No. 19-15473

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WP COMPANY LLC, dba THE WASHINGTON POST,

Movant-Appellant,

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

Movants,

v.

UNITED STATES DEPARTMENT OF JUSTICE; FACEBOOK, INC.,

Respondents-Appellees.

On Appeal from the United States District Court
for the Eastern District of California

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF MOVANTS-APPELLANTS URGING REVERSAL

[Caption continued on next page]

Katie Townsend, Esq.
Counsel of Record
Bruce D. Brown, Esq.
Gabriel Rottman, Esq.
Caitlin Vogus, Esq.
Linda Moon, Esq.
Gunita Singh, Esq.
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
ktownsend@rcfp.org

Additional amici counsel listed in Appendix A

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

Freedom of the Press Foundation does not have a parent corporation, and no publicly held corporation owns 10% or more of the stock of the organization.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's stock.

The Inter American Press Association (IAPA) is a not-for-profit organization with no corporate owners.

The Investigative Reporting Program is a project of the University of California, Berkeley. It issues no stock.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MediaNews Group Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Freedom of Information Coalition is a nonprofit organization that has not issued any shares or debt securities to the public, and has no parent

companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES v

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SOURCE OF AUTHORITY TO FILE 2

FED. R. APP. 29(a)(4)(E) STATEMENT 4

INTRODUCTION AND SUMMARY OF THE ARGUMENT 5

ARGUMENT 9

I. Court records from the contempt proceeding at issue are presumptively open to the public under the First Amendment. 9

A. The First Amendment presumption of access applies to contempt proceedings and related records. 10

B. The First Amendment presumption of access applies to court orders and opinions. 13

C. The First Amendment presumption of access applies to parties' briefs. ... 17

D. The First Amendment presumption of access applies to docket sheets. 19

E. The First Amendment presumption of access can be overcome only where a compelling interest necessitates sealing, and any sealing must be narrowly tailored. 22

II. Members of the news media have a particularly powerful interest in understanding potential risks to the security of their communications. 23

CONCLUSION 31

CERTIFICATE OF COMPLIANCE WITH RULE 32(g) 32

APPENDIX A: ADDITIONAL COUNSEL FOR AMICI CURIAE 33

TABLE OF AUTHORITIES

Cases

Associated Press v. U.S. Dist. Court, 705 F.2d 1143 (9th Cir. 1983) 11

CBS, Inc. v. District Court, 765 F.2d 823 (9th Cir.1985) 21

Courthouse News Serv. v. Planet, 750 F.3d 776 (9th Cir. 2014) 9, 11

Dhiab v. Trump, 852 F.3d 1087 (D.C. Cir. 2017) 11

Doe v. Public Citizen, 749 F.3d 246 (4th Cir. 2014)....................................... *passim*

FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404 (1st Cir. 1987) 15

Globe Newspaper Co. v. Superior Court for Norfolk Cty.,
457 U.S. 596 (1982) 10, 14

Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004) 19, 20, 21

In re Application of U.S. for Material Witness Warrant, 214 F. Supp. 2d 356
(S.D.N.Y. 2002) 15, 23

In re Copley Press, Inc., 518 F.3d 1022 (9th Cir. 2008) 9

In re Grand Jury Matter, 906 F.2d 78 (3d Cir. 1990) 12

In re Iowa Freedom of Info. Council, 724 F.2d 658 (8th Cir. 1983)...................... 12

In re Knight Publ'g Co., 743 F.2d 231 (4th Cir. 1984) 23

In re Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998) 16

In re Oliver, 333 U.S. 257 (1948) 12

In re State-Record Company, Inc., 917 F.2d 124 (4th Cir. 1990) 20

In re: Grand Jury Subpoena, 18-3071 (D.C. Cir. Apr. 23, 2019) 19, 23

Levine v. United States, 362 U.S. 610 (1960) 12

Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006) 17

Metlife, Inc. v. Fin. Stability Oversight Council, 865 F.3d 661
(D.C. Cir. 2017) 17, 18

N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286 (2d Cir. 2012)... 11

Newsday LLC v. County of Nassau, 730 F.3d 156 (2d Cir. 2013) 12, 13

Perry v. City and Cty. of San Francisco, No. 10-16696, 2011 WL 2419868 (9th
Cir. Apr. 27, 2011) 22, 23

Phil. v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991) 18

Phoenix Newspapers, Inc. v. Dist. Ct., 156 F.3d 940 (9th Cir. 1998) 10

Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984) 9, 10

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 9, 10, 22

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 9, 10, 13

Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988) 17

Smith v. United States Dist. Court for S. Distr. of Ill., 956 F.2d 647 (7th Cir. 1992) 14

Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp., Inc., 565 F. App'x 477 (6th Cir. 2012) 20

Union Oil Co. of Cal. v. Leavell, 220 F.3d 562 (7th Cir. 2000) 14

United States v. Abuhamra, 389 F.3d 309 (2d Cir. 2004) 11

United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005) 11

United States v. Amodeo, 71 F.3d 1044 (2d Cir. 1995) 14, 17

United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) 11

United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) 11

United States v. Criden, 675 F.2d 550 (3d Cir. 1982) 11

United States v. Doe, 356 F. App'x 488 (2d Cir. 2009) 23

United States v. Guerrero, 693 F.3d 990 (9th Cir. 2012) 22

United States v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014) .... *passim*

United States v. Mendoza, 698 F.3d 1303 (10th Cir. 2012) 20

United States v. Wecht, 537 F.3d 222 (3d Cir. 2008) 11

Wash. Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) 11

Statutes

18 U.S.C. § 2511 5

18 U.S.C. § 2518 5

Other Authorities

Bryan R. Kelly, *#privacyprotection: How the United States Can Get Its Head Out of the Sand and into the Clouds to Secure Fourth Amendment Protections for Cloud Journalists*, 55 Washburn L.J. 669 (2016) 30

Carl Bernstein & Bob Woodward, All the President's Men (1974) 25

Charles Berret, *Newsrooms are making leaking easier–and more secure–than ever*, Columbia Journalism Review (Mar. 1, 2017), https://perma.cc/7CJ5-ND3Y 29

Committee to Protect Journalists, *Digital Safety* (Sept. 10, 2018), https://perma.cc/E3XF-2DBR 29

Cooperation or Resistance?: The Role of Tech Companies in Government Surveillance, 131 Harv. L. Rev. 1722 (2019) 24

David Ruiz, *The Secure Data Act Would Stop Backdoors*, Electronic Frontier Foundation (May 10, 2018), https://perma.cc/B7G5-XS6G 24

Douglas Dalby and Amy Wilson-Chapman, *Panama Papers Helps Recover More Than $1.2 Billion Around The World*, International Consortium of Investigative Journalists (Apr. 3, 2019), https://perma.cc/5XY5-AMKM 28

Electronic Frontier Foundation, *Surveillance Self-Defense Guide* (Nov. 2, 2018), https://perma.cc/38X3-SAKV 29

Ellen Nakashima, *Facebook Wins Court Battle Over Law Enforcement Access to Encrypted Phone Calls,* Wash. Post (Sept. 28, 2018), https://perma.cc/29FP-5KTD 5

Eric Lichtblau, *C.I.A. Tracked Russian Prying in the Summer*, N.Y. Times (Apr. 7, 2017), https://perma.cc/KV45-QRS5 26

Frederik Obermaier et al., *About the Panama Papers*, Süddeutsche Zeitung, https://perma.cc/9NW2-Y2KZ 27

In the matter of an application by Fine Point Films Limited and Trevor Birney for Judicial Review, (2019) IEHC, Skeleton argument on behalf of the Reporters Committee for Freedom of the Press (Intervener), https://perma.cc/28WJ-R5BW 26, 27

Jennifer R. Henrichsen & Hannah Bloch-Wehba, *Electronic Communications Surveillance: What Journalists and Media Organizations Need to Know*, Reporters Committee for Freedom of the Press (last visited June 19, 2019), https://perma.cc/4TNR-B2MJ 28

Jim Waterson, *Raids on Two Northern Irish Journalists' Homes Had 'Inappropriate' Warrants, Court Says*, Guardian (May 29, 2019), https://perma.cc/AQG6-JQFC 27

Joseph Menn & Dan Levin*, In Test Case, U.S. Fails to Force Facebook to Wiretap Messenger Calls*, Reuters (Sept. 28, 2018), https://perma.cc/R532-3QDV 6

Reporters Committee for Freedom of the Press, *Journalists and public support use of confidential sources, new survey shows* (2005), https://perma.cc/ZB3U-5LZ8 25

Souad Mekhennet and Joby Warrick, *U.S. Increasingly Sees Iran's Hand in the Arming of Bahraini Militants*, Wash. Post (Apr. 1, 2017), https://perma.cc/ZUA4-8HV7 26

Todd S. Purdum, *Deep Throat Unmasks Himself as Ex-No. 2 Official at FBI*, N.Y. Times (June 1, 2005), https://perma.cc/NS5Q-MRPN 25

Rules

Fed. R. App. P. 29 ....3, 4

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Californians Aware, First Amendment Coalition, First Look Media Works, Inc., Freedom of the Press Foundation, Gannett Co., Inc., Inter American Press Association, Investigative Reporting Program, The McClatchy Company, The Media Institute, MediaNews Group Inc., MPA – The Association of Magazine Media, National Freedom of Information Coalition, National Press Photographers Association, The New York Times Company, News Media Alliance, POLITICO LLC, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech. The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The other *amici* are news media companies and press advocacy organizations dedicated to protecting the rights of journalists and the news media.

Amici file this brief in support of Movants-Appellants the American Civil Liberties Union Foundation and the American Civil Liberties Union of Northern California (together, the "ACLU"), Electronic Frontier Foundation ("EFF"), Riana Pfefferkorn, and WP Company LLC, dba *The Washington Post* (collectively, "Appellants").[1] Journalists require access to judicial documents, like the records that Appellants seek in this case, to report on civil and criminal matters pending before federal courts. As representatives and members of the news media, *amici* therefore have a strong interest in ensuring courts rigorously enforce the public's qualified First Amendment and common law rights of access to such records. *Amici* write to highlight the importance to the press and the public of access to court records in contempt proceedings to enforce technical assistance orders, in particular, and to address the applicability of the First Amendment presumption of access to such court records.

SOURCE OF AUTHORITY TO FILE

Appellants and Respondent-Appellee Facebook, Inc. consent to the filing of this *amicus* brief. Counsel for Respondent-Appellee the Department of Justice

[1] The ACLU, EFF, and Pfefferkorn filed an appeal in this case that is separate from *The Washington Post*'s appeal. Because the two cases are related, *see* Circuit Rule 28-2.6, *amici* file this brief in both appeals.

stated that it has no objection to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The judicial documents Appellants seek were filed in connection with an entirely sealed proceeding. That proceeding apparently arises out of Facebook's refusal to comply with an order entered pursuant to the Wiretap Act seeking to compel it to technically alter a communications service to permit the interception of voice conversation. *See* 18 U.S.C. § 2511(2)(a)(ii); 18 U.S.C. § 2518(4) (stating that, at the request of the applicant, a wiretap order shall "direct that a provider of wire or electronic communication service . . . shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services" provided).

Facebook reportedly refused to comply with that technical assistance order because it believed its Facebook Messenger was not a service covered by the Wiretap Act and because altering the service would be "burdensome and costly," prompting the United States Department of Justice (the "Department" or "DOJ") to seek an order from the district court compelling Facebook's compliance through a contempt proceeding. Ellen Nakashima, *Facebook Wins Court Battle Over Law Enforcement Access to Encrypted Phone Calls,* Wash. Post (Sept. 28, 2018), https://perma.cc/29FP-5KTD. The entirety of that contempt proceeding and related judicial documents—including the original motions, substantive briefing in

support and opposition, evidentiary hearing, resulting order from the district court, and the sealing order itself—are sealed. According to news reports, the district court's sealed order denied DOJ's motion to compel Facebook to comply with the technical assistance order. *See* Joseph Menn & Dan Levin*, In Test Case, U.S. Fails to Force Facebook to Wiretap Messenger Calls*, Reuters (Sept. 28, 2018), https://perma.cc/R532-3QDV; Nakashima, *supra*.

Appellants the ACLU, EFF, and Pfefferkorn moved the district court to unseal any judicial rulings associated with this proceeding, "any legal analysis presented in government submissions incorporated, adopted, or rejected implicitly or explicitly in such judicial rulings," any court orders on sealing requests, and any sealed docket sheet in the matter. Mot. to Unseal Court Records Concerning U.S. Dep't of Justice Mot. to Compel Facebook 11, ECF No. 1, *In re U.S. Dep't of* Justice, No. 1:18-mc-0057 (E.D. Cal.). Appellant *The Washington Post* moved separately to join the ACLU, EFF, and Pfefferkorn's motion to unseal and to request that the district court unseal "the order denying the requested relief sought by the government against Facebook, the parties' briefing on the government's motion to compel and the court docket in any assigned miscellaneous matter." App. of WP Co. LLC, *dba The Washington Post*, to Unseal Court Ruling and Related Briefings of Parties Pertaining to Gov't's Efforts to Enforce Assistant Provisions of Wiretap Act as to Facebook's Messenger App; Mem. of Points and

Authorities in Support thereof 7, ECF No. 3, *In re U.S. Dep't of* Justice, No. 1:18-mc-0057 (E.D. Cal.). The district court denied both motions. No. 19-15472 ER5; No. 19-15473 ER12.

The judicial records Appellants seek to unseal are distinct from any underlying wiretap application proceedings. Indeed, Appellants do not seek access to the underlying wiretap applications or any court order authorizing the use of a wiretap. *See* Appellant's Opening Br., No. 19-5472 at 3, 22, ECF No. 20 (hereinafter "ACLU, EFF, & Pfefferkorn Opening Br."); Appellant's Opening Br., No. 19-15473 at 1 (hereinafter "Wash. Post Opening Br."). The district court, however, mistakenly characterized the court records at issue as "Title III wiretap materials that directly flow from orders granting Title III wiretap requests" and denied public access to them because "Title III wiretap materials are generally not subject to disclosure." No. 19-15472 ER3; No. 19-15473 ER10.

Amici write in support of Appellants' argument that the First Amendment provides a presumptive right of access to court records in judicial proceedings related to contempt proceedings to enforce technical assistance orders.[2] Such

---

[2] *Amici* agree with Appellants that both the First Amendment and the common law presumptions of access apply to the records Appellants seek and that Title III does not negate the strong presumption of access to the records Appellants seek. *Amici* do not discuss the applicability of the common law presumption of access or Title III here, because Appellants fully address these issues in their briefs. *See*

contempt proceedings are ancillary to the wiretap application process and do not implicate the same type of sensitive law enforcement or privacy interests that underlie the statutory presumption against access to wiretap materials. To the contrary, public access to the records at issue here will provide much-needed transparency and accountability with respect to the legal reasoning, statutory interpretations, and public policy considerations that define the limits of the government's ability to compel private companies to provide technical assistance in aid of law enforcement investigations.

The general public, including journalists, uses encrypted means of communication to engage in constitutionally protected activities. There is an especially strong public interest in understanding how the government and courts interpret the law to expand, limit, or justify the government's authority to access encrypted communications, including through the use of a technical assistance order to compel a private communications provider to alter an encrypted application.

For the reasons herein, *amici* urge the Court to reverse the district court's order denying Appellants' applications to unseal.

Wash. Post Opening Br. at Sections I.A., I.C., II; ACLU, EFF, & Pfefferkorn Opening Br. at Sections I.B., II.B.

ARGUMENT

I. Court records from the contempt proceeding at issue are presumptively open to the public under the First Amendment.

The First Amendment affords the public a qualified right of access to particular judicial proceedings and judicial documents. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("*Planet I*"). The constitutional right of access is grounded in the understanding that public access is necessary for informed civil discourse and serves to ensure the proper functioning of the judicial system. *See, e.g.*, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring).

The First Amendment right of access applies to a particular judicial proceeding or document if "the place and process have historically been open to the press and the general public" and "public access would play a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*") (citations omitted). Though this Court considers both "experience" and "logic" in determining whether the First Amendment applies to a particular proceeding or document, it has held that "logic alone, even without experience, may be enough to establish the right." *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008)

(citing *Seattle Times Co. v. Dist. Ct.*, 845 F.2d 1513, 1516, 1517 (9th Cir. 1988); *Phoenix Newspapers, Inc. v. Dist. Ct.*, 156 F.3d 940, 948 (9th Cir. 1998)).

A. The First Amendment presumption of access applies to contempt proceedings and related records.

Appellants seek access to judicial records from a contempt proceeding brought to enforce a technical assistance order. They do not seek access to any raw wiretap materials. Although DOJ apparently sought enforcement of the technical assistance order so it could access certain communications pursuant to a wiretap order, the records of the contempt proceeding Appellants seek are, at most, ancillary to a wiretap proceeding, and the First Amendment presumption of access applies to them as fully as it does to records of other contempt proceedings.[3]

The Supreme Court has recognized a qualified First Amendment right of access to criminal trials and other proceedings. *See Press-Enterprise II*, 478 U.S. at 13; *Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982); *Richmond Newspapers, Inc.*, 448 U.S. at 579. As this Court and other federal appellate courts have made clear, this right applies to nearly all facets of a criminal trial. *See, e.g.*, *Associated Press v. U.S.*

[3] As Appellants note, even if the records Appellants seek reference wiretap materials, the right of access nevertheless attaches to them because they are otherwise subject to the First Amendment presumption of access. *See* Wash. Post Opening Br. at 32; ACLU, EFF, & Pfefferkorn Opening Br. at 29.

Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (right of access to pretrial criminal documents); *United States v. Brooklier*, 685 F.2d 1162, 1167, 1171 (9th Cir. 1982) (right to attend voir dire and pretrial suppression hearings); *see also N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 297–98 (2d Cir. 2012) (collecting cases); *United States v. Wecht*, 537 F.3d 222, 235–36 (3d Cir. 2008) (names of trial jurors and prospective jurors); *United States v. Alcantara*, 396 F.3d 189, 191–92 (2d Cir. 2005) (sentencing hearings); *United States v. Abuhamra*, 389 F.3d 309, 323–24 (2d Cir. 2004) (bail hearings); *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("*Robinson*") (plea agreements); *United States v. Chagra*, 701 F.2d 354, 363–64 (5th Cir. 1983) (bail reduction hearings); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (pretrial suppression, due process, and entrapment hearings). Moreover, this Court and other federal appellate courts have recognized that the First Amendment presumption of access applies in civil cases as well. *Planet I*, 750 F.3d at 786; *Dhiab v. Trump*, 852 F.3d 1087, 1099 (D.C. Cir. 2017) (Rogers, J., concurring in part and concurring in the judgment) (stating that "[e]very circuit to consider the issue has concluded that" this same "right of public access applies to civil" proceedings).

So, too, does the First Amendment presumption of access apply to both civil and criminal contempt proceedings.[4] *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013) (holding public right of access applies to civil contempt proceedings and stating that the "First Amendment 'does not distinguish between criminal and civil proceedings'"). The Supreme Court has recognized that criminal contempt proceedings must be held in public. *See Levine v. United States*, 362 U.S. 610, 616 (1960); *In re Oliver*, 333 U.S. 257, 265 (1948) ("Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court."). Numerous courts, including the Ninth Circuit, have held that the public's right of access applies equally to civil contempt proceedings. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1089 (9th Cir. 2014) ("*Index Newspapers*") (explaining that "[l]ogic may require that a portion of a contempt hearing transcript be accessible to the public" in part because a civil contempt hearing resembles a criminal trial); *Newsday LLC*, 730 F.3d at 164; *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *see also In re Grand Jury Matter*, 906 F.2d 78, 86–87 (3d Cir. 1990) (holding right attaches where incarceration is a possible penalty). Because criminal and "civil contempt

[4] Because the proceedings and court records in this matter are sealed in their entirety, it is not clear whether the DOJ sought to enforce the technical assistance order against Facebook in this case through criminal or civil contempt proceedings.

proceedings . . . carry the threat of coercive sanctions," the right of public access attaches equally to both. *Newsday LLC*, 730 F.3d at 164.

Public access serves as a check on contempt proceedings. *See Index Newspapers*, 766 F.3d at 1093. It is only through access to contempt proceedings and their related records that the public can understand the basis upon which a party invokes the court's civil or criminal contempt power and the court imposes a sanction or declines to do so. Just as with other proceedings, public access to contempt proceedings "[gives] assurance that the proceedings [are] conducted fairly to all concerned" and "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers, Inc.*, 448 U.S. at 569.

Accordingly, a First Amendment right of access exists to the records of a contempt proceeding to enforce a technical assistance order. That the contempt proceeding at issue here may be ancillary to a wiretap proceeding does not, as the district court held, automatically preclude public access.

B. The First Amendment presumption of access applies to court orders and opinions.

The First Amendment presumption of public access also applies to court orders and opinions, including those Appellants seek, because public access to judicial rulings is essential to public understanding and monitoring of the judicial

process. *See Co. Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014). Access to court orders and opinions facilitates "professional and public monitoring[,]" of the judicial branch, deters "arbitrary judicial behavior[,]" and provides "confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*").

First, as with other court orders, the judicial rulings in the contempt proceeding at issue "belong in the public domain," *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). Public access to these rulings would "play[] a significant positive role in the functioning of" the judicial process at issue, *Press-Enterprise II*, 478 U.S. at 8 (citing *Globe Newspaper*, 457 U.S. at 606), by permitting public monitoring and understanding of the court's reasoning and interpretation and application of relevant law in a contempt proceeding in which the court had to determine the limits of the executive branch's authority to compel a private electronic communications service provider to technically alter its communications services to facilitate surveillance in a criminal investigation. In addition, access to the court's rulings in the contempt proceeding will enable the public to observe not only the conduct of the court but also of the executive branch, by enhancing public understand of why the executive branch sought to compel Facebook to provide technical assistance in aid of the investigation. *See Smith v. Dist. Ct.*, 956 F.2d 647, 650 (7th Cir. 1992) ("[T]he public's right to know

what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.” (quoting *Fed. Trade Comm’n v. Standard Fin. Mgmt. Corp*., 830 F.2d 404, 410 (1st Cir. 1987))).

The Ninth Circuit has previously held that the public has a presumptive First Amendment right of access to “orders holding contemnors in contempt and requiring their confinement.” *Index Newspapers*, 766 F.3d at 1085 (stating that this right of access is “categorical and [does] not depend on the circumstances of any particular case”). In *Index Newspapers*, the Court held that an order of contempt “should be accessible.” *Index Newspapers*, 766 F.3d at 1093 (concluding that “the public has a presumptive First Amendment right to the district court’s order holding [a witness who refused to testify before a grand jury] in contempt and ordering him confined”); *see also In re Application of U.S. for Material Witness Warrant*, 214 F. Supp. 2d 356, 363–64 (S.D.N.Y. 2002) (“While grand jury secrecy is mandated by law . . . , the determination to jail a person pending his appearance before a grand jury is presumptively public, for no free society can long tolerate secret arrests.” (citations omitted)). The Court in *Index Newspapers* recognized that public access in this context provides “a check on the

process by ensuring that the public may discover when a witness has been held in contempt."[5] 766 F.3d at 1093.

Second, the district court's orders on the motions to seal the contempt proceeding are also subject to the First Amendment presumption of access. "Logic . . . dictates that the record of these types of proceedings should be open to the public because the very issue at hand is whether the public should be excluded or included in various types of judicial proceedings," and because the "public should be permitted to observe, monitor, and participate in this type of dialogue, or at least review it after the fact." *Index Newspapers*, 766 F.3d at 1096 (citing *In re Copley Press, Inc.*, 518 F.3d at 1027); *see also In re Motions of Dow Jones & Co.*, 142 F.3d 496, 501 n.8 (D.C. Cir. 1998). In *Index Newspapers*, this Court held that court records related to a motion to unseal a contempt proceeding ancillary to a grand jury matter should be open to the public because they do not jeopardize grand jury secrecy. *Index Newspapers*, 766 F.3d at 1096. If public access to court records related to sealing is appropriate in that context, it surely is appropriate here, where access certainly will not jeopardize the secrecy of any wiretap materials.

---

[5] Although *Index Newspapers* concerned an order holding a witness in contempt, it applies equally to an order holding that a witness or other party is *not* in contempt. It would stymie the public's ability to monitor the contempt process to hold that the First Amendment right of access applies only to orders in which an individual or entity is actually held in contempt.

C. The First Amendment presumption of access applies to parties' briefs.

A First Amendment right of public access also attaches to the parties' briefs filed in the contempt proceeding at issue. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (applying both the First Amendment and common law rights of access and holding that "documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons") (internal quotation marks and citation omitted)); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (holding that the First Amendment right of access applies to "documents filed in connection with a summary judgment motion in a civil case"). Both experience and logic support access to the arguments made by the parties. Proper monitoring of the judicial system and government activities would not be "possible without access to . . . documents that are used in the performance of Article III functions." *Amodeo II*, 71 F.3d at 1048. "The public has an interest in learning . . . the evidence and records" filed in a proceeding that the court considered and that formed the basis of the court's ultimate decision. *Pub. Citizen*, 749 F. 3d at 267.

As the Second Circuit has explained, "the reason parties file briefs" is to "affect the court's decision." *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 667 (D.C. Cir. 2017) (holding that the common law presumption of access applies to summary judgment briefs filed in the district court and appellate

briefs). "There is no doubt, then, that parties' briefs play a central role in the adjudicatory process." *Id.* Accordingly, access to parties' briefs is necessary for the public to oversee the workings of the judicial branch. In this case, unsealing the parties' briefs will give the public the opportunity to understand and evaluate the arguments that formed the basis of the district court's denial of DOJ's motion.

Amici agree with Appellants that the public has a constitutional right of access the parties' briefs in the underlying contempt proceeding. *See* ACLU, EFF, & Pfefferkorn Opening Br. at 34; Wash. Post Opening Br. at 17, 32. The First Amendment presumption of access applies to the parties' briefs in their entirety, regardless of whether the reasoning in the briefs was incorporated or rejected implicitly or explicitly into the court's opinion. *See Metlife, Inc.*, 865 F.3d at 668 (holding that the common law right of access applies to briefs and appendix, "including the parts [the court] did not cite or quote"); *Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 661–62 (3d Cir. 1991) (observing that "the common law presumption in favor of public access was applicable to" documents and evidentiary materials submitted in support of summary judgment regardless of the disposition of that motion). Indeed, "[a] brief (or part of a brief) can affect a court's decisionmaking process even if the court's opinion never quotes or cites it." *Metlife, Inc.*, 865 F.3d at 668.

The parties' briefing presumably discusses mainly legal arguments for and against the government's authority to force Facebook to alter an encrypted application, rather than the specific facts of the underlying investigations. They therefore "are less likely to disclose sensitive matters relating to" those investigations. *Index Newspapers*, 766 F.3d at 1094 (holding that logic favors access to transcripts and filings related to a confinement status hearing in a contempt proceeding). However, even if the briefs contain some technical information or other techniques that are properly withheld, that information should be redacted and the remainder of the briefs unsealed. *See infra* Section I.E.; *see also* Order, *In re: Grand Jury Subpoena*, 18-3071 (D.C. Cir. Apr. 23, 2019) (ordering additional portions of the "merits briefs and the oral argument transcript" to be released after "rigorously scrutiniz[ing]" the proposed redactions from the parties).

D. The First Amendment presumption of access applies to docket sheets.

Numerous federal appellate courts have recognized the public's right to inspect court docket sheets under the First Amendment. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) ("*Pellegrino*") ("[T]he media and the public possess a qualified First Amendment right to inspect docket sheets."); *Pub. Citizen*, 749 F.3d at 268 (holding that "the public and press's First Amendment qualified right of access to civil proceedings extends to docket sheets"); *United*

States v. Valenti, 987 F.2d 708, 715 (11th Cir. 1993) (holding unconstitutional the maintenance of a "dual-docketing system" whereby certain dockets were sealed and "completely hid[den] from public view"); *see also Tri-Cty. Wholesale Distribs., Inc. v. Wine Grp., Inc.*, 565 F. App'x 477, 490 (6th Cir. 2012) ("The First Amendment access right extends to court dockets, records, pleadings, and exhibits . . . ."); *United States v. Mendoza*, 698 F.3d 1303, 1307 (10th Cir. 2012) (noting that "dockets are generally public documents" and collecting cases); *In re State-Record Company, Inc.*, 917 F.2d 124, 129 (4th Cir. 1990) (per curiam) (reversing the sealing of docket sheets in criminal cases as overbroad and incompatible with the First Amendment presumptive right of access).

These federal courts have uniformly found that access to docket sheets "enhances the appearance of fairness and enlightens the public both to the procedures the district court utilized to adjudicate the claims before it and to the materials it relied upon in reaching its determinations." *Pub. Citizen*, 749 F.3d at 268. "Precisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness" necessary to a functioning judicial system. *Pellegrino*, 380 F.3d at 95. Similarly, this Court has also implicitly recognized the public's right of access to docket sheets in a contempt proceeding by "hold[ing] that it is not sufficient for documents to be declared publicly available without a meaningful ability for the

public to find and access those documents[,]" and requiring the district court in *Index Newspapers* to "unseal its docket." 766 F.3d at 1085.

Indeed, without access to docket sheets, the public is completely deprived of the most basic information about the case—such as the number of documents filed in the case, information about the parties and counsel, and whether a final judgment has been issued. And, without access to such information, the public and the press have no opportunity to oppose "closure of a document or proceeding that is itself a secret." *Pub. Citizen*, 749 F.3d at 268. Public docketing is the mechanism by which courts provide the public notice of the sealing of records to which the presumptions of access apply. *See Robinson*, 935 F.2d at 288–89. The ability of the public and the press to assert their presumptive rights of access to judicial records is, thus, "merely theoretical" if docket sheets are inaccessible. *Pellegrino*, 380 F.3d at 93; *see also CBS, Inc. v. Dist. Ct.*, 765 F.2d 823, 826 (9th Cir.1985) (noting that "a two-tier system, open and closed" erodes public confidence in the accuracy of records, and denies the public its right to "meaningful" access to judicial records).

Because the docket sheets provide critical information about the case and other judicial records to which the public has a presumptive right of access, and do not divulge the substance of the documents, this Court should join the courts in other circuits in recognizing the First Amendment right of access to docket sheets,

generally, and should hold that the First Amendment right of access applies to the specific docket sheets Appellants seek.

E. The First Amendment presumption of access can be overcome only where a compelling interest necessitates sealing, and any sealing must be narrowly tailored.

The First Amendment presumption of access can be overcome "only by an overriding interest based on findings that disclosure is essential to preserve higher values and is narrowly tailored to serve that interest." *United States v. Guerrero*, 693 F.3d 990, 1000 (9th Cir. 2012) (quoting *Press-Enterprise II*, 478 U.S. at 9). That compelling interest must be supported by "specific, on-the-record factual findings." *Perry v. City and Cty. of San Francisco*, No. 10-16696, 2011 WL 2419868, at *17 (9th Cir. Apr. 27, 2011) (citing *Press-Enterprise II*, 478 U.S. at 9). Here, the district court held that, even if a qualified First Amendment right of access applied to the records Appellants seek, that right is overcome by "the compelling interest of the DOJ to preserve the secrecy of law enforcement techniques in Title III wiretap cases," finding that that "[t]he materials at issue concern techniques that, if disclosed publicly, would compromise law enforcement efforts in many, if not all, future wiretap investigations" and that the investigation in the instant case us "ongoing." No. 19-15472 ER4; No. 19-15473 ER11.

The district court's generalized invocation of law enforcement interests does not meet the exacting standard set by this Court's precedents. *See Perry*, No. 10-

16696, 2011 WL 2419868, at *17. Moreover, to the extent that the records Appellants seek contain information that may be withheld from the public consistent with the First Amendment, redacting portions of documents is a more narrowly tailored (and thus less-restrictive) alternative to withholding them wholesale. *See United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) (stating that where "a party seeks to seal the record of criminal proceedings totally and permanently, the burden is heavy indeed"); *In re Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984) (citing *Press-Enterprise I*); *see also In re Application of U.S. for Material Witness Warrant*, 214 F. Supp. 2d at 363–64 (requiring the government to submit proposed redactions); Order, *In re: Grand Jury Subpoena*, 18-3071 at 1 (D.C. Cir. Apr. 23, 2019) ("[W]here the Rules authorize us to do so, we may—and should—release any information so long as it does not reveal the identities of witnesses or jurors, the substance of testimony's as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like" (internal quotation marks and citations omitted)).

II. Members of the news media have a particularly powerful interest in understanding potential risks to the security of their communications.

Whether, when, and how the government can compel private internet communications platforms to alter their technology to introduce security vulnerabilities in service of law enforcement surveillance is a matter of substantial

public interest and current debate. *Compare Cooperation or Resistance?: The Role of Tech Companies in Government Surveillance*, 131 Harv. L. Rev. 1722, 1740 (2019) (describing, in part, how the existence of large technology companies as surveillance intermediaries can be an "enormous benefit to law enforcement agencies" because "[t]he evidence from these companies is often incredibly important to criminal cases and national security investigations, and being able to turn to a small number of well-organized companies is critical to the efficiency and success of those pursuits.") *with* David Ruiz, *The Secure Data Act Would Stop Backdoors*, Electronic Frontier Foundation (May 10, 2018), https://perma.cc/B7G5-XS6G (explaining the risks involved with technology companies introducing "backdoors," primarily that there is "no such thing as a secure backdoor" and that introducing them weakens digital security for everybody).

Members of the news media have an especially salient interest in understanding potential threats to the security of their communications, by private or public actors, given their need to securely communicate in order to protect both journalistic work product and sources. Confidential sources, in particular, are the lifeblood of investigative reporting, particularly in areas involving national security or law enforcement. Reporters Committee for Freedom of the Press, *Journalists*

and public support use of confidential sources, new survey shows (2005), https://perma.cc/ZB3U-5LZ8.

Some of the most important reporting on both government activities and corporate malfeasance has depended on confidential sources and secure communications. During Watergate, the associate director of the FBI, Mark Felt—known only as "Deep Throat" until 2005, when Felt confirmed his identity—was a key confidential source for *Washington Post* reporters Bob Woodward and Carl Bernstein. Carl Bernstein & Bob Woodward, All the President's Men 71 (1974); Todd S. Purdum, *Deep Throat Unmasks Himself as Ex-No. 2 Official at FBI*, N.Y. Times (June 1, 2005), https://perma.cc/NS5Q-MRPN. Woodward and Felt relied on a system of coded signals to set up meetings. Bernstein and Woodward, *supra* at 71. They also, however, occasionally talked by telephone, particularly on the day after indictments were handed down against the Watergate burglars and Felt assured Woodward he could report that a "slush fund" at the Nixon re-election committee was used to finance the break-in and bugging of the headquarters of the Democratic National Committee. *Id.* at 73. A modern-day Woodward and Felt would likely use encrypted digital communications technology, and knowledge of the scope of the government's legal authority to circumvent encryption is central to how reporters today seek to protect sources' identities.

More recently, news organizations have used confidential sources to inform the public about everything from U.S. foreign policy in the middle east, *see, e.g.*, Souad Mekhennet and Joby Warrick, *U.S. Increasingly Sees Iran's Hand in the Arming of Bahraini Militants*, Wash. Post (Apr. 1, 2017), https://perma.cc/ZUA4-8HV7, to foreign threats to the 2016 presidential election, *see, e.g.*, Eric Lichtblau, *C.I.A. Tracked Russian Prying in the Summer*, N.Y. Times (Apr. 7, 2017), https://perma.cc/KV45-QRS5.

Just this past May, several *amici* in this matter intervened in a case in Northern Ireland that illustrates the importance of confidential sources to public interest journalism and the threat posed by law enforcement investigations into the identities of confidential sources. The 2017 documentary film *No Stone Unturned* explores the investigation into the "Loughinisland Massacre," a mass killing during the Catholic-Protestant conflict in Northern Ireland known as "the Troubles," for which no one has ever been charged. *In the matter of an application by Fine Point Films Limited and Trevor Birney for Judicial Review*, (2019) IEHC, Skeleton argument on behalf of the Reporters Committee for Freedom of the Press (Intervener), https://perma.cc/28WJ-R5BW. The film brought to light the possibility that law enforcement may have participated in a cover-up on behalf of the members of the loyalist paramilitary responsible for the crime, and it named likely suspects, who had been identified in an unredacted police ombudsperson

report that was anonymously leaked to one of the filmmakers. *Id.* ¶ 4. A year after the film premiered, Northern Irish and English law enforcement officers raided the filmmakers' homes and offices to seize newsgathering materials and equipment in an investigation under the United Kingdom's Official Secrets Act. *Id.* On May 29, 2019, however, the lord chief justice of Northern Ireland indicated that the court would quash the warrants against the filmmakers. Jim Waterson, *Raids on Two Northern Irish Journalists' Homes Had 'Inappropriate' Warrants, Court Says*, Guardian (May 29, 2019), https://perma.cc/AQG6-JQFC.

Confidential sources have also been instrumental in investigative journalism into private malfeasance. In a notable recent example, which directly implicates data security and encryption policy, a consortium of investigative journalists around the world reported on the "Panama Papers," a leaked cache of data about off-shore financial havens, which had been transmitted securely and anonymously to the consortium. *See* Frederik Obermaier et al., *About the Panama Papers*, Süddeutsche Zeitung, https://perma.cc/9NW2-Y2KZ (describing the nearly 50-years' worth of data illustrating fraud, money laundering, tax evasion, and evading international sanctions under the shelter of Panamanian corporate service provider Mossack Fonseca). This year, the International Consortium of Investigative Journalists, the hub of this transnational reporting team, announced that the global tally of fines and back-taxes resulting from the Panama Papers reporting has

totaled over one billion dollars. *See* Douglas Dalby and Amy Wilson-Chapman, *Panama Papers Helps Recover More Than $1.2 Billion Around The World*, International Consortium of Investigative Journalists (Apr. 3, 2019), https://perma.cc/5XY5-AMKM.

These stories depend on the ability of journalists to assure their sources confidentiality, which, in turn, depends on journalists understanding the current state of digital security, including the legal ability of others to access encrypted communications. The government has a variety of technological and legal tools for monitoring reporter-source communications. *See* Jennifer R. Henrichsen & Hannah Bloch-Wehba, *Electronic Communications Surveillance: What Journalists and Media Organizations Need to Know* 8–19, Reporters Committee for Freedom of the Press (last visited June 19, 2019), https://perma.cc/4TNR-B2MJ. As a result, while the government may be able to demonstrate a compelling need to keep certain technical details of its electronic surveillance activities secret, it is crucially important that members of the news media—and the public at large—understand the legal arguments the government is advancing in its attempts to circumvent encryption. The legal debate concerning when and under what circumstances law enforcement may compel private companies to alter their communications technologies implicates newsgathering activities and the flow of information to the public and thus warrants close scrutiny by members of the news

media and the public at large. Indeed, without an understanding of the scope of the government's legal authority to take such actions, journalists cannot adequately evaluate their ability to protect their communications with confidential sources.

Today, various resources exist to protect journalists in the digital age, all of which rely on an accurate understanding of when and how the government can use legal process to intercept or seize electronic communications. *See, e.g.*, Committee to Protect Journalists, *Digital Safety* (Sept. 10, 2018), https://perma.cc/E3XF-2DBR; Electronic Frontier Foundation, *Surveillance Self-Defense Guide* (Nov. 2, 2018), https://perma.cc/38X3-SAKV. The growth of secure messaging and file transfer tools like Signal, Confide, and SecureDrop make it simpler for sources to provide information anonymously to journalists. *See generally*, Charles Berret, *Newsrooms are making leaking easier–and more secure–than ever*, Columbia Journalism Review (Mar. 1, 2017), https://perma.cc/7CJ5-ND3Y. Numerous publications have launched webpages outlining ways that members of the public can securely communicate with their newsrooms. ProPublica, for example, highlights three options on its website, https://perma.cc/LE2S-E5KZ, and *The Washington Post* goes even further, highlighting six digital options for secure communications, https://perma.cc/FZS3-PPP3.

The complex, emergent nature of technology compounded with the unique threat to reporter-source confidentiality posed by the interception of voice

communications means it is essential that the press and the public be informed about when and how law enforcement may secure technical assistance orders that require technical alterations to an electronic communication provider's services or applications. These alternations could potentially introduce security vulnerabilities that could be exploited by actors other than law enforcement. Journalists need this information so they can take appropriate steps to further protect their communications with confidential sources and to understand if security flaws that could be exploited by others, such as computer criminals or foreign nation-state actors, are being introduced into ostensibly secure applications or networks. If journalists cannot adequately protect their data, reversions to less secure alternatives will "discourage source-based journalism," resulting in "less public trust in the press, and an equal erosion of the benefits and protections afforded by the First Amendment." Bryan R. Kelly, *#privacyprotection: How the United States Can Get Its Head Out of the Sand and into the Clouds to Secure Fourth Amendment Protections for Cloud Journalists*, 55 Washburn L.J. 669, 696 (2016). In order to adequately protect their data and their sources, journalists must have the full legal picture of when and why law enforcement can impair data security.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the district court's order denying Appellants' applications to unseal and hold that the First Amendment right of access applies to the court records Appellants seek.

Respectfully submitted,

/s/ Katie Townsend

Katie Townsend
Counsel of Record
Bruce D. Brown
Gabriel Rottman
Caitlin V. Vogus
Linda Moon
Gunita Singh
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: (202) 795-9300
Fax: (202) 795-9310
ktownsend@rcfp.org

*Additional counsel for *amici* are listed in Appendix A.

Dated: June 19, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(G)

I, Katie Townsend, do hereby certify that the foregoing brief of *amici curiae*:

1) Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
2) 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point, Times New Roman font.

/s/ Katie Townsend
Katie Townsend, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Dated: June 19, 2019
Washington, D.C.

APPENDIX A

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

David Snyder
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Marcia Hofmann
25 Taylor Street
San Francisco, CA 94102
Counsel for Freedom of the Press Foundation

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
Counsel for The Media Institute

Marshall W Anstandig
Senior Vice President, General Counsel and Secretary
MNG Enterprises, Inc.
4 North 2nd Street, Suite #800
San Jose, CA 95113
manstandig@bayareanewsgroup.com
408-920-5784 Direct
Counsel for MediaNews Group Inc.

James Chadwick
Sheppard Mullin Richter & Hampton LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600
Counsel for MediaNews Group Inc.

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY14202
Counsel for National Press Photographers Association

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Kurt Wimmer
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
Counsel for the News Media Alliance

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

D. Victoria Baranetsky
General Counsel
Reveal from The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

CERTIFICATE OF SERVICE

I, Katie Townsend, do hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 19, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Katie Townsend
Katie Townsend, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s): No. 19-15473

I am the attorney or self-represented party.

This brief contains 6495 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature __/s/ Katie Townsend___ **Date: June 19, 2019**
*(use "*s/[typed name]*" to sign electronically-filed documents)*