No. 23-70023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI`I,

Respondent.

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Pursuant to Federal Rules of Appellate Procedure 35 and 40, Petitioner Civil Beat Law Center for the Public Interest (Law Center) petitions for rehearing or rehearing en banc of the panel's March 7, 2024 decision. The panel dismissed the Law Center's petition for writ of mandamus, which requested that the Court invalidate portions of the mandatory blanket sealing provision in the Order Amending the Local Rules of Practice (Local Rules) entered by Respondent United States District Court for the District of Hawaii (District Court). The panel dismissed the case for purported failure to establish standing.

The panel decision conflicts with this Court's precedent. *E.g.*, *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020); *Isaacson v. Mayes*, 84 F.4th 1089 (9th Cir. 2023); *Cal. v. Azar*, 911 F.3d 558 (9th Cir. 2018); *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002 (9th Cir. 2003); *Valenzuela-Gonzalez v. U.S. Dist. Ct.*, 915 F.2d 1276 (9th Cir. 1990); *Associated Press v. U.S. District Court*, 705 F.2d 1143 (9th Cir. 1983).

Also, this case involves a question of exceptional importance because the panel decision:

- Leaves the Law Center no means to assert a facial challenge to a district court's local rules without first suffering harm to the First Amendment right of public access;[1]
- Permits the ongoing chilling of free speech in scores of District Court cases; and
- Refuses to consider the history of unconstitutional conduct—identified in the mandamus petition—that the District Court codified in its Local Rules.

The Law Center met Article III injury-in-fact standards. The panel decision imposed a higher burden on the Law Center's First Amendment challenge than warranted by this Court's precedent. In its first year, the Local Rules required over 150 criminal competency and sentencing

[1] The mandamus petition raises alternative grounds for invalidating the Local Rules under the common law and this Court's supervisory authority over local rules. Dkt. 1-2 at 13. Because the panel decision does not differentiate the grounds for relief, for simplicity, this petition for rehearing uses the constitutional basis to illustrate the concerns posed by the panel decision. The same concerns exist for the alternative grounds, and the shorthand reference to constitutional standards is not intended as a waiver of the other grounds for relief.

documents to be filed under seal *automatically*—without judicial review. The Law Center demonstrated its history of repeatedly paying the $49 filing fee to challenge the District Court's failure to follow constitutional procedures for sealing the categories of documents at issue here. But the panel decision improperly requires the Law Center to incur further costs in order to challenge the sweeping procedural violation of constitutional standards in the Local Rules. Article III does not require that petitioner suffer actual harm when the injury—as here—is inevitable.

I. FACTUAL BACKGROUND

A. Facts in the Mandamus Petition

On December 16, 2022, the District Court entered the order amending its Local Rules (effective January 1) to require parties in criminal cases—no exceptions—to file under seal sentencing statements, competency evaluations, and cooperator-related sentencing memoranda. Dkt. 1-2 at 55-56. Before that order, the District Court had a practice of not following the procedural and substantive constitutional standards for sealing those categories of documents.[2] *Id.* at 16 n.4. The District Court's practice—now

[2] In the mandamus petition, the Law Center moved for judicial notice of the referenced district court proceedings. Dkt. 1-2 at 12 n.3. The panel did not resolve the request for judicial notice.

codified in the Local Rules—caused the Law Center to incur costs and suffer delays in access. *Id.* at 9-10 ("This automatic closure severely prejudices the public's right of access by, at a minimum, obstructing access as the public is forced to incur the expense and delay of a motion to unseal.").

B. Facts from the District Court's Response

The District Court's response to the mandamus petition introduced additional facts that supported standing. The District Court referenced a motion to unseal that the Law Center filed after the general order. Dkt. 12 at 13. Illustrating the harms identified in the mandamus petition, in that proceeding, the Law Center paid $49 to file a motion to unseal a 5K1.1 motion for a defendant in a high-profile public corruption case (a former state legislator) who had repeatedly publicly declared his substantial cooperation with the Government.[3] *In re Civil Beat Law Center for the Public Interest*, 23-CV-175, Dkt. 1 at 4-5, 12 & n.4 (motion to unseal with "Filing fee $ 49, receipt number AIHDC-2822951").

[3] As with the mandamus petition, the Law Center requests that the Court take judicial notice of the proceedings referenced in this filing. *E.g.*, *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

As *required* by the Local Rules, the Government filed the 5K1.1 motion under seal, but ultimately conceded that it could not justify harm in unsealing certain portions. *See id.* Dkt. 16, 19 (proposed redacted version). Looking at the sealing issue for the first time, the judge ordered portions unsealed and provided robust findings to justify redactions. *Id.* Dkt. 24. The delay caused by the automatic sealing required by the Local Rules meant that nothing in the 5K1.1 motion was available to the Law Center before the defendant's sentencing nor was any explanation of the need for sealing. *See id.* Dkt. 9 at 3 (first explanation of a need for sealing April 13, 2023), Dkt. 19 (Government proposed redactions filed May 3); *United States v. Cullen*, 22-CR-13 Dkt. 22 (5K1.1 motion filed sealed March 24), Dkt. 27 (sentencing April 6), Dkt. 31 (court-ordered redactions filed May 18).

C. Other Facts Relevant to Standing[4]

In addition to the matter identified by the District Court, after the Local Rules, the Law Center paid the $49 filing fee for a motion to unseal

[4] The Law Center did not have an opportunity to brief the standing issue. The District Court did not challenge standing. *See* Dkt. 12. The panel graciously identified the concern the week before argument. Dkt. 28. But oral argument alone does not provide an adequate opportunity to address constitutional standing, and the panel declined a request for supplemental briefing. Dkt. 30-1 at 3.

the sentencing statement of another defendant in a high-profile public corruption case. *In re Civil Beat Law Center for the Public Interest*, 23-MC-547 Dkt. 1 (motion to unseal with "Filing fee $ 49, receipt number AHIDC-2883959"). Because the defendant did not file a motion to seal and the judge did not enter findings to justify sealing—constitutionally required procedures—a motion to unseal was the Law Center's only option to learn why the sentencing statement was sealed.[5]

After the motion to unseal, the judge stated on the record that the sentencing statement only updated the defendant's "personal financial figures" without any argument or addressing any other issue. *Id.* Dkt. 5. The Law Center withdrew its motion. *Id.* Dkt. 4. If the Local Rules had not *required* the defendant to file the sentencing statement under seal, the Law Center would not have needed to incur the cost of filing a motion to unseal simply to find out why the document should be sealed.

Docket activity for the District of Hawaii in 2023 emphasizes the sweeping impact of the Local Rules on the presumption of public access to

[5] As explained in the mandamus petition, the District Court had a historical practice of automatically sealing character letters and sentencing advocacy *as sentencing statements*, requiring the Law Center to file a motion to unseal to learn what the sentencing statement contained. Dkt. 1-2 at 12.

court records.[6] As required by the District Court's order, parties filed at least 130 sentencing statements, seven competency evaluations,[7] and 32 cooperation motions under seal without explanation or judicial review or findings.[8] See attachment.

II. GROUNDS FOR REHEARING

The District Court's order imminently threatened and continues to threaten the Law Center's right to access, understand, and express informed views on criminal competency and sentencing proceedings.[9] The

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[6] Because the Law Center's review relied on the text of docket entries, the numbers may be underinclusive.

[7] For six competency evaluations, the District Court also hid the docket entry. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1085 (9th Cir. 2014) ("it is not sufficient for documents to be declared publicly available without a meaningful ability for the public to find and access those documents.").

[8] Contrary to the expressed intent, the Local Rules highlights the identity of government cooperators; it does not hide them. Although docketed as a "sealed motion," a motion based on substantial cooperation is the only motion that must be sealed automatically, without a motion to seal, by the government in connection with sentencing. Although the Law Center knows some individuals have publicized their cooperation, it does not know whether identifying others would risk their safety and thus has not included cooperator-related motions in the attachment.

[9] The mandamus petition outlines the constitutional procedures required for sealing and the relevant precedent that those standards must be considered by a judge *before sealing* and satisfied on a case-by-case basis, not through a blanket order as here. Dkt. 1-2 at 16-30.

Law Center suffered repeated injury from the District Court's historical practice to seal competency evaluations, sentencing statements, and cooperator-related motions in disregard of constitutional standards and should not be required to suffer further injury to establish standing after the District Court memorialized its historical practice in a blanket order for all cases.

Standing ensures that a party has "a personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). An injury in fact "must constitute an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010).

However, "[c]onstitutional challenges based on the First Amendment present unique standing considerations." *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Thus, "when a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010). "Were it otherwise, free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser. Thus, when the threatened

enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Bayless*, 320 F.3d at 1006 (internal quotations and citations omitted).

While the person invoking federal jurisdiction must prove injury, that person is not required to wait to incur an injury from the government action before challenging the conduct. *Lopez*, 630 F.3d at 785; *see also Valenzuela-Gonzalez v. U.S. Dist. Ct.*, 915 F.2d 1276, 1278 (9th Cir. 1990) ("the standards for granting a writ of mandamus do not require that the challenged order be carried out before the writ can issue."). "The touchstone for determining injury in fact is whether the plaintiff has suffered an injury or threat of injury that is credible, not 'imaginary or speculative.'" *Lopez*, 630 F.3d at 786.

Here, the District Court entered an order that automatically sealed—without constitutionally required procedures—specific documents in every case. Dkt. 1-2 at 44 (Order Amending the Local Rules of Practice). The Law Center did not have standing to appeal that order, so it filed a mandamus petition. The petition paralleled the writ of mandamus granted in *Associated Press v. U.S. District Court*, in which the district court issued an order to automatically seal every document in a specific case. 705 F.2d

1143, 1144-45 (9th Cir. 1983). Contrary to the panel decision, this Court did not require that Associated Press challenge denial of access to a specific document in that case. *Id.* at 1147 ("The effect of the order is a total restraint on the public's first amendment right of access even though the restraint is limited in time."). Paradoxically, under the panel decision, the District Court order here cannot be challenged because it violates constitutional procedures *in all cases*, rather than just one case.

A. The Law Center's Concrete and Particularized Interests

The Law Center has three interests sufficient to establish a concrete and particularized injury in fact.

First, the Law Center incurred and will continue to incur costs to enforce the constitutional standards through motions to unseal. *Isaacson v. Mayes*, 84 F.4th 1089, 1096 (9th Cir. 2023) (injury when "plaintiffs lost money by complying with the law"; "a loss of even a small amount of money is ordinarily an 'injury'"); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (spending money "that, absent defendants' actions, they would not have spent . . . . is a quintessential injury-in-fact"); *accord Cal. v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) ("injuries of only a few dollars can establish standing"). By default under the constitutional procedures, a

judge reviews a document for proposed sealing and enters certain required findings if sealing is justified. That does not happen under the District Court's blanket order. Thus, the Law Center must incur and has repeatedly incurred a $49 filing fee and attorney hours simply to get a judge to review the sealed filing in the first instance and determine whether sealing is justified. The incident with the sentencing statement that contained only updated financial information illustrates that the Law Center would not have incurred the costs of that withdrawn motion to unseal if the District Court had followed the constitutional procedures.

Second, the Law Center suffered and continues to suffer a procedural injury from the District Court's failure to follow the constitutionally required procedures.

> To establish an injury-in-fact, a plaintiff challenging the violation of a procedural right must demonstrate (1) that he has a procedural right that, if exercised, could have protected his concrete interests, (2) that the procedures in question are designed to protect those concrete interests, and (3) that the challenged action's threat to the plaintiff's concrete interests is reasonably probable.

Azar, 911 F.3d at 570. The mandamus petition describes the Law Center's procedural rights. Dkt. 1-2 at 16-30. As this Court has explained, those safeguards are designed to protect the public (*e.g.*, the Law Center) and

"are not mere punctilios, to be observed when convenient. They provide the essential, indeed only, means by which the public's voice can be heard." *Phoenix Newspapers v. U.S. Dist. Ct.*, 156 F.3d 940, 951 (9th Cir. 1998). Further, for the reasons explained below, the threat from the District Court's order is reasonably probable, not speculative.

Third, the Law Center suffered and continues to suffer a chilling effect on its exercise of free speech rights. "A chilling of First Amendment rights can constitute a cognizable injury, so long as the chilling effect is not 'based on a fear of future injury that itself [is] too speculative to confer standing.'" *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) ("a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury."). As explained in the mandamus petition, the constitutional right of access to court proceedings ensures an "informed" discussion of governmental affairs. Dkt. 1-2 at 17-18. And this Court has recognized the importance of "timely" access to that discussion. *Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) ("To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."). The blanket District Court order seals critical filings in criminal competency and sentencing

proceedings, infringing the Law Center's ability to have an informed and timely discussion about those proceedings or, at a minimum, about why those proceedings are sealed. And as discussed below, the injury is not speculative.

B. The Law Center's Imminent Injury at the Time of Filing and Subsequent Actual Injury

Injury to the Law Center was inevitable once the District Court adopted its blanket sealing order. The Local Rules *require* parties to criminal cases to file the challenged documents under seal without complying with the constitutionally required procedures. Dkt. 1-2 at 55 ("The following documents shall be filed under seal automatically:"). However framed, especially in light of the District Court's historical practice, there was a "substantial risk" of injury or "credible" or "reasonably probable" threat of injury: that the Law Center's procedural rights would be denied, that the Law Center's ability to timely discuss the sealing would be impaired, and that the Law Center would be required to incur costs if it wanted to obtain the constitutionally required judicial review and findings. The injuries were not speculative.

"A plaintiff threatened with future injury has standing to sue if the threatened injury is certainly impending, or there is a substantial risk the

harm will occur." *Index Newspapers*, 977 F.3d at 825. In *Index Newspapers*, the Court considered conduct that occurred after the filing of the action to affirm a finding of injury in fact. *Id.* at 826 ("conduct that resulted in numerous injuries to members of the press between the date the complaint was filed and the date the district court entered its preliminary injunction"). "[T]he possibility of recurring injury ceases to be speculative when actual repeated incidents are documented." *Id.*

Here, the effect of the District Court's blanket order was clear. Sealing without the constitutional procedures was a certainty; it perpetuated a historical practice of the District Court that the Law Center had challenged repeatedly. *E.g.*, *Valenzuela-Gonzalez v. U.S. Dist. Ct.*, 915 F.2d 1276, 1278 (9th Cir. 1990) (petitioner need not suffer actual harm if injury "is not contingent upon any uncertain event that might not occur"). And the inevitable happened during the pendency of the petition, as documented in the District Court's opposition and the sealed filings referenced in the attachment. While its petition was pending, the Law Center suffered actual injury—the same imminent injury threatened and identified in the mandamus petition—by incurring the filing fee and other costs of filing a motion to unseal simply to obtain the constitutionally

required procedures that would permit an informed discussion of criminal proceedings. In 2023 alone, over 150 filings have been sealed contrary to the Law Center's constitutionally recognized procedural rights and impairing the Law Center's ability to discuss those proceedings and the related sealing. Simply getting a judge to consider whether those filings are properly sealed would cost over $7500 and countless attorney hours.

This Court has held repeatedly that standing does not require that a person must first suffer harm. *E.g.*, *Index Newspapers*, 977 F.3d at 825-26; *Cal. v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) (plaintiff "need not have already suffered economic harm"); *Libertarian Party v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013); *Lopez v. Candaele*, 630 F.3d 775, 785-86 (9th Cir. 2010); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) ("It is clear that a plaintiff does not have to await the consummation of threatened injury to obtain preventative relief."); *Valenzuela-Gonzalez*, 915 F.2d at 1278; *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). But that is exactly what the panel decision required. The panel decision required that the Law Center incur the cost and delay of filing a motion to unseal a specific document in a specific case. Dkt. 30-1 at 2.

The panel decision goes further to require that the Law Center be "denied access" to a specific document. *Id.* Imposing such a standing requirement eviscerates the constitutionally required procedures that safeguard the right of access to court records.[10] The District Court's order imposes monetary burdens and delays on the Law Center's access to, for example, the judicial findings that justify sealing a particular document—irrespective of whether that document is disclosed. The panel decision would permit the District Court to impose unconstitutional fees and delays for the Law Center to obtain the judicial review and findings that should have been provided in the first instance without any third-party intervention. But so long as the District Court eventually discloses the records after a motion to unseal, according to the panel decision, the Law Center would never have standing to challenge the constitutionality of the Local Rules' procedural defects.

[10] The issue raised in the mandamus petition is the lack of case-by-case procedure (notice, opportunity to be heard, and judicial review and findings), not whether particular records in particular cases are unsealed. *See Azar*, 911 F.3d at 571 ("The plaintiff need not prove that the substantive result would have been different had he received proper procedure; all that is necessary is to show that proper procedure *could* have done so.").

The impact of the District Court's blanket sealing order was not contingent on any uncertain action. Automatic sealing was required and has happened. The Law Center's injuries are not speculative.

CONCLUSION

Based on the foregoing, the Law Center respectfully requests that the Court grant this petition for rehearing or for rehearing en banc and allow the mandamus petition to be addressed on the merits.

DATED: Honolulu, Hawai`i, March 21, 2024

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 23-70023

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

(●) Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,058.

(Petitions and responses must not exceed 4,200 words)

OR

( ) In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ R. Brian Black **Date** 3/21/24

*(use "*s/[typed name]*" to sign electronically-filed documents)*

NOT FOR PUBLICATION

FILED

MAR 7 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC.,	No. 23-70023
CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, Respondent.	MEMORANDUM*

Petition for Writ of Mandamus

Argued and Submitted February 15, 2024
Honolulu, Hawaii

Before: PAEZ, M. SMITH, and KOH, Circuit Judges.

Civil Beat Law Center for the Public Interest, Inc. (Civil Beat) petitions the court for a writ of mandamus. Civil Beat requests that the court invalidate portions of the United States District Court for the District of Hawaii's Criminal Local Rule

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

5.2, which requires automatic filing under seal for specific categories of documents. We assume the parties' familiarity with the facts, so do not recount them here. Because Civil Beat lacks standing to file this petition, we dismiss the case for lack of jurisdiction.

1. Civil Beat does not meet Article III's injury-in-fact requirement. Parties must have standing to petition this court for a writ of mandamus. *See United States v. Mindel*, 80 F.3d 394, 398 (9th Cir. 1996); *United States v. Sherman*, 581 F.2d 1358, 1360–61 (9th Cir. 1978). Civil Beat bears the burden of establishing standing because it is the party invoking federal jurisdiction. *See Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). To meet the constitutional minimum of standing, a party must have, *inter alia*, suffered an "'injury in fact,' which is an actual or imminent invasion of a legally protected, concrete, and particularized interest." *United States v. Kovall*, 857 F.3d 1060, 1065 (9th Cir. 2017) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Because Civil Beat did not file this petition as a result of being denied access to a particular document in a particular case, nothing in the briefing or record[1] before us allows us to conclude that Civil Beat established it has suffered any legally protected, concrete, and particularized interest. *Cf. United States v. Guerrero*, 693 F.3d 990, 998–99 (9th Cir. 2012) ("Third parties challenging *orders*

[1] Neither party supplemented its briefing with a record.

denying public access to proceedings or documents do not have standing to appeal directly . . . [but] they may petition this Court for a writ of mandamus." (emphasis added)); *United States v. Brooklier*, 685 F.2d 1162, 1165 (9th Cir. 1982).

2. We deny Civil Beat leave to amend the petition and supplement the record. *See Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002) (affirming decision to deny leave to amend where plaintiff could not possibly have alleged injury in fact).

DISMISSED.