Nos. 19-15472 (L), 19-15473

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Movants–Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Respondents–Appellees.

On Appeal from the United States District Court for the Eastern District of California
Case No. 1:18-mc-00057-LJO-EPG

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INTRODUCTION

Judicial opinions have been public since the Founding. Appellants' Opening Br. ("AOB") 25–26. So have docket sheets. *Id.* at 44–45. Public court opinions are the foundation of U.S. common law, and secret law is anathema to a functioning democracy. Yet, in opposing the public's First Amendment and common-law rights of access to the materials Movants seek, the government claims that court opinions that are ancillary to a wiretap proceeding, and that determine the statutory and constitutional authority of the government and the rights and responsibilities of U.S. companies, are presumptively sealed, possibly forever. This audacious claim has no support in statute, case law, or experience.

Title III only requires that the contents of intercepted communications, and "[a]pplications made and orders granted under this chapter," "be sealed by the judge." 18 U.S.C. § 2518(8)(a), (b). Movants are not seeking communications, the wiretap application, wiretap order, or even the order directing Facebook to provide technical assistance.[1] Movants *are* seeking a judicial opinion, a docket sheet, and sealing orders from an ancillary contempt proceeding. The Wiretap Act does not seal these materials, explicitly or implicitly. *See* AOB 29.

[1] According to the government, the district court's underlying order to Facebook "to furnish technical assistance" either appeared in the same order authorizing the wiretap, or it took the form of a "separate order directed to the provider." Brief for the United States ("Gov. Br.") 21.

The long history of public access to court opinions (and similarly to dockets) was unaffected by the 1968 passage of the Wiretap Act and its 1970 amendment authorizing technical assistance orders (Title III). *See* Gov. Br. 29–31. Following the passage of Title III in 1968, no cases have held that section 2518(8)(b)'s sealing provision interferes with public access to opinions or docket sheets. To the contrary, opinions addressing statutory and constitutional rights in the Title III context are regularly made public. Such opinions assess the sufficiency of applications,[2] the adequacy of Department of Justice authorization,[3] whether affidavits demonstrate that the wiretap was necessary as the statute requires,[4] and much more. Both history and logic support a strong public right of access to court opinions, even in the wiretap context.

Of course, concluding that the rights of access attach to the judicial opinion and docket sheet that Movants seek here does not require that those materials be publicly released in their entirety, or that similar proceedings in the future must be contemporaneously open to public view. The right of access is not an all-or-nothing proposition. The government's showing falls far short of what is required under both the First Amendment and common law to justify wholesale sealing

[2] *United States v. Bailey*, 607 F.2d 237 (9th Cir. 1979).

[3] *United States v. Staffeldt*, 451 F.3d 578 (9th Cir. 2006), *amended in part*, 523 F.3d 983 (9th Cir. 2008).

[4] *United States v. Echavarria-Olarte*, 904 F.2d 1391 (9th Cir. 1990).

here. The public benefit of disclosing judicial reasoning far outweighs any risk to government interests. To the extent that particular facts in the materials should remain sealed, redaction is the appropriate remedy.

STANDARD OF REVIEW

The proper standard of review here is *de novo*, because (1) whether the rights of access attach to the records Movants seek is a matter of law, *United States v. Index Newspapers*, 766 F.3d 1072, 1091 (9th Cir. 2014), and (2) the adequacy of redaction to address Facebook and government concerns is a mixed question of law and fact. *See Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1133 (9th Cir. 2011). The district court's determination that redaction could not protect confidential information was based on legal error and is not entitled to deference, as the government asserts. Gov. Br. 54.

First, the district court erroneously held that in enacting Title III Congress intended to comprehensively seal "wiretap materials"—and not just applications and orders. ER-2. *See infra* Section I. Second, it concluded that wiretap opinions are generally not subject to disclosure. ER-3. *See infra* Section II. Third, it wrongly determined that the government has a compelling interest in preserving the secrecy of law enforcement techniques generally, as opposed to sources and methods specific to a particular investigation. ER-4. *See infra* Section III; *see also* AOB 40.

And fourth, it erred in holding that when an investigation is ongoing, no line-by-line review for redactability is required. ER-4. *See infra* Section IV.

These errors require *de novo* review, not review for abuse of discretion. Even if the abuse of discretion standard applied, the district court's wholesale sealing of the judicial records Movants seek was an abuse of its discretion for the reasons outlined previously, AOB 36–42, and below.

ARGUMENT

I. The Wiretap Act Does Not Seal Judicial Opinions or Dockets and Does Not Limit the Public's Well-Established Rights of Access to Such Documents

At the time Congress passed Title III, there was a long history of published U.S. Supreme Court cases about wiretapping. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438 (1928); *Nardone v. United States*, 302 U.S. 379 (1937) (*Nardone I*); *Nardone v. United States*, 308 U.S. 338 (1939) (*Nardone II*); *Goldman v. United States*, 316 U.S. 129 (1942); *Lee v. United States*, 343 U.S. 747 (1952); *Silverman v. United States*, 365 U.S. 505 (1961); *Lopez v. United States*, 373 U.S. 427 (1963); *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). Given that backdrop, had Congress intended to take the extraordinary step of sealing judicial opinions related to wiretapping, it would have said so. It did not.

"Statutory interpretation begins with the plain language of the statute."

United States v. Rosales, 516 F.3d 749, 758 (9th Cir. 2008) (citation and alteration omitted). The plain language of the Wiretap Act does not seal opinions or docket sheets. Congress was precise in drafting the Act. It identified three, and only three, categories of documents that should be sealed. The Act provides that:

> *Applications made and orders granted* under this chapter shall be sealed by the judge. . . . 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) (emphasis added). The statute also provides that *recordings of the contents* of any wire, oral, or electronic communications intercepted under its provisions shall be sealed under the judge's directions. *Id*. § 2518(8)(a). That is all.

Section 2518(8)(b) does not contain any of the catch-all phrases that the government uses to claim that the Act also seals judicial opinions and wiretap docket sheets. The government asserts that "Title III provides for sealing of . . . the written materials *related to* [wiretap] authorizations," including "materials *filed or generated in* proceedings to enforce Title III technical assistance orders" and "materials . . . [that] *derive from* proceedings to enforce a particular type of 'order[] granted under' Title III." Gov. Br. 14, 17–18 (emphasis added); *see also* ER-2 ("The requested materials *contain and pertain to* sensitive wiretap information…"). Section 2518 does not contain these phrases, or any other

language extending automatic sealing to any category of documents beyond contents, applications, and orders.

Only documents that are a necessary part of wiretap applications and orders—affidavits, progress reports, and minimization instructions—are presumptively sealed. That is why one of the government's cases, *In re Grand Jury Proceedings*, required a showing of good cause to unseal affidavits and progress reports because these constitute "related necessary documentation" for wiretap applications. 841 F.2d 1048, 1053 n.9 (11th Cir. 1988). Similarly, orders granting wiretap applications *must* provide that interception shall be conducted in such a way as to minimize the interception of non-responsive communications. 18 U.S.C. § 2518(5). Thus, the minimization instructions a court issues are part of sealed wiretap orders.

In short, there are only three narrow, enumerated categories that Title III requires to be sealed absent a showing of good cause. Title III has nothing to say about docket sheets or judicial opinions, expressly or by implication.

Notwithstanding the narrowness of the Wiretap Act's sealing requirements, the government maintains that "Title III implies that what is not permitted is forbidden." Gov. Br. 18. But the government is confusing cases about disclosure of the contents of intercepted communications under section 2517 with cases about unsealing applications and orders under section 2518. The government cites *United*

States v. Dorfman, 690 F.2d 1230, 1232 (7th Cir. 1982), for the proposition that Title III comprehensively seals all wiretap-related documents. *Dorfman* is referring to Title III's protection of the privacy of the *contents of intercepted communications* under section 2517. *See id.* ("But by permitting disclosure of lawfully obtained wiretap *evidence* only under the specific circumstances listed in 18 U.S.C. § 2517, Title III implies that what is not permitted is forbidden . . . ."). As further proof that *Dorfman* does not support the government, the court there held that "wiretap *evidence*" is not subject to the First Amendment right of access, but remanded to determine whether *applications* should be unsealed under the "more liberal" section 2518(8)(b). *Id.* at 1232, 1235 (emphasis added).

Given the history of public access to court materials under the First Amendment and the common law, both before and after Title III, it makes no sense to argue that Congress listed three types of documents to be sealed, but actually meant to make a dramatic change and seal by default far more.

II. The Public Has the Legal Right to Access Court Opinions and Docket Sheets

A. There is a Long History of Public Access to Opinions and Docket Sheets, Including in the Wiretap Context

Based on both history and logic, public rights of access attach to the materials Movants seek. Importantly, public access rights exist regardless of whether the materials contain sensitive information. Rather, once the rights attach,

the government has the burden of proving that its interests outweigh the interests served by disclosure. If so, this Court can impose appropriate restrictions on the public's exercise of the right—such as by requiring redaction in advance of public release. The binary choice suggested by the government—either to limit access to judicial materials entirely and forever or to endanger criminal investigations—is not the only option.

Movants seek to unseal "the docket sheet for an already decided contempt motion, as well as the court opinion denying that motion. . . ." AOB 3. The "history" prong of the *Press-Enterprise II* test strongly favors unsealing these materials.

Both the district court's and the government's arguments regarding Movants' rights of access are based on the false assertion that Title III broadly seals all wiretap-related materials. ER-2–4; *see also* Gov. Br. 29. Beyond the erroneous Wiretap Act argument, the government hangs its hat on the assertion that similar investigative-stage proceedings have historically been closed to the public. Gov. Br. 29. But Movants have cited multiple public judicial opinions regarding novel government investigative techniques and technical assistance that arose during the investigative phase. AOB 35.

The cases the government principally relies on do not support its position. First, those cases dealt with a wholly distinct category of records. None of the

government's cases concerned the right of access to judicial opinions or docket sheets; all dealt with other kinds of documents and proceedings. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 12–13 (1986) (*Press-Enter. II*) (grand jury); *United States v. Appelbaum*, 707 F.3d 283, 292 (4th Cir. 2013) (section 2703(d) motions and orders); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1211 (9th Cir. 1989) (search warrants and supporting affidavits).

Second, while *Times Mirror* and *Appelbaum* found no history of access to records from *ex parte* proceedings, those decisions addressed only ongoing, pre-indictment investigations. These courts did not opine on whether a right of access attaches once the investigation is over or defendants have been charged. *Times Mirror*, 873 F.2d at 1214; *Appelbaum*, 707 F.3d at 287. In *Appelbaum*, the Fourth Circuit declined to unseal *at that particular juncture* in the case, but held open the possibility that the materials should be made public later on. *Id*. at 295 ("We note that Subscribers are not forever barred from access … because at some point in the future, the Government's interest in sealing may no longer outweigh the common law presumption of access. At such point, the Subscribers may seek to unseal these documents."). The *Times Mirror* Court expressly "d[id] not decide at this time the question whether the public has a First Amendment right of access to warrant materials after an investigation is concluded or after indictments have been returned." 873 F.2d at 1211.

Historically, even sensitive court proceedings eventually become public. As Judge Easterbrook has written, doctrines that are phrased as favoring secrecy usually turn out to be about the timing or specific details of disclosure. In *Matter of Krynicki*, 983 F.2d 74 (7th Cir. 1992), Judge Easterbrook recognized that public access to judicial records and proceedings is the rule, even in sensitive cases involving highly-classified information:

> The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.

Id. at 75.

This Court's decision in *In the Matter of the Application of the United States for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d 1132 (9th Cir. 2003) (*In re Company*), shows that the Wiretap Act does not displace the lengthy tradition of access to the court records Movants seek, even during the investigative stage and where some facts of the case should remain confidential. There, this Court issued a public opinion in a context virtually identical to that here: a "Motion to Compel and for Contempt" filed by the government in response to the unnamed company's non-compliance with a Wiretap Act technical-assistance order. *Id.* at 1135. Far from cutting *against* Movants, Gov. Br. at 30–31, that decision shows that it is practical, feasible, safe,

and legally permissible within Title III's sealing scheme, for a court to rule publicly on a contempt motion for non-compliance with a wiretap technical-assistance order (and for other parts of district court proceedings to be unsealed)—even if the unsealing is delayed and/or the public version of the opinion is redacted.

Indeed, this Court did just what Facebook urges here: unsealing once the provider and the government have had the chance to suggest redactions. Brief of Respondent–Appellee Facebook, Inc. 3–8 ("Facebook Br.").

In re Company was not an anomaly. Since that 2003 decision, other courts have also issued unsealed public opinions on government applications requesting a wiretap technical-assistance order to a redacted third-party provider. These opinions ruled on the requests, decided the respective providers' legal obligations, and interpreted the Wiretap Act, all without endangering an underlying investigation. In one case, the court rejected a government application under the All Writs Act ("AWA") for, "in essence," a technical-assistance order to the provider "to help [the government] install a wiretap," reasoning that because the application fell short of the *Wiretap Act's* prerequisites for court orders authorizing interception of communications, it fell short of the AWA's statutory requirements as well. *In the Matter of an Application of the United States of America for an Order (1) Directing [Redacted Service Provider] to Provide Technical Assistance*

with Respect to the Interception of Wire Communications, (2) Authorizing the Use of a Pen Register and a Trap and Trace Device, and (3) the Provision of Subscriber Information, 256 F. Supp. 3d 246, 251 (E.D.N.Y 2017) (*E.D.N.Y. Opinion*). In another case, the government sought a technical-assistance order on the basis of both the Wiretap Act and the AWA. The court rejected the Wiretap Act and AWA arguments, but granted the order under Federal Rule of Criminal Procedure 41. *In re Application of the United States for an Order Directing a Provider of Commc'n Servs. to Provide Tech. Assistance to Agents of the U.S. Drug Enf't Admin.*, 128 F. Supp. 3d 478 (D.P.R. 2015) (*D.P.R. Opinion*). In both cases, the underlying application was sealed, and the court took care not to compromise the ongoing criminal investigation. *E.D.N.Y. Opinion*, 256 F. Supp. 3d at 248 n.1 (keeping government's application and proposed orders sealed for 90 days and allowing government to seek extension of sealing, whereas the opinion was "filed on the public docket, as it includes no information that can compromise the government's investigation."); *D.P.R. Opinion*, 128 F. Supp. 3d at 480 n.1 ("The application, affidavit, and corresponding order in this case have been issued under seal. The present explanatory opinion and order do not contain any identifying information regarding the Provider, Source, or Target Phone, that are involved in the ongoing criminal investigation."). The government suggests that technical assistance opinions are not made public, Gov. Br. 28, but they are.

If the *E.D.N.Y. Opinion* and the *D.P.R. Opinion*—judicial rulings on motions for wiretap technical-assistance orders—could be safely unsealed, then surely the district court's ruling here on the government's contempt motion for Facebook's non-compliance with such an order can be as well, at least in part.

B. Logic Supports the Public's First Amendment Right of Access to the Sealed Materials

Logic weighs in favor of a right of access to the judicial opinion and docket sheet at issue, *see* AOB 26–29 (opinion), 43–47 (docket sheet).[5] In this Circuit, "logic alone . . . may be enough to establish the right." *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 & n.2 (9th Cir. 2008) (citing *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516, 1517 (9th Cir. 1988)); *Phoenix Newspapers v. U.S. Dist. Court*, 156 F.3d 940, 948 (9th Cir. 1998).

District court opinions are the law, and the government's suggestion that denying the public access to them "does not deny the public access to the law" is incorrect. Gov. Br. 44. District court opinions may not bind non-parties in the same way that appellate ones do, but they interpret and apply the law. They are "adjudications—direct exercises of judicial power the reasoning and substantive effect of which the public has an important interest in scrutinizing." *Encyclopedia Brown Productions. v. Home Box Off., Inc.*, 26 F. Supp. 2d 606, 612 (S.D.N.Y.

[5] These same factors demonstrate that Movants also enjoy a common-law right of access to the materials at issue. AOB 32–35; 47–50.

1998). Additionally, these judgments can affect far more than just the parties to a particular litigation, as here where the government's demands may have had a substantial impact on Facebook's users.

The "logic" prong is not only concerned with disclosure of legal precedent but also with oversight and scrutiny of the judiciary. *See* AOB 26–27. "District courts are presumed to know and follow the law," Gov. Br. 54, which means public scrutiny of their opinions is necessary, at a minimum, to assess how courts understand those legal rights and duties.

Sealed judicial opinions frustrate the development of the law. Judicial opinions are the lifeblood of the common law, and their public character is essential to ensuring the kind of reasoned deliberation and direct conversation that informs the public and assists all courts within the system to go about their work. *See also, e.g.*, *California v. Carney*, 471 U.S. 386, 400–01 (1985) (Stevens, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. . . . Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 179 (1921))).

Absent a right of access, the government retains all of the power to decide which prior judicial rulings to disclose, and when—to the public, to other litigants, and even to other judges. The Department of Justice chose to litigate the *Apple v. FBI* dispute in public.[6] It seeks to hide this seemingly similar case. But the government's preferences do not determine what this or any other court can do.

Nor would a right of access to the sealed materials "incentivize service providers to refuse compliance" with Title III orders, "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 order." Gov. Br. 35. Disclosure here does not interfere with the government's choice to use techniques in investigations or to determine whom to prosecute as a result. This litigation concerns a court's interpretation of a private party's legal rights and duties. If a business does not believe that the government's technical assistance demand is lawful, it has the right to challenge it. And if the public seeks access to that judgment, publication is for the courts, not for law enforcement, to decide.

[6] Zack Whittaker, *Why Apple Went to War With the FBI*, ZDNet, March 15, 2016, https://perma.cc/FK56-WF86 (reporting that while government practice was to file demands for technical assistance from Apple under seal, in the San Bernardino case, the Department of Justice filed a motion to compel publicly despite a request from Apple that the proceedings be kept confidential).

C. This Court's *Index Newspapers* Decision Requires Unsealing of the Records Movants Seek

This Court's *Index Newspapers* decision, which upheld a First Amendment right of access to contempt orders and transcripts of proceedings ancillary to a grand jury, persuasively shows why the public has a right of access to the materials Movants seek. AOB 29–32. *Index Newspapers* recognizes that the public has a right of access to judicial records generated during contempt proceedings, including when they are related to proceedings in which the public has no right of access, and even when the records sought contain information about those non-public proceedings. 766 F.3d at 1085, 1093–95.

The government argues that the right of access attaches only when orders resulting from contempt proceedings hold individuals in contempt and require their confinement. Gov. Br. 38. Those were the facts in *Index Newspapers*, but that case's holding does not imply that no right of access attaches if a party is ultimately not held in contempt or confined. Were that so, the constitutional right of access would turn on the outcome of the proceeding and not on whether history and logic support public access. No right-of-access decision, including *Index Newspapers,* supports the government's outcome-determinative test.

The public has a right of access to a contempt proceeding because the liberty, due process, and other interests of a party facing a contempt finding are in jeopardy, in much the same way that a criminal defendant's rights are during a public trial. *Index Newspapers*, 766 F.3d at 1093. In such circumstances, the public has an especially strong interest in access to the proceeding and the records it

generates (contemporaneously or later) in order to effectuate oversight of the judicial and executive branches. The right of access to criminal trials does not turn on whether a defendant is found guilty and imprisoned—the specter of such imprisonment alone warrants public access as a "check on the process." *Id*. This logic applies with equal force to Movants' request to access the opinion describing a proceeding in which Facebook faced possible consequences should it have been held in contempt.[7]

Moreover, the government fails to cite any cases in support of the proposition that the public has no right of access to contempt proceedings involving corporate entities. Gov. Br. 38. The contempt proceeding against Facebook implicated Facebook's due process and other rights and raised the possibility that, at minimum, it would face sanctions if held in contempt. *See In re Under Seal*, 749 F.3d 276, 283–85 (4th Cir. 2014) (affirming contempt order and sanctions of $5,000 per day against a company for failure to comply with technical assistance in execution of a Pen Register Act order). The contempt proceeding also put the privacy and security of Facebook's users at issue, as they rely on the company's product to communicate. The public thus has the same interest in accessing any proceeding and related judicial records when the government seeks

[7] That the district court in *Index Newspapers* made contempt findings in open court underscores why the opinion Movants seek should be public. *Index Newspapers* upholds the public's right of access to portions of contempt proceedings and materials arising out of them. It also provides guidance on how courts can provide access to contempt proceedings arising out of proceedings that are historically secret.

to hold any party in contempt, regardless of the nature of the entity involved or the consequences it faces.

The government also attempts to distinguish *Index Newspapers* on the grounds that the contemnor in that case asked for an open hearing. But even if the right of access turned on the target of a proceeding's desire for a public hearing—and it does not—Facebook supports public access to the opinion Movants seek. *See* ER-2; Facebook Br. 2–8.

The government argues that *Index Newspapers* does not apply because the contempt proceeding against Facebook was not open to the public and the records generated from it were under seal. Gov. Br. 39. But some portions of the proceedings and records in *Index Newspapers* also were originally under seal and not publicly accessible. 766 F.3d at 1093, 1094–96 (ordering unsealing of contempt order and all filings related to the newspaper's motion to unseal records). This Court nevertheless unsealed them. The government is reasoning backwards, arguing that the fact that the Facebook contempt proceeding was not public means the public has no right of access. That is not how the First Amendment right of access works. Instead, even when contempt proceedings arise in a matter to which the public has no right of access, *Index Newspapers* demonstrates that logic supports public access to those contempt proceedings and related records.

Movants seek access to an opinion arising out of the Facebook contempt proceeding, which is factually and logically analogous to the contempt proceeding and records this Court unsealed in *Index Newspapers*. 766 F.3d at 1093. This Court

observed in *Index Newspapers* 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." 766 F.3d at 1086. This does not mean that the determinative factor foreclosing a right of access to the Facebook contempt opinion is that the entire proceeding stemmed from a Title III sealed application. Gov. Br. 43. The Court's statement came in the context of holding that the public lacked a right of access to grand jury materials because that class of proceedings as a whole has been off limits to the public. *Id*. The Court later recognized a public right of access to contempt proceedings *ancillary* to a grand jury proceeding because the public has a right to access the entire class of contempt proceedings, given their resemblance to criminal trials. *Index Newspapers*, 766 F.3d at 1093.

The same logic applies to legal opinions generated as a result of contempt proceedings. Thus, far from supporting the government's argument, the statement it seizes on in *Index Newspapers* supports the public's right to the opinion here.

Index Newspapers also supports Movants' right of access to docket sheets. The government argues that unsealing the docket in *Index Newspapers* amounted to nothing more than a practical oversight because the district court intended to make the docket public but failed to do so. Gov. Br. 37. In fact, this Court held that the First Amendment provides a right to access dockets because they are the only functional way in which the public can learn what is happening in courts, a necessary predicate that allows the public to serve its role as a check on the

judiciary. *Index Newspapers*, 766 F.3d at 1096 ("the entire contempt file is effectively invisible to the public as long as the docket is sealed"); AOB 42–50.

The docket sheet related to the government's contempt motion will reflect what motions, responses, sealing applications and orders were filed in that contempt proceeding. Under *Index Newspapers*, this proceeding can and should be public, at least in part. This case is different, therefore, from docket sheet cases involving grand jury matters and other pre-indictment proceedings.

III. The Government's Interests Do Not Override Movants' Rights of Access or Justify the Wholesale Sealing of the Records Sought

Public rights of access attach to the documents Movants seek. The next step in the analysis is whether the government has met the high burden necessary to override those rights. It has not. The public's First Amendment right of access can be overcome only if (1) the government has a compelling interest, (2) there is a substantial probability that disclosure will harm that interest, and (3) there are no adequate alternatives to wholesale closure. *Copley Press*, 518 F.3d at 1028; AOB 35–42. The government argues that it has a compelling interest in keeping Title III wiretap techniques and investigations entirely secret, and this interest requires wholesale closure. Gov. Br. 50–54. Yet the government fails to explain how disclosure would harm its compelling interests and why redactions or other alternatives to disclosure cannot address its concerns.

A. There is No Compelling Reason to Hide From the Public General Facts About the Government's Demand That Facebook Redesign Messenger

The government broadly asserts that the public is not entitled to know about law enforcement's capabilities and limitations, and for that reason the materials Movants seek should remain sealed. Gov. Br. 48–54. But the Department of Justice and the FBI have put those capabilities and limitations front and center in a vigorous and ongoing public policy debate. AOB 11–16. The government has actively pushed Congress to address its concerns that modern communications technologies are interfering with law enforcement's ability to conduct investigations. *See, e.g.*, Valerie Caproni, Statement Before the House Judiciary Comm., Subcomm. on Crime, Terrorism, and Homeland Sec. (Feb. 17, 2011), https://perma.cc/8P2D-DW8H. This July, Attorney General Robert Barr gave a highly publicized speech on the topic, specifically calling on companies like Facebook to develop technology that gives the government the ability to access users' online communications. U.S. Dep't of Justice, *Attorney General William P. Barr Delivers Keynote Address at the International Conference on Cyber Security* (July 23, 2019), https://perma.cc/MHM4-J8QS. Attorney General Barr also suggested that, should tech companies fail to cooperate, legislation is on the way. *Id*. Today, Barr wrote directly to Facebook asking that the company refrain from implementing end-to-end encryption across its messaging services. Ryan Mac &

Joseph Bernstein, *Attorney General Bill Barr Will Ask Zuckerberg To Halt Plans For End-To-End Encryption Across Facebook's Apps*, BuzzFeed News, Oct. 3, 2019, https://perma.cc/Z2D4-AMV4. The letter suggests that the Department of Justice believes it *does not* have the legal authority to force Facebook to comply with the entreaty, framing it as a "request" and talking about what the company "should," not "must," do. The public needs to see the district court's reasons for denying the contempt motion in order to understand the law relevant to the government's campaign to sway Facebook.

So, it is the government's own publicity effort that has put the scope of its surveillance capabilities front and center, especially with respect to encrypted platforms and services. Given this intense public debate initiated by the government, it is incumbent on it to explain why wholesale secrecy here is necessary and how disclosure here would not assist the public's understanding of both the technology and the law, while allowing for limited redaction of materials that should be confidential. It has not done so.

At least some technical details about the government's capabilities should be public and inform the ongoing debate. The Attorney General claims that tech companies can "develop effective ways to provide secure encryption while also providing secure legal access." *Id*. The technical community disputes this. AOB 13–14. Some details about how the Department of Justice thinks Facebook should

modify Messenger will give the public necessary information about the dispute. Movants agree with Facebook that the district court could use targeted redactions to protect information which might allow attackers to breach the security of Facebook's platform. Facebook Br. 6–7.

Past experience shows that public court rulings about law enforcement use of novel electronic surveillance methods benefit democratic oversight in exactly the way that the First Amendment and common-law rights of access intend. For example, courts are publicly opining on the legality of police use of "tower dumps," in which law enforcement requests the device ID of every cell phone at a given location during a given time period.[8] The practice is relatively new, but the Supreme Court references it in *Riley v. California*, 573 U.S. 373 (2014), and it appears in publicly-available unsealed warrants.[9]

The public also knows that investigators acquire historic and real-time cell-site location information from cellular providers, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Maryland v. Copes*, 165 A.3d 418 (Md. Ct. App. 2016). Law enforcement use of cell-site simulators, also called "Stingrays," is public. Police

[8] Jennifer Valentino-DeVries, *Tracking Phones, Google is a Dragnet for the Police*, N.Y. Times, Aug. 12, 2019, https://perma.cc/RPX9-RJSG; Jennifer Lynch, *Google's Sensorvault Can Tell Police Where You've Been*, Electronic Frontier Foundation, Apr. 18. 2019, https://perma.cc/E2VF-YAA9.

[9] Valentino-DeVries, *Tracking Phones, Google is a Dragnet for the Police*.

initially sought to keep this surveillance technology under wraps,[10] but today the technique is well known, still in use, and a topic of debate in courts, legislatures, and newspapers. *In re Application of U.S. for an Order Authorizing Use of a Cellular Tel. Digital Analyzer*, 885 F. Supp. 197, 198–99 (C.D. Cal. 1995) (cell site simulator).[11]

Other novel surveillance technologies include facial recognition, police body-worn cameras, aerial surveillance, gait recognition, automatic license plate readers, gun-shot detectors, thermal imaging, and more. That the public has a strong interest in understanding law enforcement adoption and use of these tools, including by reviewing judicial opinions deciding how the law permits, denies, and regulates their use, seems obvious. An informed public debate that gives consideration to crime prevention, law enforcement, and the impact of surveillance technologies on civil and constitutional rights is a basic feature of democratic oversight.[12]

The government cites cases that address "sources and methods," "investigative methods and techniques," and "techniques and procedures," arguing

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[10] Jack Gillum, *Police Keep Quiet About Cell-Tracking Technology*, Associated Press, Mar. 22, 2014, https://perma.cc/2L58-UW5V.

[11] *See also* ACLU, *Stingray Tracking Devices, Who's Got Them*, Nov. 2018, https://perma.cc/WET5-GNPK.

[12] Robyn Greene, *How Cities are Reining in Out-of-Control Policing Tech*, Slate, May 14, 2018, https://perma.cc/DVD3-SH6S.

that this language means that surveillance capabilities and limitations broadly must be kept secret. The cases do not support this claim. *United States v. Smith* dealt with an informant's identity and location. 780 F.2d 1102, 1108 (4th Cir. 1985). *United States v. Green* was also about the identity of an informant, as well as the location of a hidden police observation post. 670 F.2d 1148 (D.C. Cir. 1981). Public knowledge about broad capabilities and limitations, such as the fact that police use informants, hidden cameras, wiretapping, location tracking, and the like benefits oversight. Sometimes details, such as information that would risk a person's safety or jeopardize a police hide-out, should be sealed, consistent with due process. The government's cases do not support the overreaching claim that the public generally has no right to know what surveillance capabilities the government does or does not have.

Finally, the government suggests that cases interpreting when law enforcement techniques may be withheld under FOIA also apply to overriding the public's First Amendment or common law rights of access. Gov. Br. 53–54. They do not. As this Court has explained, the standard for withholding under FOIA is not as exacting as the First Amendment's and is not appropriately applied in the right-of-access context. *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) ("[T]he public right of access to court documents is grounded on principles related to the public's right and need to access court proceedings.

Thus, we will not import wholesale FOIA exemptions as new categories of documents 'traditionally kept secret' under *Times Mirror*.").

B. The Docket and Court Opinion Should Be Unsealed Regardless of Whether the Investigation in the Underlying Case is Ongoing

It does not appear that there is a substantial probability that publishing the materials now will result in the destruction of evidence, reveal sources, identify targets, prompt fugitives, or discourage future disclosures. *See* Gov. Br. 53. The contempt proceeding against Facebook took place in August 2018, over a year before this brief. In September 2018, at least sixteen people were charged in *United States v. Barrera-Palma*, No. 1:18-cr-207 (E.D. Cal. Aug. 30, 2018), cited in news stories as an indictment stemming from this government investigation. Related targets already know that their compatriots are under indictment. They also know that there are a number of tools that will securely encrypt their communications. In light of these factors, the government fails to meet its burden to explain how disclosure of the records Movants seek would harm a compelling interest, which it must do to rebut the presumption of access to the materials.

The government may argue that its investigation into the MS-13 gang is ongoing, and justifies the wholesale sealing of judicial records. If this assertion were correct, the government could seal nearly any case involving criminal gang activity in the United States. In any case, with appropriate redactions, public access to judicial opinions need not await the conclusion of an investigation.[13]

[13] Should the Court find that the government's investigative interests overcome the public's right of access to the materials requested at the present juncture, at some point "the competing interests precipitating … closure are no longer viable."

Movants do not have access to the opinion, but public reporting describes it as a government effort to use Title III to compel Facebook to redesign its entire Voice over Internet Protocol ("VoIP") system. Most likely, the court had to interpret Title III's technical assistance provision in light of the Communications Assistance to Law Enforcement Act. This legal reasoning can be disclosed, and other steps, including redaction, can address the government's concerns.

C. Unsealing Does Not Reward and Incentivize Leaks

The government argues that Movants and the public should be denied access to court materials to punish or disincentivize whoever may have revealed the existence of this proceeding to the press. *See* Gov. Br. 53–54. The right of access attaches irrespective of any "leak," and the problem here is that the district court failed to unseal broad categories of documents—including judicial opinions and docket sheets—that should be open. The extensive sealing in this case is not necessary or appropriate. The government could have litigated this motion in public, as it did in the analogous *Apple v. FBI* proceeding. AOB 5–7. The district court could have issued a public opinion as this Court did in *In re Company*. AOB 42. It could have made a public version of the docket sheet available. *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (a sealed docket sheet "can

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Phoenix Newspapers, 156 F.3d at 947–48 (footnote omitted). The Court should require the government to come back at intervals to show that sealing is still needed in *this particular investigation*.

effectively preclude the public and the press from seeking to exercise their constitutional right of access"). Since none of these steps were taken, Reuters' and the *Washington Post*'s reporting were the only means by which the public learned that the government believes it can force Facebook to change its security architecture, and that a court disagreed that the Wiretap Act confers that authority. This is a matter of deep public concern. This Court should disincentivize unnecessary secrecy.

IV. The Government's and Facebook's Valid Concerns Can Be Addressed Through Limited Redactions of Sensitive Information

Upon review, this Court should release all legal reasoning in the district court's order. To the extent that there are names of co-conspirators or informants, contents of private communications, trade secrets, or similar materials, redaction can maintain the secrecy of this specific information while unsealing the legal reasoning. *See* AOB 37–39. Some relevant information may include facts revealing that the government sought to use Title III to compel Facebook to redesign its VoIP system to be capable of intercepting and decrypting encrypted communications and that the district court refused to compel Facebook to do so. Redaction of these facts, generally revealing surveillance technologies, is likely unjustified.

The government insists that wholesale sealing serves both "government *and* provider interests," Gov. Br. 57, but Facebook's own filing in this Court tells a different story. Facebook writes that it "supports unsealing the legal arguments and rulings from the Title III proceeding" because they are of "widespread interest and importance." Facebook Br. 2–3. As it did in the district court, the company seeks only "limited redactions to protect sensitive information." *Id*. at 6.

Redaction "may be burdensome," but that is an insufficient reason not to do it. *Id.* at 8. The government's suggestion that such practice is impractical in a "fast moving law enforcement investigation where time was of the essence," Gov. Br. 58, is belied by public opinions prepared by numerous courts in time-sensitive investigations. *See D.P.R. Opinion*, 128 F. Supp. 3d at 248 n.1; *E.D.N.Y. Opinion*, 256 F. Supp. 3d at 480 n. 1. This Court should avoid suggesting that district courts may keep proceedings sealed just because of the press of business.

CONCLUSION

For these reasons, the Court should reverse the district court's order and remand with directions to unseal the records Movants seek.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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