UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE APPLICATION OF FORBES MEDIA LLC AND THOMAS BREWSTER TO UNSEAL COURT RECORDS	The Honorable Mark R. Hornak Misc. Action No. 2:21-mc-00052 Related to: Case No. 15-880

REPLY IN SUPPORT OF APPLICATION OF FORBES MEDIA LLC AND THOMAS BREWSTER TO UNSEAL COURT RECORDS

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Forbes Media LLC and Thomas Brewster ("Applicants") hereby submit this reply in support of their application to unseal court records ("Application").

First, the common law presumption of access to judicial records applies to the docket, court orders, and other material under seal in Case No. 15-880, and it cannot be overcome by generalized assertions of harm to law enforcement interests. There is simply no support for the Government's suggestion that All Writs Act ("AWA") materials "may not" be judicial records presumptively open to public inspection under the common law. Government's Response in Opposition to Application to Unseal Court Records ("Gov't's Resp.") at 13. To the contrary, the only district court to have addressed the question expressly recognized that "there is a presumptive common law right of access to these materials." *In re Granick*, No. 16-mc-80206, 2018WL 7569335, at *11 (N.D. Cal. Dec. 18, 2018), *aff'd*, 388 F. Supp. 3d 1107 (N.D. Cal. 2019).[1]

[1] The *In re Granick* court's conclusion—that the presumption of access to AWA materials was overcome by the "administrative burden" of the petitioners' request to unseal every such document filed in that district over a thirteen-year period—is inapposite; Applicants have moved for the unsealing of a single matter. 388 F. Supp. 3d at 1129. Moreover, its supposition that administrative burden can trump the public's common law rights substantially relied on a U.S. District Court for the District of Columbia decision that is no longer good law. *See id.* at 1127 (citing *In re Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 300 F. Supp. 3d 61, 97–98) (D.D.C. 2018)). In July 2020, the D.C. Circuit, in a thorough opinion by Judge Garland, reversed that decision, rejecting the conclusion that administrative burden can be "dispositive of whether judicial records may be released at all." *See In re Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 964 F.3d 1121, 1121 (D.C. Cir. 2020).

Because the common law presumption of access applies to the docket and other judicial records in Case No. 15-880, the Government "bears the burden of showing . . . that disclosure will work a clearly defined and serious injury to the party seeking closure," *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001) (internal quotation omitted), and it must do so "document-by-document" rather than assert a "collective evaluation of the harm alleged," *In re Avandia Marketing Sales Practice & Products Liability Litig.*, 924 F.3d 662, 677 (3d Cir. 2019). Here, the Government does not address each of the individual categories of judicial documents sought to be unsealed by Applicants, let alone tie its claimed interests to particular records. The Government's failure to meet its burden under the common law—standing alone—requires that the Application be granted.

Second, though this Court need not reach application of the First Amendment right of access, it too applies, and imposes an even more rigorous standard on the Government to justify continued sealing of the AWA materials at issue here. The Government maintains that judicial records in All Writs Act proceedings should be treated like the warrants they can help effectuate and, thus, that only the common law presumption of access—not the constitutional presumption—can apply.[2] However, that argument cannot be squared with the

[2] As discussed below, the Third Circuit has not adopted the Government's position that there is no First Amendment right of access to warrant materials.

Government's own characterization of the *Press-Enterprise II* framework, which instructs courts to consider application of the constitutional right of access as to "*each* category of documents sought," *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014) (emphasis added) (citing *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986)), and separately even to identical documents "at different stages of the same hearing," Gov't's Resp. at 6. Thus, whatever the underlying purpose of an All Writs Act proceeding—whether it be to obtain an order requiring a third-party to provide the Government with technical assistance to effectuate a warrant, or a different kind of relief—the *Press-Enterprise II* framework must be applied to each category of materials filed in that AWA proceeding, including the application and the court's order granting (or denying) it.

The Government's only support for its contrary contention that AWA materials should be treated no differently than warrant materials is *In re Granick*—a non-binding decision that, in any event, provides no guidance on this point. The petitioners in that case argued that their right to inspect AWA materials was derivative of their right to inspect other investigative materials; they therefore forfeited any argument that the AWA materials they sought to have unsealed should be treated differently. 388 F. Supp. 3d at 1129. But as Applicants explain

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Contra, e.g., *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572 (8th Cir. 1988) (holding that there is).

in their opening memorandum of points and authorities and in more detail below, technical-assistance proceedings are equivalent (in substance and form) to proceedings seeking other forms of court-ordered relief available under the All Writs Act. They are not warrant proceedings. And the Government's argument is akin to contending that all judicial records pertaining to a court order granting a writ of mandamus should be sealed in their entirety if some fraction of an underlying administrative record could be. That is simply not the law.

It is the Government's burden to demonstrate that the public's common law and constitutional rights of access are overcome with respect to each category of judicial records at issue, and that nothing short of wholesale sealing of the entirety of Case No. 15-880 is sufficient to address whatever countervailing interests the Government proffers in favor of secrecy. It has not done so. For the reasons herein, Applicants respectfully request that the Court grant their Application.

I. The common law right of access applies and is not overcome.

In an effort to evade the "strong" common law presumption of public access to judicial records, *Leucadia, Inc. v. Applied Extrusion Tech.*, 988 F.2d 157, 161 (3d Cir. 1993), the Government halfheartedly suggests that All Writs Act materials "may not" be judicial records at all because they purportedly resemble applications for certain electronic surveillance orders that the Government claims are not judicial records. Gov't's Resp. at 13. That claim is meritless. As Judge Garland

explained in a recent opinion for the D.C. Circuit, courts have consistently held that such materials *are* judicial records presumptively open to the public under common law. *See In re Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 964 F.3d 1121, 1127–29 & n.6 (D.C. Cir. 2020).

Further, the Government's claim that obtaining an All Writs Act order is like obtaining a warrant in that it does not involve "adversary proceedings," *United States v. U.S. Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 321 (1972), is descriptively wrong. As the Third Circuit has held, before an AWA order can issue, due process requires notice and a hearing at which the party to be compelled can litigate objections. *See In re Application for a Pen Register or Touch–Tone Decoder & Terminating Trap*, 610 F.2d 1148, 1157 (3d Cir. 1979). And, in any event, the Government does not (and could not) cite any support for its bald claim that AWA materials play no role in an "adjudicatory proceeding[]." Gov't's Resp. at 13 (citing *North Jersey Media Group Inc. v. United States*, 836 F.3d 421, 434 (3d Cir. 2016). Even if not "adversarial" (which it is), an AWA proceeding is still adjudicatory; it resolves a request for a judicially enforceable order under the All Writs Act, and requires the court to adjudicate the rights of the relevant parties.

Because the common law presumption of access applies to the AWA materials at issue, the Government must make an adequate showing of harm with respect to each document; "broad allegations of harm, bereft of specific examples

or articulated reasoning, are insufficient." *In re Cendant Corp.*, 260 F.3d at 194. It is not enough to announce, as a general matter, that Applicants seek to unseal "documents in a matter related to ongoing criminal matters" or that unsealing could "damage . . . ongoing investigations"; the Government must demonstrate harm from the unsealing of these specific records and explain why redaction cannot accommodate its concerns. Gov't's Resp. at 11; *see Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006) (generic references to an ongoing investigation insufficient "without any further elaboration or any specific linkage with the documents."). To Applicants' knowledge, the Government does not contend, for instance, that the warrant to which the AWA materials pertain—apparently issued more than five years ago—has not been executed, or that they concern an individual who has not been indicted or taken into custody. *See Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 (Pa. 1987) (concluding that "affidavits supporting arrest warrants that have already been executed" are presumptively accessible to the public). Nor could the Government explain how publicly docketing the matter, subject to appropriate redactions if necessary, could cause *any* harm when the fact that the matter exists, and that it pertains to an order effectuating an arrest warrant, is already public. *See* Thomas Brewster, *The FBI Is Secretly Using a $2 Billion Travel Company as a Global Surveillance Tool*, Forbes (July 16, 2020), https://perma.cc/R96R-AXL9; All Writs Act Order on Sabre to

Give Real Time Updates on Travel of Suspect, DocumentCloud, https://perma.cc/A8EJ-HEZY (last visited Feb. 17, 2021).

The Government mentions the alternative of redaction only once, in a footnote, to make the remarkable, sweeping assertion that no degree of public access is *ever* feasible in All Writs Act proceedings. *See* Gov't's Response at 11 n.2. But courts are more than capable of balancing the Government's interest in ensuring that a warrant is successfully executed and the public's right to scrutinize the judicially authorized techniques that the Government employs to do so. Indeed, public dockets are replete with judicial opinions doing just that.

An instructive example is *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant* ("*In re Apple*"), No. 1:15-mc-01902, 2015 WL 5920207 (E.D.N.Y. Oct. 9, 2015). There, several months before the San Bernardino attack, the Government requested an AWA order that would have required Apple to break the encryption on one of its devices. *See* Motion to Compel, *In re Apple*, No. 1:15-mc-01902 (E.D.N.Y. Oct. 8, 2015) (ECF No. 1). As the court quickly realized, the Government's submission was far too cursory to demonstrate the Government's entitlement to the novel relief it requested. *See In re Apple*, 2015 WL 5920207, at *7. The court ordered further briefing and, in the interim, "direct[ed] the Clerk to file on the public docket" a copy of its order that "ruled on the government's application without referring to any *specific*

information that would compromise a continuing investigation." Memorandum and Order, *In re Apple*, No. 1:15-mc-01902 (Oct. 9, 2015) (emphasis added). That approach makes good sense: The very issue raised in an All Writs Act proceeding is whether the Government can lawfully compel a private party to deploy a particular law enforcement technique, and the public has a legitimate interest in understanding that analysis. *See, e.g.*, *Dousa v. U.S. Dep't of Homeland Security*, No. 19-cv-1255, 2020 WL 4784763, at *2 (S.D. Cal. Aug. 18, 2020) (rejecting motion to seal material that would purportedly reveal intelligence sources and methods where "[t]he information was publicly accessible for five months" and the subject matter of the lawsuit was whether the surveillance in question was lawful).

The Government's claimed need for continued wholesale sealing as to Case No. 15-880 demands particularly close scrutiny, here, where the Government's submissions effectively ask the Court to ignore information about that matter—and the "techniques and methods" it references, Gov't's Resp. at 11—that is already public. *See Kamakana*, 447 F.3d at 1184 (noting that the Government's overbroad proposed redactions reinforced the court's decision to unseal records). As detailed in the Application, Case No. 15-880 is described in an AWA order that was unsealed by the U.S. District Court for the Southern District of California in Case No. 19-cr-4643-H on February 14, 2020; that order remained available on the public docket until *at least* March 10, 2020, when Mr. Brewster retrieved it via

PACER. Brewster Decl., ¶ 2. Forbes published Mr. Brewster's reporting on the contents of that order in July 2020, with a link to a copy. *See* Brewster, *supra*; All Writs Act Order on Sabre to Give Real Time Updates on Travel of Suspect, DocumentCloud, https://perma.cc/A8EJ-HEZY (last visited Feb. 17, 2021).[3]

Though the Government acknowledges, as it must, that the order was unsealed for some period of time, Gov't's Resp. at 2, it nevertheless argues that the order's public dissemination does not alter the Government's asserted interests in the secrecy of AWA proceedings, and even suggests that *re-sealing* that order in its entirety was proper, *id*. at 11. But, as a court in that very same district recently explained, "the hope of reclaiming lost secrecy isn't a compelling reason to seal" records that have already been made widely available. *Dousa*, 2020 WL 4784763, at *3 (capitalization omitted); *see also United States v. Criden* ("*Criden III*"), 681 F.2d 919, 922 (1982) (requiring release of "already public information").[4]

It is also worth noting that, despite the Government's apparent view that the order from the Southern District of California was properly re-sealed, it implicates

[3] Applicants submitted a copy of the order to the Clerk's Office for filing as Exhibit 1 to their Application. For reasons that are not clear, Exhibit 1 was not publicly docketed with the Application. The order nevertheless remains publicly accessible online through the cited link in Applicants' reporting.

[4] Though the Government represents that the order was re-sealed, there is nothing on the public docket in Case No. 19-cr-4643-H to indicate that it is subject to a sealing order, *see* Brewster Decl., Ex. 1, and there is nothing in the record before this Court to explain why—or even when—it was re-sealed.

none of the interests that the Government claims justify secrecy in All Writs Act proceedings. Even setting aside the public dissemination of the order, the underlying matter is publicly docketed. *See United States v. Kher*, No. 3:19-cr-04643 (S.D. Cal. Feb. 14, 2020) (ECF No. 8) (minute order) (unsealing the indictment). The defendant in that case was indicted, arrested, and entered a guilty plea. *See* Order Accepting Plea, *United States v. Kher*, No. 3:19-cr-04643 (S.D. Cal. Oct. 13, 2020) (ECF No. 25). That the Government uses the same abstractions to describe its secrecy interests in *that* matter and in Case No. 15-880 makes clear that the Government has offered only a "collective evaluation of the harm" unsealing would supposedly cause. *In re Avandia*, 924 F.3d at 677. That showing is insufficient to overcome the common law right of access.

II. The constitutional right of access applies and is not overcome.

Because the common law analysis in this case is straightforward, the Court need not reach application of the public's First Amendment right of access. To be clear, however, the Government's application of the First Amendment framework, like its conception of the common law right, is faulty. The Government's argument is premised on the notion that All Writs Act proceedings are akin to warrant proceedings—so much so, in fact, that a court order issued under the All Writs Act is more like a warrant than it is like, say, any other type of court order issued under the All Writs Act. That makes little doctrinal or descriptive sense.

As the Government concedes, courts must apply "the experience and logic test to *each* category of documents sought." *Index Newspapers*, 766 F.3d at 1084 (emphasis added); Gov't's Resp. at 6. Thus, the Government's insistence that the analysis as to AWA materials must mirror the analysis applicable to warrants just because AWA materials may be filed in a proceeding "ancillary to" the execution of a warrant is without merit. Gov't's Resp. at 5. In the very case the Government cites for its understanding of the framework, the Ninth Circuit applied the *Press-Enterprise II* analysis to each separate filing in a contempt hearing "ancillary to a grand jury investigation"; it did not, as the Government's arguments would seemingly require, treat them all as subject to the rule for grand jury secrecy. *Index Newspapers*, 766 F.3d at 1093.[5]

The Government's contention that "court orders issued under the All Writs Act" or "motions for relief under the All Writs Act" are less coherent categories

[5] Applicants do not argue, as the Government suggests, that the context in which an AWA order is sought is irrelevant to determining whether (and to what extent) the presumption of access is *overcome* in a particular case—only that the kind of document at issue determines whether the common law or First Amendment right *applies* in the first place. That "the interest in ensuring that judicial records remain open to the public applies with special force to judicial opinions" for instance, is well-settled. *Lipocine Inc v. Clarus Therapeutics*, No. 19-622, 2020 WL 4569473, at *3 (D. Del. Aug. 7, 2020) (collecting cases). *In re Leopold* is instructive. There, Judge Garland applied the observation that "judicial decisions have been held open for public inspection" since "at least the time of Edward III" in finding a common law right of access to surveillance orders that, indisputably, did not exist in Edward III's time. *In re Leopold*, 964 F.3d at 1128.

for purposes of applying the *Press-Enterprise II* framework than "filings related in some way to a warrant" is, in any event, unpersuasive on its own terms. For one, a technical-assistance order, like the sealed one at issue here, "functions rather like a writ of mandamus" or other forms of relief available under the Act "in that it compels a party to carry out a specific performance." Jennifer X. Luo, *Decoding Pandora's Box: All Writs Act and Separation of Powers*, 56 Harv. J. Legis. 257, 274 (2019); *cf. United States v. Mountain States Tel. & Telegraph Co.*, 616 F.2d 1122, 1129 n.7 (9th Cir. 1980) (analogizing a technical-assistance order issued "in aid of the court's potential jurisdiction to receive an indictment" to a status-quo-preserving injunction that might issue under the Act in view of a future civil action). And there should be no serious question that applications for relief in the form of mandamus or an injunction have historically been litigated in open court. *See Leucadia*, 998 F.2d at 163–64 (preliminary-injunction filings).

Logic reinforces the conclusion that proceedings seeking technical-assistance orders are like other extraordinary-relief proceedings in ways that bear critically on the importance of public access. In the warrant context, while the proceeding undeniably "adjudicate[s] important constitutional rights," *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 90 (D.D.C. 2008), at base the court's role is to determine whether the facts contained in the application amount to probable cause; constitutional and other objections to the search can be resolved at a subsequent

suppression hearing to which the public has a First Amendment right of access. *See United States v. Criden* ("*Criden II*"), 675 F.2d 550, 557 (3d Cir. 1982). Put another way, even where compelling interests overcome the public's right of access to warrant materials pre-execution, the public's entitlement to scrutinize the legal and factual basis for the search is deferred but not denied.

An All Writs Act hearing, by comparison, is very much the proper forum for a third-party to object to being bound by a technical-assistance order. *See In re Installation of a Pen Register*, 610 F.2d at 1157; *Mountain States*, 616 F.2d at 1133. Indeed, it may be the *only* forum for the resolution of those questions because it remains unsettled whether a criminal defendant is entitled to suppression where an All Writs Act order was obtained in violation of the rights of the third-party technology provider. *See United States v. Baker*, 868 F.3d 960, 969–70 & n.4 (11th 2017); *cf. Criden II*, 675 F.2d at 557 (emphasizing that logic supports access to suppression hearings because "[police] conduct frequently occurs outside the public view," and "beneficial public scrutiny may never take place if not at the hearing itself"). If the Government's rule were the law, no judicial opinion resolving the legality of a particular investigative technique judicially authorized under the All Writs Act would ever be published. That has not, thankfully, been the practice of the federal courts. *See, e.g.*, *In re Apple*, 2015 WL 5920207, at *1.

These unique features of All Writs Act proceedings highlight why this sealed matter is of such keen public interest. To Applicants' knowledge, no court has ruled on the propriety of the assistance the Government sought from Sabre in a published opinion. *Cf. In re Application for an Order Authorizing the Use of a Pen Register and a Trap and Trace Device*, 396 F. Supp. 2d 294, 326 n.24 (E.D.N.Y. 2005) (noting that the Government had asserted the legality of "hotwatch" orders but "cite[d] no decision approving the use of the All Writs Act for such purposes"). And to Applicants' knowledge no court has done so since the Supreme Court affirmed that individuals have a reasonable expectation of privacy in "the whole of their physical movements." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). The public has an interest in knowing whether difficult legal questions have been fairly raised and, if so, how they have been resolved by the courts.

Finally, even if the Government's analogy to warrant materials was sound, though the Third Circuit has not addressed the issue, other jurisdictions have held that the First Amendment right of access applies to warrant materials, at a bare minimum, when the particular investigation has concluded, *United States v. Loughner*, 769 F. Supp. 2d 1188, 1193 (D. Az. 2011), and even sooner where access can be provided without compromising legitimate interests, *see In re Gunn*, 855 F.2d at 573. As the Eight Circuit has explained, "although the process of *issuing* search warrants has traditionally not been conducted in an open fashion, the

search warrant applications and receipts are routinely filed with the clerk of court without seal." *Id.* (emphasis added); *see In re N.Y. Times*, 585 F. Supp. 2d at 88.

Logic too favors access to warrant materials because access to such records is "important to the public's understanding of the function of . . . the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct." *In re Gunn*, 855 F.2d at 573; *see also Criden II*, 675 F.2d at 557 (emphasizing the interest in exposing "the propriety of police conduct" to "public scrutiny"). To the extent disclosure at a certain stage of the investigation would jeopardize *bona fide* Government interests, that can be accommodated when asking whether the right has been overcome in a given case. *Cf. United States v. Sealed Search Warrants*, 868 F.3d 385, 395–96 (5th Cir. 2017) (explaining, in the common law context, that law enforcement interests "are not at all diluted by a case-specific approach").

In sum, for the same reasons the Government cannot overcome the common law presumption of access, it also falls short of the more rigorous obligation to show that "total restriction of the [constitutional] right of access" to Case No. 15-880 "is narrowly tailored to its compelling interests." *Id.* at 91.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Court enter an order unsealing the docket and other judicial records in Case No. 15-880.

Dated: February 23, 2021

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