Docket Nos. 19-15472

In the

United States Court of Appeals

For the

Ninth Circuit

UNITED STATES DEPARTMENT OF JUSTICE and FACEBOOK, INC.,

Respondents-Appellees,

v.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,
ELECTRONIC FRONTIER FOUNDATION and RIANA PFEFFERKORN,

Movants-Appellants,

WP COMPANY LLC, dba The Washington Post,

Movant.

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 1:18-mc-00057-LJO-EPG · Honorable Lawrence J. O'Neill

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

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

Amici are former federal magistrate judges with experience in and interest in the unsealing, where appropriate, of federal surveillance applications, orders, and related court documents.

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. A graduate of Georgetown University Law Center, 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 lawyer at the United States Department of Justice and an 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 1995-2015 and for an additional three years in that district on recall. Before 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 retired in 2015.

Stephen Wm. Smith served as a United States Magistrate Judge for the Southern District of 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.

Amici submit this brief to offer their perspective on the practical and policy concerns about sealing and unsealing, based on their individual experiences as magistrate judges.[1] With more than 90 years of cumulative service on their bench, *amici* are well-positioned to reflect on the potential effects of implementing the relief the Appellants 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 trying to proactively unseal large numbers of closed, sealed criminal surveillance applications and orders. They thus understand the challenges in unsealing these filings, the benefits of doing so, and how to improve the unsealing process.

[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.

FRAP 29(a)(2) authorizes *amici* to file this brief without leave of the Court because all parties have consented to its filing.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

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

INTRODUCTION

There is a strong presumption that judicial records and documents are open to the public. For many electronic surveillance applications and orders, the compelling interest in not jeopardizing the integrity of an ongoing investigation overcomes the presumption. But that interest does not extend to every judicial document generated in the context of granting or denying an application; most of those can and should be public. Here, the district court refused to unseal four categories of documents: docket sheets, judicial rulings, legal reasoning in government submissions that the court incorporated in its rulings, and orders granting or denying requests to seal documents. In *amici*'s experience, these kinds of documents can be public, redacted as needed, without undermining law enforcement's goals.

Even for those judicial records that a court agrees to seal, the compelling interest in secrecy eventually expires. For example, it ends when law enforcement has captured and charged a suspect or eliminated one from suspicion. When that happens, the sealed documents must be unsealed to vindicate the public's right of access. This case is unusual because appellants learned of a sealed proceeding and order and sought more information. Usually, no one other than law enforcement and the court even knows what sealed records exist. Nothing triggers the court to consider whether and when to unseal those records. Courts of appeals rarely have the chance to review orders sealing court records.

This is unfortunate. In our legal system, the public may inspect and copy all but the most sensitive judicial records and documents. Transparency discourages misconduct, checks potential abuses of judicial power, and promotes public confidence in the judicial system. Citizens must know the law, including judicial opinions, to govern their conduct. Additionally, however, sealed judicial opinions preclude healthy conversations among judges, through their opinions, about how to interpret the various laws and rules that provide for sealing sensitive documents. Similarly, sealed judicial opinions make it much less likely that Congress will learn how courts are interpreting and applying its laws. For all these reasons, *amici curiae* urge the Court to reverse the orders on appeal in a precedential opinion providing guidance for district court judges.

ARGUMENT

I. The government must rigorously justify sealing judicial proceedings and documents to overcome the strong presumption that they are open to the public.

Courts start with a strong presumption in favor of access to court records. *See, e.g., Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Lack of transparency is a threat to the rule of law. The Seventh Circuit discussed the policy reasons for the presumption in a decision overruling a magistrate's decision to file an entire opinion resolving a trade secret claim under seal. *Hicklin Eng'g., L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006), *abrogated on other grounds by RTP LLC v. Orix Real Estate Capital, Inc*.,827 F.3d. 689 (2016). Courts issue public decisions. They base those decisions on public records after public arguments. *Id.* "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification." *Id.*; *see also Little v. Mitsubishi Motor Mfg. of Am., Inc.*, 2006 WL 1554317 *3-4 (C.D. Ill. June 5, 2006) (denying motion to file a motion for summary judgment under seal and ordering party to redact only names and personally identifiable information). In appropriate cases, courts make even information in criminal investigations public. *See, e.g.*, *United States v. Kott*, 135 Fed. Appx. 69, 71, 2005 WL 1400288, at *2 (9th Cir. 2005) (affirming district court's unsealing of search warrant materials and indictment after the defendant

entered a guilty plea); *United States v. Schlette*, 842 F.2d 1574, 1585 (9th Cir. 1988) (granting petition for writ of mandamus and finding the district court's refusal to unseal a deceased defendant's presentence report was an abuse of discretion).

To prevail on a motion to seal judicial records, the movant must show (1) that closure serves a compelling interest; (2) there is a substantial probability that, absent closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 949 (9th Cir. 1998). In granting a motion to seal, a court must make specific factual findings supporting each requirement. Here, the district court presumably set out its findings in the order that appellants seek to unseal.

In *amici*'s experience, sealing entire proceedings and documents is rarely necessary to serve a compelling interest. Redacted unsealed orders and applications do not contain enough information to jeopardize ongoing or future investigations. They generally lack much technical information related to how the relevant data collection techniques work. On the contrary, many applications to seal contain more boilerplate than secret or sensitive information. Stephan Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPS's Secret Docket*, 6 Harv. L. & Pol'y Rev. 313 (2012) (discussing Pen/Trap applications and orders). And

often, the sensitive information tends to appear in the same section of each kind of document. That makes it easy to identify material to redact and to file the rest of the document in the public record. Prosecutors, however, apply an excess of caution lest they compromise an investigation. And too often courts acquiesce in a prosecutor's requests without giving adequate weight to the people's right to know what is going on in their courts. Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. Rev. 711, 715 (2004); Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 Fed. Cts. L. Rev. 177, 208 (2009). In districts having multiple magistrate judges whose schedules are known, law enforcement can choose to apply to judges known or thought to be sympathetic. *See* James Orenstein, *I'm a Judge. Here's How Surveillance Is Challenging Our Legal System*, N.Y. Times, June 13, 2019. Instead of a judge acting as a check on overzealous prosecutors, the prosecutors ought to monitor themselves to look out for the rights of citizens and the public. But this is inconsistent with their duty to advocate on behalf of law enforcement. *See id.* (the privacy of members of the public is not prosecutors' highest priority). The Court should reverse the district court's decision denying the Appellants' motion. The Court's precedential opinion would send a message empowering district courts to balance the public's presumptive right to access against law enforcement's need for secrecy.

II. Sealing more cases and court documents than necessary creates myriad problems.

A. Third parties seeking to unseal cases or documents are at a disadvantage because they lack access to specific relevant facts.

The First Amendment requires that the press and the public have a right to be heard to complain that a court has excluded them from court proceedings. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 n. 24 (1982). Individuals, news media, and public service organizations like Appellants should encourage the courts to regulate unsealing surveillance orders and related documents in a more transparent fashion. See Brian L. Owsley, *To Unseal or Not to Unseal: The Judiciary's Role in Preventing Transparency in Electronic Surveillance Applications and Orders*, 5 Cal. Rev. Circuit 259, 265 (2014) (*To Unseal*). But without access to the underlying documents, the opportunity to be heard is illusory. The district court recognized "that Applicants are handicapped in their argument due to their almost non-existent factual knowledge." Appellant's ER 2:15-16, ECF 26, filed February 11, 2019. Indeed, Appellants only learned that federal law enforcement had sought Facebook's assistance to monitor suspects' Facebook messenger calls when news sources reported the district court's denial of the government's motion to hold Facebook in contempt. See Appellants' Opening Br. at 1 n.1, No. 19-15472 (9th Cir. June 12, 2019); Dan

Levine & Joseph Menn, *U.S. Government Seeks Facebook Help to Wiretap Messenger*, Reuters, Aug. 17, 2018, https://perma.cc/MM9M-C2XU.

B. Sealing applications for electronic surveillance prevents targets who are not charged from learning that the government has accessed their private communications.

The nature of electronic surveillance is that it intercepts not only communications between conspirators but also innocent people's private communications. When applications for electronic surveillance and the resulting orders are secret, those innocent people never even know that their private information has been compromised. *Gagged* at 315. Courts often issue nondisclosure orders against service providers like phone companies, search engines, and social media sites. These prohibit a company cooperating with law enforcement from telling its customers that law enforcement may have accessed their electronic communications. Gag orders of indefinite duration arguably are content-based prior restraints on speech that violate the First Amendment. *Gagged* at 326, citing *In re Sealing*, 562 F. Supp. 2d at 881-87.

Unless they are charged with a crime, targeted people will never learn that the government has accessed their otherwise private emails, text messages, twitter accounts, or cell phone records. *Gagged* at 315. This means that they believe, wrongly, that their communications are private. Unsurprisingly, most people feel violated when they learn that the government has monitored those

communications. Owsley, *To Unseal* at 263 ("One need only look at the recent public uproar over NSA's electronic surveillance program to know that most people are very concerned about these invasions of privacy").

C. Proceedings and documents typically remain secret long after any need for secrecy has passed.

Temporary secrecy for electronic surveillance orders is reasonable and necessary to avoid jeopardizing the integrity of an ongoing investigation and tipping off the target. *Gagged* at 315; *To Unseal* at 260. But the government's compelling interest in maintaining the integrity of its ongoing criminal investigation usually expires when the investigation ends. *Butterworth v. Smith*, 494 U.S. 624, 632-33 (1990); *see also Gagged* at 326 n. 71 citing *In re Sealing*, 562 F. Supp. 2d at 881-87; *To Unseal* at 260. Still, sealed surveillance orders usually remain secret long after that. *Gagged* at 325; *To Unseal* at 260 (if a magistrate judge did not unseal his sealing orders and related documents before retiring, "they were likely to remain sealed for all of eternity"). Judges rarely draft their sealing orders to expire on a given date. Instead, an order often remains sealed "until further order of the court." *Gagged* at 325, citing *In re Sealing & Non-Disclosure of Pet/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 877-78 (S.D. Tex. 2008). In reality, a magistrate judge rarely revisits a sealing order, and so never issues another order. *Gagged* at 325. The statistics are staggering. For example, from 1995-2007, Houston's federal magistrate judges issued 3,886

electronic surveillance orders sealed until further order of the court. *Id.* As of 2008, 99.8% of those orders remained sealed. *Id.* citing *In re Sealing*, 562 F. Supp. 2d at 895; *see also To Unseal* at 261-63 (describing a magistrate judge's unsuccessful attempt to unseal old orders absent objection by the U.S. Attorney's Office for the judicial district). In other words, courts have passively or actively denied the public access to those orders even after the basis for sealing them no longer exists.

III. The public must have access to the district court's opinion related to the government's motion to hold Facebook in contempt because such opinions are the law.

Courts have long held that "the law" is in the public domain and that citizens may speak and share the law for any purpose they choose. That doctrine applies to judicial opinions as well as statutes. "[T]he whole work done by judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute." *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888), citing *Nash v. Lathrop*, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886). The Massachusetts Supreme Judicial Court articulated the policies underlying the rule:

> Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to

> prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices.

Nash v. Lathrop, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886). The *Nash* court reasoned that the public must have access to judicial opinions for the same reasons they must have access to statutes. "It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions would not be made known to the public." *Id.* On the contrary, it is a legislature's duty to promulgate its laws and the same applies to judicial opinions. *Id.*

Citizens must have free access to the laws that govern them to satisfy the notice requirement of the due process clause. *Building Officials & Code Adm. Int'l, Inc.,* 628 F.2d 730, 734 (1980); *see also United States v. Lanier*, 520 U.S. 259, 265 (1997). Due process requires that before a criminal sanction or significant civil or legal penalty attaches, an individual must have fair warning of the conduct prohibited by the relevant statute or regulation. *See, e.g., McBoyle v. United States*, 283 U.S. 25, 27 (1931) (criminal punishment); *United States v. One 1973 Rolls-Royce, V.I.N. SHR-16266*, 43 F.3d 794, 819 (3d Cir. 1994) (applying rule of lenity to a civil forfeiture provision).

Sound public policy also requires that the people can not only access sources of law, but can also share them. *Veeck v. Southern Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002). Not only may members of the public use

sources of law to comply with laws and avoid civil or criminal liability. They may use them to influence future legislation. Or they may use them to criticize enacted statutes or court's applications of statutes or common law doctrines. *Id*.

The Court may observe that all the cases above all discuss whether judicial opinions can be the subject of copyright. But that does not diminish their conclusions that judicial opinions belong to the people, who have the right to read and share them. The Seventh Circuit trade secret case discussed above expressly holds that judicial opinions must be in the public record. *Hicklin*, 439 F.3d 346, 348. A court may redact the public version and file the complete opinion under seal, but it cannot conceal its resolution of a dispute from the public. *Id.* The Supreme Court always issues public opinions, even in cases said to involve state secrets. *Id.*, citing *New York Times Co. v. United States*, 403 U.S. 713 (1971). Courts in the Seventh Circuit have issued public opinions in cases involving extremely confidential information. *Id.* at 349, citing *United States v. Progressive*, 467 F. Supp. 990, *reh'g denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.3d 819 (7th Cir. 1979) (plans for hydrogen bombs) and *A Sealed Case*, 890 F.2d 819 (7th Cir. 1989) (attorney-client confidences).

Here, the district court declined to unseal its opinion denying the government's motion to hold Facebook in contempt. While *amici* have not read the sealed opinion, it is hard to imagine an opinion a judge could not redact to

protect sensitive investigatory information no matter how thoroughly intertwined with the legal and factual arguments. Moreover, as the author, a judge can avoid tangling the sensitive information with the legal reasoning. Then, the court can easily redact sensitive information while leaving its reasoning and decision available to the public to the greatest extent possible. The Court should join the Seventh Circuit in condemning the practice of sealing entire opinions without filing a public version that informs the public of what a court did and why, without revealing sensitive details.

IV. The Court may use its ruling on this appeal to provide guidance to district court judges.

Each request to seal judicial records requires a judge to balance the strong presumption in favor of public access with law enforcement's legitimate need to intercept communications between suspected criminals. Appeals of district court decisions on applications to seal are rare. Targeted individuals have the most incentive to challenge an electronic surveillance order, but they are unlikely to know about it. *Gagged* at 315. Phone companies or internet services may appeal to challenge an order, but have little incentive to do so. Their own privacy interests are not at stake and they would have to bear the cost. *Id.* at 616; *Kudzu* at 211 and n. 176, citing Albert Gidari, Jr., *Companies Caught in the Middle*, 41 U.S.F.L. L. Rev. 535 (2007). When a company holding communications does appeal, no one necessarily advocates on behalf of the public's right access to court

documents. The government has standing to appeal denials of its *ex parte* requests, but rarely does so. An appeal runs the risk of creating unfavorable precedent. *Gagged* at 328. Simply bringing a new proceeding in front of a friendlier judge is faster and risk-free. *See* Kevin S. Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 U.S.F. L. Rev. 589 (2007); *Kudzu* at 211; Orenstein, *I'm a Judge*, at 2. Law enforcement, without appellate review, will push their surveillance power as far as they choose.

If the circuit courts had more appeals to decide, they could develop caselaw that would be useful to the district courts. The circuit courts cannot decide appeals not filed. And orders never appealed never come to the Supreme Court's attention. As a result, appellate courts have issued few written opinions to guide lower courts about how to decide—and whether to redact or seal—applications for electronic surveillance and related documents. The Supreme Court has only considered the Electronic Communications Privacy Act three times since Congress passed it. *City of Ontario v. Quon*, 560 U.S. 746 (2010); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018). Nor has Congress provided much guidance in the relevant statutes' language. The lack of guidance leads to inconsistency in how district court judges apply statutes that provide for sealing.

Amici respectfully suggest below some best practices (internal operating procedures) that the Court could endorse or recommend to the district courts.

A. Judges should be able to ensure that orders are unsealed when the need for secrecy ends.

Some magistrates have instituted policies providing notice to USAOs that applications and orders relating to closed, old, or inactive criminal cases will be unsealed unless the government requests an extension. *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876 (S.D. Tex. 2008) (courts should set fixed expiration dates so that sealing and non-disclosure of electronic surveillance orders will be unsealed unless the Government moves to keep them sealed). But at least once, a district judge has, without explanation, vacated a magistrate judge's order unsealing his oldest sealed orders before he retired. *To Unseal* at 261-62. Whether or not older sealed documents are ever unsealed should not depend on the individual views of an individual judge or judicial district.

B. Judges can publicly docket a "warrant cover sheet" for every application and order.

There is no good reason why docket sheets cannot be public. For example, the Eastern District of Virginia maintains, with the Department of Justice's endorsement, a dedicated docket for sealed surveillance applications and orders that is available to the public from the Clerk's Office. *See In re Leopold to Unseal*

Certain Elec. Surveillance Applications and Orders, 300 F. Supp. 3d 61, 73 n.8 (D.D.C. 2018) (citing *United States v. Appelbaum*, 707 F.3d 283, 288 (4th Cir. 2013)).

A warrant cover sheet could provide generic information about the warrant requested. That information, provided by the requesting prosecutor, might include the kind of surveillance sought, the kind of crime that law enforcement is investigating, and what agency requested the order. *Gagged* at 335. The burden would be minimal. *Id.* The non-sensitive information could then be aggregated in statistical reports. Court administrators, law enforcement, Congress, researchers, and interested parties, such as public interest groups and the press, would find such reports useful. *Id.* Publishing this data will allow the press and the public to better understand the extent of the government's intrusion into our digital lives. That will improve the likelihood that our legislature will strike a balance between privacy and law enforcement that reflects the informed will of the people. *Id.*

C. Judges should publish written opinions explaining the bases for their orders.

Magistrate judges typically just sign the attached proposed order denying the government's motion requesting some surveillance method rather than draft an opinion on the legal reasoning for the denial. Orders without opinions are of no use to the public or other magistrate judges. Although appellate opinions about sealing documents in applications for electronic surveillance are few, magistrate

judges have written many opinions that shed light on new law enforcement techniques. For example, cell phone service providers generate cell site locator information (CSLI), date which tracks a mobile device's location. When this technology was relatively new, the FBI obtained CLSI without a warrant, based on the Department of Justice's "hybrid" argument that combined aspects of the Pen Register Act and the Stored Communications Act. For years, district courts accepted the argument, but in sealed orders. Then, in 2005, two magistrate judges published unsealed opinions on the issue. *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747 (S.D. Tex. 2005); *In re Application of the U.S. for an Order for Disclosure of Telecommc'ns Records*, 405 F. Supp. 2d 435 (S.D.N.Y. 2005). One accepted the government's hybrid theory for obtaining CLSI without a warrant. The other rejected it. The public conversation inspired judges nationwide to weigh in, leading to a judicial consensus that the government's statutory interpretation was wrong. *See, e.g., United States v. Cooper*, No. 13-cr-00693-SI-1, 2015 WL 881578, at *5 (N.D. Cal. 2015) (collecting cases rejecting the hybrid theory). In this way, magistrate judges can bring inconsistent rulings on the same issue to one another's attention, leading to consensus and the public's clear understanding of the relevant caselaw.

CONCLUSION

The Court should reverse the decision on appeal. And the Court should direct the district court to redact its opinion so that it can file a nonconfidential version the public can access and share. The Court should also direct the district court to redact the docket sheet to the least extent necessary to address the concerns that led to its decision. The redacted docket sheet must be available to the public. Finally, the Court should direct the lower court to amend its order to provide for any documents still sealed to be unsealed on a specified date unless the government shows good cause for them to remain sealed.

Dated: June 19, 2019

Respectfully submitted,

/s/ *Elizabeth H. Rader*
Elizabeth H. Rader

Counsel for Amici curiae,
Former United States Magistrate Judges

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(7)(B)(iii). This brief uses a proportional typeface and 14-point font, and contains 4,333 words.

Dated: June 19, 2019

Respectfully submitted,

/s/ *Elizabeth H. Rader*
Elizabeth H. Rader

Counsel for Amici curiae,
Former United States Magistrate Judges

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kirstin E. Largent