Nos. 19-15472 and 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 REPLY BRIEF

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INTRODUCTION

Judicial orders resolving important rights attendant to proceedings to force third parties to assist the government's electronic surveillance activities should not be categorically barred from public access merely because they may implicate underlying applications or orders obtained under the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) ("Title III"). In advocating for a rule that would create a new category of judicial records exempt from the public's presumptive right of access—regardless of when during a criminal proceeding those records are sought—the government ignores historical precedent and the importance access can play in the proper functioning of these types of proceedings. It also fails to appreciate the need for courts to consider all alternatives to closure before withholding—in their entirety—judicial records from the public, and the effectiveness of redaction as a means to protect governmental interests.

First, in analyzing the tradition of access to the judicial records sought here, the government fails to address case law that distinguishes between requests for judicial records of adjudicatory proceedings where Title III materials are implicated and requests seeking access to the underlying applications and orders themselves. *See* WashPost Op. Br. at 29-32; *see also infra* Parts I.A.1. It is this distinction that sets this case apart from the ones relied on by the government and

the District Court below. *See infra* Parts I.A.1. Instead of addressing the Post's cases on this point, the government relies almost entirely on an overbroad and unsupported interpretation of Title III's sealing provisions as support for its position. But neither the plain language of the statute nor its legislative history supports its argument. *See infra* Part I.C.

Second, that access to the order and related legal briefings would play a significant positive role in the functioning of the process is not negated by the fact that disclosure might implicate some underlying investigatory interests. The government's ability to force third parties—at risk of contempt—to aid its surveillance activities is specifically circumscribed by statute for good reason. Public oversight over the government's compliance with congressional restrictions on its authority and over the court's role in supervising that authority fulfills all, or nearly all, of the benefits of access our courts have traditionally recognized under the second prong of the First Amendment analysis.

The government's argument that such records should be considered as synonymous to grand jury and warrant proceedings during the pre-indictment stage of a proceeding is overstated. Judicial orders addressing whether third parties must assist government surveillance activities will not in every case implicate the government's underlying investigation as would disclosure of grand jury transcripts or warrant applications during the pre-indictment stage of a case.

Simply put, who the government is investigating or what the government is investigating are not facts integral to the legal issues at the core of the specific proceeding at issue here. *See infra* Part I.A.2. As such, this Court should refrain from adopting the categorical approach advanced by the government; and, instead, recognize the utility of access to judicial orders of this type generally. *Id.*

Third, while grand jury and warrant proceedings, at certain stages, have been kept secret to advance important policy objectives, no such tradition has been established with respect to orders resolving substantive rights ancillary to the Title III application process. Rather, the common law right of access has been found to attach to records of adjudicatory proceedings implicating Title III materials and even—at certain stages of the proceeding—to requests for raw warrant or Title III materials. Because investigatory interests can be protected through redaction, the government's categorical approach to the common law right of access analysis also should be rejected.

Lastly, the government's claimed interests in secrecy are not sufficiently compelling to warrant the District Court's blanket sealing order. Ongoing investigatory interests—particularly in charged cases—are relatively narrow concerns more appropriately addressed by redaction rather than wholesale sealing. So too with investigatory techniques, a term that remains elusive here but should not be confused with the legal issues addressed below. *See infra* Part II.A.

For these reasons, and those more fully set forth below and in the Washington Post's opening brief, the District Court's judgment should be reversed.

ARGUMENT

I. THE PRESUMPTIVE RIGHT OF ACCESS ATTACHES TO JUDICIAL ORDERS AND RELATED LEGAL ARGUMENTS TO COMPEL TECHNICAL ASSISTANCE UNDER TITLE III.

A. The First Amendment Right of Access Attaches to Judicial Orders Relating to Substantive Proceedings Under Title III.

1. Records of substantive adjudicative proceedings—even those that implicate Title III materials—traditionally have been open to the public.

As an initial matter, this Circuit has soundly rejected the notion that access to judicial records hinges on "whether the documents at issue are derived from or are a necessary corollary of the capacity to attend relevant proceedings." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1092 n. 15 (9th Cir. 2014) (quoting and rejecting 2nd Circuit's contrary test in *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013)).[1]

[1] If a hearing is open to the public, it necessarily follows that the public is entitled to a transcript of the hearing. *In re Copley Press, Inc.,* 518 F.3d 1022, 1027 (9th Cir. 2008). But, consistent with this Circuit's authority, this logic does not operate in reverse. Ans. Br. at 37.

Despite this authority, the DOJ continues to argue that access to the judicial records at issue here is barred because the underlying proceedings to obtain a wiretap or technical assistance order were closed to the public. Ans. Br. at 29, 37. "This is not the test in our circuit." *Index Newspapers*, 766 F.3d at 1092 n. 15.[2]

By conflating the right of access to judicial records of adjudicative proceedings referencing wiretap orders with the underlying ex parte proceedings

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[2] The court's partial holding in *Index Newspapers*—that there was no First Amendment right of access to transcripts of those portions of contempt proceedings closed to the public—did not turn on the fact that the underlying proceeding was closed, as DOJ argues. Ans. Br. at 37-38. Rather, it turned on the fact that the transcripts of those portions of the proceedings, like the underlying proceeding itself, "contain[ed] discussion of matters occurring before the grand jury" encompassed within long-standing grand jury secrecy rules, and "the compelling need to keep matters occurring before the grand jury secret." *Index Newspapers*, 766 F.3d at 1084, 1091. Likewise, the court's rationale for recognizing a "categorical" First Amendment right of access to the contempt order – i.e., one independent of "the circumstances of any particular case"—did not turn on the fact that some portions of the contempt proceedings were public, as the DOJ argues. *Index Newspapers*, 766 F.3d at 1085; Ans. Br. at 38. Rather, access to the order turned on the similarity of the proceeding to criminal trials and positive role access would play on the process. *Id.* at 1093 (citing *United States v. Guerrero*, 693 F.3d 990, 1001 (9th Cir. 2012) (recognizing First Amendment right to competency hearing because, like trials, defendants in such proceedings have a right to be represented by counsel, an opportunity to testify, present evidence, and to confront and cross-examine witnesses)).

themselves, the DOJ ignores *entirely* the authority cited by the Post. WashPost Op. Br. at 29-32.

The Second Circuit Court of Appeals, for example, held that Title III did not supersede the First Amendment right of access where materials were submitted in connection with a motion to suppress. *In re the Matter of New York Times Co.*, 828 F.2d 110, 114-16 (2d Cir. 1987); *see also In re Matter of Application of New York Times Co.,* 577 F.3d 401, 407, * 3 (2d Cir. 2009) (distinction between a request for the "*fruits* of a wiretap, which were included in an application for a warrant," which was subject to a common law right of access, and a request for "wiretap *applications* themselves," which are not) (emphasis in original). Courts in this Circuit too have recognized the distinction. *See United States v. Kwok Cheung Chow*, 2015 WL 5094744, * 3 (N.D. Cal., Aug. 28, 2015) (same).

This history, contrary to the DOJ's contention, includes cases addressing requests for judicial records of ancillary proceedings referencing Title III materials "entered on the docket" during the pre-indictment phase (or investigatory phase) of a case, "as opposed to documents filed on the public docket of a prosecution." Ans. Br. at 26. *See, e.g., In re Application of Newsday, Inc.*, 895 F.2d 74, 76 (2d Cir. 1990) (recognizing a common law right of access to ordinary warrant applications even though those applications referenced Title III intercepted communications); *see also In the Matter of the Application of New York Times Co.*,

577 F.3d at 407 n. 3 (distinguishing the request at issue in *Newsday,* where Title III materials were referenced in search warrant materials, from a request seeking "the wiretap *applications* themselves—documents which have never been public"); WashPost Op. Br. at 16, 29-30.

The government simply ignores this line of cases.

At the same time, the DOJ recognizes, as it must, that its own manual allows for the use of Title III materials in other documents that may become public or in subsequent adjudicative proceedings. Ans. Br. at 25. It nevertheless argues that the actual wiretap communications and applications, "which may contain a broader scope of information related to sensitive investigatory techniques and ongoing investigations," remain subject to Title III's sealing provisions. *Id.* at 26.

Appellants are not seeking raw intercepted communications protected under Title III or the underlying applications for wiretaps or technical assistance. That investigatory interests might be implicated in records attendant to ancillary proceedings in Title III cases—to the extent they reference the underlying materials—is not determinative of whether a First Amendment or common law right of access attaches to those judicial records. Rather, the need to protect investigatory interests is one factor to be considered *at the balancing stage* of the access tests. *See* United States *v. Business of Custer Battlefield Museum and Store Located at Interstate 90, Exit 513, South of Billings, Montana*, 658 F.3d 1188,

1195 n. 5 (9th Cir. 2011) (stating that "[i]n many cases, courts can accommodate [investigatory] concerns by redacting sensitive information rather than refusing to unseal the materials entirely."); *Chow*, 2015 WL 5094744, *4 & n. 7 ("[T]he privacy interests underlying Title III … 'weigh heavily in a court's balancing equation in determining what portions of motion papers in question should remain sealed or should be redacted.'" (citation omitted)).

Ignoring the case law, the DOJ argues that proceedings seeking to force a third party to provide technical assistance to the government resemble grand jury proceedings or warrant applications during the pre-indictment investigatory stage of a case. Ans. Br. at 29-30. It claims that like search warrant proceedings, Title III wiretap proceedings "involve ex parte presentation to a judge for in camera evaluation—at the pre-indictment stage." Ans Br. at 30 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-14 (9th Cir. 1989)).

But this analogy misses the mark. While wiretap applications and technical assistance orders are obtained ex parte in uncontested proceedings; motions to compel compliance with technical assistance orders, challenges to such orders by providers, or related contempt proceedings are not. *See, e.g., In re U.S. for an Order Authorizing Roving Interception of Oral Communication*, 349 F.3d 1132, 1135 (9th Cir. 2003) (discussing government's motion to compel compliance with previously issued technical assistance order and for order of contempt as involving

"evidentiary hearing" in contested proceedings); *see also United States v. Sleugh*, 896 F.3d 1007, 1014 (9th Cir. 2018) (comparing judicial records adjudicating "substantive rights," to which the common law right of access attaches, to records of subpoena proceedings under Fed. Rule of Crim. Proc. 17(c), which "relate merely to the judge's trail management role, not the adjudicative process." (quotations omitted)).

As clear from the record here, Facebook contested the matter, was represented by counsel in so doing, and undoubtedly presented evidence to support its contentions that Messenger either fell outside of the technical assistance provisions of the Wiretap Act (47 U.S.C. § 1002(b)(2) & (b)(3)), or that the requested assistance could not be provided "unobtrusively and with a minimum of interference with the service" (18 U.S.C. § 2518(4)). That these issues were resolved in a contested proceeding on an evidentiary record is precisely why evaluation of the access issue here is not, and should not be, dictated by the closed, ex parte nature of the underlying application process.

Nor should the import of this Circuit's *sua sponte* order to make public its decision in this exact area of law (*In re Roving Interception*, 349 F.3d 1132)), be lost over the DOJ's noise. The importance of this Circuit's treatment of its decision in this area is not mitigated by the fact that the appellate record in *In re Roving Interception* was "under seal," or by the fact that the unsealing orders were

entered well after the government initiated its litigation. Ans. Br. at 31. No motion to unseal was advanced in that case to resolve those issues. That both this Court and the district court acted *sua sponte* to unseal its orders (and related records in the district court) belies any contention that confidentiality over judicial records in this area is required by law (Ans. Br. at 22) or commanded by any tradition of secrecy adopted to advance important policies (Ans. Br. at 45).

In short, ample case authority, the DOJ's own practices, and this Circuit's treatment of its decisions in this area of law support holding that a First Amendment right of access attaches to the District Court's order denying the government's requested relief and related legal arguments.

2. Logic also supports a right of access to the District Court's order and related legal briefs.

As explained in the Post's opening brief, access to the District Court's denial order and related legal arguments would play a significant positive role in the functioning of these types of proceedings going forward. WashPost Op. Br. at 32-35; *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Among other things, access to the District Court's order will shed much needed light on the application and reach of the Wiretap Act's technical assistance provisions, and the vulnerability of third parties to contempt sanction's for resisting government surveillance efforts. WashPost Op. Br. at 48-49. Access can also provide a check

on government overreach and abuse, and serve to ensure that justice is being meted out fairly. *Id.*; *see Custer*, 658 F.3d at 1194.

To get around these legitimate interests, the DOJ argues that the proceedings are analogous to the process of obtaining search warrants during the pre-indictment, investigatory stage of a proceedings. Ans. Br. at 32-33 (citing *Times Mirror*, 873 F.2d at 1214-17). But this analogy goes too far. The concerns underpinning *Times Mirror's* holding that no First Amendment right of access attaches to search warrant materials during "a pre-indictment investigation" do not apply here (873 F.2d at 1216)—at least not to a degree warranting a categorical exemption to the public's right of access.

In *Times Mirror*, the court recognized that the utility of access to warrant materials during a "pre-indictment investigation" were undercut by concerns that the suspect would learn of the warrant, destroy evidence before it could be executed, coordinate stories before testifying, or flee the jurisdiction. *Id.* at 1216. The privacy interests of those accused in warrant materials but ultimately exonerated also cut against the social utility of access to such materials and proceedings at the pre-indictment stage. *Id.*

Here, while it is conceivable that the government's motions below referenced the underlying wiretap applications and orders, the focus of the judicial records would naturally be on Facebook's legal obligation to comply with a

technical assistance order—issues that turn not on who or what the government is investigating but on the application of law to VOIP applications such as Messenger. It simply is not credible that disclosure of the order and legal arguments on these issues (as opposed to the probable cause affidavits justifying the original wiretap orders) would be so harmful to the government's criminal investigation (in now charged cases) as to warrant a *categorical* exemption from the right of access.

The government's far reaching argument about harm to future surveillance investigations by disclosing the technical impediments to such investigations, are similarly unavailing and should be viewed with skepticism. Ans. Br. at 34. What the law authorizes should not be confused with secret techniques. The breadth of this argument is boundless, virtually uncontestable and illusive. It would place government surveillance activities and the court's oversight role over them beyond public oversight, negating entirely the public's key role in the criminal justice system. *See Waller v. Georgia*, 467 U.S. 39, 47 (1984) (recognizing need for open proceedings is particularly strong in suppression hearings because "seizure of evidence frequently attacks the conduct of police and prosecutor… '[s]trong pressures are naturally at work on the prosecutor's witnesses to justify the propriety of their conduct in obtaining' the evidence.").

Nor should a categorical exception be creating placing beyond public

oversight the government's compliance with surveillance laws, including the application and scope of the Wiretap Act's technical assistance provisions. Our courts have long cautioned against such secrecy, and there appears no reason here to carve out an exception based on far-reaching arguments about harm to future surveillance investigations. *See In re Oliver*, 333 U.S. 257, 266 (1948) (explaining the "traditional Anglo-American distrust for secret trials" and how institutions such as the English Court of Star Chamber "symbolize a menace to liberty"); *see also Index Newspapers*, 766 F.3d at 1084 (discussing America's "long history of distrust for secret proceedings").

The government's citation of the Fourth Circuit's decision in *In Re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D) ("Appelbaum")*, 707 F.3d 283 (4th Cir. 2013), is equally unpersuasive. Ans. Br. at 33. Most notably, the district court there *affirmed* a magistrate judge's order granting a motion to unseal records pertaining to subscribers' motion to vacate a Stored Communications Act order (18 U.S.C. § 2703(d)) issued to Twitter, Inc. *Id.* at 288. It, however, upheld the denial of the subscriber's motion to unseal the government's *application* for the Twitter order, and a request to unseal other SCA orders issued to other providers for the subscribers' communications. *Id.* Thus, the district court there recognized the need to make public litigation involving SCA orders while maintaining

confidentiality over the underlying applications and orders themselves—exactly what Appellants are advocating here.

The appeal in *Appelbaum* challenged only the orders denying the motion to unseal the Twitter *application* and the other SCA orders. *Id.* at 289. It was in this context that the Fourth Circuit was called upon to address how disclosure would advance the governmental process at issue. In rejecting a First Amendment right of access to SCA applications and the other SCA orders, the court observed that the SCA *application* process, like the process for obtaining search warrants, is ex parte in nature and closed to the public. *Id.* at 292. It reasoned that because "secrecy is necessary for the proper functioning of the criminal investigations at this § 2703(d) phase, openness will frustrate the government's operations." *Id.* at 292. Because the ex parte application process at issue in *Appelbaum* is not at issue here, the DOJ's reliance on this case is misplaced.[3]

In short, public access to the judicial order and legal briefs here would play a significant positive role in the functioning of this type of proceedings.

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[3] Despite rejecting a First Amendment right of access, the court *did* recognize that a *common law right of access* attached to the applications as judicial records. 707 F.3d at 286, 293. That right was held to be outweighed by countervailing interests. *Id.* at 286, 293-94.

B. A Strong Presumption of Access to the District Court's Order Also Arises Under the Common Law.

Only a few categories of documents have been recognized as falling outside of the common law right of access as "traditionally kept secret." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006). This is so "because the consequences are drastic—'there is no right of access to documents which have traditionally been kept secret for important policy reasons,' [sic] meaning that a party need not show 'compelling reasons' to keep such records sealed." *Id.* at 1185 (quoting *Times Mirror*, 873 F.2d at 1219).

While recognizing that grand jury transcripts and warrant materials "during the pre-indictment phase of an investigation" are two types of documents "traditionally kept secret," this Circuit in *Kamakana* nevertheless cautioned that these are "very specific types of documents," and that even documents "'traditionally kept secret' are not sacrosanct." *Id.*[4]

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[4] The government's citation to FOIA's exemptions for law enforcement investigations as support for the recognition of a new category of judicial records "traditionally kept secret" under the common law, was specifically rejected by the court in *Kamakana*. *Compare* Ans. Br. at 51-52 *to Kamakana*, 447 F.3d at 1185.

Tellingly, this Circuit and numerous other circuit courts "have applied the common law right of access to a variety of warrant-related materials." *Custer*, 658 F.3d at 1192 n. 4 (citing cases). This is so even *before* those warrant materials were used in conjunction with any adjudicatory proceeding, as at issue here. *See*, *e.g.*, *Custer*, 658 F.3d at 1193 (holding post-investigation warrant materials fall outside the narrow range of documents that are not subject to the common law right of access *even when no indictment is ever issued*); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-66 (4th Cir. 1989) (holding common law right of access attached to pre-indictment search warrant affidavit); *In re Application of Newsday, Inc.*, 895 F.2d at 76-78 (holding common law right of access attached to warrant application even though it implicated communications obtained through Title III wiretap).

And the right of access has been recognized where Title III materials are implicated in records of subsequent adjudicatory proceedings. *See In re Application of Newsday, Inc.*, 895 F.2d at 76-78 (warrant materials implicating Title III communications); *In re the Matter of New York Times Co.*, 828 F.2d at 113-14 (motion to suppress and related documents implicating Title III materials); *Chow*, 2015 WL 5094744, *4 (same).

Rather than address the cases cited by the Post, the DOJ's argument relies entirely on this Circuit's decision in *Times Mirror*, addressing a request for search

warrant applications and probable cause affidavits during the pre-indictment stage of a proceeding while the government's investigation is ongoing. *Times Mirror*, 873 F.2d at 1218. As explained above, that analogy is unavailing here where Appellants are *not* seeking search warrant or Title III applications or resulting orders.

Even this Circuit's decision in *Sleugh*, 896 F.3d at 1014, relied on by the DOJ, supports the distinction. There, in holding that no common law right of access attached to a Rule 17(c) subpoena applications, the court distinguished between Rule 17(c) applications that merely "relate to the judge's trial management role," and are obtained in ex parte, and "'materials on which a court relies in determining the litigants' substantive rights,'" to which the common law right of access "ordinarily attaches." *Id.* (quotations omitted).

Rather than expand the narrow category of judicial records exempt from the common law right of access, the District Court was obligated to accommodate the government's concerns through redaction. *See Custer*, 658 F.3d at 1195 n. 5 (citing cases).

C. Title III's Sealing Rules Do Not Apply to the District Court's Denial Order.

As a starting point of any statutory analysis of Title III's sealing provisions, it is important to reiterate that a statute cannot overcome the First Amendment right of access to judicial records. *In re the Matter of New York Times Co.*, 828

F.2d at 115. Moreover, where a statute invades the common law right of access it is to be read "with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993); *see, e.g., United States v. Cohen*, 366 F. Supp. 3d 612, 619 (S.D.N.Y. Feb., 7, 2019) (ruling SCA provisions requiring service provider to refrain from disclosing information about warrant it receives "hardly evinces a clear congressional intent against disclosure that would undermined a common law presumption of access to … warrants, applications, and supporting affidavits.").[5] Nor should the plain language of a statute be set aside in favor of extrinsic interpretations. *See generally United States v. Gallegos*, 613 F.2d 1211, 1214 (9th Cir. 2010).

Ignoring these rules, the DOJ advocates for an interpretation of the sealing provisions that would supplant the statute's plain language and expand its provisions in contravention of the common law right to judicial records.

Looking to the text of Section 2518(8)(b), the DOJ argues that the term "applications made and orders *granted* under this chapter" in the first sentence of

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[5] The DOJ's reliance on similar provisions under the Wiretap Act is equally unavailing. Ans. Br. at 21.

the subdivision really means applications made and orders granted and *orders denied*. Ans. Br. at 24. It claims that such an interpretation is compelled by the third sentence in this same subdivision addressing which judge has authority to issue an order destroying "such applications and orders," i.e. "applications made or orders granted under this chapter." 18 U.S.C. § 2518(8)(b). It argues that because the authority to destroy "such applications and orders" extends to "the issuing or *denying* judge," Congress must have intended the sealing provisions in the first sentence of the subdivision to also extend to orders granted *and* orders denied. *Id.* at 25.

This strained interpretation completely ignores that fact that the phrase "issuing or denying judge" is necessary because the scope of documents that are within the judge's authority to destroy include "*applications made*"—whether granted or denied—not just *orders granted*. Thus, the referenced language, "issuing or *denying* judge," is necessary to ensure that the judge's authority extends fully to all applications whether granted or denied, as well as orders granted under Title III.

The DOJ's reference to legislative history as support for expanding the Title III's sealing provisions to records which "derive from" or "flow from" wiretap or technical assistance orders, is equally unsupportive of its position. Ans. Br. at 17. As stated in the Senate Report, "Title III has as its dual purpose (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." S. Rep. 90-1097 at 2154 (90th Cong., 2nd Sess., 1968). The Senate Report's discussion of Section 2518(8)(b), as noted by the DOJ, provides that "applications and orders *for authorization* shall be treated confidentially." *Id.* at 2194 (emphasis added). Congress was particularly concerned "in renewal situations," as the applications and orders "may be expected to contain sensitive information." *Id.* By flagging "particularly in renewal situations," Congress indicated a clear intent to protect "sensitive information" where wiretap orders are *granted*. Such concerns are implicated in particular in renewal situations where the fruits of earlier wiretaps are often disclosed.[6]

In sum, there is no indication either in the language of the statute or its history indicating an intent to obscure all information about government efforts to enforce wiretaps or technical assistance orders against providers.

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[6] Contrary to DOJ's argument, the paragraph of the Senate Report it cites refers to "applications and orders *for authorization*" and thereafter references "orders and applications" in its discussion about disclosure to subjects "incidental to the disclosure or use of the records [i.e, communications] themselves…" S.Rep. No. 1097 at 2194. No wiretap communications would exist absent an order granting the wiretap. Thus, the DOJ's attempt to read these references out of context should be rejected. *See* Ans. Br. at 25 n. 6.

Neither does the DOJ's argument that these judicial records should be included within Title III's sealing provisions as a "component" of the investigatory process find support in case law. Ans. Br. at 22. All of the cases cited by the government pertain to requests for raw wiretap communications or application records. *Id.* at 20, 22, 23. That courts have included within Title III's sealing provisions interim reporting obligations or instructions attendant to an initial order granting wiretaps (18 U.S.C. § 2518(5)&(6)), is of no moment. Ans. Br. at 23-24 (citing *In re New York Times*, 577 F.3d at 403 n. 1 and *United States v. Blagojevich*, 662 F. Supp. 2d 998, 1003 (N.D. Ill. 2009)). Those records are part of the ex parte process for obtaining issuance of a wiretap order, are specifically authorized by statute to be included in such orders, and provide a mechanism for the court to oversee that ex parte process.[7] That the sealing of these records under Title III has been upheld by a few courts does not support sealing judicial records

[7] The authority cited by the DOJ would appear to support a common law right of access even to wiretap applications, with the courts assessing governmental interests at the balancing stage of the inquiry. *In re New York Times*, 577 F.3d at 405 (assuming without deciding that Title III wiretap applications were judicial records subject to the common law right of access); *In re Granick*, 2019 WL 2179563, *10 (N.D. Cal. May 20, 2019)(concluding that common law right of access attached to technical assistance applications in concluded cases, among other records, but finding administrative burden of producing materials overcame presumption).

of adjudicatory proceedings where courts are called upon to resolve separate legal issues.

In short, the DOJ's argument that Title III's sealing provisions should read to include judicial records that are "derived from" technical assistance records is not supported by the statute's text, history or case law interpreting it.

II. THE PRESUMPTIVE RIGHT OF ACCESS IS NOT OVERCOME BY CONCLUSORY ASSERTIONS OF HARM AND THE COURT'S BLANKET SEALING ORDER WAS NOT NARROWLY TAILORED.

A. The Government's Two-Stated Interests in Preserving Secrecy Did Not Justify the District Court's Blanket Sealing Order.

As an initial matter, it is clear that the District Court's conclusory assertions of harm were tainted by an overbroad view of Title III's sealing provisions. ER11:12-13 ("Disclosure under these circumstances is exactly what the relevant statutory provisions attempted to preclude."). Because this view precluded any conscientious balancing of the respective interests, and because appellants were otherwise precluded from knowing (and to date remain precluded from knowing) the government's factual support for the sealing, this Court should review de novo the District Court's order and record below. *See* WashPost Op. Br. at 20.

The government's argument that the District Court's "findings" were sufficiently factual to warrant a lesser standard of review (Ans. Br. at 54) also runs contrary to well-establish precedent requiring "specific factual findings" sufficient to afford meaningful appellate review. *See Press-Enterprise Co. v. Superior Court*

("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984); *Kamakana*, 447 F.3d at 1178-79 (articulating standard); *see, e.g., Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1467-68 (9th Cir. 1990) (holding that because district court's stated belief that disclosure of plea agreement, which required defendant's cooperation with government, would place him and his family in jeopardy was not supported by "any factual findings," it was erroneous as a "matter of law.").

Setting aside the deficiencies of the District Court's order and applicable standard of review, the two interests articulated by the District Court do not constitute compelling reasons sufficient to justifying its blanket sealing order.

With respect to the government's first contention—that secrecy is necessary to protect an ongoing investigation *and prosecution*—it is important to note that the District Court did not conclude, as the DOJ states, that disclosure would *harm* the government's ongoing investigation. Ans. Br. at 50. It merely stated, without elaboration, that an investigation was ongoing. ER11. And *nowhere* did the District Court state that sealing was necessary to protect the "integrity of an

ongoing … *prosecution*." Ans. Br. at 50.[8] These claims, standing alone, are not sufficiently compelling to warrant a blanket sealing order. *Kamakana*, 447 F.3d at 1185.

They also should be viewed with skepticism where asserted in the post-indictment context since sealing and closures at this stage conflicts both with a defendants' Sixth Amendment right to a public trial and the public's and press's First Amendment right of access to criminal proceedings. At a minimum, the government's showing should have included detail as to how disclosure would implicate its ongoing investigation of *unindicted* individuals, as opposed to those already charged.

Similarly, the DOJ offers no support for its contention that sealing is justified to protect its ongoing *prosecutions*. Secret prosecutions have long been recognized as antithetical to our open court system. *See Index Newspapers*, 766 F.3d at 1084 ("America has a long history of distrust for secret proceedings.")

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[8] This revelation in the DOJ's answering brief, buried at page 50, is the first time that appellants have had any confirmation that the government's so-called investigatory concerns pertain to its ongoing prosecution *in charged cases*. Still, the basis of the DOJ's claimed need for secrecy with respect to those charged cases remains unstated and obscured by the sealed nature of the record below.

(citing *In re Oliver*, 333 U.S. at 268-69); *Sleuth*, 896 F.3d at 1012 ("Shrouding the mechanics of a criminal case in secrecy places the public's interest in a transparent judicial system at risk."). This is true even in the search warrant context where courts have recognized that the public "has an obvious interest in knowing that proper procedures have been followed." *United States v. Loughner*, 769 F. Supp. 3d 1188, 1194 (D. Ariz. 2011).

The DOJ's claims with respect to "sensitive sources and methods of gathering information" fairs no better. To support this contention, the government primarily relies on case law discussing the disclosure of *classified information* under the Classified Information Procedures Act, 18 U.S.C.App. § 1, where the defendant sought the identity of an informant to aid his defense under the Espionage Act. Ans. Br. at 50 (citing *United States v. Smith*, 789 F.2d 1102 (4th Cir. 1985)). Such facts are not at issue here, and any informants can be protected through redaction. It also cites *In the Matter of the Application of Leopold*, 327 F. Supp. 3d 1 (D.D.C. 2018). Ans. Br. at 50. There, the district court discussed in *dicta* the need to protect "investigative techniques" unitized in the SCA warrant process as one factor against finding (on the logic prong) a First Amendment right of access to SCA materials *after an investigation is closed*. 327 F. Supp. 3d at 5, 19. This decision is at odds with this Circuit's decision in *Custer,* 658 F.3d at 1194, which recognized a common law right of access to warrant materials in

closed investigations. The court's discussion in *Leopold* also was informed by the fact that Congress had not mandated public reporting of the SCA warrant process, while it *had* mandated such reporting of wiretaps under 18 U.S.C. § 2519. *Id.* at 20. In short, these cases do not support a wholesale exemption from our open courts doctrine for the mere invocation of the term "sources and methods of investigation."

Nor should the supposed need to protect "previously unknown capabilities and limitations" (Ans. Br. at 51), be confused with facts the disclosure of which is necessary to ensure compliance with applicable surveillance laws, or to a public understanding of how those laws apply to service providers. *Cf. Gordon v. F.B.I.*, 388 F. Supp. 2d 1028, 1036-37 (N.D. Cal. 2005) (ruling that FOIA's exemption for law enforcement records did not extend to FBI documents containing the legal basis for detaining someone whose name appears on the government's watch list). The government's logic has no bounds and, if adopted, would foster an environment where illegal government surveillance activities are allowed to flourish—something Congress was far more concerned about in adopting Title III than the evasion from detection by some criminal suspects.

In sum, the DOJ's bald investigatory interests are not sufficiently compelling to outweigh the public's interest in access here.

B. District Court's Order Failed To Adequately Consider Redaction as an Alternative to Wholesale Sealing.

Assuming, *arguendo*, that the government's showing established a compelling justification for sealing, the District Court still was required to narrowly tailor its order to protect those interests so that the remainder of its order could be made public. *Index Newspapers*, 766 F.3d at 1090; *see also* WashPost Op. Br. at 44-45. Even if the District Court's denial order contained reference to raw Title III communications or information gleaned from previously granted applications and orders, it was incumbent on the District Court to protect those interests through redaction, not wholesale sealing. Indeed, even in the context of requests for search warrant materials, this Circuit has recognized that "[i]n many cases, courts can accommodate [investigatory] concerns by redacting sensitive information rather than refusing to unseal the materials entirely." *Custer*, 658 F. 3d at 1195 n. 5 (citing cases).

The sole basis offered by the District Court for failing to protected the claimed interests in this manner was its factually devoid conclusion that "sensitive

investigatory information"[9] was "intertwined with the legal and factual information such that redaction "would leave little and/or misleading substantive information." ER11. But the obligation to redact, including in cases implicating Title III materials, remains "even if redaction will render 'almost meaningless' the documents to be disclosed." *See In re Matter of New York Times Co.*, 834 F.2d 1152, 1154 (2nd Cir. 1987). Contrary to the DOJ's argument, this obligation is not, and should not be, predicated on a court's judgment as to what the public may or may not understand of what remains.[10] Instead, under well-established constitutional principles, the District Court's obligation was to protect the claimed interest in the narrowest fashion possible. *Press-Enterprise I*, 464 U.S. at 510.

The complete withholding of the District Court's denial order and related legal briefs is undoubtedly at odds with this obligation. For this independent reason, the District Court's sealing order should be reversed.

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[9] The court's overbroad view of what is covered under Title III's sealing provisions necessarily and erroneously tainted its "intertwined" analysis. ER11.

[10] The DOJ cites *Index Newspapers* in support of this proposition. Ans. Br. at 59. There the court stated that redaction of "seemingly innocuous information," under certain circumstance, may be required if so "entangled with secrets that redaction will not be effective." 766 F.3d at 1095. Under this analysis, the focus appropriately remains on protecting the claimed interest, not on a judge's view of the public's ability to understand what remains after redaction.

CONCLUSION

The judgment of the District Court should be reversed, and this Court should conduct a de novo review of the underlying judicial order and related legal arguments to determine whether the District Court's sealing order was the least restrictive means of protecting factually supported and compelling governmental interests.

Date: Oct. 3, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Ninth Cir. R. 32-1, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6, 485 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 Mircosoft Word, version 10, using Times New Roman 14-point font.

Date: Oct. 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 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: Oct. 3, 2019

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