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Nos. 19-15472 and 19-15473

United States Court of Appeals
For the Ninth Circuit

AMERICAN CIVIL LIBERTIES FOUNDATION, et al.
Movants-Appellants,

WP COMPANY LLC, dba THE WASHINGTON POST,
Movant-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent-Appellee.

On Appeal From The United States District Court For The Eastern District of California, No. 1:18-mc-00057 (O'Neill, C.J.)

BRIEF FOR THE UNITED STATES

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INTRODUCTION

In the Wiretap Act, Congress has instructed courts to seal applications seeking wiretap authorization and orders granting them. 18 U.S.C. § 2518(8)(b). Those same sealed court orders may also direct communications providers to furnish the government all technical assistance necessary to carry out the authorized interception. *Id.* § 2518(4). But what happens when a provider refuses to furnish or claims that it is unable to furnish that court-ordered assistance, and the government seeks the court's aid in enforcing its prior order?[1] According to appellants, the statute's sealing protections vanish, and the First Amendment and the common law confer on the press and the public a right to access any court ruling on the government's request; submissions leading to that ruling; and the docket sheet, which the public can then use to identify additional documents it believes "may merit unsealing," ACLU Br. 17.

The district court sensibly rejected that position. No First Amendment or common law right of access attaches to proceedings to enforce a court order

[1] To facilitate adversarial presentation, the government assumes in the public portions of this brief that this case involves the sequence of events described in appellants' briefs and the media reports cited therein—that is, that the government moved to compel Facebook's compliance with a technical assistance order issued under the Wiretap Act (including through potential contempt sanctions), the district court conducted sealed proceedings on that motion, and the court issued a sealed decision denying the motion. This brief should not be read, however, to confirm the contents of any cited media reports, which appear to emanate from disclosures made in violation of court orders.

entered under the Wiretap Act and sealed by that statute's command. Even if such a right attaches, the district court was correct in holding that the right is overcome in the circumstances here by the government's compelling interests in preserving the secrecy of law enforcement techniques and the integrity of an ongoing investigation and prosecution. The court also reasonably concluded that, although redactions suffice in many instances to protect the government's interests, "effective redaction" is "not possible" in this case, which involves both sensitive law enforcement techniques *and* proprietary information that the provider itself seeks to shield from public view.

Affirming the case-specific decision below would not, as appellants argue (ACLU Br. 2), endorse the creation of "secret law" that governs communications providers or the public at large. A sealed, unpublished district court order does not make law in the way that this Court would in issuing a precedential opinion. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). And nothing in the district court's sealing decision here alters the reality that public judicial opinions remain the strong default rule and sealed opinions a narrow exception. The court's decision to maintain a ruling and related materials under seal in the circumstances of this case should be affirmed.

JURISDICTIONAL STATEMENT

The ACLU, the Washington Post, and other appellants appeal the district

court's denial of their motions under E.D. Cal. R. 141(f) for access to sealed materials. That court had jurisdiction over the constitutional and common-law claims under the federal question statute, 28 U.S.C. § 1331. *See In re Morning Song Bird Food Litig.*, 831 F.3d 765, 771 (6th Cir. 2016). After the court denied the motions on February 11, 2019, appellants filed timely notices of appeal on March 8 and March 13, 2019.[2] ER1-7; *see* Fed. R. App. P. 4(a)(1). This Court has appellate jurisdiction under 28 U.S.C. § 1291. *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1083 (9th Cir. 2014).

STATEMENT OF ISSUES

1. Whether the First Amendment or common law right of access attaches to a court order, pleadings, or docket sheets in a proceeding to enforce a sealed Title III technical assistance order, 18 U.S.C. § 2518(4) & (8)(b).

2. Whether, if a First Amendment or common law right attaches to any of the materials, the district court erred in concluding that the right was outweighed by compelling government interests in shielding law enforcement techniques and investigative information from public disclosure.

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[2] This brief refers to the moving parties below as "appellants" except where necessary to distinguish separate arguments they make. "CR" refers to docket entries (*e.g.*, ECF No.) in the miscellaneous case below. "ER" refers to the Excerpts of Record filed by the Washington Post in No. 19-15473. "SER" refers to the government's supplemental excerpts of record, which are being filed *ex parte* and under seal, in accordance with the government's April 25, 2019 response to the ACLU's motion regarding the record. *See* ACLU Br. 6.

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3. Whether the district court abused its discretion in concluding that redacting the requested materials was not a viable alternative to sealing, where any unprotected material was entangled with both sensitive law enforcement information and the provider's proprietary information, and disclosure of redacted materials was more likely to confuse than inform the public.

STATEMENT OF THE CASE

A. Statutory Overview

These appeals arise from applications for authorization to intercept communications under the Wiretap Act, enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2522. Title III established "a comprehensive scheme" governing the interception of wire, oral, and electronic communications and the disclosure of the intercepted communications. *See Gelbard v. United States*, 408 U.S. 41, 46 (1972). Wiretap applications must establish, and orders authorizing interceptions must be based on, probable cause that an individual is committing a crime and will use the targeted facilities and types of communications to do so, as well as a showing of "necessity"—*i.e.*, that other investigative procedures have been tried and failed or would be unlikely to succeed or be too dangerous, *United States v. Garcia-Villalba*, 585 F.3d 1223, 1227 (9th Cir. 2009). *See* 18 U.S.C. § 2518(1), (3).

Court orders authorizing Title III interceptions, in turn, must specify "the

parties whose communications are to be overheard (if they are known)," *Dalia v. United States*, 441 U.S. 238, 250 (1979), the nature and location of the communications facilities covered by the interception authority, the agency authorized to intercept, and the permitted period of interception. 18 U.S.C. § 2518(4)(a)-(e). Those same orders may require the government to provide interim progress reports on the interceptions to the issuing judge. *Id.* § 2518(6). Upon the government's request, the court's order "shall" additionally direct the communications service provider to "furnish ... forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider ... is according the person whose communications are to be intercepted." *Id.* § 2518(4).

Title III also strictly limits public disclosure of the fruits of a wiretap and the materials generated in the course of wiretap proceedings. The statute authorizes investigative or law enforcement officers who learn the contents of intercepted communications to disclose and use those contents only for limited purposes. 18 U.S.C. § 2517(1)-(2). The recordings containing intercepted communications must be made available to the issuing judge "[i]mmediately upon the expiration of the period of the order, or extensions thereof," and "sealed under [the court's] directions." *Id.* § 2518(8)(a). "Applications made and orders granted under" Title III must likewise "be sealed by the judge" and

"shall be disclosed only upon a showing of good cause." *Id.* § 2518(8)(b). This category of sealed application materials has long been construed "to include any related necessary documentation[,] such as affidavits and progress reports" ordered under Section 2518(6). *In re Grand Jury Proceedings*, 841 F.2d 1048, 1053 n.9 (11th Cir. 1988). And in light of these statutory sealing requirements, district courts in this and other circuits do not place wiretap applications and associated orders on a docket visible to the public. *See* SER41, 51, 64; *In re Granick*, No. 16-mc-80206, 2019 WL 2179563, at *2 (N.D. Cal. May 20, 2019); *United States v. Fierer*, No. 1:96-cr-294, 1997 WL 445937, at *2 n.2 (N.D. Ga. July 25, 1997).[3]

B. Sealed Title III Proceedings

[redacted]

[3] Appellants note (ACLU Br. 50) one Virginia district court's posting of limited docketing information for some types of surveillance applications, but do not suggest that even that limited information is available in sealed Title III proceedings. *See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 288, 295 (4th Cir. 2013); *Matter of Leopold*, 300 F. Supp. 3d 61, 94-95 & n.27 (D.D.C. 2018).

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C. The District Court Denies Appellants' Unsealing Motions

1. In November 2018, appellants filed motions under the local rules of the district court seeking access to sealed materials docketed in Title III wiretap proceedings in that court. CR1; CR3. The motions cited media articles from August and September 2018 reporting—based on information from unidentified sources—that the government had sought to compel Facebook, Inc. to allow the government to intercept certain communications made via Facebook and had moved to hold Facebook in contempt when it refused to comply, and that the court issued a sealed ruling denying the government request. CR1 at 1, 3-4; CR3

at 1. The motions linked the Title III proceedings to a recent case charging 16 MS-13 gang members with drug, assault, and racketeering crimes. A publicly filed affidavit in that case described the government's investigation as including "review of legally intercepted phone calls, text messages, Facebook postings, and Facebook messages," and quoted intercepted Facebook Messenger communications between the defendants and their co-conspirators. Compl. 4, 24-31, *United States v. Denis Barrera-Palma, et al.*, No. 1:18-cr-207 (E.D. Cal. Aug. 30, 2018) (CR20).

Appellants asked the court to unseal any sealed docket sheets, court orders on sealing requests, judicial rulings associated with the proceedings, and legal analysis in government submissions reflected in the requested court rulings. CR1 at 2; *see* CR3 at 2 (Washington Post's separate request for unsealing of "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").

2. On February 7, 2019, and in accordance with their understanding of earlier court orders, the United States and Facebook filed sealed responses to appellants' motions. SER32-33, 40; *see* ER8 (district court explained that the parties properly filed under seal because "the substantive nature of the responses ... parallel[ed] the reasons the proceedings were sealed in the first instance").

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Facebook supported unsealing subject to redacting certain categories of information. ER9. The government opposed unsealing in a response [redacted]

3. On February 11, 2019, the district court issued a public order denying appellants' motions to unseal. ER8-12. The court began by reaffirming its earlier determination that the Title III materials at issue had been appropriately "closed and sealed" based on contemporaneous findings that disclosure of the materials (a) would jeopardize both then-current and future criminal investigations involving Title III wiretap processes, and (b) would reveal Facebook's proprietary information and processes, "thereby jeopardizing" certain aspects of its business operations. ER8-9.

The court then explained that the legal questions before it were whether the First Amendment or the common law afford the public a right of access to

the materials sought and, if so, whether compelling governmental interests outweigh that right. ER9. In answering those questions, the court recognized that appellants were "handicapped in their" ability to address their arguments to the facts of the underlying Title III proceedings. ER9. The court stressed, however, that providing appellants "with the information that would allow them to be convinced of the need to seal would swallow the very issues that resulted in the closed hearing and sealing of records." ER9.

Turning to its First Amendment analysis, the court observed that "Title III is governed by a comprehensive statutory scheme that establishes a presumption against disclosure" and that "the requested materials contain and pertain to sensitive wiretap information that implicates directly the very purpose of" that scheme. ER9. Applying the experience-and-logic test, the court concluded that experience did not favor access "because there is no historical tradition of open access to Title III proceedings" and that logic did not support access because appellants had provided no basis for adopting "their view that public policy favors public involvement in matters such as those presented here over Congress' preferred policy as expressed in Title III itself." ER10. The court further concluded that, if a First Amendment right existed, the government's "compelling interest" in "preserv[ing] the secrecy of law enforcement techniques in Title III wiretap cases overwhelms that qualified right." ER11. That was so,

the court stated, both because the investigation at issue was "ongoing" and "the case concern[ed] techniques" whose public disclosure "would compromise law enforcement efforts in ... future wiretap investigations." ER11.

The court next held that Title III's nondisclosure scheme "supersedes any arguable common law right" and that no such right "attach[es] to the materials requested." ER11. In support of that conclusion, the court quoted (ER11) this Court's statement in *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (1989), that "there is no right of access to documents which have traditionally been kept secret for important policy reasons." The court further concluded that, if a common law right attached, the "balancing [of] interests required under" this Court's precedents favored continued sealing. ER11-12. In particular, the court found that "[t]he important policy reasons to preserve the secrecy of the Title III criminal investigation are present and remain intact" and that "[t]he interests of the public are outweighed in favor of non-disclosure based on the relevant facts and circumstances here." ER11.

Finally, the court considered whether "[r]edaction of sensitive information" was a "viable" alternative to sealing and found that it was not. ER11. "[S]ensitive investigatory information is so thoroughly intertwined with the legal and factual arguments in the record," the court explained, "that redaction would leave little and/or misleading substantive information." ER11; *see id.* ("[T]he

requested material is so entangled with investigatory secrets that effective redaction is not possible.").

SUMMARY OF ARGUMENT

I. The district court correctly held that no First Amendment or common law right of access attaches to materials filed or generated in proceedings to enforce Title III technical assistance orders. Those orders are sealed under 18 U.S.C. § 2518(8)(b), a provision in a comprehensive statutory scheme that prioritizes confidentiality and authorizes broad sealing of, and only limited disclosure of, wiretap materials. This legislative preference against disclosure extends to proceedings to enforce a technical assistance order, because those proceedings are part and parcel of the wiretap process.

Against this statutory backdrop, neither history nor logic supports a First Amendment right of access to the materials. Appellants identify no history of public access to wiretap materials in general or documents from Title III technical assistance proceedings in particular, as the courts' handling of a prior technical assistance case in this circuit shows. Openness also would not play a positive role in the proceedings, which bear important similarities to grand jury and search warrant matters at the investigative stage—two pre-indictment proceedings that this and other courts have held to fall outside any access right. That conclusion is not altered by the fact that appellants principally seek a judicial

opinion and docket sheets, both because the right-of-access analysis does not turn on the type of document, untethered to the proceeding to which it relates, and because the public's right of access to those documents is not absolute.

Appellants' focus on two particular types of documents also does not establish a common law right. Rather, as the Second Circuit has held for wiretap application materials themselves, Title III's comprehensive statutory scheme governing disclosure and sealing supersedes any such right. Even if not, the right does not attach in the first place, because technical assistance proceedings are akin to the class of pre-indictment investigative matters that have traditionally been closed for important reasons.

II. If any access right attaches, the district court correctly concluded in its discretion that the right is outweighed here by the government's compelling interests in preserving the secrecy of sensitive law enforcement techniques and protecting the integrity of an ongoing investigation and prosecution. The strength of those interests is not undermined by the public's general awareness that the government can intercept communications or unverified media reporting on some aspects of the sealed proceedings. Nor should this Court endorse a rationale that would bootstrap leaks about sealed proceedings into a right of access to those proceedings.

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The district court did not abuse its discretion in determining that redaction was not a viable alternative to sealing in the particular circumstances here. This and other courts have recognized that redaction may not be feasible where sensitive information is pervasively intertwined with more innocuous text or where the remaining text would mislead rather than inform. Here, the district court had before it an opinion and other materials from a completely sealed proceeding that would have to be redacted to accommodate both compelling government interests and Facebook's desire to protect its proprietary information. That unusual confluence of facts justified the court's conclusion that releasing the opinion with all necessary redactions would give a misleading picture of the whole and that redaction was therefore not feasible.

STANDARD OF REVIEW

This Court reviews *de novo* the question whether a right of access to certain records or court proceedings exists under the First Amendment or the common law. *United States v. Carpenter*, 923 F.3d 1172, 1178 (9th Cir. 2019). The district court's separate determinations that the balance of interests favored maintaining the materials under seal and that redactions were not viable means of protecting the relevant interests should be reviewed for abuse of discretion. *See id.*; *United States v. Doe*, 870 F.3d 991, 996 (9th Cir. 2017).

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ARGUMENT

I. NO FIRST AMENDMENT OR COMMON LAW RIGHT OF ACCESS ATTACHES TO MATERIALS FILED OR GENERATED IN PROCEEDINGS TO ENFORCE A SEALED TITLE III TECHNICAL ASSISTANCE ORDER

Appellants contend that the First Amendment and the common law afford them a right of access to a district court ruling on the government's effort to enforce a Title III technical assistance order, at least portions of the briefing leading up to the ruling, and the docket sheet reflecting the Title III proceedings. Appellants' arguments, however, give short shrift to the statutory scheme's presumption against disclosure of wiretap materials and are not supported by the precedents they invoke.

A. Title III's Comprehensive Scheme Establishes A Statutory Presumption Against Disclosure

Appellants' claims to constitutional and common law rights must be understood against the backdrop of the comprehensive scheme for disclosure of wiretap materials that Congress prescribed in Title III. Looking to the statute, the Second Circuit has held that Title III establishes a presumption against disclosure of wiretap applications and orders. *In re Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 408-10 (2d Cir. 2009) (*In re New York Times*). The district court correctly reached the same conclusion as to the materials here, which all derive from proceedings to enforce

a particular type of "order[] granted under" Title III, 18 U.S.C. § 2518(8)(b): technical assistance orders entered under 18 U.S.C. § 2518(4).

1. Title III strictly limits the circumstances under which the contents of court-authorized interceptions may be disclosed. It restricts who may make the disclosures (*i.e.*, "an investigative or law enforcement officer," "attorney for the Government," or "other Federal official") and for what purposes. *See* 18 U.S.C. § 2517(1)-(2), (5)-(8). "[B]y permitting disclosure of lawfully obtained wiretap evidence only under the specific circumstances listed" in the statute, the Seventh Circuit has explained, "Title III implies that what is not permitted is forbidden." *United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir. 1982).

At the same time, Title III provides for sealing of both communications intercepted under a court-authorized wiretap order and the written materials related to those authorizations. It requires that intercepted "wire, oral, or electronic communication[s]" be recorded when possible and the recordings "sealed" at the authorizing court's "directions." 18 U.S.C. § 2518(8)(a). In the provision most relevant here, the statute provides that

> 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. § 2518(8)(b).

Section 2518(8)(b) reflects Congress's intent "that applications and orders for authorization ... be treated confidentially." S. Rep. No. 1097, 90th Cong., 2d Sess., at 105 (1968) (Senate Report). Congress "expected" those materials "to contain sensitive information," "[p]articularly" when law enforcement agents were seeking to renew existing authorizations. *Id.* The legislative history likewise reflects Congress's expectation that "[a]pplications and orders" would be disclosed only "incidental to the disclosure or use of the [intercepted communications] themselves after a showing of good cause." *Id.* This "good cause" standard does not give courts license to engage in a free-form balancing of interests. *See Applications of Kansas City Star*, 666 F.2d 1168, 1176 (8th Cir. 1981) ("Disclosure of these documents is not a matter committed to the discretion of the district court, instead it is a matter which statutorily requires a factual finding of good cause."). Rather, Congress understood "good cause" to permit disclosure only in connection with a motion under Section 2518(10)(a), which allows an "aggrieved person"—that is, the target of a wiretap or a party to any intercepted communication, 18 U.S.C. § 2510(11)—to seek suppression of such communications or evidence derived from them.[4] *See In re New York Times*, 577

[4] Appellants make no argument that, if Section 2518(8)(b)'s good-cause standard applies here, they can satisfy it.

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F.3d at 407-08; *see also* 18 U.S.C. § 2518(9) (providing that the government cannot use intercepted communications at trial unless it discloses the wiretap order and underlying application at least 10 days before trial).

Even in authorizing disclosure to defendants, Congress recognized that the filing of a motion to suppress should not necessarily open up the entirety of wiretap proceedings. Congress authorized courts to "limit[] access to intercepted communications or evidence der[i]ved therefrom according to the exigencies of the situation," and explained that the suppression motions it "envisioned ... should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency." Senate Report 106. As the Second Circuit concluded, the legislative "purpose" evident from the Senate Report, along with Title III's text and "structure" as a whole, thus "reveal[s] a manifest congressional intent that wiretap applications be treated confidentially and clearly negate[s] a presumption in favor of disclosure." *In re New York Times*, 577 F.3d at 408.

2. The district court soundly determined that Congress's preference for non-disclosure applies equally to the materials at issue here. ER10-11. Accepting *arguendo* appellants' description of the case, the materials involve the government's effort to enforce one type of Title III order—*viz.*, an order requiring a provider of wire or electronic communication service to "furnish ...

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forthwith all ... technical assistance necessary to accomplish the interception." 18 U.S.C. § 2518(4). Such technical assistance orders *are* Title III orders covered by the statute's sealing provision. That provision applies to "orders granted under this chapter," 18 U.S.C. § 2518(8)(b), and a technical assistance order is issued "under" authority conferred by 18 U.S.C. § 2518(4), which is in the relevant "chapter" of the United States Code. *See Ardestani v. INS*, 502 U.S. 129, 134-35 (1991) (defining "under").

That conclusion is borne out by the way technical assistance orders are sought and issued in Title III proceedings. The government's request that a third party be required to furnish technical assistance appears in the same sealed application seeking wiretap authorization in the first place, and the court grants that request in the same sealed order authorizing interception and "specify[ing]" the other information required under Title III, 18 U.S.C. § 2518(4)(a)-(e). [redacted] When a court also issues a separate order directed to the provider (or other third party) required to furnish technical assistance, that order is issued under seal and bars the provider from disclosing information about the wiretap authorization and the existence of a law enforcement investigation. [redacted] *see* 18 U.S.C. § 2511(2)(a)(ii) (barring communications providers, on pain of civil penalties, from "disclos[ing] the existence of any interception … or the device used to accomplish the interception").

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Everything about technical assistance applications and orders, in short, signals that they must "be treated" just as "confidentially" as all other Title III materials. *See* Senate Report 105.

The need for confidential treatment extends to the materials at issue here. Applications to enforce technical assistance orders issued under Title III, and the enforcement proceedings and orders that result, are a component of the investigatory process authorized by Title III. They arise from a court's "inherent" power, *see Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991), to enforce orders that Title III authorizes courts to issue and commands them to issue under seal. *See* 18 U.S.C. § 2518(3), (4), (8). The materials generated in those proceedings will naturally repeat, analyze, or derive from information obtained pursuant to sealed Title III applications and orders, and should thus be protected to the same extent as the original applications for, and orders authorizing, interception. The district court was therefore correct to conclude that applications and orders for provider technical assistance, and proceedings related to the enforcement of those technical assistance orders, enjoy the same statutory sealing presumption under Section 2518(8)(b) that exists for the Title III wiretap applications and orders in which technical assistance requests are reflected. ER9-10; *see In re Granick*, No. 16-mc-80206, 2018 WL 7569335, at *6 (N.D. Cal. Dec. 18, 2018) (concluding that "[a] technical assistance application is a type of wiretap

application," and rejecting arguments for applying different sealing rules to such applications), *adopted*, -- F. Supp. 3d -- , 2019 WL 2179563 (N.D. Cal. 2019).

3. Appellants' efforts to minimize the significance of Title III's sealing provisions lack merit. They principally argue that, because the sealing provision refers to "[a]pplications made" for wiretap authorization and "orders grant[ing]" such authorization, Section 2518(8)(b) does not cover either "orders *denying* a government[] application to wiretap," WaPo Br. 39 (emphasis in original), or government efforts to enforce a technical assistance order through an "ancillary motion to compel" compliance with that order, ACLU Br. 22. Appellants' arguments suffer from several flaws.

As an initial matter, appellants overlook the broad range of materials that courts have found to fall within Section 2518(8)(b)'s protections. Courts have long construed "applications" within that provision to include both materials that accompany a government request for wiretap authorization (such as affidavits) and interim "progress reports" that the issuing judge may order the government to submit under Section 2518(6). *See In re Grand Jury Proceedings*, 841 F.2d 1048, 1053 n.9 (11th Cir. 1988); s*ee also In re New York Times*, 577 F.3d at 403 n.1 (noting that "the wiretap application materials" there included "interim reports detailing information that had been learned thus far") (internal quotation marks and citation omitted); *United States v. Blagojevich*, 662 F. Supp. 2d 998, 1003

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(N.D. Ill. 2009) ("applications, orders, reports, and instructions submitted and issued pursuant to Title III"). The ACLU appears to agree that interim reports are "presumptively sealed by statute," Br. 3 (citing Section 2518(6)), even though such reports are not literally "applications." Rather, they are documents filed to comply with a sealed wiretap authorization order entered under the authority of Sections 2518(3), (4), and (6). And appellants do not explain why, if documents that *the government* files to comply with one component of a sealed wiretap order are presumptively sealed under Section 2518(8)(b), materials filed in connection with efforts to compel *a third party* to comply with a separate component of a sealed wiretap order would not similarly be sealed.

Appellants also miss the mark in arguing that the phrase "orders granted" in Section 2518(8)(b)'s first sentence means that orders denying government applications lie beyond Title III's sealing protections.[5] That argument fails to take into account the text of Section 2518(8)(b)'s third sentence, which provides: "[s]uch 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

[5] [redacted]

years." 18 U.S.C. § 2518(8)(b) (emphasis added). In this sentence, "[s]uch applications and orders"—*i.e.*, the applications and orders "sealed by the judge"—are the object of the phrase "shall not be destroyed except on order of the issuing or denying judge." But if Congress meant "[s]uch applications and orders" to cover only "orders granted," the statute's reference to a "denying judge" would make little sense. Read "as a whole," *see Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016), Section 2518(8)(b) is instead best understood to provide for sealing of all court orders acting on government applications, whether grants or denials.[6]

Relying on a Department of Justice Manual and Second Circuit case law, appellants contend (ACLU Br. 21-22; WaPost Br. 29-31) that Title III's preference for sealing is actually narrow, because the government is allowed to use information from wiretap materials in other documents that may become public and form the basis for adjudication. The statutes referenced in the cited manual, however, make clear that Title III itself explicitly authorizes law enforcement

[6] That reading is consistent with the way the phrase "applications and orders" is used in Section 2518(8)(b)'s legislative history. *See* Senate Report 105 (twice referring generally to "[a]pplications and orders," without limiting that reference to "granted" orders). It also avoids anomalous results that Congress would not have intended—*i.e.*, that denial orders (but not grants) could be destroyed absent a court order, or that courts would be required to publicly docket an order denying wiretap authorization, even as the accompanying "application[] made" remains sealed. *But cf. In re Granick*, 2019 WL 2179563, at *2 (noting that the Northern District of California currently has "no procedure for docketing surveillance applications that are not granted").

agents and prosecutors to use that information for limited purposes, including in traditionally public documents such as indictments and trial briefs. *See* Justice Manual § 9-7.250 (citing 18 U.S.C. § 2517(1)-(2)); *In re Matter of New York Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987). Nothing in that affirmative (but limited) statutory authorization affects the protections afforded to the actual wiretap applications and associated materials, which may contain a broader scope of information related to sensitive investigative techniques and ongoing investigations. Nor do appellants' cited cases address the use of information in materials entered on the sealed wiretap docket during a case's investigative phase, as opposed to documents filed on the public docket of a prosecution headed toward a public trial.

* * *

In sum, Title III prescribes broad sealing of, and sets strict rules for disclosure of, materials generated during wiretap proceedings. That statutory preference for non-disclosure naturally includes proceedings needed to enforce a technical assistance order entered under Section 2518(4), and it affects the right of access analysis under both the First Amendment and the common law.

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B. No First Amendment Right Of Access Attaches To Materials Generated In Title III Technical Assistance Litigation

The First Amendment protects a qualified right of access to several stages of criminal proceedings. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). The Supreme Court first recognized the right in the context of criminal trials, which an "unbroken, uncontradicted" line of history showed to have "been open to all who care to observe." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 573 (1980) (plurality). The Court later held that the right applies to jury selection and to the transcript of a "preliminary hearing" in a criminal case that "function[ed] much like a full-scale trial." *Press-Enterprise Co.*, 478 U.S. at 7; *id.* at 10-13. And this Court has extended the right to some aspects of guilty-plea proceedings, *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008); *Oregonian Publ'g Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990); and in-court sentencing proceedings, *Doe*, 870 F.3d at 997.

This Court has also stressed, however, that the First Amendment right "is not unlimited," *Carpenter*, 923 F.3d at 1178, and does not extend "to all judicial proceedings, even all criminal proceedings." *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Ariz.*, 156 F.3d 940, 946 (9th Cir. 1998). To determine whether a right of access attaches to a particular proceeding and documents filed in it, courts apply "a two-part test, known as the experience and logic test." *Id.*

(internal quotation marks omitted). First, a court "must decide whether the type of proceeding at issue has traditionally been conducted in an open fashion." *Oregonian Publ'g Co.*, 920 F.2d at 1465. Second, a court must determine whether "public access plays a significant positive role in the functioning of the particular process in question," *Press-Enterprise Co.*, 478 U.S. at 8, including whether "access to the proceeding would serve as a curb on prosecutorial or judicial misconduct or would further the public's interest in understanding the criminal justice system." *Oregonian Publ'g Co.*, 920 F.2d at 1465. "If a proceeding fulfills both parts of the test, a qualified First Amendment right of access arises." *Phoenix Newspapers*, 156 F.3d at 946. This Court has also held that, in some cases, "logic alone . . . may be enough to establish the right." *Copley Press*, 518 F.3d at 1026.

Appellants' request fails both prongs of the experience and logic test. No history of public access exists for proceedings to enforce a Title III technical assistance order or documents filed in those proceedings. Opening these matters to public view would have a negative rather than a positive effect on Title III wiretap proceedings, which involve the kind of sensitive, pre-indictment investigative steps that this Court has previously held not to trigger any access right. And appellants do not present strong reasons why their "preferred public policy" of fostering discussion of government surveillance efforts in criminal

investigations outweighs the need for confidentiality and privacy reflected in Title III. *See In re New York Times*, 577 F.3d at 410. Accordingly, no qualified First Amendment right of access attaches to the materials appellants seek.

1. History And Logic Weigh Against A First Amendment Right Of Access

a. Neither wiretap proceedings generally nor Title III technical assistance litigation specifically have "historically been open to the press and general public." *Press-Enterprise Co.*, 478 U.S. at 8. Modern wiretaps are the creature of a statute (Title III) that was enacted in 1968, established a "presumption *against* disclosure," and embodied "Congress's preferred policy of favoring confidentiality and privacy." *In re New York Times*, 577 F.3d at 410. The document that initiates the wiretap proceeding—a government application for authorization—is sealed by statute and presented to a judge *ex parte*, for issuance of an order that is likewise sealed. *See id.*; 18 U.S.C. § 2518(8)(b). And wiretap authorization is sought and obtained during the investigative stages of a case, before the indictment initiating a prosecution has issued.

In those ways, Title III wiretaps resemble other investigative-stage proceedings that have historically been closed to the public. The "classic example" is the grand jury system, where secrecy and *ex parte* proceedings have deep roots. *Press-Enterprise Co.*, 478 U.S. at 9; *see* Fed. R. Crim. P. 6(e). In the wake of *Press-Enterprise Co.*, this Court looked to history and found no sustained

record of access to search warrant materials—which, like Title III wiretap materials, involve *ex parte* presentation to a judge for *in camera* evaluation—at the pre-indictment stage. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-14 (9th Cir. 1989). The Fourth Circuit likewise identified no historical support for access to proceedings to obtain records of electronic communications under the Stored Communications Act, a 1986 law that does not itself provide for sealing of applications or orders. *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 291-292 & n.9 (4th Cir. 2013) (*Appelbaum*). And, in *In re New York Times*, the Second Circuit concluded that, along with other factors, the absence of historical evidence "weigh[ed against] recognizing a First Amendment right of access to wiretap applications." 577 F.3d at 410; *accord Blagojevich*, 662 F. Supp. 2d at 1004.

Technical assistance litigation under Title III similarly lacks any history of openness. Although that type of litigation has been rare, appellants identify no historical evidence of such litigation being open to the public since Title III was amended in 1970 to expressly authorize technical assistance orders. *See In re U.S. for an Order Authorizing Roving Interception of Oral Commc'ns*, 349 F.3d 1132, 1137 n.8 (9th Cir. 2003) (*In re Company*). Their one supposedly contrary example—this Court's decision in *In re Company*, WaPo Br. 27—cuts the other

way.[7] The district court proceedings in that case were not unsealed until six years after the government initiated the litigation and more than four years after this Court resolved the appeal. ER22; *see In re Company*, 349 F.3d at 1132, 1135. During that appeal, moreover, this Court treated the case as being "UNDER SEAL," the parties filed sealed briefs and excerpts of record, and the Court closed oral argument and sealed the argument recording. ER19. Further, while this Court issued a public opinion, it did so almost a year after oral argument, after "pre-circulating" a tentative draft of the opinion under seal and authorizing sealed letter briefs to address security concerns or the need for additional redactions. ER19 (Dkt. 26-28). The courts' handling of *In re Company*, in short, belies any "tradition of accessibility to" materials generated in Title III technical assistance litigation. *See Press-Enterprise Co.*, 478 U.S. at 10.

b. Considerations of "logic" also weigh against a right of access, which would not "play[] a particularly significant positive role in" the functioning of proceedings to enforce Title III technical assistance orders. *See Press-Enterprise Co.*, 478 U.S. at 9, 11. As this Court and others have held in the context of

[7] The ACLU's three other examples (Br. 35) involved not Title III wiretaps but proceedings under the All Writs Act, 28 U.S.C. § 1651. And appellants' repeated references to one of those examples—litigation between the United States and Apple, ACLU Br. 11-15, 28, 35, 46-47; WaPo Br. 9-10—overlooks that that case did not concern efforts to enforce an order sealed by statute through court proceedings that were sealed from the start.

analogous pre-indictment investigative matters, public access "would hinder, rather than facilitate, ... the government's ability to conduct criminal investigations." *Times Mirror*, 873 F.2d at 1215.

In *Times Mirror*, this Court held that logic did not support public access to search warrant materials at the pre-indictment, investigative stage. 873 F.2d at 1214-17. The Court recognized that the media applicants' articulated interests in open warrant proceedings as a check on possible governmental abuses and a means to enhance the quality of the fact-finding process were "legitimate." *Id.* at 1215. But the Court also explained that if those interests were enough to justify access, then "few, if any, judicial proceedings would remain closed." *Id.* at 1213. This Court further observed that warrant proceedings bear important similarities to a grand jury investigation, the paradigmatic example of a proceeding that does not trigger an access right. *Id.* at 1215. And the Court quoted with approval the observation that, if grand jury proceedings "can be kept secret, *a fortiori*, matters relating to a criminal investigation leading to the development of evidence to be presented to a grand jury may also be kept secret." *Id.* at 1216 (internal quotation marks and citation omitted).

Other courts have echoed this reasoning. For example, in holding that no access right attaches to proceedings to obtain electronic communications records under 18 U.S.C. § 2703(d), the Fourth Circuit explained that "secrecy is

necessary for the proper functioning of" criminal investigations at the "[p]re-indictment investigative" phase, and that "openness will frustrate the government's operations." *Appelbaum*, 707 F.3d at 292. The Sixth Circuit similarly concluded that publication of search warrant documents can jeopardize investigations even after a warrant is executed, both because it can "reveal[] the extent of the government's knowledge" in a way that prompts suspects "to destroy evidence or to flee," and because it can limit the amount of information that the government is willing to include in warrant applications. *In re Search of Fair Finance*, 692 F.3d 424, 432 (6th Cir. 2012).

Opening Title III technical assistance litigation to the public implicates many of these same concerns. Those proceedings are part and parcel of the government's evidence-gathering efforts at a "phase of what may or may not mature into an indictment," *Appelbaum*, 707 F.3d at 292, and are inextricably linked to the sealed wiretap order the proceedings are brought to enforce.[8] Papers generated and filed in the proceedings may well detail the government's evidence of criminal activity, identify sources of information, reveal the theory of the crime being investigated, or describe other targets of the investigation. Given the nature of the litigation, moreover, the documents are likely to reveal

[8] [redacted]

information about the communications the government has been able and unable to obtain, describe the need for the latter communications, and explain the service provider's ability or willingness to provide them. Dissemination of those materials would give the public a roadmap of how the government conducts an investigation and the technological impediments it faces in gathering some forms of evidence, thereby enabling wrongdoers to take measures to conceal evidence and avoid detection. No less than in other investigative settings, "[o]penness" here thus would "frustrate criminal investigations and thereby jeopardize the integrity of the search for truth that is so critical to the fair administration of justice." *Times Mirror*, 873 F.2d at 1213.

Those concerns do not dissipate simply because, in a given case, an indictment has been returned. To the contrary, the government's awareness that its evidence-gathering abilities or difficulties can later be disclosed has a recognized "chilling effect" across cases. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 496 (FISC 2007); *cf. United States v. Gonzales*, 150 F.3d 1246, 1261 (10th Cir. 1998) (explaining that one downside of granting a right of access to sealed Criminal Justice Act materials would be "forcing counsel to be more careful in the information presented to the court for fear of future disclosure"). It may cause the government "to be more selective in the information it disclose[s]" when seeking and enforcing Title III technical assistance orders "in

order to preserve the integrity of its investigations," *Fair Finance*, 692 F.3d at 432, or to forgo enforcement proceedings entirely. That, in turn, would incentivize service providers to refuse compliance, knowing that the government might not want to risk disclosure of sensitive law enforcement techniques or the details of an investigation by taking action to enforce the Title III order. Such "frustrat[ion of] the government's efforts to investigate criminal activity," *Times Mirror*, 873 F.2d at 1217, confirms that openness here would not play a positive role in the functioning of proceedings to enforce technical assistance orders.

2. Neither *Index Newspapers* Nor The Nature of Appellants' Requested Documents Supports Access

Appellants' contrary position rests on two main contentions—that (a) this Court has, in effect, already decided that a right of access attaches to opinions and related documents in contempt proceedings ancillary to sealed proceedings; and (b) a right of access attaches based on the nature of the requested documents alone. Neither contention has merit.

a. Appellants rely heavily (ACLU Br. 29-32; WaPo Br. 27-29) on this Court's decision in *Index Newspapers*, which held that a First Amendment right of access attaches to certain aspects of contempt proceedings ancillary to a grand jury investigation. 766 F.3d at 1084-85. *Index Newspapers* is analogous to this case in that it involved underlying proceedings that are shielded by statute from

public view.[9] But careful review of the decision shows that it supports the district court's judgment.

In *Index Newspapers*, two witnesses moved to quash subpoenas issued by a federal grand jury. 766 F.3d at 1079. After the district court denied the motions to quash, the witnesses refused to testify, the government filed written motions to hold the witnesses in contempt, and the district court conducted partially sealed hearings on the government's motions. *Id.* at 1079, 1092. Specifically, the court sealed portions of the hearing in which the witnesses' grand jury appearances were discussed but opened the hearing before holding the witnesses in contempt and ordering them confined. *Id.* at 1079. The court also issued written orders memorializing its contempt findings and rulings. *Id.* When the media moved to unseal the records of the contempt proceedings, the court denied the motion except as to the public portions of the contempt hearing transcripts. *Id.* at 1080-81. Because the docket sheet containing those filings remained sealed, however, the public had no means to access those transcript segments. *Id.* at 1091-92.

On appeal, this Court held that a First Amendment right of access

[9] Federal Rule of Criminal Procedure 6(e), which governs grand jury secrecy, is often equated with a statute because it was "enacted . . . into positive law" by Congress. *Murphy v. Exec. Office for U.S. Attorneys*, 789 F.3d 204, 206 (D.C. Cir. 2015).

attached to some but not all the materials the media requested. Emphasizing the harmful effects that disclosure could have on a pre-indictment investigation, the Court held that, at least while the grand jury investigation continued, the public had no right of access to either set of pleadings in the case—those on the witnesses' motion to quash or those in which the government moved for contempt. 766 F.3d at 1086-88, 1092-93. As to the contempt hearing, the Court identified "no hard-and-fast tradition that contempt hearings ancillary to a grand jury investigation must be public." *Id.* at 1089. The Court then concluded that the public had no right to access the closed portion of the hearing where grand jury information was disclosed but that it did have a right to access the portions of the hearing that had been open to the public, as well as court "orders holding contemnors in contempt and requiring their confinement." *Id.* at 1085; *id.* at 1089-90. Finally, the Court ordered the district court to unseal the docket sheet with redactions, because that court had "intended" to release part of the transcript and the only way to do so "in practice" was to make a docket available to the public. *Id.* at 1091-92.

Index Newspapers does not support appellants' view that the sealed nature of a matter giving rise to contempt proceedings "is irrelevant to the right-of-access question," ACLU Br. 32. To the contrary, this Court's analysis in rejecting an access right for motions to quash a subpoena and a government

contempt motion depended squarely on the fact that they concerned proceedings subject to grand jury secrecy requirements and thus *not* subject to a right of access. 766 F.3d at 1087-88, 1092-93. This Court's reasoning in that respect has direct application to appellants' request (ACLU Br. 16, 34) for government contempt submissions here—*i.e.*, because those submissions likewise relate to an underlying proceeding sealed by statute, *Index Newspaper* forecloses a First Amendment right of access to them. *See* 766 F.3d at 1093 ("We affirm the district court's decision to maintain the written motion to hold [the witness] in contempt under seal.").

Appellants also err in contending (ACLU Br. 29-30; WaPo Br. 27-28) that *Index Newspapers* establishes a First Amendment right of access to the district court opinion ruling on any contempt motion in this case. While the Court in *Index Newspapers* recognized a right of access to "orders holding contemnors in contempt *and* requiring their confinement," 766 F.3d at 1085 (emphasis added), its analysis was tied closely to features of the proceedings that are absent here—namely, that the orders reflected contempt and confinement findings the district judge had made in open court, during a portion of the proceedings unsealed at the contemnor's request. *Id.* at 1089-91.

Those features affected both prongs of the First Amendment inquiry. Experience supported access because, under Supreme Court precedent, public

contempt proceedings were *required* upon request to protect "contemnors' due process rights." *In re Grand Jury Subpoena No. 7409*, No. 18-gj-41, 2019 WL 2169265, at *4 (D.D.C. Apr. 1, 2019) (cited at WaPo Br. 29); *see United States v. Smith*, 123 F.3d 140, 149 n.13 (3d Cir. 1997). And this Court found that logic supported access to the contempt order because that order resolved a proceeding that shares similarities with a criminal trial and can result in a witness's confinement to custody. *See Index Newspapers*, 766 F.3d at 1093 ("Public access to this part of the record provides a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody."); *see id.* at 1089 (same reasoning as to public portion of hearing transcript); *id.* at 1091 ("opening the courtroom ensured that [the witness] was confined under circumstances that would permit the public to have notice of his confinement"). By contrast, *Index Newspapers* does not establish a right of access to a court order in a sealed contempt proceeding that was not required to be (and was not) open to the public and where confinement was never possible because the putative contemnor (Facebook) is not a natural person.

b. In a second line of argument, appellants focus on the categories of documents in which they are principally interested (judicial opinions and docket sheets), contending that those documents have historically been available to the public regardless of the proceedings to which they relate. ACLU Br. 25-29, 43-

44; WaPo Br. 25-27. As just explained, however, that approach cannot be reconciled with *Index Newspapers*, which tailored its analysis closely to the grand jury context and made clear that courts must account for the particular type of proceeding that is allegedly open to public access. 766 F.3d at 1084 (experience-and-logic test is used "to determine whether the First Amendment right of access applies to a particular proceeding" and "documents generated as part of" it) (emphasis and internal quotation marks omitted). Nor is appellants' approach consistent with *Copley Press*, where this Court did not simply identify a right of access to plea colloquy transcripts and deduce from it a more general right to transcripts relating to all guilty-plea proceedings. 518 F.3d at 1026-27. Instead, the Court analyzed separately access to each type of document and hearing transcript, and even to those documents at different stages of the same hearing, finding a right of access to some but not others. *Id.* at 1027-28.

Appellants' main cases from other circuits also do not consider the type of document at issue in isolation, untethered to the treatment of the proceeding in which the document appears. For example, when the Fourth Circuit held that a First Amendment right of access attaches to a judicial opinion ruling on a summary judgment motion in *Doe v. Public Citizen*, 749 F.3d 246 (2014), it did so in light of precedent establishing that the right attached to summary judgment proceedings in a civil case, and specifically to documents and materials filed in

connection with a summary judgment motion. *Id.* at 267. Only then did the court determoine that "it would be anomalous to conclude that the First Amendment right of access applies to materials that formed the basis of the district court's decision ruling on a summary judgment motion but not the court's opinion itself." *Id.* at 267-68.

Decisions involving docket sheets chart the same course. The courts in the ACLU's cited cases (Br. 43-45) identified a right of access to docket sheets where the types of proceeding described in the docket—*e.g.*, civil litigation or post-charge criminal cases—were themselves generally subject to a right of access. But courts have reached the opposite conclusion as to grand jury matters and other orders authorizing pre-trial investigative steps. *See Appelbaum*, 707 F.3d at 295 ("[W]e have never held, nor has any other federal court determined, that pre-indictment investigative matters such as § 2703(d) orders, pen registers, and wiretaps, which are all akin to grand jury investigations, must be publicly docketed."); *In re Sealed Case*, 199 F.3d 522, 525-26 (D.C. Cir. 2000) (same as to grand jury ancillary proceedings); *Fair Finance*, 692 F.3d at 433 (same for search warrant proceedings); *see also Matter of Leopold*, 327 F. Supp. 3d 1, 25 n.17 (D.D.C. 2018) (no right to public docketing in "pre-indictment criminal investigative matters," because for such materials "significant law enforcement, public safety and privacy interests counterbalance the public's interest in

transparency").[10] Because Title III technical assistance litigation is a part of pre-indictment, investigative proceedings to which no right of access attaches, the docket sheets appellants seek here also are not subject to a right of access. *Cf. Appelbaum*, 707 F.3d at 295 ("refus[ing] to venture into the[] uncharted waters" of "requiring district courts to publicly docket each matter in the § 2703(d) context").

c. Appellants spend much of their briefs emphasizing the public interest in accessing judicial opinions. They situate the district court's decision here in the context of a "public policy debate about encryption and information security," ACLU Br. 4, and speculate that the court resolved far-reaching issues that implicate the rights of communications service providers and their customers, *id.* at 27-28; WaPo Br. 48-49. At the same time, appellants and some *amici* (ACLU Br. 28; Mozilla Br. 8-13) urge that providers need access to the court's opinion to understand their legal obligations and litigation options.

Public access to judicial opinions is vital in our system, and the government agrees that issuance of public opinions must remain the norm and sealing a rare exception. Nevertheless, the preference for open judicial opinions is not

[10] *Index Newspapers* is not to the contrary. As explained above, the Court there ordered unsealing of the docket because it was the only practical means of affording access to the limited class of materials subject to a constitutional right of access, including transcripts that the district court itself had intended to make public. *See* 766 F.3d at 1085, 1091-92.

absolute, even as to appellate opinions. *See, e.g.*, *Parks v. Archer*, 493 F.3d 761 (6th Cir. 2007) (announcing issuance of a sealed opinion in an "attorney fee dispute"); *cf. Copley Press*, 518 F.3d at 1029 & n.5 (issuing sealed addendum to a precedential opinion); *Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) (applying compelling-reasons standard where parties sought "to seal the entire record of the proceedings in the district court, including the court's opinion"). Appellants' arguments are misguided, moreover, to the extent they base an access right on the subject matter or perceived importance of a particular judicial decision. This Court's precedents dictate a different form of analysis—*i.e.*, that "[d]etermining whether there is a public right of access requires looking at the class of proceedings as a whole, not the particular proceedings at issue in this case." *Index Newspapers*, 766 F.3d at 1086.

At the same time, appellants' emphasis on the guidance to be gained from the sealed decision here overlooks relevant distinctions between appellate and district court opinions. District court opinions are often "wise" and "well-reasoned," and they have the power to persuade. *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 458 (7th Cir. 2005). But even when that is true, those opinions are not "precedent," do "not have stare decisis effect," and thus provide a hazardous basis for "a lawyer to advise his clients." *Id.* at 457-58; *see Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (explaining that district court opinions

do not bind other judges in the district or even the authoring judge in a future case). For that reason, the sealing of a single district court opinion resolving a dispute between two parties does not deny the public access to the law in the same way as would this Court's sealing of a precedential decision that binds lower courts and litigants throughout the circuit.

C. No Common Law Right Of Access Attaches To The Materials Appellants Seek

Appellants argue (ACLU Br. 32-35, 47-49; WaPo Br. 36-37) that a right of access to the materials attaches under the common law, which "is generally understood to provide" a weaker right of access than the First Amendment. *United States v. Bus. of Custer Battlefield Museum*, 658 F.3d 1188, 1197 n.7 (9th Cir. 2011) (*Custer Battlefield*). That contention lacks merit.

1. The Supreme Court "recognize[d] a general right to inspect and copy public records and documents" in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), a case involving access to tapes introduced in evidence at a criminal trial. The Court stated, however, "that the right to inspect and copy judicial records is not absolute," and "that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 598-99.

Since *Nixon*, this Court has held that, in civil cases, a right of access attaches to dispositive pleadings and attachments to them. *Kamakana v. City &*

County of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006). In criminal cases, the Court has recognized a common law right to access search warrant materials after an investigation is complete and charges formally brought or declined. *Custer Battlefield*, 658 F.3d at 1192-94.[11] But it has also held the common law right does not extend to several other aspects of criminal cases—*i.e.*, submissions that a defendant makes to the district court to obtain subpoenas, *United States v. Sleugh*, 896 F.3d 1007, 1012-15 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1231 (2019); and some documents associated with partially sealed plea proceedings, *Copley Press*, 518 F.3d at 1029 & n.6. Most relevant here, this Court has held that no right attaches "to documents which have traditionally been kept secret for important policy reasons," *Times Mirror*, 873 F.2d at 1219, such as "grand jury transcripts and warrant materials in the midst of a pre-indictment investigation," *Kamakana*, 447 F.3d at 1178.

2. Under these decisions, the materials that appellants seek fall outside the common law right for two reasons. First, as set forth above, Title III establishes a comprehensive scheme that governs sealing and sets the boundaries on disclosures. *See* Part I.A, *supra*. That scheme is most naturally read to

[11] *Custer Battlefield* again reserved whether any right of access attaches when an indictment has been returned but an investigation remains ongoing. 658 F.3d at 1192 n.3; *see also Times Mirror*, 873 F.2d at 1221.

support sealing of materials filed in connection with efforts to enforce a sealed technical assistance order issued under Section 2518(4). And as the district court concluded (ER11), the statutory scheme supersedes any common law right. *See In re New York Times*, 577 F.3d at 405; *Blagojevich*, 662 F. Supp. 2d at 1002; *see also In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (any common law right of access to materials in ancillary grand jury proceedings "has been supplanted by" Fed. R. Crim. P. 6(e)).

Second, proceedings to enforce a Title III technical assistance order are akin to the other proceedings at the pre-indictment investigative stage that this Court has already held not to trigger an access right. *See Times Mirror*, 873 F.2d at 1218-19 (grand jury materials and search warrants during an ongoing investigation). As explained above, no "tradition of openness" exists for materials generated or filed in those proceedings, *see Custer Battlefield*, 658 F.3d at 1194, and opening them to public view would frustrate rather than advance "the ends of justice," *Times Mirror*, 873 F.2d at 1219, including by exposing evidence-gathering techniques and practices in ways that would facilitate evasion and discourage future disclosures to Title III courts. For that reason as well, no common law right of access attaches.

3. In resisting this conclusion, appellants largely recycle their approach to the First Amendment right, arguing that this Court should look solely to the

category of documents at issue, without regard to the nature of the proceeding in which the documents were generated or submitted. ACLU Br. 32-33; WaPo Br. 36-37. That approach fares no better under the common law than under the Constitution. Decisions such as *Custer Battlefield*—cited by appellants—underscore the point by conducting a careful contextual analysis that considers any historical tradition of openness for the particular material at the particular stage. *See* 658 F.3d at 1193-94; *see also Carpenter*, 923 F.3d at 1179 (concluding, after considering historical practice as reflected in this Court's "early cases," that a right of access attaches to a pre-trial proffer of a duress defense).

Even this Court's decision *not* to resolve the existence of a common law right in *Index Newspapers* points in the same direction. There, this Court declined to decide definitively whether the materials at issue—"filings and transcripts relating to motions to quash grand jury subpoenas" and "motions to hold a grand jury witness in contempt"—triggered a common law right because any such right was outweighed by the government's compelling interest in maintaining grand jury secrecy. 766 F.3d at 1084-85; *see id.* at 1086 n.5, 1088, 1090. But he Court's cautious approach would have been unnecessary if, as appellants suggest, its precedents dictated that the right attached simply because the materials were judicial documents submitted to a court.

Appellants' reliance on the decision in *Kamakana*, 447 F.3d 1172, is also

misplaced. *Kamakana* stated—accurately—that this Court does "not readily add classes of documents to th[e] category" of materials "traditionally kept secret" for important policy reasons, and will not do so "simply because such documents are usually or often deemed confidential." 447 F.3d at 1185 (internal quotation marks omitted). But the Court made that statement in addressing a question quite different than the one here—whether, in a civil case, merely invoking certain privileges often applied in civil litigation or under the Freedom of Information Act (FOIA) was enough to place documents beyond the common law right. *Id.* Subsequent decisions confirm that *Kamakana* did not foreclose the possibility that other materials would fall within the kept-secret-for-important-reasons category, *see Copley Press*, 518 F.3d at 1029, much less bar this Court from placing within that category materials that share relevant similarities with grand jury matters and search warrants at the investigative stage.

II. COMPELLING GOVERNMENT INTERESTS OUTWEIGH ANY FIRST AMENDMENT OR COMMON LAW RIGHT AND JUSTIFY CONTINUED SEALING

The district court determined that, even if a First Amendment or common law right of access attached to the materials at issue, compelling government interests outweigh that right and support continued sealing because no less restrictive alternative would adequately serve those interests in this case. ER11-12. Appellants' challenges to those determinations lack merit.

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A. The Government's Interests In Protecting The Secrecy Of Investigative Techniques And The Integrity Of An Ongoing Investigation And Prosecution Outweigh Any Access Right

1. The First Amendment and common law confer "qualified" access rights that can be overcome by sufficiently important government interests. *See Doe*, 870 F.3d at 998. Where the First Amendment right is at issue, documents and proceedings in criminal cases may be closed to the public when "three substantive requirements are satisfied: (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." *Id.* (quoting *Oregonian Publ'g Co.*, 920 F.2d at 1466); *see also Times Mirror*, 873 F.2d at 1211 n.1 ("the public still can be denied access if closure is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest") (internal quotation marks and citation omitted).

To overcome the common law presumption of public access, the party supporting closure must identify "compelling reasons . . . 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 quotation marks and citations omitted). When the party does so, the district court may opt for continued sealing after conscientiously balancing

"the competing interests of the public and the party who seeks to keep certain judicial records secret." *Custer Battlefield*, 658 F.3d at 1195 (internal quotation marks and citation omitted).

2. The district court correctly applied these principles in concluding that the government's compelling interests in preserving the secrecy of law enforcement techniques in Title III wiretap cases and protecting the integrity of an ongoing investigation and prosecution justified denying appellants' unsealing motion. ER10-12.[12]

As to the first interest, courts have long recognized that "[t]he government has a substantial interest in protecting sensitive sources and methods of gathering information." *United States v. Smith*, 780 F.2d 1102, 1108 (4th Cir. 1985) (en banc). That interest is compelling because public access to such sources and methods can "compromise future investigations by revealing the existence or workings of investigative methods and techniques, the very efficacy of which may rely, in large part, on the public's lack of awareness that the [government] employs them." *Leopold*, 327 F. Supp. 3d at 19 (internal quotation

[12] These two government interests may not apply in full to the ACLU's request (Br. 35 n.16) for "any court orders on sealing requests," to the extent the ACLU means stand-alone orders granting a request to seal a pleading in the technical assistance litigation. But this Court would reach that issue only if it concluded that a right of access attaches to such orders despite their being part of Title III proceedings sealed by statute. *See* Part I, *supra*.

marks and citation omitted). Here, the government demonstrated to the district court through its filings how disclosure of the requested Title III materials would significantly threaten this interest by publicizing previously unknown capabilities and limitations, thereby facilitating suspects' ability to avoid detection. [redacted].[13] And the specificity of that showing belies any suggestion that the court grounded its ruling on a "blanket" government claim of "law enforcement" interests. *See Kamakana*, 447 F.3d at 1185.

Contrary to appellants' contention (ACLU Br. 40-41; WaPo Br. 45-46), the strength of the government's interest is not diminished by the public's generalized knowledge that the government uses wiretaps in investigations or that tools such as encryption may limit law enforcement's ability to access certain communications. Cases involving the qualified law enforcement privilege in criminal prosecutions are instructive. Those decisions allow the government to withhold from criminal defendants information about specific law enforcement techniques when disclosure would compromise the efficacy of that technique in ongoing *or* future criminal investigations. *See, e.g.*, *In re The City of New York*, 607

13 [redacted]

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F.3d 923, 944 (2d Cir. 2010); *cf.* 5 U.S.C. § 552(b)(7)(E) (exempting from disclosure under FOIA records or information that "would disclose techniques and procedures for law enforcement investigations or prosecutions"). That is so even though the defendant (and the public) may know that the government employs that practice as a general matter—*i.e.*, that it engages in undercover operations, *City of New York*, 607 F.3d at 944, or uses cameras or binoculars to surveil suspects from hidden locations, *see United States v. Green*, 670 F.2d 1148, 1155-56 (D.C. Cir. 1981). If the government's interest in preserving the efficacy of evidence-gathering techniques in future investigations can be strong enough to keep that information from a criminal defendant facing loss of liberty, then it should surely be sufficient to shield that information from the public at large. *Cf. Doe*, 870 F.3d at 1000 (recognizing that the government interest in cooperator safety is based in part on the need to advance "future criminal investigations").

In any event, the district court found that sealing was also justified by the "ongoing" nature of the investigation and prosecution, ER11, an interest that appellants acknowledge can be compelling. ACLU Br. 41 (citing *Times Mirror*, 873 F.2d at 1217). The court soundly based that finding on the government's showing that a large-scale investigation can continue even after an indictment has been returned against a group of defendants, and its explanation of how disclosing the Title III technical assistance materials would harm the investigation

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at issue—by, *inter alia*, enabling targets to hide evidence or avoid apprehension through the use of particular forms of communication. [redacted] *see Appelbaum*, 707 F.3d at 293-94 (upholding order denying unsealing of surveillance materials in ongoing investigation based on similar government interests).

Appellants contend (ACLU Br. 39-40) that the district court should have considered that some information about the technical assistance litigation is "already public knowledge" because of media reports. But this is not the cat-out-of-the-bag scenario that appellants describe. *Id.* (citing *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154-55 (D.C. Cir. 2007)). As explained above (at p. 51 n.13), the materials under seal contain sensitive information beyond what has been publicly reported. And when unsealing materials would reveal "significantly more information" implicating compelling government interests, public awareness of some details about that matter does not vitiate those interests. *See Dhiab v. Trump*, 852 F.3d 1087, 1096 (D.C. Cir. 2017) (internal quotation marks omitted); *see also Index Newspapers*, 766 F.3d at 1087 (grand jury witness's decision to disclose testimony did not eliminate government interests).

A contrary rule would produce pernicious incentives. Specifically, a rule that unverified media reporting on the contents of sealed court proceedings eliminates the government interests that supported sealing would encourage litigants dissatisfied with a court's binding sealing order to leak that information.

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This Court should reject as unsound any principle that would predicate a right of access on leaks that circumvent court orders. *Compare Motions of Dow Jones*, 142 F.3d at 505 (grand jury information held no longer secret when the attorney of a witness authorized by law to disclose his testimony "virtually" shouted that information "from the rooftops").

Finally, appellants fault the district court for failing to analyze their unsealing request category-by-category or to engage in more detailed balancing, with the Washington Post going so far as to suggest that this Court apply a more exacting standard of review. ACLU Br. 19, 42; WaPo Br. 20, 45. Those criticisms are unfounded. District courts are presumed to know and follow the law, *see United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc), and the court here stated that it was balancing the respective interests as required by a specific decision of this Court reciting the governing legal standard. ER11-12 (citing *Custer Battlefield*, 658 F.3d at 1192). The remainder of the court's opinion, moreover, reflects the court's intent to issue a public opinion addressing appellants' main arguments while taking care not to disclose the very information the court found to be properly shielded from public view. ER9. That approach respected the unique circumstances of this case and is appropriately reviewed with deference. *See Sleugh*, 896 F.3d at 1012.

B. The District Court Did Not Abuse Its Discretion In Determining That Redaction Is Not A Viable Alternative To Sealing In The Particular Circumstances Of This Case

Appellants argue at length (ACLU Br. 37-39, 42; WaPo Br. 46-48) that, even if government interests support sealing of some information, the district court should have considered alternatives to full sealing, including release with redactions. On the particular facts of this case, however, the court did not abuse its discretion in finding no other alternative to sealing "that would adequately protect the compelling interest[s]" at stake. *Doe*, 870 F.3d at 998 (internal quotation marks and citation omitted).

1. This Court has explained that, "[i]n many cases," courts can "accommodate" the government interests reflected in investigative materials "by redacting sensitive information rather than refusing to unseal the materials entirely." *Custer Battlefield*, 658 F.3d at 1195 n.5. Redactions, however, do not suffice in every case. *See, e.g.*, *Doe*, 870 F.3d at 1001 (redactions "would not sufficiently protect" a cooperating witness and would instead have "flag[ged] the filings" at issue). In *Index Newspapers*, for example, this Court recognized that in some cases "even seemingly innocuous information can be so entangled with secrets that redaction will not be effective," and that redaction may likewise be unfeasible "if the record is sufficiently voluminous, the consequences of disclosure sufficiently grave or the risks of accidental disclosure sufficiently

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great." 766 F.3d at 1095. Other courts have similarly considered whether releasing a document in part would be "more likely to mislead than to inform the public," *United States v. Amodeo*, 71 F.3d 1044, 1052 (2d Cir. 1995), and whether a document "can be redacted without doing violence to [its] meaning," *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006). *See also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003) (rejecting on the facts the district court's determination "that redaction would leave only meaningless connective words and phrases").

The district court reasonably applied these principles in concluding that redaction was "not a viable option here." ER11. The materials before the court had been submitted or generated in proceedings conducted entirely under seal and were replete with sensitive information that the court found to implicate two compelling government interests. *Id.* The intermingling (or "entangl[ing]") of protected information with any "legal and factual arguments" that might otherwise warrant release would alone have justified continued sealing under this Court's reasoning in *Index Newspapers*, 766 F.3d at 1095. ER11. But the court faced additional categories of information that would likely have to be redacted, most notably the proprietary business information that Facebook sought to keep out of the public domain. ER9; SER37; *see Nixon*, 435 U.S. at 598 (common law right does not require disclosure of "sources of business

information that might harm a litigant's competitive standing"); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 664 (8th Cir. 1983) (trade secrets). Given the need to accommodate both government *and* provider interests, the district court acted well within its discretion in concluding "that redaction would leave little and/or misleading substantive information," ER11, and that its opinion and related record materials should remain under seal.

2. Appellants' various criticisms of that case-specific decision lack merit. Appellants deem it unlikely that the district court could not release any portion of its decision or a redacted docket sheet, pointing out that Congress recently required the government to make some opinions of the Foreign Intelligence Surveillance Court (FISC) "publicly available to the greatest extent practicable," 50 U.S.C. § 1872(a). *See* ACLU Br. 28; Mozilla Br. 16. But that is a legislative judgment, not a constitutional or common-law command. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 490-97 (no right of access attaches to court orders and government pleadings in the FISC). It is also a judgment that leaves the Executive Branch discretion in unsealing decisions, just as this Court's precedents afford the district court discretion in determining whether redaction is a viable alternative to sealing in a particular case. And in light of its familiarity with the Title III proceedings and associated investigation and prosecution, the district court here was well positioned to determine that the multiple categories

warranting redaction would leave blacked-out materials more likely to confuse than inform the public.[14]

Appellants additionally suggest (ACLU Br. 42) that the district court could have drafted its opinion with public release in mind, noting that this Court took that route in another sealed technical assistance case, *In re Company*, 349 F.3d 1132. But as explained above, pp. 30-31, *supra*, this Court did so in preparing an opinion that would have precedential effect and it did so with the luxury of time. The district court here issued a ruling to resolve the obligations of a single party during a fast moving law enforcement investigation where time was of the essence. *See In re Motions of Dow Jones*, 142 F.3d at 502 (explaining that "appellate courts have a comparative advantage over district courts" in addressing grand jury secrecy, and that "[i]n the district court, ancillary proceedings generally proceed at a more rapid pace"). Whatever best practice may be in that scenario, the fact that the district court might not have planned for public release did not disable it from later concluding that redactions to its decision were not viable.

[14] By its terms, the court's order did not indicate that redaction would never become feasible and that all materials must "remain under seal in perpetuity," *Sleugh*, 896 F.3d at 1017 n.7. But because appellants do not assert any durational error in the order, this Court need not decide whether this is one of the "occasions when permanent sealing is justified." *Phoenix Newspapers*, 156 F.3d at 948 n.2.

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The United States appreciates that court orders and opinions are kept under seal only in exceptional circumstances. The district court, however, reasonably concluded that this case involved such circumstances. The court had issued a decision in connection with Title III orders that are sealed by statute. The opinion involved an ongoing investigation and law enforcement surveillance techniques, the disclosure of which the court found could imperil compelling government interests. And the opinion contained and would reveal the kind of proprietary information that the recipient of the sealed order wanted to keep out of—and that courts have held is properly kept out of—the public domain. That unusual confluence of circumstances justified the court's conclusion that this is not a case in which redactions are feasible, because releasing the opinion with all necessary redactions would give a misleading picture of the whole. *See Index Newspapers*, 766 F.3d at 1095.

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CONCLUSION

The judgment of the district court should be affirmed. If the judgment is reversed or vacated, this Court should remand with instructions to consider in the first instance redactions that the government and Facebook would propose to any materials held subject to a right of access.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Ninth Cir. R. 32-1, I hereby certify that this brief contains 13,890 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)) and has been prepared in a proportionally spaced, 14-point typeface using Microsoft Word 2013.

s/ Scott Meisler
Scott A.C. Meisler

STATEMENT OF RELATED CASES

The United States is not aware of any cases currently pending before this Court that are related to these now-consolidated appeals.

s/ Scott Meisler
Scott A.C. Meisler