No. 19-15473

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WP COMPANY LLC, dba THE WASHINGTON POST,

Movant-Appellant,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
ELECTRONIC FRONTIER FOUNDATION, et al.

Movants-Appellants

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.

Real Party in Interest-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
Misc. Case No. 1:18-mc-00057-LJO-EPG
Hon. Lawrence J. O'Neill

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26-1 of the Federal Rules of Appellate Procedure, WP Company LLC, dba The Washington Post (the "Post"), hereby states, through undersigned counsel, that the Post is a wholly owned subsidiary of Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

Date: June 12, 2019.

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INTRODUCTION

This case presents important issues of first impression regarding the public's First Amendment and common law rights of access to judicial records submitted as a basis for adjudicating issues ancillary to a criminal wiretap investigation. Several movants, including WP Company, LLC, dba The Washington Post (the "Post"), sought to unseal judicial ruling(s) and party briefings filed in connection with government motion(s) to compel Facebook, Inc., to modify its voice-over-internet-protocol application, Messenger, to intercept its users' conversations, or to hold it in contempt of court for refusing to provide that assistance (collectively, "contempt proceedings").

No movants sought, or are seeking, the raw materials or applications obtained by the government in the underlying investigation under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) ("Title III").

On the same day the District Court accepted sealed submissions by the government and Facebook, presumably containing the justifications for sealing records in the contempt proceedings, the court issued an order upholding a blanket seal over its ruling(s) and related briefings in that matter. In its sealing order, the District Court concluded that Title III, which circumscribes the disclosure of intercepted wire communications and applications and orders *granting*

interception, "overwhelmed" the First Amendment right of access to judicial records and "superseded any arguable common law right." ER11.

In so ruling, the District Court misconstrued the scope of Title III's protections and failed to appreciate both the tradition of access and the policies underlying why, under the First Amendment, judicial opinions, including in contempt proceedings ancillary to otherwise closed criminal investigations, are presumptively public records.

Its erroneous view of Title III's reach also precluded any conscientious balancing of the respective interests—other than one in favor of the government—under the common law right of access to inspect and copy judicial records. Because the records sought here did not fall within the narrow categories of documents recognized in this Circuit as falling outside of the common law right of access (grand jury transcripts and warrant materials during a pre-indictment investigation), the court was required to balance the respective interests and narrowly tailor any sealing order to ensure that as much as possible of the court's ruling(s) and the parties' legal arguments be made public. This did not happen.

Had movants sought access to raw materials covered under Title III during the preindictment stage of the government's investigation and before they were used in connection with any challenge or ancillary proceeding, the District Court's order may have been correct. But that scenario is not this case.

Instead, the government initiated separate proceedings to compel Facebook to facilitate the government's investigation, and to hold it in contempt when it refused to provide that assistance. The initiation of these separate proceedings, even if the records reference raw materials obtained from wiretaps or wiretap applications, triggered the public's rights of access under both the First Amendment and common law. Indeed, the very case relied on by the District Court in denying movants' motions to unseal, recognizes the distinction between a request for raw wiretap materials covered under Title III and one where those materials are referenced in other judicial records to which the right of access attaches. ER10 (citing *In the Matter of the Application of New York Times Company to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 407 n. 3 (2d Cir. 2009)).

Under both the First Amendment and the common law, redaction not wholesale sealing is the mechanism by which courts are to protect compelling and factually supported investigatory interests or privacy interests of uncharged third parties.

The importance of access to the judicial records at issue here cannot be overstated. The public's ability to understand just how far the law allows the government (and courts) to go in requiring third-parties to Title III investigations to provide "facilities or assistance" [18 U.S.C. § 2518(4)] to the government in

effectuating a wiretap depends, at the very least, on a thorough vetting of judicial orders rendered ancillary to the underlying criminal investigation. This Court has recognized as much by requiring, in one of the few decisions addressing this area, that its disposition be made public. ER19 (Dkt. # 26) & *In re U.S. for an Order Authorizing Roving Interception of Oral Communications*, 349 F.3d 1132 (9th Cir. 2003). In this appeal, the Post respectfully requests that the same consideration be afforded over the District Court's ruling(s) and the parties' legal contentions.

For the reasons more thoroughly set forth below, the District Court's sealing order should be reversed. Upon *de novo* review, this Court should hold that a First Amendment right of access or, alternatively, the common law right of access to judicial records, or both, attaches to the ruling(s) and associated briefings filed in the contempt proceedings. It also should conduct an in camera review of the presently seal record to determine whether any countervailing compelling interests were presented and supported by record evidence. In doing so, it should ensure that any redactions are narrowly tailored to protect only those compelling interests, while allowing the remainder of the records, including the court's legal justifications for denying the government's requested relief, to be made public.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the matter under 28 U.S.C. § 1331, *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 610 n. 24 (1982) (under

First Amendment, "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion" from judicial proceedings); *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978), and United States District Court, Eastern District of California Local Rule 141(f).

This Court has jurisdiction under 28 U.S.C. § 1291 because there are no other matters pending before the District Court upon entry of the District Court's order dated February 11, 2019. Therefore, the order is appealable either as a final order under 28 U.S.C. § 1291, or as a collateral order. *See State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1129 (9th Cir. 2003). The Post's notice of appeal, filed on March 13, 2019, is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) & (B). ER1.

ISSUE(S) PRESENTED

1. Whether the First Amendment or common law right of access to judicial records attaches to judicial opinions and legal arguments in contempt proceedings relating to government efforts to compel third parties to provide facilities or technical assistance to the government to effectuate a Title III wiretap?

2. Whether the District Court erred in concluding that Title III's specific sealing requirements, which govern the fruits of wiretaps, and applications and orders *granting* wiretap applications, negated the presumption of access to order(s) *denying* a request to compel a service provider to provide technical assistance to

the government to effectuate a wiretap or to hold it in contempt of court for refusing to provide that assistance?

3. Whether the District Court erred by not narrowly tailoring its blanket sealing order to redact only that which was necessary to protect compelling interests supported by record evidence, while ensuring that the remainder of the records be made public?

STATEMENT OF THE CASE

A. Public Reporting on Sealed Contempt Proceedings Against Facebook, and National Debate on Government Efforts to Circumvent Encryption.

On August 17, 2018, journalists first reported that the U.S. Department of Justice was trying to force Facebook to break the encryption in its popular Messenger app so law enforcement could listen to a suspect's voice conversations in a criminal probe. *See* ACLU/EFF's Motion to Unseal, ECF No. 1 at 10 (citing Dan Levine & Joseph Menn, *U.S. Government Seeks Facebook Help to Wiretap Messenger Calls*, Reuters, Aug. 17, 2018, https;//perma.cc/MM9M-C2XU (hereinafter "Reuters, Aug. 17, 2018")).

In response, Facebook reportedly argued that Messenger calls are end-to-end encrypted,[1] and compliance would require Facebook to rewrite the code relied on by all its users to remove encryption or else to hack the government's current target. *Id.* According to the Post, Facebook also argued that Messenger was not covered by the law that requires telecommunications providers to build their systems with wiretap capabilities, and that devising a way to give law enforcement access to Messenger was burdensome and costly and would exceed the Title III's "technical assistance" provisions. *See* Post's Motion To Unseal, ECF No. 3 at 6 (citing Ellen Nakashima, *Facebook wins court battle over law enforcement access to encrypted phone calls*, WashPost, Sept. 28, 2018, www.washingtonpost.com/world/national-security/facebook-wins-court-battle-over-law-enforcement-access-to-encrypted-phone-calls/2018/09/28/df438a6a-c33a-11e8-b338-a3289f6cb742_story.html?noredirect=on&utm_term=.3e336aaa7ddd ("Post, Sept. 28, 2018.")). When Facebook reportedly refused to comply, the Justice

[1] End-to-end encryption is "a system of communication where the only person who can read the messages are the people communicating," and the communications service providers do not have access to the "keys" necessary to decrypt the conversations. ACLU/EFF Motion to Unseal, ECF No. 1 at 2 (citing Andy Greenberg, *Hacker Lexicon: What is End-to-End Encryption?*, Wired, Nov. 25, 2014, https://perma.cc/4M2R-PCD3).

Department reportedly moved for an order to hold Facebook in contempt of court. *Id.*

On August 14, 2018, a judge of the District Court reportedly heard arguments on the government's motion in closed proceedings. *See* ACLU/EFF Motion to Unseal, ECF No. 1 at 12 (citing Joseph Menn & Dan Levin, *In Test Case, U.S. Fails to Force Facebook to Wiretap Messenger Calls*, Reuters, Sept. 28, 2018, https://perma.cc/R532-3QDV (hereinafter, "Reuters, Sept. 28, 2018))). In late September, the Post and Reuters reported that the District Court had denied the Justice Department's motion in a sealed opinion. *Id.* at 12 (citing WashPost, Sept. 28, 2018, Reuters, Sept. 28, 2018).

As reported by the Post and Reuters, the matter was believed to relate to a public criminal complaint against 16 alleged MS-13 gang members accused of drug, racketeering and assault related crimes. *See* Post's Motion to Unseal, ECF No. 3 at 6 (citing Post, Sept. 28, 2018); ACLU/EFF Motion to Unseal, ECF No. 1 at 13 (citing Reuters, Sept. 28, 2018); *see also* Cmpl., *U.S. v. Barrera-Palma et al*., 18-cr-00207-LJO-SLO, ECF No. 20 (E.D. Cal., Aug. 30, 2018). The complaint, filed August 30, 2018, attached a 96-page probable cause statement from an FBI agent that said in a footnote, "[a]s it relates to Facebook, VOIP calling allows live voice communication through Facebook['s] mobile phone application. Currently, there is no practical method available by which law enforcement can monitor those

calls."). *Id.* at 31-32. As reported, the cases were charged despite the District Court's refusal to compel Facebook to break its encryption on its Messenger app. to comply with a wiretap order. *See* Post's Motion to Unseal, ECF No. 3 at 6 (citing Post, Sept. 28, 2019).

As explained by the ACLU and EFF below, the matter arose amidst a long-running public debate on the wisdom and legality of government surveillance and decryption efforts. *See* ACLU/EFF's Motion to Unseal, ECF No. 1 at 13-16. The instant matter drew comparisons to the 2016 controversy surrounding the FBI's efforts to force Apple to unlock its encryption on an iPhone belonging to the gunman accused of killing fourteen people in San Bernardino, California. *Id.* at 14 (citing Government's Motion to Compel Apple Inc. to Comply With This Court's February 16, 2016 Order Compelling Assistance in Search, ECF No. 1, *In the Matter of Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203 (In the Matter of an Apple iPhone)*, No. 16-cm-10-SP (C.D. Cal. Feb. 19, 2016)). Apple actively resisted the government's demands in *public* court proceedings, supported by several amicus groups. *See* ACLU/EFF's Motion to Unseal, ECF No. 1 at 15 (citing Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, ECF No. 16, *In the Matter of Search of an Apple iPhone*, No. 16-cm-10-SP (C.D.

Cal. Feb. 25, 2016)). While the FBI ultimately found a third party to unlock the suspect's iPhone and dropped its case against Apple, the case sparked a larger debate about the role of encryption and law enforcement efforts to circumvent it. *Id.* at 15 (citing Katie Benner & Eric Lichtblau, *U.S. Says It has Unlocked iPhone Without Apple, N.Y. Times*, Mar. 28, 2016, https://perma.cc/BKB4-XTTE).

During its 114th session, Congress convened several hearings about encryption, and a bipartisan working group report of both the House Judiciary and House Energy and Commerce Committee supported encryption as a "national interest" and concluded that "this can no longer be an isolated or binary debate." *Id.* at 15, n. 10 (citing congressional reports).

Though of widespread public interest, the District Court's legal justifications for denying relief to the government in its efforts to force Facebook to unlock its Messenger app remained sealed.

B. Proceedings in District Court.

On November 28, 2018, the ACLU and EFF, in a miscellaneous action, filed a motion to unseal the following court records: (1) any judicial ruling(s) associated with the Department of Justice's motions to compel Facebook to provide technical assistance, or hold it in contempt of court for refusing to comply; (2) any legal analysis presented in the government's submissions "incorporated, adopted, or rejected implicitly or explicitly in such judicial rulings"; (3) any court orders on

sealing requests; and (4) the sealed docket sheet in the matter. *See* ACLU/EFF Motion to Unseal, ECF No. 1 at 2:3-7.

On this same date, the Post filed in the miscellaneous action a motion to unseal "the order denying the requested relief sought by the government against Facebook, the parties' briefing on the government's motion to compel and the court docket in any assigned miscellaneous matter." *See* Post's Motion to Unseal, ECF No. 3 at 7:4-6. While joining in the efforts of the ACLU/EFF to unseal these court records, the Post moved separately "to preserve the right to be heard on any arguments raised" in opposition to the motions, and to present additional arguments not raised in the ACLU/EFF's Motion to Unseal. *Id.* at 7:6-13.

On November 29, 2018, the District Court issued a scheduling order giving the government and Facebook until January 7, 2019, to file "whatever documents they wish the Court to consider." In setting the schedule, the court noted that "all" of the cases before it had "time-precedent" and "some" had "constitutional-precedent," and that the requests had "neither factual nor legal urgency…" *See* Scheduling Order, ECF No. 4, ER13.

On December 20, 2018, two sealed events were entered on the docket [ECF Nos. 5 & 6], following which the court issued an order via a text entry on the docket granting the government and Facebook a one-month extension of time, until February 7, 2019, to file any response. ER14 & ER25-26.

On February 7, 2019, the government and Facebook filed notices of appearance [ECF Nos. 9, 10, 11, 12], and on February 7th, 8th and 11th, several sealed events were entered on the docket [ECF Nos. 13-17, 18-21]. ER25-26. On February, 11, 2019, the Court issued an order granting, on an ex parte basis, the filing of the above referenced documents under seal. ER15.

This same day, February 11, 2019, without affording movants an opportunity to reply or otherwise object to the numerous sealed filings, the District Court issued an order denying the motions to unseal, and ordering all responsive filings sealed. ER8.

The District Court stated that its original sealing of the records sought was supported by representations of the government that disclosure would harm "both the then-current and subsequent criminal investigations of future cases (both categories involving and emanating from Title III wiretap processes)," and representations by Facebook that the records concerned its trademarks and protected materials. ER8:23-9:6.

The District Court opined that Title III's statutory scheme, "including the provisions governing disclosure of wiretap materials, makes it clear that Congress intended such materials to remain confidential and 'clearly negate(s) a presumption in favor of disclosure.'" ER9:25-10:4 (citing *In Re the Matter of Application of New York Times Co.*, 577 F.3d 401, 408-10 (2d Cir. 2009); *United States v. Kwok*

Cheung Chow, No. 14-cr-00196, 2015 WL 5094744, * 3 (N.D. Cal. Aug. 28, 2015)).

The court stated that the "materials contain and pertain to sensitive wiretap information that implicates directly the very purpose of the Title III statutory scheme of nondisclosure. *See* 18 U.S.C. §§ 2517, 2518. " ER9:20-21; *see also id.* at 10:5-6 ("All of the materials Applicants seek are Title III wiretap materials that directly flow from orders granting Title III wiretap requests."). The court stated that it was not possible to separate that information from "non-covered material." ER9:22; *see also id*. at 11:14-17.

In applying the experience and logic test for assessing the First Amendment right of access, the District Court relied entirely on cases addressing requests to unseal the fruits of wiretaps obtained pursuant to Title III and materials supporting wiretap applications. ER10-11. It stated it was siding with the government's (sealed) legal position that "Title III wiretap materials are generally not subject to disclosure because there is no historical tradition of open access to Title III proceedings," and that there was no basis to adopt movant's view of public policy "over Congress's preferred public policy as expressed in Title III itself." ER10:20-24.

The court stated that even if a First Amendment right of access attached to the records sought, "the compelling interest of the DOJ to preserve the secrecy of

law enforcement techniques in Title III wiretap cases overwhelms that qualified right." ER11:4-5. The court added that "[t]he materials at issue in this case concern techniques that, if disclosed publicly, would compromise law enforcement efforts in many, if not all, future wiretap investigations." ER11:5-7. It also stated, "in the instant case, the investigation is ongoing." *Id.* at 11:7-8. It did not explain whether the investigation related to the indicted cases, as surmised by the Post based on public reports of the government's criminal probe. *See* Post's Motion to Unseal, ECF No. 3 at 6.

The court rejected a common law right of access to the court's ruling and related legal arguments, concluding that "Title III supersedes any arguable common law right." ER11:20-21. Claiming to balance the respective interests "as required under *United States v. Bus. Of Custer Battlefield Museum & Stored Location at Interstate 90, Exit 514, S. of Billings, Mont*., 658 F.3d 1188, 1192 (9th Cir. 2011)," the court concluded, without further elaboration, that the applications for disclosure "fall short and are therefore DENIED." *Id.* at 11:24-5:2.

These appeals followed. ER1 & ER6.

SUMMARY OF THE ARGUMENT

Whether the public's First Amendment or common law right of access to judicial records attaches to judicial orders and related briefings in proceedings to force a social media company to modify its network to effectuate a wiretap of its

users' communications are matters of first impression in this Circuit. Believing the answer was compelled by Title III, and the stated need to protect all *future* wiretap investigations, the District Court concluded that Title III "superseded" the common law right of access, and necessarily "overwhelmed" the First Amendment right. ER11.

This conclusion misapprehends the scope of Title III, and failed to account for the well-established First Amendment and common law rights that attach to judicial orders and related records, even where the underlying proceeding is closed to the public. Because this legal error imbued both the District Court's "experience and logic" analysis under the First Amendment and the weight to be afforded the right of access under the common law, the District Court's order should be reviewed *de novo,* and reversed. *See infra* § III. Reversal is warranted for several reasons.

First, applying the U.S. Supreme Court's two-part "experience and logic" test for determining whether the First Amendment right of access attaches, it is clear that there is a long tradition of access to judicial orders generally, and to judicial orders in contempt proceedings in particular. *See, e.g., United States v. Index Newspapers, LLC*, 766 F.3d 1072, 1093 (9th Cir. 2014). This is so even where the underlying proceedings are closed to the public, such as in grand jury investigations. *See infra* I.B.1. The right of access attaches to contempt orders

connected to grand jury investigations because the proceedings adjudicate substantive rights of the parties, not unlike in criminal trials. *Index Newspapers*, 766 F.3d at 1089. This logic applies equally to proceedings ancillary to Title III investigations, even if the proceedings implicate Title III materials (wiretap communications and applications granting wiretaps). Courts in other circuits and this Circuit have recognized as much. *See In re the Matter of New York times Co.,* 828 F. 2d 110, 115 (2d Cir. 1987); *United States v. Kwok Cheung Chow*, 14-cr-00196, 2015 WL 5094744, * 4 (N.D. Cal. Aug. 28, 2015); *see infra* I.B.1.

Thus, while the public may not have a right of access to raw Title III materials untethered to any ancillary proceeding during the pre-indictment stage of an investigation, once these materials are submitted or referenced as a basis for adjudication in other proceedings, as they were here, the public's right of access attaches. *See In re New York Times*, 577 F.3d at 407 n. 3 (distinguishing between a request for raw Title III applications and intercepted communications, and one that implicates such materials because they are included in an application for a search warrant—a public document).

The logic prong of the two-part test (whether access plays a significant positive role in the functioning of the particular process) strongly supports a right of access to the judicial records at issue here. Without access to judicial opinions, public oversight of the courts is impossible. *See infra* I.B.2. This Court's own

rules recognize as much by requiring that its dispositions be public, even in sealed matters. Cir. R. 27-13(j). Access in contempt matters more particularly ensures "that public may discover when a witness has been held in contempt and held in custody." *Index Newspapers*, 766 F.3d at 1093. Access also can enhance the administration of justice by providing a check on the judiciary, ensuring against unreasonable searches and burdens on third parties, and preventing government overreach in an area of obvious public importance. *See Custer*, 658 F.3d at 1194. Access here also may inform the current public debate about government surveillance, and the effects encryption has on such efforts.

In short, both experience and logic support a determination that the First Amendment right of access attaches to the ruling(s) and related party briefings at issue here, and that the District Court erred in concluding otherwise. ER11.

Second, as recognized by the District Court, the common law right of access to judicial records attached to the District Court's ruling(s) and related party briefings in the contempt proceeding. Because the records sought do not fall within the narrow categories of records recognized by this Court as "traditionally kept secret," the District Court was required to start its analysis with a strong presumption in favor of the right of access. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006); *see, e.g., United States v. Carpente*r, 17-10498, 18-cr-10006, 2019 WL 2049818, *4 (9th Cir. May 9, 2019)

(holding common law right of access attached to proffers for duress defense because records did not fall within the category of records traditionally kept secret). This right required the District Court to "conscientious balancing" the respective interests. *Kamakana*, 477 F.3d at 1178-79. Due to the court's erroneous view of Title III, it failed to balance the respective interests at all.

Third, Title III's sealing provisions are specific to intercepted communications, and orders *granting* wiretaps or technical assistance applications. 18 U.S.C. § 2518(8)(a)-(b). Movants below did not seek, and are not seeking, access to intercepted wire communications, the government's probable cause justifications for requesting wiretaps or orders granting applications under Title III. *See In re Matter of New York Times Co*., 828 F.2d 110, 115 n. 1 (2d Cir. 1987) (explaining that Title III provisions did not apply where paper was *not* seeking access to Title III applications or orders per se, "but merely Title III materials to the extent it is contained in motion papers filed with the court."). Thus, the District Court's reliance on Title III's sealing provisions, and case law addressing the public's right of access to those raw materials, was error. ER10. By its plain language, Title III does not command secrecy over orders refusing to enforce technical assistance orders, let alone those subject to challenge in ancillary proceedings. *See infra* II.A. The District Court interpreted Title III contrary to its plain reading, and in a manner that improperly impinges on First Amendment and

common law rights. *In re Matter of New York Times Co.*, 828 F.2d at 115 ("Obviously, a statute cannot override a constitutional right."). Simply put, the District Court's conclusions that Title III "overwhelmed" the First Amendment right and necessarily "superseded" any common law right was plain error. ER11.

Fourth, under both the First Amendment and common law, the District Court was required to narrowly tailor any sealing order to protect only countervailing interests supported by record evidence, while ensuring that the remainder of the records be made public. *See infra* III.A. Rather than engage in the required analysis, the District Court simply concluded that sealing was commanded as a matter of law under Title III. ER11-12. This Court should now review the government's (sealed) submission to ensure that any sealing is narrowly tailored to serve compelling interests supported by specific factual findings. *Kamakana*, 447 F.3d at 1178-79. In doing so, it should be cautious of overly broad or vague claims of investigatory interests. *Kamakana*, 447 F.3d at 1185 ("Simply invoking a blanket claim, such a privacy or law enforcement, will not, without more, suffice to exempt a document from the public's right of access.").

STANDARD OF REVIEW

This Court reviews "de novo whether the public has a right of access to the judicial records of court proceedings under the First Amendment, the common law,

or [the Federal Rules of Criminal Procedure], because these are questions of law." *Index Newspapers LLC*, 766 F.3d at 1081; *Carpenter*, 2019 WL 2049818, * 3.

"When the district court conscientiously balances the common law presumption in favor of access against important countervailing interests, [the Court] review[s] a decision whether or not to unseal the judicial record for abuse of discretion." *Index Newspapers*, 766 F.3d at 1081 (citing *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999)). A conscientious balancing includes a decision based on "compelling reasons and specific factual findings…." *San Jose Mercury News*, 187 F.3d at 1102. Where, "the district court's decision turns on a legal question, however, its underlying legal determination is subject to *de novo* review." *Id.* at 1100.

Here, the District Court's balancing analysis was not based on specific factual findings; rather, it was based on the erroneous legal conclusion that Title III "supersedes any arguable common law right" of access and necessarily "overwhelms" the First Amendment qualified right. ER11:20-12 & 11:4-5. Because this conclusion turned on the court's erroneous and overbroad view of Title III's reach as a matter of law, the court's conclusions should be reviewed *de novo*.

ARGUMENT

I. THE FIRST AMENDMENT AND COMMON LAW CREATE A STRONG PRESUMPTION OF ACCESS TO JUDICIAL OPINIONS, AND LEGAL ARGUMENTS THAT THE TITLE III DOES NOT NEGATE.

A. The Right of Access to Inspect and Copy Judicial Records Arises Both Under the Common Law and First Amendment.

The right of access to judicial records is generally protected by both the First Amendment and the common law. *Carpenter*, 2019 WL 204918, * 3; *Custer*, 658 F.3d at 1192 (recognizing "'a First Amendment right of access to criminal proceedings' and documents therein.") (*citing Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1, 8 (1986) (recognizing that the First Amendment guarantees access to government records in criminal proceedings)); *see also Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (holding that public and press have a First Amendment right of access to pretrial documents filed in a criminal case).

The First Amendment right of access "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 569 (1980) ("[H]istorically both civil and criminal trials have been presumptively open."). The U.S. Supreme Court has described public access as an "essential" component of the American judicial system that allows "the public to participate in and serve as a check upon

the judicial process." *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982). The Ninth Circuit too has recognized that "[t]he right of access is [ ] an essential part of the First Amendment's purpose to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785, 786-87 (9th Cir. 2014) (holding that First Amendment right of access "extends to [court] proceedings and associated records and documents.").[2]

The Ninth Circuit also has long recognized a general right under the common law "'to inspect and copy public records and documents, including judicial records and documents.'" *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Nixon*, 435 U.S. at 597); *Kamakana*, 447 F.3d at 1178; *Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122, 1135 (9th Cir. 2003). *See also Valley Broad. Co. v. U.S. Dist. Court for the Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986) (explaining that while existing as a separate basis for public access to judicial records, "[t]he common-law right of access has historically developed to accomplish many of the same purposes as are advanced by the First Amendment.").

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[2] As the Ninth Circuit observed, allowing the media to enforce the constitutional right of access to court proceedings "is essential not only to its own free expression, but also to the public's." *Id.* at 786.

The common law right has a long history that has been said to "predate even the Constitution itself." *United States v. Cohen* 366 F. Supp. 3d 612, 619 (S.D.N.Y. February 7, 2019) (citations omitted). This "presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *Id.* (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)). More broadly, "'[t]his right is justified by the interest of citizens in 'keep[ing] a watchful eye on the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (quoting *Nixon*, 435 U.S. at 598).[3]

B. A Strong Presumption of Access Under the First Amendment Attaches to Judicial Opinions, Including in Contempt Proceedings in Matters Otherwise Closed to the Public.

To determine whether a First Amendment right of access attaches to particular proceedings or records, the Supreme Court instructs that courts consider (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Carpenter*, 2019 WL 2049818, * 3 (quoting *Press-Enterprise II*, 478 U.S. at 8). If the proceeding passes

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[3] "Such vigilance is aided by the efforts of newspapers to 'publish information concerning the operation of government.'" *Id.* (quoting *Nixon*, 435 U.S. at 598).

the "experience and logic" test, a qualified First Amendment right attaches. *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 9). When the right attaches, it "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 9.

Importantly, the First Amendment and common law rights of access to judicial records are not circumscribed by any rule that the underlying judicial proceeding be open to the public. The Ninth Circuit specifically has rejected any such requirement. *See Index Newspapers LLC*, 766 F.3d at 1095 n. 15 (citing and declining to follow *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013)); *see, e.g.*, *United States v. Brooklier*, 685 F.2d 1162, 1167, 1175 (9th Cir. 1982) (holding transcripts of properly closed suppression hearing must be released when the danger of prejudice has passed); *see also Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F. 3d 940, 948 (9th Cir. 1998) (warning against conflating the question of the right to attend a closed proceeding, and obtaining a post-trial transcript of the hearing, and holding right of access attached to transcript of closed voir dire proceeding).

In reviewing the experience prong of the two-part test for determining whether "the place or process have historically been open to the press and general public" the court "does not look at the particular practice in any one jurisdiction,

but instead 'to the experience in that type or kind of hearing throughout the United States.'" *United States v. Guerrero*, 693 F.3d 990, 1000 (9th Cir. 2012); *see also N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286 (2d Cir. 2012) (instructing that the First Amendment question "focus[es] not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake").

Moreover, "logic alone, even without experience, may be enough to establish the right." *Index Newspapers*, 766 F.3d at 1094 (quoting *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008)); *see also Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988) (recognizing a First Amendment right of access to pretrial detention proceedings even absent an "unbroken history of public access" where "public scrutiny" would "benefit" the proceeding).

1. Judicial opinions, including in contempt proceedings, historically have been open to the public.

In the Ninth Circuit and nationwide, there is a long and established history of public access to judicial opinions under both the First Amendment and the common law.[4] *See Index Newspapers,* 766 F.3d at 1093 (ordering disclosure of

[4] This Court's rules similarly recognize a strong presumption in favor of access to its dispositions, even in sealed cases. Cir. R. 27-13(j) ("This Court will

contempt order and other judicial records in part based on the court's "conclu[sion] [that] the public has a presumptive First Amendment right to the district court's order"); *In re Copley Press, Inc*., 518 F.3d at 1028 (holding qualified First Amendment right of access attached to motion to unseal and district court order on motion); *see generally Associated Press,* 705 F.2d at 1145 ("the public and the press have a first amendment right of access to pretrial documents in general").

Across the board, access to judicial opinions is treated with the same presumption of access as other judicial records. In *Intel Corp. v. Via Technologies, Inc.*, No. 99-3062, 2000 WL 1811386, at *2-3 (N.D. Cal. Sept. 22, 2000), the court granted a motion to unseal a court order ruling on a motion to modify a protective order. In doing so, it agreed with the defendant's argument that "court records such as judicial opinions are normally open to the public because of the generally recognized right of public access to judicial records and documents." *Id.* at *1.

Courts throughout the United States have held similarly. *See*, *e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) ("Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible."); *Doe v. Exxon Mobil Corp.*, 570 F. Supp. 2d 49, 52 (D.D.C. 2008) ("the public's right to access judicial opinions is very high").

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presumptively file any disposition publicly, even in cases involving sealed materials.").

Even in the context of Title III, this Circuit has recognized the need to publish in the public docket its decisions. In one of the few Ninth Circuit decisions addressing the technical assistance provisions of Title III, this Court, in reversing a district court order granting the government's request to force an operator of a vehicle monitoring system to assist its investigation, issued a *public*, *published* decision. *See In re U.S. for an Order Authorizing Roving Interception of Oral Communication*, 349 F.3d 1132 (9th Cir. 2003). It did so after specifically ordering its decision unsealed, providing for the redaction of certain identifying information, and affording the parties an opportunity to object. ER19 (Dkt. # 26). On remand, the district court ordered unsealed all of the judicial records in the enforcement matter, including all briefing and its initial orders granting the government's request. ER22.

Not only is there a history of public access to judicial opinions on a general level, but a strong presumption attaches to opinions in contempt proceedings in particular. This presumption attaches even where the underlying proceedings themselves are closed. In *Index Newspapers*, for example, the Ninth Circuit held that though there was no right of access to a motion to hold a witness in contempt while a grand jury investigation was ongoing—given the importance of secrecy to grand jury investigations—this same logic did not hold true for the judicial order holding the witness in contempt. 766 F.3d at 1093. Rather, the court held that "the

public does have presumptive First Amendment rights of access to [orders stemming from contempt proceedings] . . . These rights of access are *categorical* and do not depend on the circumstances of any particular case." 766 F.3d at 1085 (emphasis added).[5]

As explained by the court, "[l]ogic dictates that at least some of the filings related to contempt hearings ancillary to grand jury investigations may be open to the public because of their similarity to criminal trials." *Id.*; *see also Foltz*, 331 F.3d at 1135-36 (noting that "'summary judgment adjudicates substantive rights and serves as a substitute for trial'") (internal quotations omitted).

Other courts too have recognized the public's right of access in the context of contempt proceedings ancillary to grand jury proceedings. *See, e.g., In re Grand Jury Subpoena,* 97 F. 3d 1090, 1094-95 (8th Cir. 1996) (affirming the district court's decision to close a contempt hearing while grand jury questions were read and to open the hearing for adjudication of contempt); *In re Grand Jury Matter*, 906 F.2d 78, 86 (3d Cir. 1990) (holding that a contempt proceeding "may be closed to the public *only* to the extent necessary to preserve the secrecy of the grand jury process") (emphasis added); *In re Duran*, No. 12-GJ-149, 2014 WL

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[5] Though recognizing the First Amendment right of access to orders in contempt proceedings as categorical, it nevertheless recognized that the right was not unqualified. *Id*.

7140454, at *3 (W.D. Wash. Dec. 12, 2014) (unsealing judicial record in context of grand jury proceeding regarding contempt; citing *Index Newspapers* in reasoning); *Kelly v. Wengler*, 979 F. Supp. 2d 1243 (D. Idaho 2013) (holding that documents in contempt proceedings should not be kept under seal); *cf. In re Grand Jury Subpoena No. 7409*, No. 18-41, 2019 WL 269265, * 5 (D.D.C. April 1, 2019) (in dicta ruling that briefs and transcripts of hearing to hold grand jury witness in contempt not subject to First Amendment or common law right of access, but noting mootness of issue pertaining to court's order as addressed in *Index Newspapers* because contempt orders were already public).

Thus, even where the underlying proceedings are not open to the public, once related judicial records are submitted as a basis for adjudication of issues in ancillary proceedings, they become subject to the First Amendment right of access to judicial records. This is true even in the context of proceedings referencing or implicating Title III materials.

For example, in *In re the Matter of New York Times Co.*, 828 F.2d at 114-16, the Second Circuit Court of Appeals held that Title III did not supersede the First Amendment right of access where materials were submitted in connection with a motion to suppress. While recognizing the important privacy interests Title III was intended to protect, the court nevertheless recognized that "where a qualified First Amendment right of access exists, it is not enough simply to cite Title III.

Obviously, a statute cannot override a constitutional right." *Id.* at 116. The court cautioned, however, that privacy interests of innocent third parties should "weigh heavily in the court's balancing equation…." *Id.* The court concluded that the district court's findings in support of sealing were not specific enough to meet the requirements of *Press-Enterprise II*, and that its own review indicated that the sealing was "more extensive than necessary to protect defendants' fair trial rights, their privacy interests and the privacy interests of third persons." *Id.*

Similarly, the Second Circuit in *In re Application of Newsday, Inc.,* 895 F.2d 74, 76 (2d Cir. 1990), confronted the issue of public access to Title III intercepted communications when those communications are referenced in a warrant application sought by a newspaper subsequent to an indictment and guilty plea. After concluding that Title III did not expressly preclude disclosure of intercepted wire communications in a warrant application, the court analyzed the common law right of access to the warrant applications in general. *Id.* at 76-78 ("[Title III] does not … address the issue of public access to intercepted communications when those communications become part of a public document….") The court concluded that, in the context presented, the common law right of access attaches, and that "the presence of material derived from intercepted communications in the warrant application does not change its status as a public document subject to a common law right of access…" *Id.* at 79. The court nevertheless recognized that

the presence of such materials "may require careful review by a judge before the papers are unsealed." *Id.*

Courts in this Circuit too have recognized the public's right of access to judicial records referencing Title III materials when the records are submitted as a basis of adjudication. For example, in *Chow*, media intervenors sought to unseal defense motions to suppress evidence and a related court order. 2015, WL 5094744, *3. The court ruled that "even for excerpts of Title III materials within those briefs and within the order—by their incorporation into the parties' arguments and the Court's analysis, the excerpts themselves become judicial records." *Id.*, *4. Thus, the court concluded that under the First Amendment, any sealing or redaction was required to be "narrowly tailored to serve compelling reasons." *Id.* The court found that protection of confidential sources and the identities of unindicted third parties supported redaction. The court also noted that such information had "no bearing on the parties' legal arguments or the Court's analysis of the motions…." *Id.* *See also United States v. Inzunza*, 303 F. Supp. 2d 1041, 1049 (S.D. Cal. 2004) (ruling that First Amendment right of access did not attach to sealed wiretap materials sought by media because they had yet to be submitted in connection with any proceeding—"[N]o hearing on any critical stage in the criminal proceeding—such as a suppression hearing, preliminary hearing, *or Title III challenge*—has yet to occur.") (Emphasis added.).

As in *New York Times, Newsday*, *Chow*, and *Index Tribune*, movants here are seeking judicial records introduced as a basis for adjudication in judicial proceedings separate from the government's underlying criminal probe—not raw materials untethered to a substantive judicial proceeding. The right of access attaches to these records precisely because they were used in judicial proceedings to which the right of access to related judicial records attached.[6]

Thus, history supports a determination that judicial opinions, including in the context of contempt hearings in connection with otherwise confidential proceedings, are subject to the First Amendment right of access. That the records may reference Title III materials does not alter this conclusion.

2. Logic also supports a right of access to judicial opinions and related legal arguments.

Public access to the District Court's ruling(s) and related party arguments here will "play[] a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8 (citing Globe Newspapers Co., 457 U.S. at 606).

First, without access to judicial opinions, "public oversight of the courts,

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[6] Even the case relied on by the District Court in denying the motions to unseal—*In re New York Times*, 577 F.3d at 407, * 3, which involving a request for raw intercepted communications and applications for wiretaps—recognizes the distinction between a request for raw Title III materials and one for judicial records that reference intercepted communications but are otherwise subject to the right of access. ER10.

including the processes and the outcomes they produce, would be impossible." *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014). As this Court has recognized, "resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the 'public's understanding of the judicial process and of significant public events.'" *Kamakana*, 447 F.3d at 1179 (quoting *Valley Broad. Co.*, 789 F.2d at 1294). Presumably, this is precisely why, by Circuit Rule, this Court's own dispositions are presumptively public, even in sealed matters. Cir. R. 27-13(j).

Second, access can provide "a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody." *Index Newspapers*, 766 F.3d at 1093. Given the similarities that contempt proceedings have to criminal trials, access to records of such proceedings can advance many of the same polices underlying the right of access to criminal trials generally. *Index Newspapers*, 766 F.3d at 1093. Open criminal trials "enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 508 (1984). This is so because "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurances that established

procedures are being followed and that deviations will become known." *Id.* at 508.

Moreover, the absence of a jury in a particular proceeding, "makes the importance of public access [sic] even more significant." *Press Enterprise II*, 478 U.S. at 12. Access also may provide a "community therapeutic value." *Id.* at 570. Granted that the access rights here do not implicate heinous crimes necessitating a community outlet, but access could provide the public with needed information to intelligently participate in an ongoing debate about government surveillance and encryption. *See Richmond* Newspapers, 448 U.S. at 587 (explaining that First Amendment plays a structural role in republican system of self-government by ensuring "valuable public debate" is informed).

Lastly, though raw warrant materials, such as probable cause statements or the fruits of any particular search, are *not* being sought here, cases recognizing the utility of access to these types of judicial records once an indictment has been returned or an investigation concluded are instructive.

As this Court has recognized, access to warrant materials can "serve as a check on the judiciary because the public can ensure that judges are not merely serving as a rubber stamp for the police." *Custer*, 658 F.3d at 1194 (quoting *In re New York Times Co.*, 585 F. Supp. 2d 83, 90 (D.D.C. 2008)). Access also is "'important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on

prosecutorial or judicial misconduct.'" *Id.* (quoting *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988)).

Similarly, the U.S. Supreme Court has explained, in the context of suppression hearings, that "[a] challenge to the seizure of evidence frequently attacks the conduct of the police and prosecutors" and "strong pressures are naturally at work on the prosecutor's witnesses to justify the propriety of their conduct in obtaining the evidence." *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984). "The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Id.*

These same salutary effects stemming from public scrutiny over warrant materials are at issue here where the government attempts to force a third party to the proceedings to alter their network systems to enable surveillance against their users, or hold them in contempt for refusing to do so. *See Katz v. United States*, 389 U.S. 347, 34 (1967) (recognizing electronic interception of telephone communications as search and seizure and thus violative of Fourth Amendment absent judicial authorization).[7]

In sum, access to the court's ruling(s) and parties' legal arguments here can

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[7] It was in the wake of *Katz*, that Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, to provide a procedure for obtaining wiretap authorization and to limit disclosure of information obtained through wiretaps. *Chow*, 2015 WL 5094744, *3.

clearly enhance the underlying process.

C. A Strong Presumption of Access Also Attaches to the Records under the Common Law.

As the U.S. Supreme Court has recognized, under the common law, the public has a qualified right "to inspect and copy public records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597. Judicial orders and motions are undoubtedly "judicial records and documents." *Id.*; *see also Custer*, 658 F.3d at 1193 (holding that affidavits of probable cause in support of search warrants "clearly fall within the definition of 'judicial documents.'") (quoting *Nixon*, 435 U.S. at 597).

"Unless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point." *Kamakana*, 447 F.3d at 1178 (quoting *Foltz*, 331 F.3d at 1135); *see, e.g., Custer*, 658 F.3d at 1192 (holding that post-investigation warrant materials were not within narrow range of documents not subject to the common law right of access).

This Circuit has recognized only two types of documents that fall within this category: grand jury transcripts and warrant materials during the "pre-indictment phase" of an investigation. *Custer*, 658 F.3d at 1193 (quoting *Kamakana*, 447 F.3d at 1178). It also has warned against adding classes of documents to this category because by doing so the "documents are usually or often deemed confidential." *Kamakana*, 447 F.3d at 1185.

This case does not involve a request to unseal warrant materials untethered to any substantive legal proceeding; rather, it involves access to judicial orders and related legal arguments attendant to motions to compel technical assistance, or to hold in contempt a third-party for refusing to provide that assistance.[8]

Because these records—judicial orders in contempt proceedings—do not fall within the narrow range of documents this Court has recognized as "traditionally kept secret for important policy reasons," they are "public documents almost by definition, and the public is entitled to access by default." *Kamakana*, 447 F.3d at 1180.

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[8] Even in cases involving direct requests to unseal wiretap or technical assistance applications, without their use in any other proceedings, such materials have been recognized as judicial records within the common law right of access. *See, e.g., In re Cranick*, No. 16-mc-80206, 2019 WL 2179563, *10 (N.D. Cal. May 20, 2019) (adopting magistrate report and concluding that common law right of access to judicial records attached to technical assistance applications in concluded cases, among other documents, but finding administrative burden of producing materials going back 13 years, among other things, overcame presumption in favor of access); *In re New York Times Co.,* 577 F.3d at 405 (assuming arguendo that *wiretap applications* in closed investigation were judicial records within the common law right of access but concluding that Title III superseded any arguable common law right).

II. TITLE III'S SEALING RULES DO NOT NEGATE THE STRONG PRESUMPTION OF PUBLIC ACCESS HERE.

A. Title III's Sealing Rules Do Not Govern Orders Refusing to Compel Companies to Provide Technical Assistance, or Orders in Ancillary Contempt Proceedings.

Title III, which governs the interception of a wire, oral, or electronic communication, was adopted to provide a procedure for obtaining wiretap authorizations and to limit the disclosure of certain information. *Chow*, 2015 WL 5094744, *3. It contains sealing requirements for both the contents of intercepted communications and the applications and orders authorizing the intercept. 18 U.S.C. § 2518(8)(a)-(b).

Section 2518 does not, however, provide that the entire universe of material, documents, and judicial decision-making related to a wiretap and/or wiretap assistance be sealed. As to the *fruits* of wiretaps, "18 U.S.C. § 2517 sets forth limited circumstances in which information gleaned from wiretapping may be disclosed, including disclosure between law enforcement officers and disclosure 'while giving testimony under oath or affirmation in any [judicial] proceeding.'" *Chow*, 2015 WL 5094744, *3.

As to applications for and orders granting permission to engage in wiretapping, Section 2518(8)(b) provides in relevant part:

> Applications made and orders *granted* under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be

> disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

18 U.S.C.A. § 2518(8)(b) (emphasis added); *see also Chow*, 2015 WL 5094744, *3 (describing reach of statute as applying to "applications for and orders granting permission to engage in wiretapping"); *United States v. Yoshimura*, 831 F. Supp. 799, 803 (D. Haw. 1993) (ordering release of certain redacted information and noting that "Congress require[s] that applications made and order granted under this statute must be sealed by the judge").

These sealing provisions are in keeping with Congress's dual purpose in enacting Title III: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *In re U.S. for an Order Authorizing Roving Interception of Oral Communication*, 349 F.3d at 1136 (quoting S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 2112, 2153 (1968)); *see also Application of Kansas City Star*, 666 F.2d 1168, 1174 (8th Cir. 1981).

Notably absent from these sealing requirements is any mention of orders *denying* a government's application to wiretap, or orders *denying* relief to the government seeking to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act ("CALEA"), as

provided under Section 2522. *See* 18 U.S.C. § 2518(4) ("Pursuant to section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.").

No statutory sealing requirements govern such denial orders. *See United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010) ("If the plain language of a statute renders its meaning reasonably clear, we will not investigate further unless its application leading to unreasonable or impracticable results.") (internal quotations and brackets omitted).

Nor does disclosure of an order denying enforcement of the technical assistance provisions of CALEA carry with it the same concerns raised with disclosure of the underlying application or order granting that application, which may reveal the government's probable cause determination and implicate privacy interests of suspect individuals. *See United States v. Abraham*, 541 F.2d 624, 628 (6th Cir. 1976) ("The requirement of sealing in § 2518(8)(a) appears to be related to the purpose of maintaining confidentiality of the recordings . . . This is clearly the purpose of § 2518(8)(b), which relates to applications and orders *authorizing* interceptions") (emphasis added).

In short, the records at issue here are not covered by Title III's sealing requirements.

B. Facebook's Messenger App May Be Beyond the Reach of Title III's Enforcement Provisions and CALEA, and in Such Event Title III's Sealing Requirements Would be Inapplicable.

Other reasons may exist for a finding that Facebook's Messenger app falls outside of the enforcement provisions of Title III, which provide a mechanism for compelling compliance with CALEA, thus rendering its sealing requirements inapplicable. For example, as in *In re U.S. for an Order Authorizing Roving Interception of Oral Communication*, 349 F.3d at 1146, it may not have been possible to provide the assistance requested "unobtrusively and with a minimum of interference with the service" as required under 18 U.S.C. Section 2518(4). Or Facebook and its service may fall outside of CALEA's technical assistance requirements altogether. Those requirements do not apply to "information services"; nor do they apply to encrypted communications, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication. *See* 47 U.S.C. § 1002(b)(2) & (b)(3). They also do not apply if the assistance is not "reasonably achievable through the application of available technology…" 47 U.S.C. § 1007(a)(2).

If any of these reasons supported the District Court's determination, the sealing requirements of Title III are plainly inapplicable.

III. THE DISTRICT COURT'S SEALING ORDER WAS NOT NARROWLY TAILORED DUE TO ITS ERRONEOUS VIEW OF TITLE III'S REACH.

A. The District Court's Balancing Was Tainted By its Erroneous View of the Scope of Title III's Sealing Requirements.

"When a qualified right of access exists and the trial court is confronted with legitimate competing interests, the trial court must carefully balance those interests." *Phoenix Newspapers*, 156 F.3d at 949. Both the First Amendment and common law right of access start from "a strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135.[9] Under the First Amendment, that presumption of access is overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13 (quoting *Press-Enterprise I*, 464 U.S. at 519).

Specifically, the party advocating sealing must show that "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Phoenix Newspapers*, 156 F.3d at 949 (citation omitted); *see also Associated Press*, 705

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[9] The First Amendment provides "a stronger right of access than the common law." *Custer*, 658 F3d.at 1197 n. 7.

F.2d at 1145 (public's right of access to documents filed in conjunction with criminal proceeding can be overcome only by an affirmative showing that the sealing of documents is "*strictly and inescapably necessary*" to promote competing interest of the highest order) (emphasis added). [10]

Separately, any closure ordered must be narrowly tailored in time and scope, and must be effective in protecting the compelling interest at stake. *See Press-Enterprise Co*. *II*, 478 U.S. at 14 (requiring "on the record findings … demonstrating that 'closure is … narrowly tailored to serve [the compelling] interest,'" and "that closure would prevent" the harm asserted) (emphasis added) (citation omitted); *Associated Press,* 705 F.2d at 1146 ("there must be 'a substantial probability that closure will be effective in protecting against the perceived harm'") (citation omitted).

Before access may be limited, trial courts are required to "make specific factual findings" that "satisfy all three substantive requirements for closure." *Phoenix Newspapers*, 156 F. 3d at 950; *see also Oregonian Publ'g Co.*, 920 F.2d at 1466 ("[a]n order of closure should include a discussion of the interests at stake, the applicable constitutional principles and the reasons for rejecting alternatives, if any, to closure.") (citations omitted); *Press-Enterprise I*, 464 U.S. at 510 ("The

interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.")

Under the common law, the party seeking to seal judicial records must "articulate[ ] compelling reasons supported by specific factual findings… that outweigh the general history of access and the public policies favoring disclosure, such as the 'public interest in understanding the judicial process.'" *Kamakana*, 447 F.3d at 1178-79 (internal citations omitted).[11] The court must "conscientiously balance[ ] the competing interests" of the public and the party who seek to keep certain judicial records secret. *Id*. (citing *Foltz*, 331 F.3d at 1135). Conclusory assertions of harm are insufficient. *Id.* at 1182 (rejecting as insufficient "conclusory statements" that disclosure would place officers "in a false light").

Importantly, this Circuit has specifically rejected an "all-or-nothing" approach to judicial records over which the common law right of access attaches. *Index Newspapers*, 766 F.3d at 1090 (citing *In re Copley Press*, 518 F.3d at 1027-28). Even when portions of the records will invoke confidentiality concerns (e.g., testimony introduced to a grand jury), the court is required to redact only those

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[11] "The 'compelling reasons' standard is a strict one, and '[s]imply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents does not satisfy the burden.'" *Music Group Macao Commercial Offshore Limited v. Foote*, No. 14-cv-03078, 2015 WL 3993147, *1 (quoting *Kamakana*, 447 F.3d at 1184).

portions of the records that invoke compelling interests so that the remainder may be made public. *Id.*

If the court decides to seal certain portions of judicial records, it must "base its decision on compelling reasons and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)).

Here, the District Court did not engage in a conscientious balancing of interests. Rather, it concluded that "Title III supersedes any arguable common law right," and "overwhelmed" the qualified right under the First Amendment. ER11: 20-21 & 11:5. Its conclusion that "important policy reasons" justify "secrecy of the Title III criminal investigation" was based on the view that Congress, through Title III, commanded such secrecy, even over orders *denying* forced technical assistance or in ancillary proceedings such as one for contempt of court. ER11:20-23. This erroneous view of the scope of Title III's sealing provisions, as more thoroughly explained above, imbued the District Court's view of the proper balance to be struck in this case, *precluding any balance other than one in favor of the government*.

This legal error is punctuated by the District Court's stated conclusion that sealing was required to preserve the government's interests in all "future" wiretap cases. ER11:24-12:2 (finding sealing justified based on government's contention

that disclosure would jeopardize "subsequent investigations of future cases"). This dangerously expansive view of the government's interests, would place outside of the public's reach how courts interpret the wiretap statutes, giving carte blanch power to government entities and courts in effectuating (or punishing third-parties for not effectuating) what the Supreme Court has recognized as—at its core—a Fourth Amendment search. *Katz*, 389 U.S. at 354.

The all-or-nothing approach adopted by the District Court must be rejected.

Because the District Court's balancing was flawed as a matter of law, this Court should review *de novo* its order and the underlying court records, applying anew the above standards to the government's proof. *San Jose Mercury News*, 187 F.3d at 1100 (where "the district court's decision turns on a legal question, however, its underlying legal determination is subject to *de novo* review.").

B. Redaction Rather than Wholesale Sealing Should be Utilized to Protect Any Compelling Privacy and Investigatory Interests.

In reviewing the materials, to the extent possible, any interest in privacy or confidentiality should be accommodated through appropriate redaction rather than wholesale withholding of judicial records. *See, e.g., Custer*, 658 F.3d at 1195 n. 5 (recognizing that certain concerns may warrant redaction of warrant materials); *Chow*, 2015 WL 5094744, * 4 (finding privacy interests of third parties and confidential informants warranted redaction of Title III materials).

For instance, to the extent the parties' briefing and District Court's ruling(s)

on enforced wiretapping or contempt contain genuinely sensitive information about the criminal case (like the identities of confidential informants or targets of further investigations, or private information about individual Messenger users), those details could be redacted. *See, e.g., Index Newspapers*, 766 F.3d at 1090 (recognizing that certain portions of transcript of contempt hearing discussing substantive grand jury matters could be redacted so that remainder of transcript could be made public); *In re Matter of New York Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) ("Redaction is permissible . . . even if redaction will render 'almost meaningless' the documents to be disclosed, if . . . important Title III privacy interests cannot otherwise be protected and such privacy interests outweigh the public's interest in access") (internal quotation omitted); *see also Cohen*, 366 F. Supp. 3d at 625 (ordering redaction from warrant affidavits and Stored Communication Act materials the names of uncharged individuals who may be stigmatized by their association with the criminal case).

However, "not every release of information contained in an ongoing criminal investigation file will necessarily affect the integrity of the investigation." *Virginia Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004). As this Court has recognized, "[s]imply invoking a blanket claim, such as privacy or law enforcement, will not, without more, suffice to exempt a document from the public's right of access." *Kamakana*, 447 F.3d at 1185. Rather, the government

must have provided "specific underlying reasons for the district court to understand how the integrity of the investigation reasonably could be affected by the release of such information" to justify continued sealing of any part the records. *Wash. Post*, 386 F.3d at 579.

Because the interests of the Post here are in the legal and policy arguments put forth by the parties, and the District Court's resolution of them, it is simply implausible that wholesale sealing is the least restrictive means to protect any claimed privacy interests of uncharged individuals or the government's interests in specific ongoing investigations.

IV. THE PUBLIC HAS A STRONG INTEREST IN LEARNING THE LEGAL JUSTIFICATIONS AND ARGUMENTS UNDERPINNING THE DISTRICT COURT'S ORDER.

There is a strong public interest in access to the District Court's legal justifications for denying the government's requested relief and the underlying legal arguments advanced by the parties. Public access may reveal whether, in the District Court's view, Title III applies to VOIP applications, such as Facebook's Messenger app., and the reach of Title III's technical assistance provisions to such services. Given the world-wide prevalence of such applications, with over 1.3 billon users of Messenger alone, and the obvious Fourth Amendment implications flowing from government wiretaps of private communications over VOIP applications, public access here could inform the ongoing public debate over these

issues.

This Court's own decision to make public its opinion in *In re U.S. for an Order Authorizing Roving Interception of Oral Communication*, 349 F.3d 1132, illustrates the importance of access here. That opinion brought to light efforts by the Federal Bureau of Investigation to use a vehicle's telecommunications devise (called on-board systems), as a roving "bug" of private conversations of occupants suspected of criminal activity. *Id.* at 1134. In addition to revealing government efforts to tap on-boarding systems generally, the case resolved complex statutory issues under Title III as to whether a company that runs an on-board system can be considered a "provider of wire or electronic communications service" or an "other person" within the meaning of Section 2518(4), and therefore required to furnish facilities and technical assistance to the government to effectuate a wiretap. *Id.* at 1144. It also addressed whether the district court went too far by ordering assistance that could not be provided "unobtrusively and with a minimum of interference with the services" as required under Section 2518(4) of the statute. *Id.*

Similar legal arguments were reportedly advance by Facebook below. Just how the District Court applied the law to Messenger, or whether it found Messenger to be beyond Title III's reach are important legal issues that should be, and can be, made public without adversely impacting compelling countervailing interests.

CONCLUSION

As the United States Supreme Court noted in *Richmond Newspapers*, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572. Because the District Court's order sealing its ruling(s) and related briefings in the contempt proceedings was erroneous as a matter of law, it should be reversed. Upon review, this Court should ascertain whether the government presented compelling interests to justify any redaction, and ensure that as much of the underlying records are made public as possible.

Date: June 12, 2019 JASSY VICK CAROLAN LLP

/s/ Duffy Carolan
Duffy Carolan

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STATEMENT OF RELATED CASES

This appeal is related to the appeal in *American Civil Liberties Union Foundation, et al. v. United Stated Department of Justice, United States Circuit Court, Ninth Circuit Court of Appeals* (No. 19-15472), in that both appeals arise out of the same case in the district court, involve the same parties, raise the same or closely related issues and involve the same events—sealing of judicial records.

Date: June 12, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,345 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, version 10, using Times New Roman 14-point font.

Date: June 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 12, 2019

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