that heavy burden"); *see also DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997) ("The burden of demonstrating that a document submitted to a court should be sealed rests on the party seeking such action . . . .") (citation omitted).

That the Search Warrant Materials were already subject to a stipulated protective order when Mr. Schulte moved to make them public is irrelevant to this analysis: the burden always remains with the party opposing public access. *See, e.g.*, *Pickard*, 733 F.3d at 1302 ("[T]he party seeking to keep records sealed bears the burden of justifying that secrecy, even where, as here, the district court already previously determined that those documents should be sealed."); *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1181–82 (9th Cir. 2006) (party opposing unsealing of sealed documents filed pursuant to stipulated protective order bears

burden of showing why documents should remain sealed); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004) (same). "A failure to meet that burden means the default posture of public access prevails." *Kamakana*, 477 F.3d at 1178 (rejecting argument that court erred by not articulating its reason for unsealing the record because "[t]his proposed approach is upside down" as "[t]he judge need not document compelling reasons to unseal; rather the proponent of sealing bears the burden with respect to sealing"). *See also United States v. Antar*, 38 F.3d 1348, 1362 (3d Cir. 1994) ("Instead of recognizing that it bore the burden of justifying the original sealing order, as well as the decision to maintain the transcripts under seal, the court shifted the burden to the press to demonstrate to the court why the documents should be unsealed."); *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 307 (2d Cir. 1997) (requiring, *sua sponte*, that the district court review records filed wholesale under seal to determine whether their confidential treatment was warranted, without considering whether there was a person or entity that had a specific interest in gaining access to them or maintaining them in the public files of the court).

Finally, the district court failed to articulate sufficient reasons that would support sealing of judicial documents under the common-law right of access. *See United States v. Sealed Search Warrants*, 868 F.3d 385, 397 (5th Cir. 2017) ("The findings made by the district court in this case are bare. . . . While the district court

need not conduct an exhaustive assessment, it must generally articulate its reasons to support sealing the affidavits with a level of detail that will allow for this Court's review."); *Lugosch*, 435 F.3d at 120 ("Broad and general findings by the trial court … are not sufficient to justify closure."). The district court here stated only general conclusions to support the indefinite sealing of the documents. In fact, there are no sufficient countervailing factors that outweigh the strong presumption of access to the materials under both the Constitution and the common law.

Accordingly, the district court failed to apply the correct common-law and First Amendment presumption-of-access analyses to the Search Warrant Materials and improperly placed the burden on Mr. Schulte to prove that public disclosure is necessary for his defense. For these reasons alone, the district court's orders cannot stand. *See, e.g.*, *Tough Traveler, Ltd., v. Outbound Prods.*, 60 F.3d 964, 965 (2d Cir. 1995) (failure to "apply the correct legal standard" was an "abuse of discretion" that required a remand for further proceedings).

E. The government failed to meet its burden of showing that disclosure of the materials would endanger national security.

The government failed to meet its burden of demonstrating that disclosure of even limited portions of the Search Warrant Materials would impede any ongoing investigation or endanger the nation's security. It never explained what kind of investigation is still ongoing, what information remains to be investigated, or how

long its investigation will take. It claimed that information in the Search Warrant Materials implicates national security interests because "it describes the way that a U.S. Intelligence Agency maintained one of its sensitive computer systems" in 2016, but did not provide any more detail. A. 455.

While it is true that some of the search-warrant applications contain some information about a [redacted], the information has not been designated as "classified." And it is so general in nature that it is hard to see how public disclosure, especially with redactions, would implicate either investigatory or national security concerns. For example, the Search Warrant Materials disclose that (a) the classified information released by WikiLeaks [redacted] (b) the [redacted] was used [redacted] (c) the [redacted] was [redacted] (d) the [redacted] work was [redacted] and (e) the WikiLeaks data [redacted] *See* A. 286–87. But the Search Warrant Materials do not reveal (a) the real name of the [redacted] (b) the real name of the [redacted] that had access to the [redacted] (c) the real name of [redacted] (d) the name of any individuals, apart from Mr. Schulte, who had access to [redacted] or (e) the actual location of the [redacted] The affidavits also contain redacted information. *See* A. 348

(redacting [redacted]. In short, the affidavits already conceal information that the government does not want to be made public.

The fact that the CIA has [redacted], moreover, is no secret, as this information is available publicly on the CIA's own website. *See* Central Intelligence Agency, https://tinyurl.com/y2yagvyc (job description for the CIA's Field IT Systems Administrator position states that administrators "operate, maintain, install and manage complex LAN and WAN platforms") (last accessed June 3, 2019). Non-specific, unclassified, and, in part, inaccurate information about a [redacted] is not the type of information typically deemed sufficiently sensitive to justify blanket secrecy. *Cf. United States v. Lindh*, 198 F. Supp. 2d 739, 742 (E.D. Va. 2002) (interviews with detained members of a foreign terrorist organization were "of critical importance to national security" and thus properly subject to a protective order "as detainees may reveal information leading to the identification and apprehension of other terrorist suspects and the prevention of additional terrorist acts"); *United States v. Yousef*, 327 F.3d 56, 168 (2d Cir. 2003) (information related to jailhouse informants was properly sealed for "the protection of confidential informants and the need for secrecy about how [the government] investigates and responds to terrorist threats"); *Cohen*, 366 F. Supp. 3d at 623 (wholesale disclosure of search warrant

materials that "catalogue an assortment of uncharged individuals and detail their involvement in communications and transactions connected to the campaign finance charges to which Cohen pled guilty" could impact the government's ongoing investigation).

Here, of course, the Search Warrant Materials do not contain information that reveals the identities of terrorist suspects, confidential informants, uncharged individuals, or how the government responds to terrorist threats. Instead, portions of the materials contain general information about a computer system. The government has not demonstrated that keeping such general information secret outweighs the important constitutional and common-law values favoring transparency in criminal cases.

F. The district court further erred by not considering whether unsealing redacted versions of the Search Warrant Materials would adequately serve the government's alleged countervailing interests.

Not only did the district court apply the incorrect legal standards, but it also failed to address whether the complete sealing of the Search Warrant Materials is narrowly tailored, or whether the court considered any less restrictive alternatives, such as partial redaction. "[I]n determining what degree of protection is appropriate, courts should ensure that a protective order 'is no broader than is necessary' to serve the intended purposes." *United States v. Smith*, 985 F. Supp. 2d 506, 545 (S.D.N.Y. 2013) (quoting *Lindh*, 198 F. Supp. 2d at 742); *see*

also United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) ("[W]e reinforce the requirement that district courts avoid sealing judicial documents in their entirety unless necessary" because "[t]ransparency is pivotal to the public perception of the judiciary's legitimacy and independence."); *In re Application of Newsday, Inc.*, 895 F.2d 74, 80 (2d Cir. 1990) (warning against "drastic restrictions on the common law right of access" and approvingly noting the district court's limited redactions to a warrant application). In Mr. Schulte's case, only some of the six search-warrant applications contain information about the [redacted] The others make no mention of the [redacted].[3] And none of the six applications contains sufficient details about the [redacted] to warrant blanket sealing. The protective order is thus far broader than necessary.

A thorough analysis recently conducted by Judge Pauley in *United States v. Cohen*, 366 F. Supp. 3d 612 (S.D.N.Y. 2019), is instructive. There, media organizations sought an order unsealing search warrant materials involved in the prosecution of Michael Cohen, President Trump's former attorney. *Id.* at 617. As here, the government in *Cohen* claimed that the materials contained sensitive information that would jeopardize an ongoing investigation if publicized. *Id.* at 618. In a lengthy opinion, Judge Pauley carefully considered whether a common-

[3] To the extent some of the applications attach exhibits (earlier warrant applications) that do contain information about the [redacted], those exhibits could either be redacted or removed.

law or First Amendment presumption of access warranted the unsealing of the materials, finding that the materials were judicial documents entitled to a strong presumption of public access under the common law. *Id.* at 620–21. Although the court ultimately found that "wholesale disclosure of the Materials would reveal the scope and direction of the Government's ongoing investigation," based in part on ex parte submissions, it held that "disclosure of the Materials with redactions strikes an appropriate balance between the strong presumption of public access to search warrant materials and the countervailing interest identified by the Government." *Id*.

As in *Cohen*, a few careful redactions, at most, not the perpetual blanket sealing of all materials, is the appropriate resolution here.

* * *

Properly applying the correct legal standard, Mr. Schulte's motion to disclose the Search Warrant Materials should be granted. Under the common law, the government failed to overcome the strong presumption of public access. And because the First Amendment presumption of public access also attaches to the materials, the court was required to make specific, on-the-record findings that "higher values" necessitate a narrowly tailored sealing. It failed to do so and instead, after improperly placing the burden on the defense, simply accepted the government's conclusory assertion that *any* disclosure of *any* portion of the

materials would jeopardize the government's investigation or national security. This vague assertion is not sufficient to justify sealing. *See Stagg P.C. v. U.S. Dep't of State*, 673 F. App'x 93, 95 (2d Cir. 2016) (reiterating that government invocation of "national security" as "a broad, vague generality" cannot "abrogate the fundamental law embodied in the First Amendment") (quoting *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring)).

In summary, the government has not shown any compelling consideration that overcomes the strong presumption of public access to the Search Warrant Materials or defeats Mr. Schulte's First Amendment right as a speaker to share and discuss them. Accordingly, they should be made public.

CONCLUSION

For these reasons, the Court should reverse the district court's orders, direct the court to release the Search Warrant Materials from the constraints of the protective order and file them on the public docket, and grant any other relief that may be warranted. Alternatively, the Court should vacate the district court's orders and remand for further proceedings.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This Redacted Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: New York, New York
June 5, 2019

/s/
EDWARD S. ZAS

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Redacted Brief to be filed with the Court's CM/ECF system, which will effect service on all counsel of record.

Dated: New York, New York
June 5, 2019

/s/_____
EDWARD S. ZAS