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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE APPLICATION OF FORBES MEDIA LLC AND THOMAS BREWSTER TO UNSEAL COURT RECORDS	Misc. Case No. 3:21-mc-80017 Related to CR1690391 MISC EDL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICANTS' MOTION FOR DE NOVO DETERMINATION OF DISPOSITIVE MATTER REFERRED TO MAGISTRATE JUDGE** **Noticed Hearing:** **Date:** Thursday, June 24, 2021 **Time:** 1:30pm **Judge:** Hon. Phyllis J. Hamilton

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OBJECTIONS AND STATEMENT OF ISSUES

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and Civil L.R. 72-3, Applicants move for de novo determination of the Application of Forbes Media LLC and Thomas Brewster to Unseal Court Records ("Application") (ECF No. 1) referred to Magistrate Judge Thomas S. Hixson. Applicants object to the Report and Recommendation to Deny Petition ("Report") (ECF No. 17) on the following grounds:

1. The Report incorrectly concluded that the public's common law right of access does not attach to All Writs Act orders; applications for relief under the All Writs Act; motions to seal filed in an All Writs Act proceeding; sealing orders entered in an All Writs Act proceeding; and dockets in All Writs Act proceedings.

2. The Report incorrectly concluded, in the alternative, that the common law right of access was overcome with respect to the entirety of each document sought by the Application without considering alternatives to such wholesale sealing, including whether redaction would be feasible.

3. The Report incorrectly concluded that the public's First Amendment right of access does not attach to All Writs Act orders; applications for relief under the All Writs Act; motions to seal filed in an All Writs Act proceeding; sealing orders entered in an All Writs Act proceeding; and dockets in All Writs Act proceedings.

4. The Report incorrectly concluded, in the alternative, that the First Amendment right of access was overcome with respect to the entirety of each document sought by the Application without considering alternatives to such wholesale sealing, including whether redaction would be feasible.

INTRODUCTION

Applicants seek to unseal court records in CR1690391 MISC EDL relating to an order under the All Writs Act, 28 U.S.C. § 1651, that required a travel technology firm to assist the Government in effectuating an arrest warrant. Originally adopted in connection with the Judiciary Act of 1789, *see* Judiciary Act of 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82, the All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages principles of law," 28 U.S.C. § 1651. Though it can be invoked in a range of postures, the Act essentially "give[s] the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act in certain situations." 14AA Charles Wright et al., Fed. Prac. & Proc. Juris. § 3691 (4th ed. 2021). In other words, it authorizes courts to issue "injunctions in aid of their jurisdiction." *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993); *see also Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971).

Of particular interest to the public are All Writs Act orders that require private entities to provide the Government "technical assistance" in implementing surveillance. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 171 (1977). But while their subject matter may be unique, such orders are not different in kind from other equitable remedies available under the Act. *See Plum Creek Labor Co. v. Hutton*, 608 F.2d 1283, 1289 (9th Cir. 1979) (noting that an All Writs Act application for assistance in executing an administrative warrant was a request "to enjoin" the employer). As the Ninth Circuit has explained, technical assistance orders operate like status-quo-preserving injunctions: They ensure that the third-party's inaction does not thwart "the court's potential jurisdiction to receive an indictment," just as an appellate court can issue an injunction to protect its potential jurisdiction over a future civil action. *United States v. Mountain States Tel. & Telegraph Co.*, 616 F.2d 1122, 1129 n.7 (9th Cir. 1980) (citing *FTC v. Dean Foods*, 384 U.S. 597 (1966)).

That the public has a common law right—and indeed a constitutional right—to inspect judicial records filed in All Writs Act matters under Ninth Circuit precedent is, for the reasons discussed below, clear. And, contrary to the Report's conclusions, those presumptions of public access attach even if legitimate secrecy interests may in particular cases require redaction or sealing. After all, applications for equitable relief in the form of an injunction or mandamus have been litigated in open court since the founding. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137 (1803). The Ninth Circuit has already described the weighty public interests that support access to filings seeking (or orders granting) injunctive relief, which, like technical assistance orders under the All Writs Act, determine "substantive rights" and "invoke important Article III powers." *Ctr. for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1100 (9th Cir. 2016) (internal quotations and citations omitted). And, in a decision the Report makes no attempt to distinguish, this Court previously concluded that the common law presumption of access *does* attach to All Writs Act applications and orders, even when the order effectuates surveillance. *See In re Granick*, No. 16-mc-80206, 2018W L 7569335, at *11 (N.D. Cal. Dec. 18, 2018), *aff'd*, 388 F. Supp. 3d 1107, 1129–30 (N.D. Cal. 2019); *see also* United States' Response to Unsealing Petition at 16 ("Gov't Resp.") (ECF No. 12) (conceding that "language in *Granick* . . . could be interpreted to have found a common law interest in All Writs Act materials" but "contend[ing] that no such right exists").[1]

Nevertheless, the Report concludes that neither right attaches to any documents filed in an All Writs Act proceeding "ancillary to" a warrant proceeding that is, itself, properly sealed — whether those records are All Writs Act orders, All Writs Act applications, sealing motions and orders, or docket sheets. Report at 7. That conclusion is erroneous. For one, it is not how the right-

[1] In *Granick*, both the magistrate judge and this Court ultimately concluded that "administrative burden [overcame] the common law presumption of access to AWA materials" where the petitioners sought the unsealing of every such application filed in this District over a multi-year period. *In re Granick*, 388 F. Supp. 3d at 1129. That consideration is not implicated here; Applicants seek the unsealing of records in a single identified matter.

of-access framework works. Even the grand jury secrecy rule does not displace the public's presumptive rights as to every record in proceedings "ancillary to a grand jury investigation" — each category of document in such a proceeding must be examined in its own right. *United States v. Index Newspapers LLC*, 776 F.3d 1072, 1093 (9th Cir. 2014).[2] As a practical matter, too, All Writs Act proceedings and warrant proceedings bear little resemblance to each other. It cannot be the case that the same balance of interests governs a court's judgment about the scope of the All Writs Act, *see, e.g.*, *In re Apple*, 149 F. Supp. 3d 341, 344–76 (E.D.N.Y. 2016), and the sufficiency of a fact-bound probable-cause affidavit outlining reasons to think an individual committed a crime.

This Court should reject the Report. The public's rights of access—and certainly the common law right at minimum—attach to each category of documents sought by the Application. And the Government has not shown that its interests cannot be "accommodate[d] . . . by redacting sensitive information rather than" sealing "the materials entirely." *United States v. Business of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1195 n.5 (9th Cir. 2011). Because the Report does not make any finding whatsoever about the feasibility of redaction, *see* Report at 22 n.6, its recommendation must be rejected.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant Thomas Brewster is a journalist and associate editor for Forbes, where he covers surveillance and privacy issues. *See* Brewster Decl. ¶ 2 (ECF No. 13-1). On March 10, 2020, Mr. Brewster obtained an All Writs Act application and order from the public docket of the Southern

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[2] The Report's 'derivative' approach seems to have been an effort to follow *Granick*'s First Amendment analysis, but the Report misconstrued that decision. As this Court explained, and as discussed in more detail below, the Court's reason for not conducting a separate constitutional right-of-access analysis for All Writs Act filings in *Granick* was that the petitioners *themselves* had argued that their right to those documents was derivative of their right to access warrants and similar investigative materials — forfeiting any argument that All Writs Act proceedings are different. *In re Granick*, 388 F. Supp. 3d at 1129. The Report never mentions, let alone addresses, Applicants' arguments that the two kinds of proceedings are, in fact, very different.

District of California that, according to a clerk's stamp, had been unsealed on February 14, 2020. *See* Application, Ex. 1 at 1 (ECF No. 1-1); Brewster Decl. ¶ 2. The application requested an order compelling Sabre, a travel technology firm, "to provide representatives of the FBI complete and contemporaneous 'real time' account activity" for an individual subject to an arrest warrant, Application, Ex. 1 at 2 — what the Government refers to as a "hot watch" order, *id.* at 4.

Technical assistance orders to firms like Sabre are of keen interest to the public. In perhaps the highest-profile example, the Government in 2016 sought an order under the All Writs Act that would have required Apple to provide a means of bypassing security on an iPhone that belonged to one of the shooters in the San Bernardino attack. *See In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203* ("*In re San Bernardino iPhone*"), No. ED 15-0451M, 2016 WL 618401, at *1 (C.D. Cal. Feb. 16, 2016). Before it was mooted, that litigation sparked a wide-ranging debate on the legitimate scope of court-ordered technical assistance. *See, e.g.*, *Amicus Briefs in Support of Apple*, Apple (Mar. 2, 2016), https://perma.cc/PL6K-S6WZ (collecting filings opposing the order).

That controversy traces, in part, to the fact that the All Writs Act "is a residual source of authority to issue writs that are not otherwise covered by statute." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). In other words, the Government only applies for relief under the Act when it is not clear that Congress has authorized the step it wishes to take. Courts have therefore issued opinions and orders on either side of the recurring question of whether the Act permits a particular form of assistance. *Compare, e.g.*, *In re San Bernardino iPhone*, 2016 WL 618401, at *1, *with In re Apple*, 149 F. Supp. 3d at 344. To Applicants' knowledge, no published opinion addresses the propriety of the requested assistance the Government sought from Sabre. *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 asserted the legality of

hot watch orders but "cite[d] no decision approving the use of the All Writs Act for such purposes"). The unsealed application represented, though, that other courts had granted such relief, and it identified those matters by case number. *See* Application, Ex. 1 at 4.

In July 2020, Applicants published an article about the contents of the unsealed records from the Southern District of California, along with a complete copy. *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/E9NM-F68U (last visited May 10, 2021). And in January 2021, in an effort to better understand the reasoning of the courts that have granted such relief, Applicants moved to unseal records in matters cross-referenced in the unsealed application. *See* Application at 1; *In re Application of Forbes Media LLC and Thomas Brewster to Unseal Court Records*, No. 2:21-mc-52 (W.D. Pa. Jan. 25, 2021); *In re Application of Forbes Media LLC and Thomas Brewster to Unseal Court Records*, No. 2:21-mc-0007 (W.D. Wash. Jan. 25, 2021). Specifically, each application requested access to the court orders themselves; the Government's applications and supporting documents; and any other related judicial records, including motions and orders to seal, docket sheets, and any docket entries. *See* Application at 1.

Here, the Government opposed Applicants' requests in their entirety. *See* Gov't Resp. at 1. Startlingly, the Government also moved to seal the Application itself on the ground that the records Applicants obtained from the Southern District of California had been "resealed." *Id.* at 4.[3]

On April 26, 2021, Magistrate Judge Hixson issued a report and recommendation. Though he correctly rejected the Government's motion to seal or strike Applicant's filings, characterizing

[3] Specifically, the Government represented that the records were "mistakenly unsealed for a brief period in February 2020." Gov't Resp. at 3. That was misleading at best. The records remained available on the docket until at least March 10, 2020, when Mr. Brewster accessed them. Brewster Decl. ¶ 2. The Government has yet to explain when, exactly, it moved to 're-seal' those records, and that docket does not reflect a motion to seal. Brewster Decl., Ex. 1 (ECF No. 13-2).

that request as "a vain attempt to reclaim lost secrecy," he recommended that the Application be denied in its entirety. *See* Report at 22–23. This timely motion for de novo determination followed.

ARGUMENT

I. The public's common law right of access attaches to the All Writs Act documents sought to be unsealed by the Application.

In this Circuit, "[t]he law recognizes two qualified rights of access to judicial proceedings and records, a common law right 'to inspect and copy public records and documents, including judicial records and documents,' and a 'First Amendment right of access'" to certain judicial proceedings and the documents filed in them. *Custer Battlefield Museum*, 658 F.3d at 1192 (first quoting *Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589, 597 (1978), then quoting *Press-Enter. Co. v. Superior Court* ("*Press-Enterprise II*"), 478 U.S. 1, 8 (1986)). Because the analysis under the common law right is straightforward (and dispositive), Applicants address that framework first.

Under the common law, "[u]nless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mutual Auto. Insurance Co*., 331 F.3d 1122, 1135 (9th Cir. 2003)). The burden is on the the party defending secrecy to "articulate[] compelling reasons" to justify the continued sealing of the relevant records, *id.*, and to explain, in particular, why simply "redacting sensitive information" would be inadequate to accommodate any legitimate interests it can show, *Custer Battlefield Museum*, 658 F.3d at 1195 n.5.

The Ninth Circuit has cautioned in the strongest terms against expanding the category of documents "traditionally kept secret." Because the consequences of enlarging it are "drastic" when compared to accommodating secrecy interests on a case-by-case basis, *Kamakana*, 447 F.3d at 1185, the list includes only three entries—and the Ninth Circuit has not added one in nearly a decade, *see Dousa v. U.S. Dep't of Homeland Security*, No. 19-cv-1255, 2020 WL 4784763, at *2

(S.D. Cal. Aug. 18, 2020).[4] Moreover, precedent makes clear that merely showing that a document is law enforcement sensitive—or even that a balancing of relevant interests would "usually or often" result in a conclusion that such documents should be sealed—is insufficient to demonstrate that records of that kind are "traditionally kept secret." *Kamakana*, 447 F.3d at 1184–85. There must be a unique reason to conclude not just that the secrecy interests in question are "important," but also that that it would be unworkable to accommodate them in each "particular case . . . through a court's discretion either to release redacted versions of the documents, or, if necessary, to deny access altogether." *Custer Battlefield Museum*, 658 F.3d at 1194.

After acknowledging that courts must not "readily add classes of documents" to that rarified category, the Report recommends adding four: All Writs Act orders, All Writs Act applications, sealing motions and orders in All Writs Act proceedings, and docket sheets in All Writs Act proceedings. Report at 7 (quoting *Kamakana*, 447 F.3d at 1185). To Applicants' knowledge, there is no precedent in this or any other jurisdiction for the Report's conclusion that the common law presumption has no application to any of these—very different—categories of records. *Contra In re Granick*, 2018 WL 7569335, at *11, *aff'd*, 388 F. Supp. 3d at 1129.

A. In concluding that the common law presumption of access does not apply to any of the sealed records in CR1690391 MISC EDL, the Report erroneously failed to consider each type of document under seal as required by Ninth Circuit law.

As an initial matter, the Report went astray by failing to consider whether *each* type of sealed record at issue—All Writs Act orders, All Writs Act applications, sealing motions, sealing orders, and docket sheets—is 'traditionally kept secret.' Instead, the Report created an umbrella class of its own: any and all filings in an All Writs Act matter "ancillary to, and in furtherance of, the execution of an arrest warrant that [is] itself under seal," Report at 7. That was error.

[4] It includes only "grand jury transcripts, warrant materials during the pre-indictment phase of an investigation, and attorney-client privileged materials." *Dousa*, 2020 WL 4784763, at *2.

When determining if a right of access attaches to a specific type of document, courts look to that document's role in the legal process, not its (case-specific) subject matter. *See United States v. Smith*, 776 F.2d 1104, 1114 (3d. Cir. 1985). A motion for contempt and a contempt order, for instance, may draw on the same facts and be part of the same proceeding, but the Ninth Circuit has made clear they must be analyzed separately. *Index Newspapers*, 766 F.3d at 1093; *accord In re Application of the United States* ("*Applebaum*"), 707 F.3d 283, 290 (4th Cir. 2013) (separately analyzing certain electronic surveillance orders and the Government's motions for them); *In re Leopold to Unseal Certain Electronic Surveillance Orders*, 964 F.3d 1121, 1128 (D.C. Cir. 2020) (Garland, J.) (same). That approach is consistent with the core purpose of the common law and constitutional rights of access: to ensure the public can understand "the function and operation of the judicial process." *Custer Battlefield Museum*, 658 F.3d at 1194 (internal quotation omitted). Certain documents—like court orders—play distinctive roles in that process no matter what the underlying lawsuit happens to concern, and case-specific interests can always be accommodated by evaluating whether the right is overcome *in a given case* or *as to particular parts of documents.*

Applying that approach here, it is clear that the common-law right attaches to each category of document at issue. All Writs Act orders are court orders, and it is a commonplace that the right of access "applies with special force to judicial opinions" because of their role in declaring the law. *Lipocine Inc v. Clarus Therapeutics*, No. 19-622, 2020 WL 4569473, at *3 (D. Del. Aug. 7, 2020) (collecting cases). All Writs Act applications are motions for equitable relief, and applications for such relief "invoke important Article III powers"—regardless of the specific relief requested. *Ctr. for Auto Safety*, 809 F.3d at 1100 (internal quotation omitted). As for sealing motions and orders, though neither the Government nor the Report addressed that part of the Application, the Ninth Circuit has held that a right of access attaches to them "because the very issue at hand is whether the public should be excluded or included in various types of judicial proceedings." *Index Newspapers*,

766 F.3d at 1096; *see also United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017) (citing *In re Copley Press*, 518 F.3d 1022, 1026–28 (9th Cir. 2008)). Finally, court dockets, whatever the case caption, always provide the mechanism whereby the public receives the notice necessary to assert its rights of access in the first place. *See Index Newspapers*, 766 F.3d at 1092; *In re Leopold*, 964 F.3d at 1129. None of these categories has ever been properly kept secret by default, or else the gaps in the public's understanding of the court system would be staggering.

Of course, the common law presumption of access can be rebutted. A court order may contain properly classified information; the contents of a meritorious sealing motion may overlap with the contents of its properly sealed attachments; and a case caption may contain the name of an individual who has not yet been apprehended. But sealing is "not an all-or-nothing proposition." *Index Newspapers*, 766 F.3d at 1090. "[S]pecific references to the substance of . . . classified materials" can be separated from "general statements about the relevant law," *United States v. Ressam*, 221 F. Supp. 2d 1252, 1263 (W.D. Wash. 2002), and the names of individuals at large can be redacted. Put differently, the relevant determination is whether the Government has carried its burden to overcome the right of access to a court order, or a portion thereof, not whether 'court orders that reference individuals who have not yet been arrested' is a category of documents traditionally kept secret. *See, e.g., In re Reporters Comm. for Freedom of the Press to Unseal Criminal Prosecution of Julian Assange*, 357 F. Supp. 3d 528, 535 (E.D. Va. 2019). So too here. 'Documents filed in an All Writs Act proceeding ancillary to the execution of a warrant in an ongoing investigation' is not a category of documents 'traditionally kept secret.' It is a description gerrymandered to avoid application of the common law presumption of access as to the All Writs Act documents currently under seal in CR1690391 MISC EDL.

B. <u>The Report applied the wrong legal framework to determine, erroneously, that All Writs Act proceedings ancillary to a warrant proceeding are traditionally kept secret.</u>

Even assuming arguendo that the Report's failure to separately consider application of the common law right of access to each type of record under seal in CR1690391 MISC EDL was not legal error—it was, *see Index Newspapers*, 766 F.3d at 1093—the Report should still be rejected. The Report offers two explanation for its conclusion that no common law right of access applies to All Writs Act ancillary to a sealed warrant proceeding. First, it argues, "the Government's under seal *ex parte* statement makes clear that the AWA Materials in *this* ongoing investigation are comparable to warrant materials during the pre-indictment stage of an ongoing criminal investigation," which the Ninth Circuit has concluded are traditionally kept secret. Report at 17 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1215 (9th Cir. 1989)) (emphasis added). But a conclusion that a "class[]" of documents is traditionally kept secret must be based on facts about the class, not facts contained in a particular record in a particular case. *Kamakana*, 447 F.3d at 1185. Whatever is in the Government's *ex parte* statement of facts, its characterizations of *these* records cannot support a finding that All Writs Act proceedings in general are traditionally secret.

Moreover, and more fundamentally, All Writs Act proceedings—whether ancillary to the execution of a warrant or not—are not comparable or analogous to warrant proceedings. Even when the subject matter is compelled surveillance, All Writs Act proceedings function like other All Writs Act proceedings seeking equitable relief. *See* Jennifer X. Luo, *Decoding Pandora's Box: All Writs Act and Separation of Powers*, 56 Harv. J. Legis. 257, 274 (2019) (noting that a technical assistance order "functions rather like a writ of mandamus"). The Report's suggestion, for instance, that the proceedings are comparable to warrant proceedings because of "[t]he *ex parte* nature of the application," Report at 8, and the lack of "adversary proceedings" is simply incorrect, *id.* at 7 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 321 (1972)). Though entities often have business reasons not to contest an order, *see* Luo, *supra*, at 278–79, technical assistance proceedings are adversarial: As the Ninth Circuit and other courts have held, an entity is entitled to "notice and

an opportunity to be heard prior to the entry of any order compelling its assistance," just as it would generally be entitled to an opportunity to be heard on objections to being bound by any other injunction. *Mountain States*, 616 F.2d at 1123; *In re Installation of a Pen Register or Touch–Tone Decoder & Terminating Trap*, 610 F.2d 1148, 1157 (3d Cir. 1979). Hence the popular shorthand for the San Bernardino case — 'Apple v. FBI.' *See, e.g.*, Elizabeth Weise, *Apple v. FBI Timeline: 43 Days that Rocked Tech*, USA Today (Mar. 15, 2016), https://perma.cc/YV85-3R3G.

Likewise, All Writs Act and warrant proceedings do not "have similar ends." Report at 8. In the warrant context, the court's role is to determine whether the facts in the application amount to probable cause; other objections to the search can be resolved at a suppression hearing to which the public has a right of access. *See United States v. Brooklier*, 685 F.2d 1162, 1169–71 (9th Cir. 1982). Thus, even where compelling interests overcome the right of access to warrant materials *before* the warrant is executed, the public's entitlement to understand the search is deferred but not wholly denied. *See Times-Mirror*, 873 F.2d at 1218 (measuring the "incremental value" of access pre-indictment relative to the access provided by suppression hearings). An All Writs Act proceeding, by comparison, is the proper forum for objections to the validity of the order sought. It may be the *only* forum for those objections because it remains unsettled whether a defendant is entitled to suppression where an All Writs Act order was obtained in violation of the rights of the technology provider. *See United States v. Baker*, 868 F.3d 960, 969–70 & n.4 (11th 2017). Thus, the consequences of denying access to the two proceedings differ dramatically when it comes to the public's opportunity to understand the legal basis for any relief that was ordered by the court.

These differences also highlight why the contents of records in an All Writs Act proceeding differ meaningfully from warrant materials. Even where the Government proposes an unusual search or seizure, a warrant application will typically consist of investigative facts, not constitutional arguments. *See, e.g.*, Affidavit, *In re Application for a Warrant to Search Certain*

Microsoft Exchange Servers Infected with Web Shells, No. 4:21-mj-755 (S.D. Tex. Apr. 9, 2021) (applying for authorization to delete malware from infected devices without explaining how the operation amounted to a "seizure"). But this Court need only look to the example of the All Writs Act application filed in the Southern District of California to see that material specific to that investigation consists of a limited, segregable portion of the document. There is no reason to bar courts from attempting to balance, say, the interest in concealing through redaction the identity of the specific individual sought, *see* Application, Ex. 1 at 1, and the public's interest in understanding the Government's characterization of governing law and the existence of relevant precedent supporting their request for a technical assistance order under the All Writs Act, *id.* at 3–4.[5]

Courts routinely strike just that balance. An instructive example is *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant* ("*In re Apple I*"), 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 order that would have required Apple to break the encryption on one of its devices. *See* Motion to Compel, *In re Apple I*, 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 entitlement to that novel relief. *See In re Apple I*, 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," allowing the public to understand the issues at stake. Memorandum and Order, *In re Apple*, No. 1:15-mc-01902 (Oct. 9, 2015) (ECF No. 3). But a conclusion that All Writs Act filings are "traditionally kept secret" would rule out that sort of accommodation, denying that any balance can be reached when clearly one can.

[5] For two more examples that demonstrate the same features, see Motion to Compel at 1–3, *In re Apple*, No. 1:15-mc-01902 (E.D.N.Y. Oct. 9, 2015) (ECF No. 1); Application, *In re One Gray and Black Colored Apple iPhone*, No. 1:16-mj-02007 (D. Mass. Feb. 1, 2016) (ECF No. 6).

As an alternative justification for its conclusion, the Report notes that it "found no First Amendment right of access to the AWA Materials under its own analysis, and '[t]he First Amendment is generally understood to provide [a] stronger right of access than the common law.'" Report at 17 (quoting *Doe*, 870 F.3d at 997). As discussed below, Applicants disagree with the Report's First Amendment analysis, but in any event the point is a non-sequitur. The First Amendment right is "stronger" in the sense that it is harder to overcome. *Compare Kamakana*, 447 F.3d at 1178, *with Custer Battlefield Museum*, 658 F.3d at 1197 n.7. But, as to whether a right of access attaches in the first place, the common law's reach is broader. *See, e.g.*, *United States v. Sealed Search Warrants*, 868 F.3d 385, 389 n.1 (5th Cir. 2017) (common law right can attach "[e]ven absent a finding of a First Amendment right of access"); *Applebaum*, 707 F.3d at 290. As a result, courts frequently conclude that a document to which they find no First Amendment right of access is subject to the common law right, as *In re Granick* concluded in the specific context of All Writs Act materials. *See* 2018 WL 7569335, at *11; *Applebaum*, 707 F.3d at 290–92.

In short, neither of the Report's proffered justifications in fact justify a finding that each category of documents sought by the Application has "traditionally been kept secret," and this Court should reject its conclusion that the common law presumption of access does not attach to them.

II. The Government has not met its burden to demonstrate that the common law presumption of access is overcome as to the entirety of the records at issue.

Where, as here, the common law presumption of applies, the court's obligation to "'conscientiously balance the competing interests' of the public and the party who seeks to keep judicial records secret" entails considering alternatives to wholesale sealing, including redaction. *Kamakana*, 447 F.3d at 1179 (quoting *Foltz*, 331 F.3d at 1135); *see also Foltz*, 331 F.3d at 1136–37; *Custer Battlefield Museum*, 658 F.3d at 1195 n.5; *United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998). It should be plain, too, that the answer to how much to disclose here is 'more than nothing.' For one, some of the information at issue necessarily overlaps with what is already

public. Unless the Government's suggestion is that it made misrepresentations to the district court in the Southern District of California, there can be no dispute that Case No. CR1690391 MISC EDL exists, that it concerns an All Writs Act order entered by this Court in 2016, that the order required Sabre "to assist in effectuating" an arrest warrant, and that Sabre "complied." Application, Ex. 1 at 4. The records almost certainly contain, too, even more content that the Government could not possibly demonstrate must be kept under seal. The Government cannot claim a secrecy interest in characterizing the *New York Tel. Co.* framework, for instance, *see id.* at 3–4, or in any description of the existence of hot watch techniques, *see id.* at 2, 4. And any interest in concealing references to courts that have granted similar relief is de minimis at most; the bare fact that an All Writs Act order was entered in a particular jurisdiction in a particular year could not "alert" any specific individuals to the fact that they are under investigation. Report at 8.

As to the remaining portions of the documents at issue, the notion that the risk of "giv[ing] criminal actors information needed to thwart future efforts to use similar techniques" must always defeat disclosure of previously undisclosed information about what the Government and the courts believe the scope of the All Writs Act to be sweeps far too broadly. Report at 15. On that theory, the Supreme Court should have resolved *New York Tel Co.* itself in a sealed opinion, and the public should not know whether authorities had the power to use the Act to require installation of a pen register. The compelled decryption questions at issue in the San Bernardino case, too, should have been litigated in secret. *Contra, e.g.*, James Comey, *Encryption, Public Safety, and 'Going Dark'*, Lawfare (July 6, 2015), https://perma.cc/HH6M-YLAY (emphasizing the then-FBI Director's view that "[d]emocracies resolve such tensions through robust debate"). The consequences of that view, if adopted by this Court, would be perverse; the whole point of an All Writs Act proceeding is to adjudicate whether an investigative technique is lawful and permissible. On the Government and the Report's theory, the Government could lose any number of sealed cases, continue to shop for an

amenable court, and then trumpet that result in its other applications—steadily and quietly building up a body of secret law in its favor without generating any adverse public precedent.

These same considerations foreclose the Report's suggestion that the interest in ensuring that a particular warrant "is successfully executed" will always trump the public's interest in disclosure until that warrant is, in fact, executed and the investigation is over. Report at 21. By definition, an application for assistance in executing a warrant is made—and acted upon—before the warrant is executed. Under the Government's theory, then, the public could never learn of controversial assertions of authority under the All Writs Act until it is too late to meaningfully engage with the issues raised. *Contra, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (stressing that the public's right of access is a "*contemporaneous* right of access") (emphasis added); *cf. Courthouse News Serv. v. Planet* ("*Planet III*"), 947 F.3d 581, 592 (9th Cir. 2020) ("Citizens could hardly evaluate and participate in robust public discussions about the performance of their court systems if complaints—and, by extension, the very existence of lawsuits—became available only after a judicial decision had been made."). Because that approach would make little sense, courts do not, in fact, adhere to it, instead requiring redaction of sensitive investigative facts from what may be necessary to allow the public to understand the legal issues presented—even where a warrant is still unexecuted. *See, e.g., United States v. Burns*, No. 1:18-cr-492-1, 2019 WL 2079832, at *1 & n.1 (M.D.N.C. May 10, 2019).

Despite the obvious feasibility of balancing these considerations through redaction, the Government never addressed redaction in its opposition, and the Report mentions the issue only in a passing footnote, saying it declines to consider redaction because Applicants purportedly "d[id] not develop that argument," Report at 22 n.6. For this reason too, the Report should be rejected.

As an initial matter, Applicants asserted from the outset that any justification for continued sealing that the Government proffered would need to confront the alternative of redaction. *See*

Memorandum of Points and Authorities in Support of Application to Unseal Court Records at 16 (ECF No. 1-2). Applicants could not have explained in their Application line-by-line how the Government's asserted interests could be addressed by redaction because Applicants did not know what interests the Government would assert, or even if the Government would oppose disclosure. Once the Government opposed the Application, Applicants addressed why the Government's stated concerns could not plausibly extend to the entirety of the documents sought to be unsealed, and that redaction should be sufficient. *See* Reply in Support of Application to Unseal Court Records at 6–9, 15 (ECF No. 13). In any event, it was the Government's burden—not Applicants'—to propose appropriate redactions; the presumption of access attaches to the documents in their entirety and prevails to the extent it goes unrebutted with respect to any portion of them. *See Kamakana*, 447 F.3d at 1178. And, as the current Attorney General explained while serving as Chief Judge of D.C. Circuit, redaction "is a task best undertaken (or at least proposed) by the governmental entity that submitted [a] surveillance application in the first place." *In re Leopold*, 964 F.3d at 1134 n.14.

It is ultimately the Court's responsibility, too, to measure the parties' representations about the interests at stake against the documents as they actually exist and to consider alternatives to wholesale secrecy. Applicants cannot be the ones to conduct the "document by document, line by line balancing" of competing values that the common law requires; they do not have access to the sealed records. *Binh Hoa Le v. Exeter Finance Corp.*, 990 F.3d 410, 419 (5th Cir. 2021) (internal quotations and citations omitted); *see also In re Leopold*, 964 F.3d at 1334 (emphasizing that "[p]roviding public access to judicial records is the duty and responsibility of the Judicial Branch"). The Report erred in shifting that burden to Applicant and by refusing to consider redaction.

III. The public's First Amendment right of access attaches to the All Writs Act documents sought to be unsealed by the Application.

The Report also errs in concluding that no First Amendment right of access attaches to any of documents sought to be unsealed by Applicants. In answering that question, courts look to the

complimentary considerations of "experience and logic"—that is, "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8, 9. As the Ninth Circuit has explained, "[w]here access has traditionally been granted to the public without serious adverse consequences, logic necessarily follows." *In re Copley Press*, 518 F.3d at 1026 n.2. But "even without an 'unbroken history of public access,' the First Amendment right" will attach "if 'public scrutiny' would 'benefit' the proceedings." *Id.* (quoting *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516–17 (9th Cir. 1988)).

Here, the Report's error mirrors the flaw in its common law analysis: It failed to apply the First Amendment framework to "*each* category of documents," *Index Newspapers*, 766 F.3d at 1084 (emphasis added), instead analogizing all of the documents as a lumped-together whole to warrants, Report at 7–8. Again the Report's only support for this approach—which is otherwise inconsistent with Ninth Circuit precedent—is *In re Granick*, where this Court made clear that its analysis was driven by the petitioners' forfeiture of any claim that All Writs Act materials are distinct from warrant materials. 388 F. Supp. 3d at 1129; *see supra* at 4 n.1. When each is properly viewed as distinct, history and logic support access to the relevant categories—All Writs Act orders, All Writs Act applications, sealing motions and orders, and dockets—for the reasons stated above. *See supra* at 8–18. The All Writs Act has a history that traces back to the Founding—it was not born again when *New York Tel. Co.* was decided in 1977—and experience and logic have traditionally justified access to hearings under the All Writs Act seeking such injunctive relief.

The Report's First Amendment analysis differs from its common law analysis in only one meaningful way: It addresses docket sheets separately. *See* Report at 6 n.1 But there, too, the Report errs, concluding that the question of access to the underlying materials should control access to the docket. *Id.* at 12. Public access to docket sheets, though, serves a vital purpose even when

the underlying documents reflected on that docket are properly sealed because the docket provides the public notice and an opportunity to present arguments to the contrary. *See, e.g., Pub. Citizen*, 749 F.3d 267 (noting that parties cannot oppose "closure of a document or a proceeding that is itself a secret"); *Brooklier*, 685 F.3d at 1167–68 (emphasizing that "those excluded from [a] proceeding must be afforded a reasonable opportunity to state their objections"). Where a court fails to take "reasonable steps to make knowledge of the pendency of [a sealing motion] available," the Ninth Circuit has warned, the public will only ever "fortuitously" be in position to assert its rights, and plausibly meritorious claims risk dying in secret. *Id.* at 1171. That is, of course, exactly what unfolded here; Applicants were able to present their arguments for unsealing only because this matter was referenced in a different public record. Neither history nor logic supports such a regime, which will lead inevitably to the sealing of material that cannot lawfully be sealed. The public has an independent constitutional right to inspect the Court's docket.

IV. The Government has not met its burden to demonstrate that the First Amendment right of access is overcome as to the entirety of the records at issue.

Finally, as the Report notes, the First Amendment right is "stronger" than the common law presumption of access. Report at 17 (quoting *Doe*, 870 F.3d at 997). As a result, to the extent the Government has failed to justify blanket sealing under the common law, it has failed to show that such secrecy is "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest." *Custer Battlefield Museum*, 658 F.3d at 1197 n.7 (internal quotation omitted).

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court reject the recommendations of the Report and enter an order unsealing the records sought by the Application.

Dated: May 10, 2021

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