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 REPLY BRIEF

[Caption continued on next page]

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INTRODUCTION

Whether in the Supreme Court, this Court, or a district court, the public has long been entitled to scrutinize how the judicial branch interprets the All Writs Act, 28 U.S.C. § 1651, including when compelling private firms to facilitate surveillance, *see United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977); *In re U.S. for an Order Authorizing an In-Progress Trace of Wire Commc'ns* ("*Mountain States*"), 616 F.2d 1122 (9th Cir. 1980); *In re U.S. for an Order Authorizing Use of a Pen Reg. Device*, 407 F. Supp. 398 (W.D. Mo. 1976). The presumptive right to do so reflects "the antipathy of a democratic country to the notion of 'secret law,'" *In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 964 F.3d 1121, 1127 (D.C. Cir. 2020), and the need to "ensure that judges are not merely serving as a rubber stamp," *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194 (9th Cir. 2011) (citation omitted).

The Government gives those interests short shrift. Indeed, it appears unwilling to concede it is ever appropriate for the public to learn what courts have concluded (or what the Government has argued) the Act means, *see* Consolidated Answering Br. for the United States ("Gov't Br.") at 48, except perhaps at its sole discretion, *see* Gov't Ltr. at 1.[1] In justifying that position, the Government has

[1] The Government's letter to this Court, advising that it is not opposing the unsealing of substantially similar All Writs Act materials in another matter, highlights that the Government's only consistent test in this context is its own fiat.

little to say about the defining features of All Writs Act injunctions, including in the technical-assistance context, or the role the Act has traditionally played. Instead, it misdirects its argument to *other* judicial documents—warrants, grand jury records, and Title III materials—that Petitioners-Appellants have not moved to unseal, each governed by different legal regimes inapplicable to the All Writs Act.

The correct inquiry is straightforward. Both a common law and First Amendment presumption of access attach to each class of records Petitioners-Appellants moved to unseal: All Writs Act orders, applications for injunctive relief under the All Writs Act, sealing motions and orders, and docket sheets. Those documents are defined by their role in the "judicial process," *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (citation omitted), not the subject matter of "the particular proceedings at issue in this case," *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1086 (9th Cir. 2014). The fact that these records concern the Government's bid to compel technical assistance—while not "irrelevant" to determining the extent, if any, to which the public's presumptive right to inspect them is presently overcome, Gov't Br. at 28—is not dispositive of whether they are presumptively accessible to the public in the first place. Just as there is a presumption of public access to "criminal trials" that cannot be dodged

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The letter further underlines the district courts' legal errors, as set forth more fully in the response to it filed herewith. *See* Pet'r-Appellants' Resp. to Gov't Ltr. at 1.

by denying a tradition of access to "a murder trial," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 597, 605 n.13 (1982), the presumption of access to an All Writs Act injunction does not turn on the specific action it mandates, *see Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1102 (9th Cir. 2016).

That the All Writs Act injunctions at issue here discuss technical assistance bears on what should have been the primary focus of the district courts' inquiry: whether the Government demonstrated "specific compelling reasons" sufficient to "justify each redaction" the Government should have proposed when arguing the applicable presumptions are overcome. *Kamakana*, 447 F.3d at 1183–84. But the rationales the Government advanced cannot extend to the entirety of the records; its asserted need to conceal investigative facts cannot justify concealing "matters of constitutional and statutory interpretation which do not hinge on the particulars of the underlying investigation and charge." *In re U.S. for an Order Authorizing Disclosure of Location Info.*, 849 F. Supp. 2d 526, 532 (D. Md. 2011). The district courts therefore erred by failing to draw a "specific linkage with the documents" and concluding that "general categories" of asserted law enforcement interests could justify blanket sealing. *Kamakana*, 447 F.3d at 1184. In doing so, they endorsed a radical degree of secrecy that would deprive the public of a meaningful understanding of court-ordered technical assistance under the Act.

For the reasons herein and in their opening brief, Petitioners-Appellants respectfully request that this Court reverse and remand the decisions under review.

ARGUMENT

I. Under both the common law and First Amendment, the Government misstates the test that controls whether a presumption of access applies.

The Government does not appear to dispute that All Writs Act injunctions, applications for All Writs Act injunctions, sealing motions and orders, and docket sheets are all categories of judicial records that are presumptively accessible to the public if taken on their own terms. It has therefore forfeited any argument to the contrary, and Petitioners-Appellants will not repeat the reasons for concluding that both presumptions of access apply to each. *See* Opening Br. at 25–32, 51 & n.13.

Instead, the Government's position turns on rewriting this Circuit's approach to the right-of-access framework entirely. It argues this Court should start and end its inquiry by asking whether there is a presumption of access to the relevant "proceeding," Gov't Br. at 25, rather than by "[a]pplying the experience and logic test to each category of documents sought," *Index Newspapers*, 766 F.3d at 1084. And it maintains that analysis should look only to All Writs Act proceedings about technical assistance—the topic of the "particular proceedings at issue in this case," *id.* at 1086—rather than All Writs Act proceedings "as a whole," *id.*

As detailed below, even if this Court adopted that approach, technical-assistance materials—as the Government prefers to define them—would still come

within the common law and First Amendment presumptions. *See infra* Part II. But the Government's proposed approach also contravenes Circuit precedent. Whether a presumption of access attaches to a judicial record depends on the role that kind of record plays in the "judicial process." *Kamakana*, 447 F.3d at 1179 (citation omitted). That analysis necessarily entails considering "each category of documents sought," *Index Newspapers*, 766 F.3d at 1084, because different records filed in the same proceeding may implicate the public's interest in understanding the legal system in different ways: An injunction is not a sealing motion, nor is it a docket.[2] And "technical assistance," in that inquiry, describes the subject matter of a particular All Writs Act injunction—not a distinct class of records.

A. Whether a presumption of access attaches to a particular record depends on the role that kind of record plays in the judicial process.

As the Government concedes, *see* Gov't Br. at 25, the decisions below never separately considered each category of records before authorizing blanket secrecy. Defending that departure from precedent, the Government narrates the facts of

[2] The Government's authority for the claim that access to a docket turns on access to the underlying filings is inapposite. Those cases involved bids for structural reform to "docketing procedures," rather than access to an existing docket. *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)* ("*Appelbaum*"), 707 F.3d 283, 290 (4th Cir. 2013); *In re Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000). The right to inspect docket sheets is not limited to entries describing unsealed records; in fact, the right is necessary precisely so the public can challenge sealing decisions. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 94 (2d Cir. 2004).

United States v. Index Newspapers LLC, 766 F.3d 1072 (9th Cir. 2014), and *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008), in a fashion apparently intended to debunk what any reader of those opinions can see: This Circuit separately considers whether a presumption of access attaches to each category of records filed in a proceeding, even when they share a subject matter. This Court has carefully distinguished, for instance, a contempt motion from a contempt order, *see Index Newspapers*, 766 F.3d at 1072–73, the history of unsealing motions from the history of the underlying proceeding sought to be unsealed, *see id.* at 1096, and even a sealing motion's attachments from the motion itself, *see In re Copley Press*, 518 F.3d at 1026–28. The Government's approach would ignore these distinctions; on its view, this Court instead should have adopted umbrella rules for "contempt materials ancillary to a grand jury investigation" and "plea materials."

On appeal, the Government introduces a new twist on this argument: It claims this Court and the Supreme Court make the nature of a "proceeding"—however defined—dispositive of the public's right to inspect judicial records. Gov't Br. at 25. The claim is meritless. It is irreconcilable on its face with the common law right, which applies to public documents in "all three branches of government" even where there is no "proceeding" to speak of. *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 89 F.3d 897, 903 (D.C. Cir. 1996) (citation

omitted); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). And it likewise contradicts Circuit precedent under the First Amendment.

The Government's insistence that the Supreme Court takes its approach is transparently misplaced: The Supreme Court has never heard a case addressing the First Amendment right of access to judicial documents in particular. *See* David S. Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 840 (2017). It is unremarkable that its precedents on access to proceedings speak in terms of proceedings. And it should be no surprise, then, that "[d]espite the Supreme Court's apparent interest in the 'proceedings,' courts have often, where documents were at issue, turned directly to the documents in dispute, and applied the 'experience and logic' ideas to them." *Dhiab v. Trump*, 852 F.3d 1087, 1104 (D.C. Cir. 2017) (Williams, J., concurring in part and concurring in the judgment).

This Court's precedent requires that approach. This Circuit expressly declines to tie the right of access to judicial documents to the question "whether the documents at issue are derived from or are a necessary corollary of the capacity to attend the relevant proceedings." *Index Newspapers*, 766 F.3d at 1092 n.15 (quoting *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013)).[3] And even the Government's authorities confirm that the proceeding is not

[3] Even circuits that do take that proceeding-based approach, like the Second Circuit, do so *in addition to*—not instead of—applying the experience-and-logic inquiry directly to records. *See Newsday*, 730 F.3d at 164.

controlling. In *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940 (9th Cir. 1998), for instance, this Court refused "to conflate" the questions of access to a hearing and access to a corresponding transcript, because "the rationale for closing a proceeding, such as infringement of the defendant's right to a fair trial, may have no bearing" on whether to maintain related documents under seal, *id*. at 947. So too in the technical-assistance context, where this Court has sometimes permitted argument *in camera* while nevertheless publishing the resulting opinion. *See, e.g.*, *In re United States*, 427 F.2d 639, 641 & n.2 (9th Cir. 1970).

B. "Technical assistance" describes the subject matter of a given All Writs Act injunction, not a legally distinct class of judicial records.

Even if a proceeding-based approach were proper, looking only to All Writs Act proceedings seeking technical assistance—"the particular proceedings at issue in this case" rather than All Writs Act proceedings "as a whole," *Index Newspapers*, 766 F.3d at 1086—would be error.[4] Indeed, the Supreme Court has already ruled out that kind of effort to evade a presumption of access.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 597 (1982), Massachusetts attempted to evade the presumption of access to criminal trials by

[4] The Government's own brief is internally inconsistent on this point: It urges this Court to look to All Writs Act proceedings "[s]ince the Founding" when it suits it, Gov't Br. at 13 n.5 (quoting Opening Br. at 7), but limits the inquiry to "proceedings in which the government seeks technical assistance" in particular—beginning in the mid-twentieth century—when that lens seems preferable, *id.* at 14.

arguing that there is no tradition of access to "the testimony of minor sex victims" in particular. *Id.* at 605 n.13. The Supreme Court found that claim—accurate or not—"unavailing" because the presumption attaches to criminal trials "as a general matter." *Id.* Whether that presumption is overcome "in the context of any particular criminal trial, such as a murder trial . . . or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction." *Id.* That distinction between the two stages of the inquiry is not semantic: "Resolving the level of generality affect[s] not only who [bears] the burden of persuasion but also the severity of that burden." *Dhiab*, 852 F.3d at 1105 (Williams, J., concurring in part and concurring in the judgment).

In the shadow of that precedent, the Government's brief makes new efforts to distinguish "technical-assistance proceedings" from other All Writs Act proceedings. But in doing so, it only highlights that the "distinctions drawn by the court[s] below are insubstantial" and that All Writs Act orders requiring technical assistance are, at most, "a subspecies" of All Writs Act injunction. *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149–50 (1993) (per curiam). In an effort to make technical-assistance orders under the All Writs Act look more like warrants, for instance, the Government maintains such proceedings are *ex parte*, ignoring this Court's contrary holding that All Writs Act proceedings in the

technical-assistance context require that the third party to be enjoined be given "notice and an opportunity to be heard." *Mountain States*, 616 F.2d at 1133.

Similarly, the Government wrongly claims that courts "apply[] the familiar probable-cause framework" applicable to warrants—rather than an equitable balancing test—in deciding whether to issue a technical-assistance order under the All Writs Act. Gov't Br. at 18. The Government's own applications for such orders, which state a different standard, belie that argument. *See* ER-84. In any event, the claim misreads *New York Telephone*. Probable cause was relevant there only in the sense that an All Writs Act order can only issue to protect "jurisdiction otherwise obtained" and orders "previously issued." 434 U.S. at 172. For an All Writs Act order to issue in aid of a warrant, there must first be a valid warrant.

In deciding whether to grant a subsequent All Writs Act order, however, courts must weigh the requested relief's consistency or not "with the intent of Congress," *N.Y. Tel. Co.*, 434 U.S. at 172, the third party's distance or not "from the underlying controversy," *id.* at 174, the third party's "interest in not providing assistance," *id.*, and the harm to the investigation of withholding relief, *id.* at 175; *accord Mountain States*, 616 F.2d at 1128–33; *United States v. Blake*, 868 F.3d 960, 970–71 (11th Cir. 2017). In other words, before issuing a technical-assistance order under the All Writs Act courts must balance the equities and weigh whether Congress has precluded resort to equitable relief—just as a federal court would

before issuing any All Writs Act injunction to a third party "in a position to frustrate the implementation of a court order." *N.Y. Tel. Co.*, 434 U.S. at 174.

The Government's effort to debunk the "putatively 'injunctive'" features of All Writs Act injunctions is no more persuasive. Gov't Br. at 19. It disputes, for instance, whether this Court endorsed the Government's own past argument that technical-assistance orders are "writ[s] in the nature of a mandatory injunction." *In re United States*, 427 F.2d at 643. The point is academic: The Supreme Court adopted the Government's argument that they are permissible "injunctive orders to third parties" in *New York Telephone*. 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; *see N.Y. Tel. Co.*, 434 U.S. at 174 (relying on several cases involving All Writs Act injunctions outside the criminal-investigative context). But, in any event, this Court did not dispute the Government's claim that such an order *is* an injunction; instead, it concluded that the Wiretap Act precluded issuing one. *See In re United States*, 427 F.2d at 643–44. That inquiry is conventional whenever a court considers whether to grant an All Writs Act injunction where Congress has also legislated. *See, e.g.*, *V.N.A. of Greater Tift Cty., Inc. v. Heckler*, 711 F.2d 1020, 1029 (11th Cir. 1983) (asking "(1) whether refusal to grant the injunction will defeat the court's review jurisdiction and (2) whether Congress intended to permit or to preclude a status

quo injunction"). And as this Court has elaborated, a technical-assistance order operates like a status quo injunction in that the order preserves "the court's potential jurisdiction to receive an indictment if significant violations of the law are discovered." *Mountain States*, 616 F.2d at 1129 n.7.

In sum, the Government has found nothing to rebut the conclusion that a technical-assistance order is a "subspecies" of All Writs Act injunction with a particular subject matter. *El Vocero de Puerto Rico*, 508 U.S. at 150. And as the Supreme Court has explained, such case-by-case subject matter distinctions do not control whether a presumption of access attaches to a given class of judicial records. *See Globe Newspaper*, 457 U.S. at 605 n.13.

II. The common law and First Amendment presumptions of access apply to All Writs Act materials, including in the technical-assistance context.

Even if this Court were to look narrowly to All Writs Act materials only in the technical-assistance context, the common law and First Amendment presumptions of access would still apply. The Government relies on a nonprecedential order for the proposition that this Court should start with an unnecessary constitutional analysis, *see* Gov't Br. at 11 n.4 (citing *U.S. Dep't of Justice v. ACLU Found.*, 812 F. App'x 722, 723–24 (9th Cir. 2020)), but published precedent makes clear that this Circuit considers first whether a case can be resolved "by applying the common law right of access alone," *Custer Battlefield Museum*, 658 F.3d at 1196; *see also United States v. Carpenter*, 923 F.3d 1172,

1180 & n.6 (9th Cir. 2019); *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101–02 (9th Cir. 1999).[5] The common law alone resolves this appeal.

A. The common law presumption of access applies to All Writs Act materials because such records are not "traditionally kept secret."

As the parties agree, "[u]nless a particular court record is one traditionally kept secret, a strong presumption in favor of access is the starting point." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). But the Government does not appear to understand that phrase is a "term of art," *id.* at 1184, and it fails to attempt the appropriate showing as a result. Indeed, the Government offers no argument specific to the common law; it rests on its First Amendment claim that there is "no 'tradition of openness'" with respect to All Writs Act proceedings in the technical-assistance context. Gov't Br. at 24. That claim is wrong, as discussed below. But even if it were correct, that showing would be inadequate because the common law and constitutional standards differ.

As this Circuit has explained, documents that "are usually or often deemed confidential"—that are not, in other words, traditionally public—are not necessarily "traditionally kept secret." *Kamakana*, 447 F.3d at 1185. On the

[5] The Government's suggestion confuses the two stages of the right-of-access inquiry. The First Amendment presumption is stronger where it attaches, but the common law applies to a broader class of records. As a result, a finding that the First Amendment presumption does not apply to a document does not obviate the need to ask whether the common law does. *See United States v. Sealed Search Warrants*, 868 F.3d 385, 390 n.1 (5th Cir. 2017); *Appelbaum*, 707 F.3d at 290.

contrary, this Court has "found a common law right of access" to judicial records "despite the fact that [they] traditionally had been kept confidential by the courts" in an ordinary-language sense. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). As *Times Mirror* clarified, documents are "traditionally kept secret" under this Court's precedent only if no as-applied balancing of the interests in a particular case could yield a conclusion that "disclosure would serve the ends of justice." *Id.* (quoting *United States v. Schlette*, 842 F.2d 1574, 1581 (9th Cir. 1988)). Because such situations are vanishingly rare, this Court has "decline[d] to extend" the *Times Mirror* approach. *Custer Battlefield Museum*, 658 F.3d at 1194.

The Government does not attempt to establish that All Writs Act materials related to technical assistance fit *Times Mirror*'s narrow, specialized description—that their disclosure can *never* serve the ends of justice while any related investigation is ongoing. Nor could it. For one, the Government itself has filed technical-assistance materials publicly during ongoing investigations.[6] And Petitioners-Appellants have cited a number of cases in which courts made an express determination that sealing an All Writs Act order in the technical-assistance context would be unjustified despite an ongoing investigation or an

[6] *See* Motion to Vacate Order Compelling Apple Inc. at 11 n.22, *In re Search of an Apple iPhone Seized During Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203*, No. 5:16-cm-0010 (C.D. Cal. Feb. 25, 2016), ECF No. 16 (noting that the Government "alerted reporters" before filing its motion for technical assistance in San Bernardino).

unexecuted warrant. *See* Opening Br. at 24 n.7. The Government's only response is that some of those orders denied the relief the Government sought, *see* Gov't Br. at 15 n.6, an irrelevant distinction under this Court's precedent, s*ee Ctr. for Auto Safety*, 809 F.3d at 1102. In short, even if these were the only such public materials—and they are far from it—they would defeat the argument that All Writs Act materials in the technical-assistance context are "traditionally kept secret."

The Government's one-sentence claim that All Writs Act materials in the technical-assistance context are "akin to . . . grand-jury materials and search warrants during an ongoing investigation" fails on its face. Gov't Br. at 24. With respect to warrants, *Times Mirror* explains that this Court's conclusion turned on "the incremental value in public access" at the pre-indictment stage in light of "other mechanisms . . . already in place to deter governmental abuses of the warrant process." 873 F.2d at 1218; *see also id.* at 1217–18 (emphasizing that warrant materials will, "in due course, be disclosed . . . at a suppression hearing to which the public has a First Amendment right of access"). But the Government does not appear to dispute that there is no such later opportunity for the public to review All Writs Act materials in the technical-assistance context; in fact, its brief suggests there ought not be such an opportunity regardless of the status of the investigation. *See* Gov't Br. at 48. As a result, the rationale underlying *Times*

Mirror is inapplicable in this setting, and extending *Times Mirror* here would result in far greater secrecy than this Court authorizes in the warrant context.

Grand jury materials, for their part, are "unique" in the degree of secrecy our system affords them. *In re Leopold*, 964 F.3d at 1133 (citation omitted). The grand jury antedates the Constitution, and it requires secrecy to better check the Government: It cannot perform "its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" unless "unhindered by external influence or supervision." *United States v. Dionisio*, 410 U.S 1, 17 (1973). Federal Rule of Criminal Procedure 6(e) codifies that tradition, "displac[ing] the common-law right of access." *In re Leopold*, 964 F.3d at 1133; *accord Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989). And as this Court has elaborated, Rule 6(e) makes the question whether the grand jury's investigation is ongoing dispositive, because the rule requires sealing "*to the extent and as long as necessary* to prevent the unauthorized disclosure of a matter occurring before a grand jury." *Index Newspapers*, 766 F.3d at 1088 n.8 (quoting Fed. R. Crim. Proc. 6(e)(6)). The All Writs Act, however, contains no provisions relevant to sealing; as a result the common law presumption applies. *See In re Leopold*, 964 F.3d at 1129 (same with respect to the Stored Communications Act).

Finally, the Government's reliance on a nonprecedential order of this Court addressing Title III materials is similarly misplaced. *See ACLU Found.*, 812 F.

App'x at 722. The Wiretap Act reflects Congress's considered judgment about the degree of secrecy wiretap investigations require. As a result, wiretap materials, "since the time of their creation in Title III, have been subject to a statutory presumption *against* disclosure," *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 (2d Cir. 2009), which displaces the common law. Again, the All Writs Act has no such statutory secrecy presumption.

Looking beyond the individual flaws in these analogies, the Government's decision to dedicate just one paragraph of its brief to the common law, *see* Gov't Br. at 24, cannot be squared with this Court's counsel that "[w]e do not readily" exempt documents from the common law presumption of access, because the "consequences" of doing so would be "drastic" for public understanding of the law. *Kamakana*, 447 F.3d at 1185. The same would be true here if the Government's rule were law. Because the district courts failed to apply the correct standard under the common law, this Court need not address whether the First Amendment requires reversal. *See Custer Battlefield Museum*, 658 F.3d at 1196.

B. The First Amendment presumption of access applies to All Writs Act materials because experience and logic favor access.

Though the Government devotes far more of its brief to the First Amendment than the common law, its constitutional argument is no better supported. Its core flaw is straightforward: All Writs Act controversies arising in the technical-assistance context have been litigated in public since *New York*

Telephone. The Government can offer only its own say-so for the opposite proposition, going so far as to suggest Petitioners-Appellants have conceded this point. *Compare* Gov't Br. at 15, *with* Opening Br. at 23–24 & n.7 (citing examples for the proposition that such controversies have been presumptively public "since the earliest years of the All Writs Act's use as authority for technical-assistance orders"). But as Petitioners-Appellants' opening brief detailed, experience does, in fact, support a constitutional presumption of access to All Writs Act materials, including in the technical-assistance context. And despite the Government's efforts to diminish the public interest in understanding the nature and legal limits of court-ordered technical assistance, logic requires access too.

i. Experience favors access to All Writs Act materials in the technical-assistance context.

The history of All Writs Act orders addressing technical assistance in particular substantially begins with *New York Telephone*, which unfolded in plain view. As Judge Mansfield noted at the Second Circuit stage of the proceedings, "until the [then] recent decision of the Seventh Circuit in [*United States v. Ill. Bell Tel. Co.*, 531 F.2d 809 (7th Cir. 1976)], the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant." *In re U.S. in Matter of Order Authorizing Use of a Pen Reg.*, 538 F.2d 956, 963 (2d Cir. 1976) (Mansfield, J., concurring in part and dissenting in part). From their inception, then, such controversies were resolved in published opinions. This

history makes for a stark contrast with, say, Title III materials, subject to special statutory secrecy since their creation. *See In re N.Y. Times Co.*, 577 F.3d at 410.

The Government questions whether Petitioners-Appellants have cited *enough* published All Writs Act decisions to make clear that this experience of public access has continued. It does not explain when enough would be enough, but in any event Petitioners-Appellants have put forward ample authority. While the cases collected in footnote 7 of the opening brief are the starkest evidence against the Government's position—because each made an express determination that sealing would be unjustified even though a warrant remained unexecuted or an investigation ongoing—they are hardly the only public orders cited in the brief. Petitioners-Appellants can offer even more. *See, e.g.*, *Court Documents Related to All Writs Act Orders for Technical Assistance*, Am. C.L. Union, https://www.aclu.org/other/court-documents-related-all-writs-act-orders-technical-assistance (last visited Apr. 25, 2022) (collecting filings in more than fifty matters).

On the other side of the ledger, while the Government insists that "[t]he historical evidence is unequivocal," Gov't Br. at 19, it fails to cite any. The closest it comes is a district court's observation that "[t]here is no Ninth Circuit authority recognizing a First Amendment right to access technical assistance orders under the [All Writs Act]." Gov't Br. at 16 (quoting *In re Granick*, 388 F. Supp. 3d 1107, 1129 (N.D. Cal. 2019)). That much is trivially true: The question presented

is one of first impression. And even the district court in *Granick* recognized "a *presumptive* common law right of access to these materials," albeit one that was overcome by a consideration—the burden of a request for years of records—not presented here. *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). Not one case in the Government's brief, then, stands for the proposition that All Writs Act materials in the technical-assistance context are anything but presumptively public.

What the Government apparently means when it claims history is on its side is that entirely different records—warrants, grand jury materials, and Title III materials—have not historically been accessible to the public during the pendency of an investigation. But Petitioners-Appellants have not moved to unseal warrants, grand jury materials, or Title III materials, records that—as discussed above—are not meaningfully analogous to, let alone strictly equivalent to, All Writs Act materials. This Court's decision in *United States v. Index Newspapers LLC*, 766 F.3d 1072 (9th Cir. 2014), is again instructive. The All Writs Act materials here are not literally warrant materials, and they were not issued in a warrant proceeding; they are, as the Government concedes, at most "ancillary to . . . the execution of arrest warrants." Gov't Br. at 16. In *Index Newspapers*, this Court likewise considered whether the public could access a range of documents in a proceeding "ancillary to a grand jury investigation." 766 F.3d at 1092. And rather

than apply the rule of presumptive secrecy that would govern the grand jury's own records, this Court "[a]ppl[ied] the experience and logic test to each category of documents sought," *id.* at 1084, accounting for the differing histories of, say, contempt and unsealing motions, *see id.* at 1096. It should do so here. There is a distinctive tradition of access to All Writs Act materials, including in the technical-assistance context, that supports a constitutional presumption of public access.

ii. Logic favors access to All Writs Act materials in the technical-assistance context.

Even if this Court were to find the historical evidence too equivocal, the benefits of public access to these judicial records alone would justify a constitutional presumption of access. *See In re Copley Press*, 518 F.3d at 1026 n.2. As described in the opening brief, the Government's preferred approach would afford All Writs Act injunctions in the technical-assistance context a *sui generis* degree of secrecy, one with predictably negative consequences for each corner of the legal system. The Government's efforts to show otherwise amount to a quarrel with the basic theory of the right of public access to judicial records.

For instance, the Government advances the remarkable argument that the public's interest in understanding the law is limited to the decisions of appellate courts. *See* Gov't Br. at 33. Petitioners-Appellants are unaware of any authority for that proposition, and for good reason. District courts exercise "important Article III powers" and adjudicate "litigants' substantive rights." *Ctr. for Auto*

Safety, 809 F.3d at 1100 (internal quotation marks omitted). And it is practically cliché that "the resolution of a dispute on the merits . . . is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Kamakana*, 447 F.3d at 1179 (citation and internal quotation marks omitted). Here, the technical-assistance orders at issue adjudicated Sabre's rights and bound it to carry out a controversial duty for the Government. Precedential or not, and regardless whether the orders are reasoned or rubber stamps, the public has a vital interest in understanding what they held.

The Government's suggestion that Congress could inform itself about use of the Act by other means, even if true, reflects a similar grievance with the basic theory of the right of access. The presumption "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604. In our system, "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) (emphasis added). That logic requires that All Writs Act materials in the technical-assistance context be presumptively accessible to the public.

III. To the extent either the common law or First Amendment presumption is overcome, the most the Government can justify is limited redactions.

Because the common law and constitutional presumptions of access attach to each category of documents Petitioners-Appellants moved to unseal, the district courts should have considered whether the Government had demonstrated compelling interests that necessitated redacting any portion of them. *See Kamakana*, 447 F.3d at 1185; *Custer Battlefield Museum*, 658 F.3d at 1195 & n.5. Petitioners-Appellants do not dispute that this analysis should take into account, *inter alia*, the status of the investigations, any need to protect witness confidentiality, or any need to avoid alerting fugitives at large. But the district courts were obliged to draw a "specific linkage with the documents" in explaining which portions implicate compelling interests on the facts of these particular cases, *Kamakana*, 447 F.3d at 1184—and obliged to make public the portions that do not.

Instead, the district courts reiterated their generalized reasons for concluding that no presumption of access applies. The decisions are virtually identical on that front to orders that this Circuit has previously found inadequate. *See Phoenix Newspapers*, 156 F.3d at 950 (too "generalized" to state "that the investigation is ongoing and that it is in a posture that the disclosure of the transcript [at issue] would constitute a serious risk of compromising the investigation").

A. The Government has failed to draw a "specific linkage with the documents" in articulating the interests it believes justify secrecy.

The Government's brief fails to supply that missing specificity, asserting its interests categorically. To make the crispest version of the point, this Court knows with certainty that *some* information must be disclosed because the Government concedes it is "already publicly available," *Kamakana*, 447 F.3d at 1184—the Government objects only that the records *also* "contain sensitive information *beyond* what has been publicly reported." Gov't Br. at 37 (emphasis added). That concession necessarily defeats the district courts' conclusion that the presumptions of access would be overcome in their entirety here: "Once information is published, it cannot be made secret again." *In re Copley Press*, 518 F.3d at 1025.

Similarly, while Petitioners-Appellants do not disagree in the abstract that the Government has an interest in avoiding harm to an ongoing investigation, *see* Gov't Br. at 36, it does not have an interest in concealing any records, or portions thereof, that do not implicate that interest. That "the AWA materials name individuals against whom the United States has obtained sealed indictments" as well as their "personally identifiable information" is a reason to redact names and personal information, ER-79, 80, not to withhold segregable legal argument.[7]

[7] If this Court were to extend the *Times Mirror* rule to All Writs Act injunctions and other judicial records in the technical-assistance context, which for the reasons given herein it should not do, the Government does not appear to dispute that a rule requiring unsealing or notice to the public at the investigation's

Indeed, the Government makes no effort to conform its description of what the records may contain to the examples of All Writs Act applications that this Court can examine for itself, *see* Opening Br. at 29 n.9, which contain few of the investigative facts the Government suggests are pervasive.

The Government's emphasis on "protecting sensitive sources and methods of gathering information," Gov't Br. at 35 (citation omitted), is no more persuasive. For one, the Government has conceded that records discussing precisely the same "technique" can be disclosed elsewhere. *See* Gov't Ltr. at 1; Pet'rs-Appellants' Resp. to Gov't Ltr. at 1. But more importantly, when the Government says "law enforcement technique," it has in mind not the "nature or configuration" of a new technology, *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders,* 562 F. Supp. 2d 876, 885 (S.D. Tex. 2008), but the answer to a question of statutory interpretation: Does the All Writs Act authorize the assistance the Government seeks? If the question whether the Government's conduct is lawful were itself an official secret, "then the Government would be free to cloak in secrecy *any* investigative technique, from the most mundane search

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close would be a practical necessity if the public is ever to have an opportunity to assert its rights of access—a conclusion of the district court in the Northern District of California that the Government chose not to appeal. *See* Gov't Br. at 47 n.13. Neither does the Government appear to dispute that this Court's supervisory authority gives it the power to impose that rule, as Petitioners-Appellants argued.

warrant to the most sophisticated electronic surveillance, thereby avoiding the disinfecting rays of public scrutiny." *Id.* at 886. That is not our judicial system.

B. The Government's effort to shift its burden to propose redactions to Petitioners-Appellants is meritless.

As its final fallback position, the Government suggests that it did not need to articulate its interests in support of the continued, wholesale sealing of the documents at issue with any specificity because Petitioners-Appellants should have done so on its behalf instead. *See* Gov't Br. at 44–46. That suggestion is specious.

As an initial matter, Petitioners-Appellants explained from the outset that any justification for continued sealing the Government proffered would need to confront the alternative of redaction; the Government itself concedes as much. *See* Gov't Br. at 45 n.12. Petitioners-Appellants could not have explained line-by-line how the Government's asserted interests could be addressed by redaction because the Government had yet to assert any; once it did, Petitioners-Appellants explained in detail why the Government's stated concerns could not plausibly extend to the entirety of the documents sought to be unsealed and would, at most, justify limited redactions. *See* Reply in Support of Application to Unseal Court Records at 2–3, 6–9, 12, *In re Application of Forbes Media LLC*, No. 2:21-mc-00007 (W.D. Wash. Mar. 5, 2021), ECF No. 10. But regardless, proposing specific redactions was then—and remains now—the Government's burden, because the presumption of access requires disclosure to the extent the Government fails to rebut it with

respect to any portion of a record. *See Kamakana*, 447 F.3d at 1178. This Court's decision in *Custer Battlefield Museum* provides a clear illustration. There, unlike here, the applicant argued only for "[u]nfettered disclosure" and "unrestricted access." *Custer Battlefield Museum*, 658 F.3d at 1191, 1196. But even he did not "forfeit" the Government's duty to sustain its burden. Because a presumption of public access attached to the records, and because the district court had erred in its common law analysis, the appropriate remedy was a remand "to reapply the common law standard" to the Government's proposed restrictions. *Id.* at 1196.

While the Government might like to maintain that "neither the [district] court nor the government has an obligation to sift through these [documents] to determine what is secret and what is not," this Court "disagree[s]." *Index Newspapers*, 766 F.3d at 1092. Members of the public cannot be the ones to conduct the "document-by-document, line-by-line balancing" of values that the rights of access require; they do not have access to the records. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 419 (5th Cir. 2021) (citation and internal quotation marks omitted). And for precisely that reason, redaction "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.

"Providing public access to judicial records is the duty and responsibility of the Judicial Branch." *Id.* at 1134. Unfortunately, the decisions under review fall

short of what that duty requires. Applying a flawed framework, they arrived at a rule that would deny the public any meaningful understanding of court-ordered technical assistance under the All Writs Act. This Court should reject that result.

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.

Date: April 25, 2022

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