Nos. 21-16233, 21-35612

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORBES MEDIA LLC
and THOMAS BREWSTER

Petitioners-Appellants,

v.

UNITED STATES,

Respondent-Appellee,

On Appeal from the United States District Court for the
District of Northern California
Case No. 4:21-mc-80017-PJH (The Honorable Phyllis J. Hamilton), and;

The United States District Court for the
Western District of Washington
Case No. 2:21-mc-00007-RSM (The Honorable Ricardo S. Martinez)

PETITIONERS-APPELLANTS' CONSOLIDATED OPENING BRIEF

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Katie Townsend
Counsel of Record for Petitioners-Appellants
Grayson Clary
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

Jean-Paul Jassy
JASSY VICK CAROLAN, LLP
355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
Telephone: (310) 870-7048
Facsimile: (310) 870-7010

Ambika Kumar
DAVIS WRIGHT TREMAINE LLP
920 Fifth Ave., Suite 330
Seattle, WA 98104-1610
Telephone: (206) 757-8030

CORPORATE DISCLOSURE STATEMENT

Forbes Media LLC is a privately owned company with no parent corporation; no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

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 and principles of law," 28 U.S.C. § 1651. These consolidated appeals arise out of applications by journalist Thomas Brewster and Forbes Media LLC ("Petitioners-Appellants") to unseal three particular All Writs Act orders requiring a private travel technology firm to help the Government execute arrest warrants, along with several other categories of judicial records filed in connection with those orders. *See* ER-11. Petitioners-Appellants have already reported that the Government obtained that relief in these cases using the All Writs Act, *see* Thomas Brewster, *The FBI Is Secretly Using a $2 Billion Travel Company as a Global Surveillance Tool*, Forbes (July 16, 2020, 7:10 AM), https://perma.cc/R96R-AXL9 ("Sabre Article"), and the Government has since acknowledged as much in its filings, *see* ER-79. But Petitioners-Appellants seek to unseal—so that members of the public can understand—the *reasoning* underlying each court's conclusion that the Act authorizes this relief.

The public's presumptive right to inspect these judicial records should not be controversial. It is clear under this Circuit's precedent: This Court has already held that a "strong" common law presumption of public access attaches to

injunctive-relief filings, *Ctr. for Auto Safety v. Chrysler Grp.*, 809 F.3d 1092, 1101 (9th Cir. 2016), and that a technical-assistance order under the All Writs Act is a "writ in the nature of a mandatory injunction," *Application of the United States*, 427 F.2d 639, 643 (9th Cir. 1970); *see also Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289 (9th Cir. 1979). And the public's right to understand courts' interpretation of the statute is all the more clear in principle. Because "[e]very citizen is presumed to know the law," it typically "needs no argument to show . . . that all should have free access to its contents," *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (quotation omitted), and even "the judge who enjoined publication of details of the hydrogen bomb's construction managed to explain his decision to the public," *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 30 (7th Cir. 1995) (Easterbrook, J., in chambers). If the Government has an interest in concealing some specific fact contained in the materials at issue here—say, the name of a particular individual to be arrested—"courts can accommodate these concerns by redacting sensitive information rather than refusing to unseal the materials entirely." *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1195 n.5 (9th Cir. 2011) (collecting comparable examples).

But the district courts concluded that not a single line on a single page of a single record can be disclosed because, the Government maintained, the orders necessarily discuss what "methods of gathering information" the federal courts

have authorized. ER–18; *see also* ER-20 (opposing disclosure of "any part of law enforcement's technique"). In other words, because a court's interpretation of the Act would necessarily clarify what assistance the Government can and cannot lawfully demand, the Government believes such orders should become public only if and when it suits the Government's interests, with no safeguards in place "to ensure that AWA proceedings are not forever sealed off from public review." ER-19. Neither practice nor common sense supports that rule. That degree of secrecy would deny Congress the insight necessary to craft better-tailored legislation, courts the benefit of other courts' reasoning, private firms the means to effectively oppose the imposition of orders under the All Writs Act, and the public any means of "keep[ing] a watchful eye on the workings of public agencies" that invoke the Act to compel private entities to provide the Government with ever more novel forms of assistance. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978).

This Court should reject that stark departure from precedent and principle. The common law and First Amendment presumptions of public access apply to each of the categories of judicial records that Petitioners-Appellants sought to have unsealed, and the Government has not met its burden to show that nothing short of wholesale sealing is necessary to accommodate any countervailing interests. Petitioners-Appellants respectfully urge this Court to reverse the district courts' decisions to the contrary and remand with instructions requiring unsealing of the

All Writs Act materials at issue, subject only—to the extent necessary—to any tailored redactions that are demonstratively necessitated by compelling, countervailing interests. *See In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1134 n.14 (D.C. Cir. 2020) (Garland, J.).

STATEMENT OF JURISDICTION

The district courts had jurisdiction under 28 U.S.C § 1331, and each court "has supervisory power over its own records," *Nixon*, 435 U.S. at 598. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, as each appeal was taken from a final order entered by the district courts. Petitioners timely filed notices of appeal in the Northern District of California and the Western District of Washington on July 26 and July 28, 2021. *See* ER-87, ER-88; Fed. R. App. P. 4(a)(4)(A)(iv).

STATEMENT OF THE ISSUES

I. Whether the common law presumption of access to judicial records attaches to All Writs Act orders; applications for injunctive relief under the All Writs Act; motions to seal and sealing orders entered in an All Writs Act proceeding; and docket sheets and entries in an All Writs Act proceeding.

II. Whether the Government has met its burden to overcome the common law presumption of access by demonstrating that compelling reasons justify the wholesale sealing of every record that Petitioners sought to unseal in these matters.

III. Whether the First Amendment presumption of access to judicial records attaches to All Writs Act orders; applications for injunctive relief under the All Writs Act; motions to seal and sealing orders entered in an All Writs Act proceeding; and docket sheets and entries in an All Writs Act proceeding.

IV. Whether the Government has met its burden to overcome the First Amendment presumption of access by demonstrating that wholesale sealing of every record that Petitioners sought is narrowly tailored to a compelling interest.

STATEMENT OF THE CASE

I. The Government's use of the All Writs Act to enjoin Sabre to provide technical assistance in the execution of arrest warrants.

Since the Founding, the All Writs Act has extended to 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 Arthur D. Miller, Fed. Prac. & Proc. Juris. § 3691 (4th ed. 2021). In other words, the Act 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 public interest—and recurring public controversy—are All Writs Act orders that require private firms to provide the Government with "technical assistance" in conducting criminal investigations. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 171 (1977); *see also, e.g.*, Kate Knibbs, *The 227-Year-Old Statute Being Used to Endanger Your Privacy, Explained*, Gizmodo (Feb. 18, 2016, 9:35 AM), https://perma.cc/AVP4-B9C5.

Petitioner-Appellant Thomas Brewster is a journalist and associate editor for *Forbes*, where he covers surveillance, cybersecurity, and privacy issues. *See* ER-9. Mr. Brewster routinely reviews and reports on the contents of court records to inform the public about—among other issues of clear public concern—the scope of the Government's judicially authorized investigative authority. *See, e.g.*, Thomas Brewster, *The FBI Is Locating Cars by Spying on Their WiFi*, Forbes (July 22,

2021, 1:35 PM), https://perma.cc/2AVV-C2M5. On March 10, 2020, Mr. Brewster came across an application for an All Writs Act order on the public docket of the U.S. District Court for the Southern District of California that, according to a clerk's stamp on the document, had been unsealed on February 14, 2020. *See* ER-10. 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 then subject to an active arrest warrant—what the Government calls a "hot watch" order. *Id.* at 4.

All Writs Act 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 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 terrorist attack. *See In re Search of an Apple iPhone Seized During 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 public 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 court filings opposing the order).

That robust debate traces, in substantial part, to the fact that "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." *Pa. 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 whether the Act permits a particular form of conscripted assistance. *Compare, e.g., In re San Bernardino iPhone*, 2016 WL 618401, at *1 (ordering Apple to provide assistance in circumventing its encryption), *with In re Apple, Inc.*, 149 F. Supp. 3d 341, 344 (E.D.N.Y. 2016) (concluding that the Act did not permit a comparable order).

To Petitioners-Appellants' knowledge, no published opinion addresses the propriety of the assistance the Government sought from Sabre in particular. *Cf. In re Application of the United States for an Order Authorizing the Use of a Pen Register & a Trap & 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 application that Mr. Brewster found, though, showed that other courts had issued similar orders to Sabre and identified each by docket number. *See* ER-10.[1]

[1] The dockets are GJ19-097 and GJ17-432 in the Western District of Washington and CR1690391MISC EDL in the Northern District of California.

II. Petitioners-Appellants' applications to unseal the Sabre materials.

In July 2020, understanding that the assistance Sabre provided was newsworthy, Petitioners-Appellants published an article about the application from the Southern District of California, including a copy. *See* Sabre Article, *supra*; All Writs Act Order on Sabre to Give Real Time Updates on Travel of Suspect, DocumentCloud, https://perma.cc/F3Y3-MDMW (last visited January 3, 2021).

As Mr. Brewster's reporting explained, Sabre "processes well over a third of all air travel bookings in the world" and a range of related transactions; it thus "sit[s] on huge networks and databases full of information on the world's travel plans: itineraries, fares, reservations, connecting flights and ticket costs are all there, as are crew schedules and other logistical information." Sabre Article, *supra*. Because the company is one of the largest players in its industry, few travel itineraries avoid contact with Sabre's systems: "Anyone who's ever booked a holiday will likely have been facilitated by the Texan company's technology." *Id.* The assistance that the Government obtained therefore represents "a particularly powerful snooping option" compared to seeking records from individual airlines or hotels. *Id.* But the legal experts to whom Mr. Brewster spoke also found the All Writs Act order "legally questionable," as well as "unusual and excessive." *Id.*

In January 2021, to better understand the reasoning of the courts that have entered such orders, Petitioners-Appellants moved to unseal court records in

matters cross-referenced in the unsealed application that had been filed in the Southern District of California. *See* ER-11; *see also 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 particular, each application requested access to the All Writs Act orders themselves; the Government's applications and supporting documents; and any other judicial records related to the All Writs Act orders, including motions and orders to seal and the relevant docket sheets. *See* ER-11.

III. The Government's opposition to any degree of disclosure.

In each jurisdiction, the Government opposed Petitioners-Appellants' motions in their entirety. *See* ER-5, ER-11. Startlingly, in each matter now on appeal, the Government also moved to seal Petitioners-Appellants' own filings on the theory that the records from the Southern District of California that Mr. Brewster obtained from a public docket—and that had already been published online months earlier—were purportedly "resealed" at some point. ER-74.[2]

[2] Specifically, the Government represented that the records were "mistakenly unsealed for a brief period in February 2020." United States' Response to Unsealing Petition at 3, *Forbes Media LLC v. United States*, No. 4:21-mc-80017 (N.D. Cal. Feb. 16, 2021), ECF No. 12. That was misleading at best. The records remained available until at least March 10, 2020, when Mr. Brewster came across them. ER-9. The Government has never explained when or whether it moved to "reseal" those records; the docket in the matter in the Southern District of California does not reflect a motion to seal or any order "resealing" them. *See* Docket, *United States v. Kher*, No. 3:19-cr-04643 (S.D. Cal. Mar. 23, 2021).

In the proceedings in the U.S. District Court for the Northern District of California, the Government's opposition refused to confirm whether any of the records Petitioners-Appellants sought existed, and the Government—without submitting a corresponding motion to seal—submitted its own separate, sealed statement of facts *ex parte*. ER-11. Petitioners moved to unseal that filing for the reasons in the initial application, a motion the Government opposed. ER-11.

In the Western District of Washington, the Government acknowledged that the records exist and confirmed Petitioners-Appellants' characterization of their contents—namely, that the All Writs Act orders were issued to Sabre and compelled the company to provide information about individuals subject to arrest warrants. *See* ER-79. The Government further represented that the investigations remained ongoing because the individuals are foreign nationals who "reside in countries that would not honor a United States extradition request." ER-80.

IV. The district courts' decisions.

On April 26, 2021, a magistrate judge of the Northern District of California recommended that the district court deny Petitioners-Appellants' application, Petitioners-Appellant's motion to unseal the Government's *ex parte* statement of facts, and the Government's motion to seal Petitioners-Appellants' filings. *See* ER-75. Petitioners-Appellants timely filed objections to the Report & Recommendation. *See* ER-11. In a footnote to its opposition, the Government

attempted to introduce its own objection to the magistrate judge's recommendation that its motion to seal Petitioners-Appellants' filings be denied. *See* ER-21. The district court held a hearing on the objections on June 24, 2021. *See* ER-10.

On July 13, 2021, the district court for the Northern District of California issued one of the decisions under review, overruling Petitioners-Appellants' objections to the Report & Recommendation but rejecting the Government's effort to seal Petitioners-Appellants' filings. As to the merits, the court declined to "engage in the intellectual gymnastics necessary to decide on the continued sealing of documents that may not exist" and confirmed that they do, in fact, exist. ER-10 n.2. But the district court concluded that neither a First Amendment nor a common law presumption of access attached to any of the records and, in the alternative, that either presumption was overcome as to the records in their entirety. *See* ER–9.

On the question of whether a First Amendment presumption of access attaches, the court rejected Petitioners' argument that this Circuit "appl[ies] the experience and logic test to each category of documents sought," *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014), and instead treated each category of documents at issue—from the Government's applications to the courts' own orders—as one and the same. The district court then framed the analysis as whether logic and experience favor "access to proceedings involving third-party assistance in the execution of a sealed arrest warrant" without

distinguishing between any of the documents sought. ER-14. The district court answered its umbrella question in the negative because All Writs Act materials that relate to a warrant "may discuss confidential informants, cooperating witnesses, wiretap investigations, grand jury matters, and sensitive law enforcement techniques." ER-15. In the alternative, assuming that the First Amendment presumption of access attached, the district court concluded that the same secrecy concerns amounted to "compelling governmental interests" that would "necessitate . . . continued non-disclosure while the investigation remains ongoing[.]" ER-16.

As to the common law, the district court again rejected the suggestion that different categories of documents should be analyzed separately as "tunnel-visioned parsing." ER-18. Instead, the court concluded that all the judicial records Petitioners-Appellants moved to unseal are "'warrant materials in the midst of a preindictment investigation,' which the Ninth Circuit has said are not subject to a common-law right of access." ER-18 (quoting *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1186 (9th Cir. 2006)). In the alternative, the court concluded that, assuming it applied, the presumption would be overcome because "granting the public access to these documents would provide criminal wrongdoers insight into the investigation and a roadmap to avoid apprehension." ER-18.

The district court acknowledged that the application "raises important issues related to public access and government transparency." ER-18. And the district

court recognized that "[s]ome transparency is . . . necessary to ensure that AWA proceedings are not forever sealed off from public review," which its disposition of the merits of the application would not provide. ER-19. The court declined, though, to adopt the less restrictive alternative of redaction. Without explaining why redaction would be infeasible, the court reiterated its general conclusion that "[a]s described above . . . the government's interests in preserving the confidentiality of its materials related to an ongoing criminal investigation outweighs both presumptions of public access." ER-20. Instead, the court ordered the Government "to give notice when its investigation has closed or has become public" so that "Petitioners may file a new application to unseal" the records. ER-20. "To ensure some ongoing accountability," the court further ordered the Government to file a certification as to the investigation's status on an annual basis on the first business day of July, beginning July 1, 2022. ER-20.

Finally, as to the Government's effort to seal Petitioners-Appellants' filings, the district court concluded that the Government's "footnoted attempt" to introduce its own objection was "procedurally defective" and, regardless, meritless. ER-21.

One week later, on July 21, 2021, the district court in the Western District of Washington denied the application without a hearing on substantially identical grounds, *see* ER-4–8, and struck the motion to seal Petitioners-Appellants' filings

as moot, *see* ER-8. The court did not, as the Northern District of California had, require the Government to disclose when the investigations end or become public.

These appeals timely followed. *See* ER-87, ER-88.

SUMMARY OF ARGUMENT

Public access to a court's orders—"the 'quintessential business of the public's institution'"—is the most basic and fundamental guarantee of the public's right of access to judicial records. *In re Leopold*, 964 F.3d at 1128. And as this Court has elaborated, such access is especially urgent when a court acts on an application for extraordinary relief. *See Ctr. for Auto Safety*, 809 F.3d at 1100. Those "important Article III powers" can be used, after all, "to . . . police the separation of powers in times of domestic and global instability" or "determine life and death," *id.* at 1100–01 (internal citation omitted), and they can be used, as here, to require that private firms assist the Government in controversial investigative efforts, *see N.Y. Tel. Co.*, 434 U.S. at 171. Questions about the legitimate scope of that power under the All Writs Act may be sensitive and complex, but this Court has answered them in public decisions in order to inform public debate.[3] "People in an open society do not demand infallibility from their

[3] *See, e.g.*, *Application of the United States*, 427 F.2d at 639; *Plum Creek Lumber Co.*, 608 F.2d at 1283; *United States v. Mountain States Tel. & Tel. Co.*, 616 F.2d 1122 (9th Cir. 1980); *cf. In re Application of the United States for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d

institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

The district courts nevertheless endorsed a rule that not only conceals the All Writs Act orders at issue here, but would also ensure more broadly that this consequential class of records is "categorically shielded from the public right of access." *Ctr. for Auto Safety*, 809 F.3d at 1101. In each decision, the core error was to treat "each category of documents" that Petitioners-Appellants sought access to, *Index Newspapers LLC*, 766 F.3d at 1084, as if all were unexecuted warrants, *see* ER-18 (treating each category of records like "warrant materials"). Even if that lump sum approach were permissible under this Circuit's law—it isn't—All Writs Act orders are not warrants.[4] Even when the relief sought is technical assistance, All Writs Act proceedings function like other injunction proceedings designed to air legal argument—not warrant proceedings designed to ensure the Government has shown probable cause. And the suggestion that the very same balance of interests governs a fact-bound probable-cause affidavit and a federal court's reasoned interpretation of a statute is not credible; it is akin to arguing that the Supreme Court's opinion in the *Pentagon Papers* case should have

1132, 1144 (9th Cir. 2003) (interpreting in a public opinion the scope of the separate technical-assistance provisions Congress enacted in the Wiretap Act).

[4] Petitioners-Appellants have not sought to unseal the underlying warrants.

been classified because the Pentagon Papers themselves were. *Contra N.Y. Times Co. v. United States* ("*The Pentagon Papers Case*"), 403 U.S. 713, 732–733 (1970) (White, J., concurring) (noting the Court's ability to resolve the case in public).

The law of this Circuit does not permit the district courts' broad-brush approach, and for good reason. The rule the Government urged, which runs roughshod over the different roles All Writs Act materials and warrant materials play in the "judicial process," *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990), will result in vastly *more* secrecy in the All Writs Act context than in the warrant context, out of all proportion to any legitimate investigative need. In fact, as one of the decisions under review grudgingly recognized, the Government's preferred approach would ensure that All Writs Act orders—unlike warrants—*never* become public *regardless* of the status of the investigation, unless the Government at its discretion discloses them. *See* ER-19. Few corners of our criminal investigative system, if any, feature that degree of secrecy. To extend it here would deny the public—as well as judges, lawmakers, and litigants—any meaningful understanding of the scope of judicial power under the All Writs Act, handing the Government a dangerous discretion to shape the path of federal law.

Both precedent and common sense compel this Court to reject that "drastic" result. *Kamakana*, 447 F.3d at 1186. No one would suggest that relief in the form of a mandatory injunction or mandamus has historically been awarded in secret.

See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). And while the Government can include arbitrarily sensitive material in any application for such relief, *see generally The Pentagon Papers Case*, 403 U.S. at 713, those fact-sensitive concerns can be accommodated through redaction. Petitioners-Appellants do not expect this Court to reveal the name of a fugitive seeking to avoid extradition. But the Government is also fighting to conceal the material the public is most entitled to see: not only the Executive's arguments as to what the law should be, but also the conclusive view of the judicial branch as to "what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. That result would be incompatible with "the antipathy of a democratic country to the notion of 'secret law.'" *In re Leopold*, 964 F.3d at 1127. Petitioners-Appellants respectfully urge this Court to reverse the judgments below and remand with instructions requiring unsealing of the All Writs Act materials at issue, subject only—if necessary—to tailored redactions demonstratively necessitated by compelling, countervailing interests.

ARGUMENT

"The 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 documents. *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. Super. Ct.* ("*Press-Enterprise II*"), 478 U.S. 1, 8 (1986)). Both presumptions attach to each category of judicial records at issue here, and the Government has not met its burden to demonstrate that either presumption is so comprehensively overcome by countervailing interests that only the wholesale sealing of every record will do.

Under both the common law and First Amendment, this Court reviews de novo whether a presumption of access attaches to a particular class of records, *see Custer Battlefield Museum*, 658 F.3d at 1192; *Index Newspapers*, 766 F.3d at 1081, and evaluates a judgment that the presumption is overcome in any particular case for abuse of discretion, *see United States v. Sleugh*, 896 F.3d 1007, 1012 (9th Cir. 2018). But that standard also requires "determin[ing] under de novo review whether the district court applied the correct legal rule." *Id.* Here, both courts made the same legal error at both stages of the analysis: They imported the bright-line rule of *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989), which found that any right of access to warrant materials is categorically overcome during a pre-indictment, ongoing investigation, to the very different context of the All Writs Act. But technical-assistance orders—to say nothing of sealing orders or dockets—bear no resemblance to warrants in either their contents or their role in the legal process. And extending the rule of *Times Mirror* to cover them would distort that principle badly. This Court should reverse the district courts' error and

insist they apply this Court's precedent to "each category of documents" Petitioners-Appellants moved to unseal. *Index Newspapers*, 766 F.3d at 1084.

Because the analysis under the common law would provide all of the relief sought, Petitioners-Appellants address that framework first. *See Custer Battlefield Museum*, 658 F.3d at 1196 (approaching the right-of-access analysis in that order).

I. The common law presumption of access attaches to the All Writs Act materials that Petitioners-Appellants moved to unseal.

As this Court has explained, "[u]nless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point" of the common law analysis. *Kamakana*, 447 F.3d at 1178 (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)).[5] The list of documents "traditionally kept secret"—a "term of art," *id.* at 1184—is short, exceptional, and effectively closed.[6] Nevertheless, the district courts lumped every

[5] This Circuit recognizes a narrow and unrelated exception to the presumption for motions that are not "more than tangentially related to the underlying cause of action," such as certain nondispositive discovery motions. *Ctr. for Auto Safety*, 809 F.3d at 1099. The Government has never argued that that exception is at issue here, nor could it. An All Writs Act proceeding tests the merits of the Government's request to enjoin a third party, and all of the judicial records at issue relate directly to a court's final determination of that question.

[6] This Circuit has not added another category to the list in nearly a decade, and it has only three entries: "[1] grand jury transcripts, [2] warrant materials during the pre-indictment phase of an investigation, and [3] attorney-client privileged materials." *Dousa v. U.S. Dep't of Homeland Security*, No. 19-cv-1255, 2020 WL 4784763, at *2 (S.D. Cal. Aug. 18, 2020) (citing *Kamakana*, 447 F.3d at 1185; then citing *Lambright v. Ryan*, 698 F.3d 808, 820 (9th Cir. 2012)).

(very different) type of filing that Petitioners-Appellants moved to unseal—including a court's own orders under the All Writs Act—into that narrow category. That "drastic" step was error. *Id.* at 1185. Even if it were appropriate to analyze the documents as an undifferentiated whole, technical assistance orders have not traditionally been kept secret in even a colloquial sense, let alone in the technical way in which this Circuit has used that phrase. And, in any event, the categorical approach taken by the district courts was error under Circuit precedent, which carefully distinguishes between different types of documents filed in the same proceeding to take stock of the role each record plays in the exercise of "Article III powers." *Ctr. for Auto Safety*, 809 F.3d at 1100 (internal citation omitted). Applying either lens, the common law presumption attaches to the records here.

A. Even on the district courts' framing of the class of records at issue, the presumption attaches to technical-assistance orders and applications.

The threshold for concluding that an entire class of records is "traditionally kept secret" is exceptionally high. This Court has held 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 finding that such documents should be sealed—is insufficient to avoid the presumption. *Kamakana*, 447 F.3d at 1184–85; *see also Times Mirror Co.*, 873 F.2d at 1219 (noting that this Court has "found a common law right of access" even to records that "traditionally had been kept confidential" in a colloquial sense). Instead, to justify disabling the usual case-by-

case approach to access, there must be some categorical reason to think it would be fruitless to accommodate the interests at stake in each "particular case," relying on the courts' "discretion either to release redacted versions of the documents, or, if necessary, to deny access altogether" on the facts presented. *Custer Battlefield Museum*, 658 F.3d at 1194. No such need for indiscriminate secrecy exists here.

1. The district courts erred in ignoring the federal courts' practice and experience providing public access to technical-assistance materials.

Starting with the "class" of records, *Kamakana*, 447 F.3d at 1185, as the district courts defined it—"AWA materials . . . requiring third-party assistance in furtherance of an underlying sealed warrant," related to "an ongoing, sealed criminal investigation[,]" ER-15—there is neither a tradition of secrecy nor a compelling need for one. For one, federal courts routinely issue public orders in just that posture. To be sure, the application for an All Writs Act order may necessarily include *some* sensitive investigative facts, but the court's role in acting on the motion largely "concerns matters of constitutional and statutory interpretation which do not hinge on the particulars of the underlying investigation and charge." *In re Application of U.S. for an Order Authorizing Disclosure of Location Info.*, 849 F. Supp. 2d 526, 532 (D. Md. 2011). As a result, courts can and conscientiously do segregate different kinds of information—to preserve the integrity of ongoing investigations while allowing the public to understand the legal merits of the questions presented—and they have done so since the earliest

years of the All Writs Act's use as authority for technical-assistance orders.[7] This Court is no exception. *See, e.g.*, *Application of U.S.*, 427 F.2d at 641 & n.2 (permitting oral argument *in camera* but then publishing the resulting opinion).

It should be no wonder that courts have taken care to publish their orders in this context. For one, as a general matter, it has long been recognized that "the interest in ensuring that judicial records remain open to the public applies with special force to judicial opinions." *Lipocine Inc. v. Clarus Therapeutics, Inc.*, No. 19-622, 2020 WL 4569473, at *3 (D. Del. Aug. 7, 2020) (collecting cases). "Since at least the time of Edward III, judicial decisions have been open for public inspection." *In re Leopold*, 964 F.3d at 1128 (citing 3 Edward Coke, Reports, at iii–iv (London, E. & R. Nutt & R. Gosling 1738) (1602)). And this Court has recognized a presumption of access to court orders in diverse procedural settings, *see, e.g.*, *Index Newspapers*, 766 F.3d at 1093 (contempt order); *In re Copley*

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[7] *See, e.g.*, *United States v. Burns*, No. 1:18-cr-492, 2019 WL 2079832, at *1 & n.2 (M.D.N.C. May 10, 2019) (concluding that "the circumstances presented permit the disclosure in this Order of information about [a] search warrant" that was unexecuted and under seal); *Matter of United States*, 256 F. Supp. 3d 246, 248 (E.D.N.Y. 2017) (temporarily sealing an application while filing the resulting order "on the public docket, as it includes no information that can compromise the government's investigation"); *In re U.S. for an Order Directing a Provider of Commc'ns Servs. to Provide Tech. Assistance*, 128 F. Supp. 3d 478, 480 n.1 (D.P.R. 2015) (issuing an opinion and order without disclosing "any identifying information regarding the Provider, Source, or Target Phone, that are involved in the ongoing criminal investigation"); *Application of U.S.*, 407 F. Supp. 398, 411 (W.D. Mo. 1976) (temporarily sealing in a technical-assistance proceeding "all papers *other than* this memorandum opinion and the order[]" (emphasis added)).

Press, Inc., 518 F.3d 1022, 1026 (9th Cir. 2008) (sealing order), as have the district courts of this Circuit, *see, e.g.*, *United States v. Ressam*, 221 F. Supp. 2d 1252, 1257 (W.D. Wash. 2002) (protective order). Indeed, the only other district court to address the question of public access to All Writs Act orders in the technical-assistance context found "a *presumptive* common law right of access to these materials." *In re Granick*, No. 16-mc-80206, 2018 WL 7569335, at *11 (N.D. Cal. Dec. 18, 2018), *aff'd* 388 F. Supp. 3d 1107, 1129 (N.D. Cal. 2019).[8]

In the specific context of technical assistance, striking that balance between investigative interests and the public's knowledge of the law is essential given the All Writs Act's role as a gap-filling statute. Without knowing what, exactly, courts have concluded the limits on the Government's authority are, Congress and the public cannot consider "amendatory legislation" that would either clearly authorize or clearly forbid any particular form of assistance. *Application of the United States*, 427 F.2d at 642. This Circuit is intimately familiar with that usual and healthy dynamic, since it was this Court's conclusion that the All Writs Act could not be used to compel assistance in implementing a wiretap that prompted Congress to provide specific statutory authority for such orders. *See N.Y. Tel. Co.*,

[8] The district court there ultimately concluded that "administrative burden overc[ame] the common law presumption of access to AWA materials" where the petitioners sought to unseal all such materials filed in one district over a multi-year period. *In re Granick*, 388 F. Supp. 3d at 1129. That concern is not present here.

434 U.S. at 177 n.25. To take the district courts' approach instead—to let the limits of the Act be tested and defined in secret—would be "fundamentally inconsistent with the proposition that such important policy issues should be determined in the first instance by the legislative branch after public debate—as opposed to having them decided by the judiciary in sealed, *ex parte* proceedings." *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant*, No. 1:15-mc-01902, 2015 WL 5920207, at *3 n.1 (E.D.N.Y. Oct. 9, 2015).

Maintaining all technical-assistance proceedings under seal would also have obvious deleterious effects on the operation of the courts. "As ours is a common-law system based on the 'directive force' of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions." *Lowenschuss v. W. Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976). But since the earliest days of the Act's use in the technical-assistance context, courts have objected to the Government's habit of submitting "superficial briefs" that do not fairly preview the existence of relevant precedent or the difficulty of the questions presented. *Application of U.S.*, 407 F. Supp. at 408. As a result, courts are forced to engage in "[i]ndependent research" to reassure themselves *sua sponte* of the answer to novel and challenging constitutional questions. *Id.* That task becomes vastly more difficult when all precedent is, itself, sealed away, such that only the Government knows whether any exists. The practical upshot of that secrecy—as former

magistrate judges have described in related contexts based on firsthand experience—would be to allow the Government to shop for favorable outcomes while burying adverse decisions, leaving the path of the law "vulnerable to the whims of prosecutorial decision-making and strategic objectives rather than judicial review." Brief of Former U.S. Magistrate Judges as Amici Curiae, *ACLU v. United States*, No. 20-1499, 2021 WL 2227903, at *23 (U.S. May 27, 2021).

And the effect on Congress's choices in this space would be no less stark. Lawmakers have crafted an "extensive congressional scheme [that] provides courts with guidance as to the form and substance of the authorizations" available when the Government seeks to conduct surveillance, as well as an equally elaborate web of "congressionally-mandated reporting requirements." *In re Application of U.S. for an Order*, 849 F. Supp. 2d at 583. The Wiretap Act, for instance, reflects Congress's considered judgment about the secrecy wiretap applications require, *see* 18 U.S.C. § 2518(8)(b), but tempers that opacity with a detailed set of reporting requirements that permit systemic oversight, *see* 18 U.S.C. § 2519. The Pen Register Act provides different—but equally detailed—guidance on sealing and unsealing pen register orders, as well as the information necessary to legislative oversight. *Compare* 18 U.S.C. § 3123(d)(1) (permitting sealing of individual orders), *with* 18 U.S.C. § 3126 (requiring annual reports to Congress). These statutory frameworks not only balance law enforcement and private interests

as to the actual conduct of surveillance, but also carefully balance any need for secrecy against the sunlight required to ensure each system is running as intended.

The All Writs Act is far more protean: To keep it from swallowing the rest of Congress's design, lawmakers have relied on courts' fidelity to the principle that the Act cannot be used "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient," *Pa. Bureau of Corr.*, 474 U.S. at 43, along with courts' adherence to the norm that their decisions belong to the public. But the Government faces an ongoing temptation to test both boundaries, "to circumvent the requirements of the Fourth Amendment and other statutes that already occupy the space." *In re Application of U.S. for an Order Authorizing Disclosure of Location Information*, 849 F. Supp. 2d at 583. And whenever the Government successfully persuades a court to seal an order "giv[ing] it authority that Congress chose not to confer," *In re Apple*, 149 F. Supp. 3d at 363 (citation omitted), it conceals from Congress and the public that any territory has been adversely possessed. The district courts' approach would make that dangerous degree of secrecy the rule rather than the exception. This Court should reject it.

There is likewise no reason to prevent courts from weighing the balance of law enforcement and public interests case by "particular case" with respect to the Government's applications for All Writs Act orders. *Custer Battlefield Museum*, 658 F.3d at 1194. For one, even a glance at a typical application—such as the one

the Government filed in the Southern District of California—makes clear that investigative interests could easily be accommodated "by redacting sensitive information rather than refusing to unseal the materials entirely." *Id.* at 1195 n.5. Far from being enmeshed in facts about the investigation, the relevant legal argument is separated out in a standalone section, helpfully titled "Discussion," that consists of citations to judicial precedent and discussions of relevant law. ER-84.[9] Unsealing that material to vindicate the public's "strong interest in monitoring . . . the positions that its elected officials and government agencies take in litigation," *Doe Co. v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014), runs no risk of revealing genuinely sensitive facts specific to a given investigation.

That there is no need for complete, wholesale secrecy in these matters is reinforced by the Government's own litigation practices. Far from striking an attitude of consistent secrecy, senior officials have often insisted that, when controversies about court-ordered assistance arise, "democracies resolve such tensions through robust debate." James Comey, *Encryption, Pub. Safety, & "Going Dark"*, Lawfare (July 6, 2015, 10:38 AM), https://perma.cc/HH6M-YLAY. In that vein, it was the Government—not Apple—that moved to make

[9] For other applications with the same features that confirm Petitioners' example is representative, *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 & Black Colored Apple iPhone*, No. 1:16-mj-02007 (D. Mass. Feb. 1, 2016), ECF No. 6.

public its application for assistance in San Bernardino, even though that warrant had not been executed, the Government maintained other suspects could be at large, and compelled decryption was not widely familiar to the public at the time. *See* Motion to Vacate Order Compelling Apple Inc. at 11 n.22, *In re San Bernardino iPhone*, 5:16-cm-0010 (C.D. Cal. Feb. 16, 2016), ECF No. 16. Plainly the Government believed not only that "public scrutiny would benefit the proceedings," by reassuring the public that the request was justified, but also that the key moment for deliberation was the pendency of the motion. *In re Copley Press*, 518 F.3d at 1026 n.2 (internal quotation omitted). And the Apple case is hardly the only instance in which the Government has chosen to press its case for a controversial use of the All Writs Act in public. *See* Tim Cushing, *DOJ Asks DC Court to Compel Decryption of Device Seized in a Capitol Raid Case*, Techdirt (June 21, 2021, 12:02 PM), https://perma.cc/N85T-F3WC. In short, the tradition of secrecy that the district courts claimed here simply does not exist.

2. The district courts erred in conflating technical-assistance materials with warrant materials to which they bear no real resemblance.

Lacking any tradition of secrecy in the technical-assistance context, the district courts imputed to these All Writs Act materials the secrecy that this Circuit has afforded pre-indictment search warrant materials in ongoing investigations, on the theory that all of the different kinds of documents Petitioners-Appellants moved to unseal relate to a warrant in one way or another. ER-18. As discussed

below, that analytical approach was, itself, error; the law of this Circuit required the district courts to consider each type of record based on its role in the legal process, not the particular subject matter it happens to "relate to" here. But, just as important, the analogy is flawed on its own terms. Technical-assistance proceedings bear no resemblance to warrant proceedings, and the district courts erred by extending the narrow *Times Mirror* rule to the All Writs Act context.

For one, All Writs Act materials and warrant materials differ systematically in their contents because the scope of the court's role in each proceeding is different. In the warrant context, while the proceeding certainly "adjudicate[s] important constitutional rights," *Custer Battlefield Museum*, 658 F.3d at 1194 (quotation omitted), at base the court's responsibility is to determine whether the facts in the application show probable cause; constitutional and other objections to the search can be—and are—resolved at a later suppression hearing to which the public has a presumptive right of access. *See United States v. Brooklier*, 685 F.2d 1162, 1169–71 (9th Cir. 1982). As a result, even where the Government proposes an unusual search or seizure, a warrant application will typically consist predominantly of investigative facts—reasons, for example, to think that a particular individual committed a crime—rather than legal arguments.

But where the warrant process defers the resolution of most legal questions and "involves no . . . adversary proceedings," *United States v. U.S. Dist. Ct.*, 407

U.S. 297, 321 (1972), a technical-assistance proceeding is a full-blown adversarial proceeding aimed at resolving any potential challenges to the validity of the All Writs Act order sought by the Government. As this Circuit has made clear, a company 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 be heard on objections to being bound by any other injunction. *Mountain States*, 616 F.2d at 1133; *see also In re Application for Order Authorizing Installation of a Pen Register of Touch-Tone Decoder & Terminating Trap*, 610 F.2d 1148, 1157 (3d Cir. 1979). And any given application may raise novel questions that take dozens of pages in the Federal Reports to resolve, *see In re Apple*, 149 F. Supp. 3d at 344–76, implicating the Fourth Amendment, *see In re Application for an Order Authorizing Disclosure of Location Information*, 849 F. Supp. 2d at 580–81, the Due Process and Takings Clauses, *see In re Application for a Pen Register*, 610 F.2d at 1156–57, even the First Amendment, *see* Motion to Vacate Order Compelling Apple, Inc. at 32–34, *In re San Bernardino iPhone*, No. 5:16-cm-0010. The result is that All Writs Act filings in the technical assistance-context, whatever the status of the investigation to which they may relate, are far *less* likely to contain information that would compromise it than a warrant would, and also far *more* likely to contain legal arguments the public is squarely entitled to understand.

For much the same reason, the district courts' talismanic reliance on the fact that the investigations here are ongoing—whatever merit that line may have in the warrant context—makes no sense in the All Writs Act context. As this Court explained in *Times Mirror*, the key fact about pre-indictment warrant materials as a *class*—the fact that justifies including them in the "traditionally kept secret" category—is that the public will have its chance to review them later. *See* 873 F.2d at 1218. As a result, the "*incremental* value in public access is slight" at the pre-indictment stage because of "the *other* mechanisms . . . that are already in place to deter governmental abuses of the warrant process." *Id.* (emphases added). But there is no later stage of the judicial process during which All Writs Act materials will predictably become public, 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 a third-party. *See United States v. Baker*, 868 F.3d 960, 969–70 & n.4 (11th Cir. 2017).[10] As a result, the initial hearing is not just *one* forum to understand the validity of a particular use of the All Writs Act, but typically the *only* one. *Cf. In re Application for a Pen Register*, 610 F.2d at 1157

[10] The materials in the Southern District of California reflect this dynamic. Even though that prosecution ended long ago, had it not been unsealed in February 2020, the All Writs Act application filed there would have remained secret long past the conclusion of that case—to say nothing of the execution of the arrest warrant—because its existence is still not reflected on the public docket. *See* Docket, *United States v. Kher*, No. 3:19-cr-04643 (S.D. Cal. Mar. 23, 2021).

(observing, for due process purposes, that the "only meaningful time" to debate whether relief under the Act is justified is "prior to [the order's] enforcement"). And that reality informs the on-the-ground practice, described above, of permitting public disclosure of All Writs Act materials even while investigations remain ongoing, subject where necessary to redactions. *See* cases cited *supra* note 8.

Even if there were a subsequent stage of the criminal process that reliably afforded public access to All Writs Act materials, though, the *critical* stage in this context—but not the warrant context—is the moment in which a court considers whether to extend the Government the extraordinary relief it requests. To make the existence of an ongoing investigation a light switch for the public's rights would ensure that moment is *always* insulated from public scrutiny; by definition, an application for assistance in executing a warrant is made, and acted upon, before the warrant is executed. But if public access is to provide a meaningful check on the proceedings, the public cannot be presented with the result as a *fait accompli*. As this Court has explained in the context of access to newly filed civil complaints, "[c]itzens could hardly evaluate and participate in robust public discussions about their performance of their court systems" if judicial records "became available only after a judicial decision has been made." *Courthouse News Serv. v. Planet* ("*Planet III*"), 947 F.3d 581, 592 (9th Cir. 2020). That is why "a necessary corollary of the right to access is a right to timely access." *Id.* at 594; *accord Pub.*

Citizen, 749 F.3d at 272 (stressing that the public's right of access is a "contemporaneous right of access"). But on the rule the district courts endorsed, 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. That is, of course, the result the Government hopes for—that it will face minimum friction in extending the power of the All Writs Act to require ever more novel forms of assistance. But this Court should reject that effort to cut short public debate on the difficult, controversial legal questions characteristically presented in this context.

In sum, in form and substance, All Writs Act orders and applications bear no meaningful resemblance to warrant materials; they walk and talk like mandatory injunctions. And extending the rule of *Times Mirror* to cover them would distort that holding beyond recognition, transforming a rule designed to defer access into one that denies it always and entirely. That result would conflict with the guidance of *Times Mirror* itself, which underlined that "there must be *some* process by which society can monitor law enforcement officials' decision to search or seize property beyond relying on the judgment of the neutral detached magistrate." 873 F.2d at 1218 n.11 (emphasis added). The district courts erred in embracing an approach that would deny the public that opportunity in the All Writs Act context.

B. On the correct framing of the "class" of records at issue, the presumption attaches to All Writs Act orders and applications.

Petitioners-Appellants can and should, for the reasons given above, prevail even on the district courts' broad-brush definition of the "class" of documents at issue. *Kamakana*, 447 F.3d at 1185. But the road to the right answer in this case is even more straightforward because, under this Circuit's precedent, classes of documents are defined by their role in the "judicial process," not their case-specific subject matter. *Id.* at 1179; *accord United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985). And this Circuit has already explained that, as a matter of legal process, a technical-assistance order under the All Writs Act is a "writ in the nature of a mandatory injunction." *Application of the United States*, 427 F.2d at 643. Given this Court's holding that injunction filings are presumptively open to the public under the common law, *see Ctr. for Auto Safety*, 809 F.3d at 1101, this case should have proceeded promptly to the question whether the Government could meet its burden to justify redacting portions of the particular records at issue here.

Neither the Government nor the district courts seriously disputed that technical-assistance orders are, in fact, injunctions, since this Court has repeatedly so characterized them. *See id.*; *Plum Creek Lumber Co.*, 608 F.2d at 1289 (describing a motion for assistance executing an administrative warrant as a request to "enjoin" the employer). Indeed, to do so would require the Government to repudiate the case it made to the Supreme Court in *New York Telephone* itself, where the Deputy Solicitor General explained that technical-assistance orders are

just one more "situation[] involving injunctive orders to third parties." Transcript of Oral Argument, *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977) (No. 76-835), https://www.oyez.org/cases/1977/76-835. But here the Government insisted, and the district courts concluded, that these orders should be thought of like the warrants they help effectuate in this particular case, rather than as instances of the "category of documents" they belong to generally. *Index Newspapers*, 766 F.3d at 1084.[11] Even setting aside the descriptive flaws in that reasoning, *see supra* at 30–35, that approach to the analysis is flatly inconsistent with this Circuit's precedent.

This Court's decision in *Index Newspapers* provides a clear illustration of both the appropriate framework and the rationales that underpin it. There, a media organization sought access to a diverse range of filings in a contempt proceeding ancillary to a grand jury investigation—ancillary in much the same sense the All Writs Act materials here could be considered ancillary to a warrant. *See Index Newspapers*, 766 F.3d at 1080. Grand jury materials, of course, are "unique" in the level of secrecy our system affords them, *In re Leopold*, 964 F.3d at 1133 (citation omitted), and this Circuit has found that grand jury transcripts qualify as a

[11] The only support the Government mustered for its analysis-by-analogy was *In re Granick*, a district court decision whose approach was driven by forfeiture: The petitioners in that matter argued their right to access All Writs Act materials was derivative of their right to access underlying warrants and other investigative materials. *See* 388 F. Supp. 3d at 1129. But they were wrong to do so—Circuit law does not permit that lumped-together approach, as detailed below—and Petitioners-Appellants are not bound by a different party's concessions.

class of documents traditionally kept secret, to which no common law presumption of public access attaches. If the district courts' approach were the correct one, then, *Index Newspapers* would be a very short opinion—grand jury materials are entitled to secrecy, and thus so are all records filed in any proceeding "ancillary to a grand jury investigation," 766 F.3d at 1083. The analysis would end there.

But the analysis did not end there. Instead, this Court analyzed all seven categories of documents at issue separately because each played a different role in the proceeding and implicated a different balance of interests. *See id.* at 1084–85. Different kinds of filings, the Court recognized, were more or "less likely to disclose sensitive matters relating to the grand jury's investigations" and therefore could not be reduced to a lump sum. *Id.* at 1094. Similarly, while the contempt motion and contempt order concerned the same subject matter and were filed in the same proceeding, this Court considered them separately—and came to different conclusions—because access to the order was necessary to "ensur[e] that the public may discover when a witness has been held in contempt and held in custody." *Id.* at 1093. In other words, this Court's precedent demands the very approach one district court derided as "tunnel-visioned parsing," ER-18, to ensure the public's interest in access is given its due, *see also, e.g.*, *In re Copley Press*, 518 F.3d at 1028 (separately analyzing a diverse range of records all filed in connection with a plea hearing). Other circuits take the same deliberate approach.

See 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 applications for them); *In re Leopold*, 964 F.3d at 1128 (same).

The reason for doing so is obvious: The touchstone of the analysis is the "public interest in understanding the judicial process," *Kamakana*, 447 F.3d at 1179, and courts cannot assign that interest due weight without taking stock of the role a particular type of record plays in the exercise of "Article III powers," *Ctr. for Auto Safety*, 809 F.3d at 1100 (internal citation omitted). For instance, the public has separate—if overlapping—interests in understanding what the Government argues the law ought to be and what a court concludes the law actually is. As a result, the inquiry may differ as to "substantively identical" records reflecting those different values. *Ressam*, 221 F. Sup. 2d at 1262 (proposed protective orders become subject to a presumption of access when endorsed by the court).[12] Were it otherwise, a court's reasoned analysis of a statute could be kept wholly secret if even a fraction of its contents overlap with a sealed probable-cause affidavit. In operation, such a framework would eviscerate the

[12] *See also, e.g.*, *United States v. Kwok Cheung Chow*, No. 14-cr-00196, 2015 WL 5094744, at *4 (N.D. Cal. Aug. 28, 2015) ("excerpts of Title III materials" become subject to a presumption of access when "incorporate[ed] into the parties' arguments and the Court's analysis"); *In re Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (fruits of Title III wiretap become subject to presumption of access when incorporated into a warrant subject to the common law presumption).

public's rights of access, and it is not the law in this Circuit. The district courts erred by treating every different class of record at issue here as if it were a warrant.

Clearing away that error, there can be no doubt that All Writs Act orders and applications are, as a general matter, presumptively open to the public. All Writs Act orders are court orders, "the quintessential business of the public's institutions," *In re Leopold*, 964 F.3d at 1128 (internal quotation marks omitted), and therefore part of the "top drawer of judicial records" that is "hardly ever closed to the public," *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008). All Writs Act applications are motions for equitable relief, and applications for such relief "invoke important Article III powers"—regardless of the subject matter of the relief requested in a particular case. *Ctr. for Auto Safety*, 809 F.3d at 1100 (internal quotation omitted). And while the fact that *these* applications and orders involve technical assistance may be relevant to judging whether the presumption is overcome with respect to any portion of the particular sealed records here, it does not determine whether the presumption attaches in the first place. Or to put it differently, "AWA materials . . . requiring third-party assistance in furtherance of an underlying sealed warrant," related to "an ongoing, sealed criminal investigation[,]" ER-15, is not a category of documents with any legal reality; it cannot be found in the United States Code or

the Federal Rules. It is a description gerrymandered to avoid application of the presumption to the specific records that Petitioners-Appellants moved to unseal.

C. The presumption attaches to sealing motions and orders.

The question whether the common law presumption attaches to sealing motions and orders is likewise straightforward. Because neither district court even addressed this portion of Petitioners-Appellants' motions, their judgment on this question rises or falls on their refusal to apply the right-of-access inquiry to "each category of documents" sought. *Index Newspapers*, 766 F.3d at 1084. After all, as the Report & Recommendation recognized, Circuit precedent already holds that not only the common law right, but also the First Amendment presumption of access attaches to sealing orders, *see* ER-58 n.2 (citing *In re Copley Press*, 518 F.3d at 1026), and this Court does not start the analysis from scratch every time a familiar document is filed in a case with a new subject matter. *Index Newspapers*, for instance, looked to the history of "[m]otions to unseal judicial proceedings and orders ruling on those motions"— not the history of motions to unseal filed in contempt proceedings ancillary to a grand jury subpoena in particular—and it drew on examples from a range of procedural settings. 766 F.3d at 1096 (citing *In re Copley Press*, 518 F.3d at 1025 (plea hearing); *Kamakana*, 447 F.3d at 1176–78 (civil action); and *Times Mirror*, 873 F.2d at 1211–12 (warrant proceeding)).

Again, it was error for the district courts to simply forgo any separate analysis of the presumptions of access with respect to sealing motions and orders.

What's more, presumptive access to sealing motions and orders serves the same vital purpose in the technical-assistance context as it does in other procedural settings. While the contents of sealing motions and orders may overlap to some extent with their properly sealable attachments, *see In re Copley Press*, 518 F.3d at 1028, the records must be at least partly accessible to the public to "give the public and press an opportunity to object or offer alternatives to closure," *id.* at 1027 (internal quotation omitted). That bedrock point, rooted in the obligations of due process, *see In re Hearst Newspapers LLC*, 641 F.3d 168, 186 (5th Cir. 2011); *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982), applies with as much force in the All Writs Act context as in any other. The district courts erred in ignoring it here.

D. The presumption attaches to docket sheets.

Finally, the common law presumption of access also attaches to the relevant docket sheets. Far from being the kind of records traditionally kept secret, there is a "centuries-long history of public access to dockets." *United States v. Mendoza*, 698 F.3d 1303, 1304 (10th Cir. 2012); *see also Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004) (tracing the tradition of open "docket books" to "the first years of the Republic"). No surprise, then, that other courts

have concluded that the presumption attaches to them, including in the context of pen register and Stored Communications Act orders that genuinely are analogous in important respects to search warrants. *See In re Leopold*, 964 F.3d at 1129.

To hold otherwise would make nonsense of the public's rights of access. As the Supreme Court has explained, for those rights "to be meaningful, the press and general public must be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper*, 457 U.S. at 609 n.25 (quotation omitted). But without a docket that gives notice of the existence of an order, the public has no chance to oppose "closure of a document or proceeding that is itself a secret." *Pub. Citizen*, 749 F.3d at 268; *see also Index Newspapers*, 766 F.3d at 1086 (the right of access requires "a meaningful ability for the public to find and access those documents" to which the right attaches). And whether the Court ultimately concludes Petitioners-Appellants' application for the underlying records should prevail or not, it should be scandalous that a claim that even the district courts recognized "raises important related to public access and government transparency" could only be presented at all because the materials here were fortuitously referenced in an entirely different public document. ER-18.

A similar dynamic unfolded in the District of Massachusetts in 2016. There, the American Civil Liberties Union was able to assert a right of access to All Writs Act materials only because an order's existence was referenced in a public search

warrant affidavit. *See* Janus Rose, *Apple's Next Encryption Battle is Likely Playing Out in Secret in a Boston Ct.*, Vice (Mar. 31, 2016, 1:57 PM), https://perma.cc/X7UA-D9YV. The Government in that matter promptly admitted that there was no continued need to seal the application and order. *See* Motion to Unseal, *In re One Gray & Black Colored Apple iPhone*, No. 1:16-mj-02007 (D. Mass. Apr. 8, 2016). But for that stray reference, records that concededly could no longer lawfully be sealed would have remained sealed in perpetuity. That result is unreasonable; a presumption of access attaches to each of the dockets at issue.

II. The district courts erred in concluding that compelling reasons justify wholesale sealing of every record at issue in these cases.

Where the common law presumption attaches, "[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the compelling reasons standard." *Kamakana*, 447 F.3d at 1178 (internal quotation marks omitted). The court, for its part, must "conscientiously balance the competing interests" and "articulate the factual basis for its ruling, without relying on hypothesis or conjecture," *id.* at 1179 (internal quotation marks omitted) (citations omitted), a task that entails weighing the alternative of tailored redaction, *see id* at 1183–85; *Custer Battlefield Museum*, 658 F.3d at 1195 n.5; *Foltz*, 331 F.3d at 1136–37; *United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998).

This Court generally reviews the result of that exercise for abuse of discretion, *see Sleugh*, 896 F.3d at 1012, but that standard also requires

"determin[ing] under de novo review whether the district court applied the correct legal rule," *id.* Here, the district courts erred as a matter of law by conducting the analysis at the wrong level of generality; indeed, neither conducted a genuinely separate analysis at this stage of the inquiry at all. Instead, both decisions reiterate concerns generally or hypothetically implicated by All Writs Act materials "without any further elaboration or any specific linkage with the documents." *Kamakana*, 447 F.3d at 1184; *see* ER-7, ER-18. And each decision does so without explaining why redaction would not suffice to protect the Government's asserted interests and without confronting the information that is already public. That is not the rigorous "document-by-document, line-by-line" review of competing interests that the common law presumption requires. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 419 (5th Cir. 2021) (quotation omitted).

In concluding that the common law presumption of access was overcome in its entirety here, each district court rested—dispositively and categorically—on the Government's assertion that the investigations are ongoing. *See* ER-8, ER-20. But the broad claim that nothing can be disclosed without jeopardizing the investigations is neither plausible on the facts of this case nor, for the reasons given above, tenable as a general approach to All Writs Act materials in the technical-assistance context. This Court has already warned, for that matter, that it is not enough to intone "ongoing investigation" as a general matter and expect to defeat

the common law presumption; rather, to offer "specific compelling reasons" means to offer compelling reasons *specific to the material that a party seeks to conceal*. *Kamakana*, 447 F.3d at 1183–84. Or as another circuit put the same point: "[I]t is not enough simply to assert this general principle without providing specific underlying reasons for the district court to understand *how* the integrity of the investigation reasonably could be affected by the release of such information." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004) (emphasis added). But the reasons offered in the decisions below are entirely generic.

For one, far from tying the Government's asserted interests to particular documents, as explained above, the decisions do not even distinguish between the different categories of documents at issue. But each category plainly implicates different concerns. To highlight the most obvious version of the point, docketing an order that everyone agrees is an All Writs Act order to Sabre under the heading "Order Granting Application of the United States for an Order Under 28 U.S.C. § 1651 to Sabre" cannot alert anyone in particular that the Government is pursuing them. *Cf. In re Leopold to Unseal Certain Surveillance Applications & Orders*, 300 F. Supp. 3d 61, 73 n.8 (D.D.C. 2018), *rev'd on other grounds*, *In re Leopold*, 964 F.3d 1121 (noting a U.S. Attorney's representation that the Eastern District of Virginia's real-time docketing of certain surveillance orders "reveals to the public some information that relates to open investigations, but 'doesn't seem to put

anybody in danger'"). As a result, the district courts' rationales for nondisclosure are simply inapposite with respect to portions of Petitioner-Appellants' motions.

Further, the district courts entirely omitted any consideration of the information that is "already publicly available." *Kamakana*, 447 F.3d at 1184. Both suggested, for instance, that wholesale sealing was necessary to ensure that fugitives do not learn the techniques the Government deployed in these cases and take matching precautions. *See* ER-7, ER-18. But the whole world already knows what investigative technique was used in these cases: The Government obtained orders compelling Sabre to produce travel records about the targets as it acquired them. *See* Sabre Article, *supra*; ER-79. To the extent fugitives wish to plan their itineraries with an eye to avoiding that kind of monitoring, they can already do so. Unsealing the portions of the records that confirm what the Government has already disclosed in other sworn court filings would not alter that result.

More broadly, neither the district courts nor the Government tied their hypothetical characterization of investigative interests to the actual contents of a typical All Writs Act application or order—let alone the specific orders Petitioners-Appellants moved to unseal here. But it does not require a close review of the materials unsealed in the Southern District of California to see that much of it consists of material in which the Government's secrecy interests are either nil or *de minimis*. The Government cannot, for instance, claim it has an interest in

concealing its restatement of the *New York Telephone* framework. *See* ER-84. Neither is there a legitimate interest in concealing representations that other courts have granted similar relief. *See* ER-85. Knowledge that an order was entered in a judicial district in a particular year cannot prompt any particular fugitive to flee. In fact, in other matters, the Government has conceded that the fact that a particular company received a particular All Writs Act request is the kind of fact that can "properly be filed on the public docket without jeopardizing any pending criminal investigation." *In re Apple*, 149 F. Supp. 3d at 349. The district courts did not explain how the same sort of information could cause any cognizable harm here.

At base, the district courts neglected to draw a "specific linkage with the documents" when articulating the harm unsealing any particular portion of them could cause, *Kamakana*, 447 F.3d at 1184, and thereby reached the erroneous conclusion that nothing can be unsealed. But blame for that result lies ultimately with the Government, which put each of the courts in an untenable position. "Redaction," after all, "is a task best undertaken (or at least proposed) by the governmental entity that submitted the surveillance application in the first place," *In re Leopold*, 964 F.3d at 1134 n.14, but the Government here chose to adopt an all-or-nothing posture, leaving the record bereft of the more tailored representations that might survive contact with the strong presumption of access, *contra Index Newspapers*, 766 F.3d at 1090 (emphasizing that sealing "is not an

all-or-nothing proposition"). Petitioners-Appellants do not expect this Court to reveal the names of unindicted fugitives. But a remand is necessary for the district courts to hold the Government to its burden, and to measure its representations against the documents with the specificity that this Court's precedent requires.

A. At a minimum, this Court should exercise its supervisory authority to ensure that All Writs Act materials do not remain sealed indefinitely.

If this Court nevertheless concludes that the common law presumption is overcome while an investigation remains ongoing, Petitioners-Appellants would urge this Court to exercise its supervisory authority to require unsealing—or at least notice—when the relevant investigation ends. *Cf. Mountain States*, 616 F.2d at 1132 (exercising that power to require that district courts hold a prior hearing in technical-assistance matters). As the Northern District of California recognized below, because All Writs Act orders—unlike warrants—will not surface at a later stage of the criminal process, "[s]ome transparency is necessary to ensure that AWA proceedings are not forever sealed off from public review." ER-19. Otherwise, no mechanism ensures the court that entered an initial sealing order—to say nothing of the public—will ever learn that the investigation has been closed.

Because "the government's interest in its ongoing investigation does not ongo [sic] forever," *United States v. Moten*, 582 F.2d 654, 661 (2d Cir. 1978), other federal courts in similar postures have either required the Government to submit a renewed motion to seal by a date certain or ordered regular status reports

on the investigation's status, *see, e.g.*, *United States v. Cohen*, 366 F. Supp. 3d 612, 634 (S.D.N. Y. 2019). If this Court concludes that the public cannot yet workably access the materials at issue here, this Circuit should impose a similar requirement that the inquiry be revisited when the relevant investigation ends. Otherwise, in practice, a rule notionally pegged to the investigation's status will in fact authorize wholesale, permanent secrecy. For the reasons given above, that result would have intolerable consequences for the public's right to understand their own law.

III. The First Amendment presumption of access attaches to the judicial records that Petitioners-Appellants moved to unseal.

As discussed above, this Court need not reach the question whether a First Amendment presumption also attaches to judicial documents Petitioners-Appellants have sought to unseal; the common law entitles Petitioners-Appellants to all the relief they seek. But the constitutional presumption does apply here and imposes an even more rigorous burden on the Government. The district courts erred in concluding that wholesale secrecy can satisfy the First Amendment here.

In determining whether the First Amendment presumption attaches to a class of records, this Court looks to the complementary 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 this Circuit has held, "[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.* at 1026 (quoting *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516–17 (9th Cir. 1988)). The essential judgment under this framework is whether "the benefits of opening the proceedings outweigh the costs to the public." *Times Mirror*, 873 F.2d at 1213.

The district courts erred by failing to "apply[] the experience and logic test to each category of documents" at issue. *Index Newspapers*, 766 F.3d at 1084. Properly considering All Writs Act orders and applications, sealing motions and orders, and docket sheets, respectively, there can be no serious dispute that each category has traditionally been accessible to the public—and for good reason.[13] But Petitioners-Appellants would underscore again that even if the relevant analysis looked more broadly to judicial records filed in All Writs Act proceedings

[13] As discussed above, "since at least the time of Edward III, judicial decisions have been open for public inspection" to ensure the public's understanding of its rights and obligations, *In re Leopold*, 964 F.3d at 1128 (internal quotation marks omitted); injunction proceedings have been open to superintend the exercise of "important Article III powers" that "affect litigants substantive rights," *Ctr. for Auto Safety*, 809 F.3d at 1100 (internal quotation marks omitted); sealing motions and orders must be public "to give the public an opportunity to be heard" on the question of access, *In re Copley Press*, 518 F.3d at 1027; and dockets have likewise been available since "the first years of the Republic" to give notice that records to which the right of access may attach exist. *Pellegrino*, 380 F.3d at 94.

in the technical-assistance context, "the benefits of opening the proceedings" would still "outweigh the costs" for the reasons stated above in connection with the common law. *Times Mirror*, 873 F.2d at 1213; *cf. Pellegrino*, 380 F.3d at 92 (noting that the reach of the common law presumption is relevant in judging the scope of the First Amendment presumption as well). Arguments about the legitimate scope of court-ordered technical assistance pursuant to the All Writs Act can easily survive greater sunlight than the district courts were willing to provide, and these debates, for that matter, cannot function properly in the dark.

IV. Wholesale sealing of the judicial records at issue is not narrowly tailored to a compelling interest as the First Amendment requires.

"The First Amendment is generally understood to provide a stronger right of access than the common law," *Custer Battlefield Museum*, 658 F.3d at 1197 n.7, overcome only upon a showing that "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest," *Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990) (citing *Press-Enterprise II*, 478 U.S. at 13–14). As in the common law context, the quintessential less-restrictive alternative that courts must consider under the First Amendment is carefully tailored redaction. *See Index Newspapers*, 766 F.3d at 1093. Because the

Government failed to satisfy its burden here under the common law, it follows *a fortiori* that it fell even farther short of its obligations under the Constitution.

The district courts nevertheless rested, as in the common law context, on the assertion that the presumption is overcome by the interest in concealing from criminals what the Government can use the All Writs Act to accomplish. Taken to the extreme the district courts embraced, though, that suggestion militates against having any public surveillance law at all. *See In re Sealing & Nondisclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d at 886 (rejecting a similar argument). Every time a federal court interprets the Fourth Amendment, it gives wrongdoers new insight into the powers of law enforcement—clarifying, for instance, that gamblers need not avoid phone booths to enjoy the shelter of the warrant requirement. *See Katz v. United States*, 389 U.S. 347, 352 (1967). And every time Congress enacts limits on the powers of the Executive, to some extent it creates similar opportunities for gamesmanship. *See* Jonathan Manes, *Secrecy & Evasion in Police Technology*, 34 Berkeley Tech. L.J. 503, 545 (2019) (offering the example of mobsters gaming the Wiretap Act's minimization requirements in Martin Scorsese's *Casino* (Universal Pictures 1995)). But a free society nevertheless expects to be governed by public laws, reflected in the public decisions of its courts. That principle is "a fundamental element of the rule of law." *In re Leopold*, 964 F.3d at 1123. This Court should insist on it here.

CONCLUSION

For the foregoing reasons, Petitioners-Appellants respectfully request that this Court reverse the judgments below and remand with instructions requiring unsealing of the All Writs Act materials at issue, subject only—if necessary—to redactions demonstratively necessitated by compelling, countervailing interests.

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/s/ Katie Townsend
Katie Townsend
Counsel of Record for Petitioners-Appellants
Grayson Clary
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

Jean-Paul Jassy
JASSY VICK CAROLAN, LLP
355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
Telephone: (310) 870-7048
Facsimile: (310) 870-7010

Ambika Kumar
DAVIS WRIGHT TREMAINE LLP
920 Fifth Ave., Suite 330
Seattle, WA 98104-1610
Telephone: (206) 757-8030

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FOR THE NINTH CIRCUIT

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