UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 20-mc-00082 (PJS/TNL)

IN THE MATTER OF THE APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS TO UNSEAL CERTAIN SEARCH WARRANT MATERIALS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO AMENDED APPLICATION TO UNSEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

INTRODUCTION

By its Amended Application, Petitioner Reporters Committee demands a wholesale change in the way this Court approaches the sealing and unsealing of investigative materials and other orders.

The law does not support Reporters Committee's request. Neither the First Amendment nor the common-law right of access to judicial proceedings and materials establishes a presumptive right of unsealing after 180 days for the kinds of pre-indictment investigative materials at issue in this case. Contrary to Petitioner's core argument, orders under the Pen Register Statute and Stored Communications Act are not analogous to search warrants relating to the physical search of a property, and precedent pertaining to traditional search warrants is not dispositive here. The information obtained through pen registers and § 2703(d) orders is far more similar to that obtained through grand jury subpoenas, subject to the third-party doctrine, about which courts have routinely concluded there is no reasonable expectation of privacy.

Nor does any right of access require the Court to alter its docketing practices to reflect amended or denied applications made by the government to warrants and other investigative tools, or to modify its approach to the sealed status of such materials. Reporters Committee fails to cite any pertinent authority to support its position.

The Amended Application should be denied.

BACKGROUND

Reporters Committee initiated this action in December 2020, filing its initial Application to unseal all Stored Communication Act (SCA) warrant applications, supporting materials, related court orders and docket sheets dating back to January 1, 2018. Doc. No. 1 ¶ 1. At the initial status hearing, the Court informed Petitioner's counsel that most of the relief they sought was already reflected in this District's practices, denied the petition without prejudice, and advised Petitioner to confer with the U.S. Attorney's Office and the Clerk of Court to determine what further relief the parties could agree to. Doc. No. 26 at 7-10 ("I would like to deny your pending application without prejudice just because it's basically aimed at a bunch of stuff that doesn't exist.").

Over the next year, the parties and the Clerk's Office conferred on multiple occasions and were able to reach agreement on a number of items, most of which have now been implemented by the Clerk's Office. These changes reflected a significant change in the docketing practices and tracking capabilities in the District, resulting in increased transparency. The current litigation reflects areas on which Reporters Committee and the U.S. Attorney's Office failed to reach an agreement. Notably, the issues now before the Court were almost entirely absent from Petitioner's initial Application. Rather than SCA warrants, their focus has now shifted to certain orders issued under the

Pen Register Act and § 2703(d) of the SCA (which are different from SCA warrants arising under §§ 2703(a)-(c)). To properly address Reporter's Committee's arguments, it is important to describe the statutory framework governing pen registers and § 2703(d) orders.

I. The Electronic Communication Privacy Act

The Electronic Communication Privacy Act of 1986 ("ECPA") has three parts, only two of which are at issue here, the Pen Register Statute and the Stored Communications Act. These provisions permit law enforcement and prosecutors – only upon making certain showings to the satisfaction of the Court – to seek court authorization to obtain information from electronic communications services and remote computing services in ongoing pre-indictment criminal investigations.

"[T]he term 'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C § 2711(2). "The term 'electronic communication service' means any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510. Examples of "electronic communications service" providers include cell phone providers like Verizon, AT&T, and T-Mobile, while social media companies like Google, Apple, Microsoft, and Facebook are both "electronic communications service" and "remote computing service" providers.

A. The Pen Register Statute

Title III of ECPA, the Pen Register Statute, governs pen register and trap and trace devices, or PR/TTs. Pub. L. No. 99-508, 100 Stat. 1848, 1873 (1986) (codified at 18 U.S.C. §§ 3121-3127). The Pen Register Statute permits the government to submit an ex parte application, under seal, to a court requesting an order authorizing or extending the installation and use of PR/TTs to record, decode, and/or capture dialing, routing, addressing, and signaling information associated with each communication to or from a cellular or land-line telephone number, an email address, or a social media account that is believed to be used by a suspect or target in an ongoing criminal investigation.[1]

For a target telephone account, a PR/TT logs incoming and outgoing calls, tracking the dates and times of the calls and the phone numbers of the

[1] A pen register is "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted." 18 U.S.C. § 3127(3). Thus, a pen register is able to record outgoing numbers dialed by a target phone. A "trap and trace device" is "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication." 18 U.S.C. § 3127(4). Thus, a trap and trace captures the numbers of incoming calls made to a target phone.

callers. For a target internet account, a PR/TT logs IP addresses accessed from the account. For a target email account, a PR/TT logs incoming and outgoing emails, tracking the dates and times of the emails and the addresses of the emailers. PR/TTs do not capture any content of the communications.

The government's application for a PR/TT must include three elements: (1) "the identity of the attorney for the Government or the State law enforcement or investigative officer making the application;" (2) "the identity of the law enforcement agency conducting the investigation;" and (3) "a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." 18 U.S.C. § 3122(b). Upon certification by the court that the government's ex parte application meets the requirements of the statute, the court enters an ex parte order authorizing the installation and use or continued use of a PR/TT. 18 U.S.C. § 3123(a)(1), (2).

The Pen Register Statute requires that orders authorizing the installation of PR/TTs be sealed "until otherwise ordered by the court." 18 U.S.C. § 3123(d)(1). The Local Rules for the District of Minnesota also provide that applications and orders for PR/TTs be sealed. LR 49-1(c)(1)(B)(ii).[2]

[2] In this District, records obtained using PR/TTs are provided to a defendant after charges are filed, in accordance with the government's discovery obligations in each case. PR/TTs that do not result in criminal

B. The Stored Communications Act

Title II of ECPA, the Stored Communications Act, governs law enforcement's access to stored communications and transaction records from third-party electronic communications services and remote computing services. Pub. L. No. 99-508, 100 Stat. 1848, 1860 (1986) (codified at 18 U.S.C. § 2701 *et seq.*). The core provision of the SCA is § 2703, which authorizes government access to two categories of information, each with differing access requirements: 1) *contents* of wire or electronic communications; and 2) subscriber *records* and other *non-content* information.

For the government to obtain the first category of information (which includes things like the contents of email accounts, social media accounts, and cloud-based storage accounts), a search warrant under Rule 41 is required. 18 U.S.C. § 2703(a), (b). In the District of Minnesota, such warrants are sealed only by order of the Court, typically for a period of 180 days, and the sealing may be extended only by further order of the Court upon a showing of good cause.

---

charges typically remain sealed and are not disclosed outside of the prosecutors and investigators who were involved in obtaining and conducting the PR/TTs.

The second category of information – non-content subscriber records and information – can be obtained by § 2703(d) order. Section 2703(d) permits the government to submit, under seal, an ex parte application for an order requiring an electronic communication service or remote computing service provider to disclose non-content records and other information pertaining to the subscriber's account(s), which may be identified by, for example, an email address, telephone number, account number, user name, IP address or domain name. A court order under § 2703(d) "shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought . . . are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).[3]

The Local Rules for the District of Minnesota provide that § 2703(d) applications and orders are sealed. LR 49-1(c)(1)(B)(iii). The government "is not required to provide notice to a subscriber or customer" when obtaining

[3] A subset of subscriber records can be obtained by "an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena;" specifically, the subscriber's name, address, local and long distance telephone connection records or records of session times and durations, length of service and types of service utilized, telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address, and means and source of payment for such service. 18 U.S.C. § 2703(c)(2).

records pursuant to the order. *See* 18 U.S.C. § 2703(c)(3). Most of the large providers, however, give notice to their customers unless prohibited to do so by court order. [4] Such nondisclosure orders are for a limited duration, meaning typically the customer will be given notice at some point, whether or not criminal charges result, and could therefore seek unsealing of the application and order.

The types of records obtained using a PR/TT or § 2703(d) order are not subject to a legitimate expectation of privacy and are therefore not protected by the Fourth Amendment. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *United States v. Wheelock*, 772 F.3d 825, 828-29 (8th Cir. 2014). The principle underlying this conclusion is referred to as the third-party doctrine, which, at its simplest, is that a person "has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743–44 (collecting cases). The third-party doctrine applies to both phone

[4] 18 U.S.C § 2705(b) permits the government to obtain "an order commanding a provider of electronic communications service or remote computing service to whom . . . [the] court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of . . . [the] court order." Such a nondisclosure, or preclusion, order must be issued if the court finds "reason to believe that notification . . . will result in — (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial." *Id.* Nondisclosure orders in this District are issued for a limited duration, typically 180 days, and extensions may be granted only upon a showing of continued good cause.

records and records from internet providers like IP addresses. *Id.* (phone records); *Wheelock*, 772 F.3d at 828-29 (IP address); *see also United States v. Soybel*, 13 F.4th 584 (7th Cir. 2021) (IP address); *United States v. Trader*, 981 F.3d 961, 967 (11th Cir. 2020) (email and IP addresses); *United States v. Ulbricht*, 858 F.3d 71, 97 (2d Cir. 2017) (IP address) *United States v. Graham*, 824 F.3d 421, 432 (4th Cir. 2016) (en banc) (noting that "third-party information relating to the sending and routing of electronic communications does not receive Fourth Amendment protection"); *United States v. Christie*, 624 F.3d 558, 574 (3d Cir. 2010) (IP address); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) (IP address); and *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) (collecting cases).

II. District practice

As noted above, PR/TT and § 2703(d) applications and orders are sealed by Local Rule. LR 49-1(c)(1)(B)(ii), (iii). Other categories of documents listed in the mandatory-sealing rule include, for example, grand jury materials, wiretap applications and orders, and criminal subpoenas. *See* LR 49.1(c)(1)(A), (c)(1)(B)(i), (c)(1)(B)(v)-(vi). This express inclusion in the Local Rules of application materials and orders under both § 2703(d) and the Pen Register Act arises from the nature of such orders and their frequent use at the earliest stages of a criminal investigation.

As an example of how PR/TTs and § 2703(d) orders are used, in a child pornography investigation the FBI may have records showing that pornographic images and videos from a known producer of child pornography are being downloaded to an IP address assigned to the internet account of Person A. In such a case, the FBI could obtain a § 2703(d) order for Person A's cellphone, internet, or email accounts to determine if, in the past, Person A had been in contact with the known producer of child pornography or visited websites from which child pornography could be acquired. Similarly, law enforcement may obtain a PR/TT on Person A's cellphone, internet, or email accounts to determine if, over the next 60 days,[5] Person A is in contact with the known producer of child pornography or visits websites from which child pornography could be acquired. In this example, FBI agents review the records obtained from both the § 2703(d) order and the PR/TT and find nothing to connect Person A to child pornography. Later, the FBI learns that a neighbor of Person A had, without Person A's knowledge or permission, surreptitiously accessed Person A's wireless router and used it to download child pornography. The neighbor has since fled the country after finding out he was being investigated, and so is never charged.

[5] Under 18 U.S.C § 3123(c)(1), a PR/TT can be obtained for a period of 60 days, and may be extended by court order.

And so, in this example, although Person A has committed no crime, the application for the § 2703(d) order would contain "specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought . . . are relevant and material to an ongoing criminal investigation" into Person A's involvement in child pornography. The application would also reveal identifying information about Person A, such as his phone number and account names (e.g., Person.A@gmail.com). Similarly, the PR/TT applications would contain Person A's name and would specify the account on which the PR/TT was obtained, revealing additional identifying information about Person A, such as his phone number and account names. Moreover, the PR/TT order would also contain Person A's name and account names/numbers, would identify Person A as a "subject of the criminal investigation," and would further contain "a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates," which in this case is receipt of child pornography. 18 U.S.C. § 3123(b)(1)(b), (d). Obviously, the unsealing and release of all of this information without any further context or information, which likely would not be available in the public domain, would be damaging to Person A's reputation.

ARGUMENT

I. The Amended Application should be dismissed for lack of standing.

The Court should dismiss the Amended Application because Petitioner's lack standing. Reporters Committee has failed to establish that it has suffered any concrete and particularized injury from its lack of access generally to sealed investigative materials to date, or that it will be injured by the denial of access to such materials in the future.

A. Legal standards

Standing is "an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The principle that the party invoking federal jurisdiction must establish standing ensures "that federal courts do not exceed their authority as it has been traditionally understood" by limiting "the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 334 (2016).

The "irreducible constitutional minimum" of standing consists of three elements. *Lujan*, 504 U.S. at 560. The plaintiff (1) must have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.* at 560–61. The injury-in-fact requirement "requires a plaintiff to allege an

injury that is both 'concrete *and* particularized.'" *Spokeo*, 578 U.S. at 334 (quotation omitted; emphasis in original). And standing to assert one claim does not create standing to assert claims arising from the same or related facts. Standing "is not dispensed in gross," and the plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 353 (2006).

A "[c]oncrete injury, whether actual or threatened, [is] that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–221 (1974). It "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *id.* at 221, and ensures that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

To establish injury, "the complaining party [is] required to allege a specific invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14. That invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen v. Wright*, 468 U.S. 737, 750–51,

756, 760 (1984) (internal quotation marks omitted), *abrogated on other grounds by Lexmark Int'l v. Static Control Components*, 134 S.Ct. 1377 (2014). An "[a]bstract injury is not enough," *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), because injury-in-fact "is not an ingenious academic exercise in the conceivable [but] requires a factual showing of perceptible harm," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (cleaned up).

Federal courts lack jurisdiction to hear suits "claiming only harm to [the plaintiff's] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan*, 504 U.S. at 573–74. The desire to seek "vindication of the rule of law . . . does not suffice" to establish standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998).

In *Lance v. Coffman*, 549 U.S. 437, 441–42 (2007), the Supreme Court held that the plaintiffs lacked standing because "[t]he only injury [they] allege is that the law . . . has not been followed." In *Allen*, 468 U.S. at 754, the Court noted that it has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." And in *Schlesinger,* 418 U.S. at 219–20, the Court held that the "generalized interest of all citizens in constitutional governance . . . is an abstract injury" that is an insufficient basis for standing.

B. Petitioner has failed to demonstrate injury-in-fact.

Petitioner's supposed injury from the denial of access to the materials it seeks, or from an allegedly improper presumption in favor of continued sealing, is not concrete and particularized within the meaning of Article III. Petitioner claims a general interest in seeing applications and orders authorizing certain categories of investigatory techniques for the purpose of academic research and public awareness of the United States' use of these types of orders. Doc. No. 36, at 1 ("Access to these materials would provide the public with insight into the government's use and the court's authorization of electronic surveillance. It also would provide the press with the information it needs to keep the public informed about its government and bolster both fairness and the appearance of fairness of the court."). These interests are too general to establish an injury from the denial of access.

A litigant lacks standing to "seek wholesale improvement" of a government program "by court decree, rather than in the offices of the Department or the halls of Congress where programmatic improvements are normally made." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Instead, the case or controversy requirement requires that "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action." *Id.*

In individual cases, criminal defendants have standing and incentive to challenge the government's use of specific investigative procedures, and they frequently do. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Wheelock*, 772 F.3d at 827-29. Similarly, the press and public seek access in particular cases where the questions of the continued need for secrecy can be decided in the concrete context of a particular investigation. *See, e.g.*, *Forbes Media LLC v. United States*, 2021 WL 2935906 (N.D. Cal. July 13, 2021). Service providers and uncharged targets challenge the government's use of these types of processes as well. *See*, *e.g.*, *In re Nat'l Sec. Letter*, 863 F.3d 1110 (9th Cir. 2017); *In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(d), United States v. Appelbaum,* 707 F.3d 283, 286–87 (4th Cir. 2013) ("*Appelbaum*"); *Microsoft Corp. v. U.S. Dept. of Justice*, 233 F. Supp. 3d 887 (W.D. Wa. 2017).

Relatedly, members of the public have sometimes sought to unseal criminal proceedings. *See, e.g.*, *In re Search Warrant for Secretarial Area Outside Office of Gunn ("In re Gunn")*, 855 F.2d 569, 570-71 (8th Cir. 1988). But such cases generally involve motions to unseal particular proceedings, not wholesale changes to unsealing procedures like those sought here.[6]

[6] While ultimately concluding Petitioners' request for prospective relief was improper, the Northern District of California in 2019 in *In re Granick* found Petitioners had standing to seek access to judicial records. *See* 388 F.Supp.3d at 1117. By contrast, a recent decision in this district, applying Eighth Circuit

Because no injury-in-fact is present, and this dispute is not sufficiently concrete or particularized to give rise to a case or controversy within the meaning of Article III, Petitioner's Amended Application should be denied.

II. Even if Petitioner had established standing, no right of access applies to the investigative materials at issue.

"'The law recognizes two qualified rights of access to judicial proceedings and records.'" *United States v. Doe*, 870 F.3d 991, 996–97 (9th Cir. 2017) (quoting *United States v. the Business of the Custer Battlefield Museum and Store*, 658 F.3d 1188, 1192 (9th Cir. 2011)); *In re Gunn*, 855 F.3d at 573, 575-76 (Bowman, J., concurring). There is a qualified First Amendment right of access to criminal proceedings and related records. *Zink v. Lombardi*, 783 F.3d 1089, 1112 (8th Cir. 2015) (en banc) (citing *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986) (*Press-Enter. II*)). There is also a qualified common-law right to inspect and copy public records and documents, including judicial records and documents. *United States v. McDougal*, 103 F.3d 651, 657-58 (8th Cir. 1996) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)).

Petitioner claims there is both a First Amendment right to access and a common-law right to access PR/TT and § 2703(d) materials, such that this

---

law, found plaintiff environmental organizations lacked standing to pursue challenges to a mining proposal because they failed to allege a particularized, concrete injury and any future injuries were speculative and premature. *See Waterlegacy v. USDA Forest Service*, 2019 WL 4757663, *21 (D. Minn. Sept. 30, 2019).

District must institute a presumption of unsealing these materials after 180 days. Petitioner fails to demonstrate that either right applies here. Accordingly, even if Petitioner had established standing, its Amended Application should be denied.

A. No First Amendment right of access applies.

Reporters Committee contends the public has a qualified First Amendment right of access to PR/TT and § 2703(d) materials. Doc. No. 36 at 13-24. That contention lacks merit.

1. Experience and logic test; qualified right

The Supreme Court has "implicitly recognized that the public has no right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) (citing *Press-Enter. II*, 478 U.S. at 8). To determine whether a qualified First Amendment right of public access applies to a particular proceeding or document, courts apply an "experience and logic" test. *Press-Enter. II*, 478 U.S. at 9. That test asks (1) "whether the place and process have historically been open to the press and general public;" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8. Both prongs of this test support denial of Petitioner's request,

a. Logic alone does not suffice.

Citing out-of-circuit caselaw, Petitioner suggests satisfying the logic requirement alone may be enough to establish a qualified First Amendment right of access. *See* Doc. No. 36 at 14 (citing *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008)). Petitioner also suggests "the Supreme Court indicated in *Press-Enterprise II*" that "logic alone can support a First Amendment right of access." *Id.* This is inaccurate. In describing the test, the Court noted that prior decisions had "emphasized two complementary considerations," which it later referred to as "[t]hese considerations of experience and logic." 478 U.S. at 8, 9. The Court then stated, "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9. Far from indicating that either prong is optional, this language expressly states that both should be included in a proper analysis.

The Eighth Circuit has understood the rule this way. In *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (en banc), the full court held a group of death-row inmates failed to state a claim for access to records associated with execution proceedings because the evidence fell "well short of the *required* 'tradition of accessibility' that might give rise to a right of access." *Id.* at 1113 (emphasis added); *see also Flynt v. Lombardi*, 885 F.3d 508, 512 (8th Cir. 2018) (noting that "to the extent there was a First Amendment right of access, it

would depend on *two prerequisites*: '(1) a historical tradition of accessibility, and (2) a significant positive role for public access in the functioning of the judicial process in question'") (emphasis added) (citing *IDT Corp. v. eBay*, 709 F3d 1220, 1224 (8th Cir. 2013)).

b. Right of public access is qualified, not absolute

Moreover, even when a plaintiff satisfies both the experience and logic requirements, the resulting "right of public access is not absolute; it is a qualified right." *In re Gunn*, 855 F.2d at 574. The "public still can be denied access if closure 'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Times Mirror*, 873 F.2d at 1211 n.1 (quoting *Press-Enter. II*, 464 U.S. at 509–10); *see In re Gunn*, 855 F.2d at 574 (affirming decision to keep search warrant materials under seal notwithstanding qualified right of access). "The First Amendment generally grants the press no right to information superior to that of the general public." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978).

As explained in Section III below, even if a First Amendment right of access were applicable to PR/TT or § 2703(d) materials, that right would be overridden by compelling interests such that no presumption of unsealing is required here.

2. There is no First Amendment right of access here.

Neither experience nor logic supports the extension of a First Amendment right of access to § 2703(d) and PR/TT orders and applications. The inapplicability of a right to access such materials is clear from the very nature of these investigative tools. As noted above and further explained below, the records obtained pursuant to a PR/TT or § 2703(d) order are similar to information obtained through early investigation tools like grand jury subpoenas, for which there is no right of access. These orders and applications are thus in the nature of other materials subject to a strong tradition of secrecy, and public access to them would not play a significant role in the government operations for which the tools exist. No First Amendment right of access should attach here.

a. The "experience" prong is not met.

Like information obtained pursuant to grand jury subpoenas, no historical tradition of access exists. For example, in a case decided by the Fourth Circuit, subscribers sought to unseal, at the pre-grand jury, investigative stage, § 2703(d) applications and orders pertaining to the unauthorized disclosure of classified documents to Wikileaks.org, and the alleged involvement of U.S. Army Private First Class Manning. *See Applebaum*, 707 F.3d 283. The subscribers conceded that the experience prong

was not met because there was not a long tradition of access to § 2703(d) orders, given that the statute was enacted in 1986. *Id.* at 291.

Even apart from that concession, however, the Fourth Circuit made clear that there was "no history of access to § 2703(d) matters." *Applebaum*, 707 F.3d at 291-92 n.9. As the Court explained, "§ 2703(d) orders are most analogous to sealed or unexecuted search warrants and grand jury proceedings for which traditionally, there has been no right of access." *Id.* This comparison makes sense. Section 2703(d) applications are traditionally submitted ex parte and in camera. *See, e.g., Appelbaum,* 707 F.3d at 292 (proceedings at issue "consist of the issuance of and compliance with § 2703(d) orders, are ex parte in nature, and occur at the investigative, pre-grand jury, pre-indictment phase of what may or may not mature into an indictment."). The statute specifically authorizes the United States to obtain an order prohibiting notification of the existence of a § 2703(d) order to anyone. *See* 18 U.S.C. § 2705(b); [7] *see also In re Application of the N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials,* 577 F.3d 401, 410 (2d Cir. 2009) (no First Amendment right of access

[7] The Department of Justice issued internal guidelines in 2017 to provide uniformity on the use of § 2705(b) orders. Contrary to Petitioner's contention, the guidelines were not "to address a problem of prosecutors requesting indefinite gag orders." Doc. 36 at 5 n.3. Indeed, the guidance expressly states: "Nothing in this guidance is intended to indicate or imply that any existing protective order(s) issued by any court may be improper." Oct. 19, 2017 Deputy Attorney General Mem. at 3.

to wiretap materials where applications were created by statute and statute also had protective scheme); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502-03 (D.C. Cir. 1998) (no First Amendment right of access to proceedings ancillary to grand jury investigation because no tradition of openness).

Other courts that have squarely addressed the issue have concluded both § 2703(d) orders and PR/TT orders are quite unlike judicial materials as to which a tradition of public access exists. *See In re Granick*, 388 F. Supp.3d 1107, 1124 (N.D. Ca. 2019) (there is "no tradition of making sealed warrant materials accessible to the public as a matter of course"); *id.* at 1128 ("In other words, *Leopold II* determined that there was no First Amendment right of access to PR/TT materials because neither prong of the 'experience or logic' test was satisfied."); *Matter of Leopold*, 327 F. Supp.3d 1, 18-20 (D.D.C. 2018) (finding no First Amendment right of access to PR/TT or § 2703(d) materials); *cf. In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000) (pre-indictment investigative processes "where privacy and secrecy are the norm . . . are not amenable to the practices and procedures employed in connection with other judicial proceedings"); *Forbes Media LLC v. United States*, 2021 WL 2935906, *4 (N.D. Cal. July 13, 2021) (no First Amendment right of access to investigative materials arising under All Writs Act).

Petitioner nonetheless suggests the "experience" prong is met because § 2703(d) materials are "analogous to search warrants." Doc. No. 36, at 17-18.

Simply put, they are not. Unlike typical search warrants, which authorize entering spaces and obtaining information protected by the Fourth Amendment, PR/TT and § 2703(d) orders do no such thing. As noted at pages 4-11 above, the subscriber records obtained using a PR/TT or § 2703(d) order do not include the contents of any of the subscriber's communications and, like grand jury subpoenas, provide access to information not subject to a legitimate expectation of privacy. In addition, unlike PR/TT or § 2703(d) orders, execution of a search warrant is typically an overt, public event, with law enforcement agents entering a residence to execute the warrant and leaving a copy of the warrant and an inventory of anything seized when they are done.

Petitioner's reliance on *In re Gunn* is misplaced. Generally, the Eighth Circuit has taken a narrow approach to applying a First Amendment right of access to judicial materials. *In re Gunn* itself, while stating such a qualified right existed, nevertheless held that the district court was right to keep the search warrant materials at issue under seal given the "substantial probability that the government's on-going investigation would be severely compromised if the sealed documents were released." 855 F.2d at 574.

The court's First Amendment discussion was therefore not necessary to the holding in the case, as the concurrence pointed out. *See id.* at 575-76. Indeed, in a later opinion, the Eighth Circuit indicated that *In re Gunn*'s "holding . . . was limited to that case." *Webster Groves School Dist. v. Pulitzer*

Pub. Co., 898 F.2d 1371, 1377 n.9 (8th Cir. 1990). For multiple reasons, therefore, *In re Gunn* does not dictate the result Petitioner seeks here and certainly fails to establish any history of public access to PR/TT or §2703(d) materials.

In sum, the experience prong is not met with respect to these investigative materials. They are akin to grand jury subpoenas, as to which no history of access exists; other courts to consider similar questions under the First Amendment have concluded the experience prong is not met; and the Eighth Circuit's *In re Gunn* decision fails to establish any tradition of access here.

b. The "logic" prong is not met.

Nor does Petitioner satisfy the logic prong of the First Amendment test as to either PR/TT or § 2703(d) materials. Public access does not and should not play a significant role in these investigative processes, based on such factors as the safety and privacy of confidential sources; reputational interests of innocent individuals; and the specific nature of the statutory schemes at issue.

i. Public access plays no role in the governmental processes in question, nor should it.

The logic requirement asks whether public access plays a significant positive role in the process in question. *Press-Enter. II*, 478 U.S. at 8-10. As

the Supreme Court has recognized, "[a]lthough many governmental processes best operate under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Id.* at 8-9. The "classic example," of course, is that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Id.* (quoting *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979)).

Grand jury proceedings are far from the only such governmental processes. That many investigative materials sometimes need to be kept secret in order for law enforcement to function effectively is commonsensical and well-recognized in statutory and common law. *See, e.g.*, *In re City of New York*, 607 F.3d 923, 940–41 (2d Cir. 2010) (explaining purpose of common law's recognition of a law enforcement privilege "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation."); *United States v. Rigmaiden*, 844 F. Supp. 2d 982, 989 (D. Ariz. 2012) (recognizing law enforcement privilege to shield sensitive surveillance technique from disclosure); *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957) (recognizing common-law privilege to protect the identity

of a confidential informant); *see also* Classified Information Procedures Act, 18 U.S.C. App. III.

These principles apply here, because public access rightfully plays no significant role in SCA or PR/TT processes. The proceedings are limited to the issuance of and compliance with an investigative order. They are ex parte in nature, and occur at the investigative, pre-indictment phase of what may or may not mature into an indictment. During an investigation, maintaining these materials under seal promotes important interests in investigative integrity; the safety and privacy of confidential sources, cooperating witnesses, and law enforcement; public safety; and the important privacy interests of individuals implicated but never charged in criminal investigations.

ii. Sealing often remains warranted later in the process.

Furthermore, maintaining the current presumption of continued sealing makes good sense. Logic does not support the wholesale unsealing of all SCA materials in this District even when an investigation has ended. Petitioner argues that "[i]ndefinite sealing of . . . 2703(d) materials conflicts with the public's interest in judicial openness and accountability." Doc. No. 36 at 28. But that is not the case. When an investigation ends with charges, the public is informed of the charges through a public indictment, and the defendant will receive notice of SCA materials in discovery. The indictment presents an opportunity for interested parties to seek unsealing in particular cases, where

the Court can assess the need for secrecy in light of the particular facts of the case.

When an investigation ends without any charges, unsealing of these materials would violate the privacy of or endanger uncharged, potentially innocent, individuals who fall within the scope of the investigation. *In the Matter of the Application of WP Co.,* 201 F. Supp. 3d at 122 ("[C]ourts have been reluctant to recognize even a qualified public right to access to [post-investigation warrant materials] where, as here, an investigation concludes without indictment.").

Indeed, "as a general matter, the Due Process Clause of the Fifth Amendment protects an individual from governmental accusations of criminal misconduct without providing a proper forum for vindication." *Id.*; *see also* Justice Manual § 9-27.760 ("As a series of cases make clear, there is ordinarily 'no legitimate governmental interest served' by the government's public allegation of wrongdoing by an uncharged party, and this is true '[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future.'") (citing *In re Smith*, 656 F.2d 1101, 1106–07 (5th Cir. 1981)). "Courts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings." *Id.* (citing cases).

Unsealing investigative documents that contain derogatory inferences (such as, in the example above, that Person A was investigated for child pornography) could result in, at a minimum, significant reputational harm. *See, e.g., In the Matter of the Application of WP Co.*, 201 F. Supp. 3d at 122 (recognizing the "stigma that implicates an individual's reputational interest" and the "due process interest [that] arises from an individual being accused of a crime without being provided a forum in which to refute the government's accusations"). A blanket presumption of unsealing would affect the rights of people who would not be in a position to protect against such harm. [8] *Granick*, 388 F.Supp.3d at 1120 ("Even if the government did not raise concerns about publicly disclosing information in a particular search warrant matter, the defendants, witnesses, cooperators, victims, targets of investigations, property owners, confidential sources and other individuals implicated in those materials could have standing to object to public disclosure and the court would be called upon to address the merits of those objections in each case before unsealing the records.").

[8] Petitioner may suggest redaction is an option for protecting these interests. Notwithstanding that this would be a burdensome process for both the court and the government, it would result in almost no public benefit, as the redactions would remove most of the relevant evidence (subject's name, telephone or other account number, and anything else in the "specific and articulable facts" that could identify the subject).

The First Amendment does not require a blanket presumption that these materials must be unsealed after any set time period.

iii. Neither statutory scheme suggests a significant role for public access.

Petitioner's "logic" showing also founders on the specific considerations underlying the SCA and the PR/TT process. Concerning the SCA, as the Fourth Circuit rightly observed, "Section 2703(d) proceedings can be likened to grand jury proceedings. In fact, they are a step removed from grand jury proceedings, and are perhaps even more sacrosanct." *Appelbaum*, 707 F.3d at 292. Because SCA materials are investigative, "openness of the orders does not play a significant role in the functioning of investigations." *Id*.

Additionally, the Pen Register Act's comprehensive statutory scheme, including the provisions governing the presumption of sealing and limits on disclosure, reflect Congress's determination that PR/TT material should remain confidential. Petitioner has failed to present any basis upon which the Court could adopt its view that public policy favors public involvement in the requested PR/TT materials over Congress's preferred public policy as expressed in the statutory scheme.

Against this statutory backdrop, it is reasonable that PR/TT and § 2703(d) orders remain subject to a presumption of sealing in this District. Although Petitioner contends that logic dictates openness even in

contravention of historical practice, the strong tradition of secrecy for these materials compels the conclusion that there is no First Amendment right to them. As the Supreme Court has observed, "considerations of experience and logic are [] related, for history and experience shape the functioning of governmental processes." *Press-Enter. II*, 478 U.S. at 9. The investigative tools at issue here contain provisions underscoring their secrecy, and historically have been sealed in this District, precisely because logic dictates that a presumption of openness would undermine the usefulness of these particular tools and cause harm to innocent third parties.

iv. Generalized considerations of fairness and self-governance are not dispositive.

Petitioner's resort to general concepts of self-governance and fairness is equally unavailing. In *Times Mirror*, the Ninth Circuit considered and rejected the argument that "any time self-governance or the integrity of the criminal fact-finding process may be served by opening a judicial proceeding and its documents, the First Amendment mandates opening them to the public." 873 F.2d at 1213. As the court explained, accepting that argument would mean few, if any, judicial proceedings would remain closed because every "judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of

government." *Id.* But it rejected complete openness, explaining that it "would undermine important values that are served by keeping some proceedings closed to the public. Openness may, for example, frustrate criminal investigations and thereby jeopardize the integrity of the search for truth that is so critical to the fair administration of justice." *Id.*; *see also United States Dep't of Justice v. ACLU*, 812 Fed. Appx. 722, 723 (9th Cir. 2020) (rejecting First Amendment right of access to "various contempt proceeding documents related to a technical assistance wiretap order" because "the benefits of open proceedings are more than outweighed by the damage to the criminal investigatory process") (cleaned up); *In the Matter of the Application of WP Company LLC d/b/a The Washington Post for Access to Certain Sealed Records*, 201 F. Supp. 3d 109, 122 (D.D.C. 2016) ("without an indictment, even a 'closed' investigation is more analogous to a federal grand jury proceeding, to which no public right of access attaches, than the sort of public criminal proceeding that lies at the core of the First Amendment").

Accordingly, "claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open these proceedings to the public. Nor will the mere recitation of these interests open a particular proceeding merely because it is in some way integral to our criminal justice system." *Times Mirror*, 873 F.2d at 1213. The important considerations identified by the *Times Mirror* court are amplified here, where the Court is not

being asked to make a determination about the values served in unsealing a particular matter, but rather is being asked to order a District-wide policy change affecting all § 2703(d) and PR/TT matters going forward.

For these reasons, because neither experience nor logic supports recognition of a First Amendment right of access to PR/TT or § 2703(d) materials, this Court should not apply any such right in its consideration of this matter.

B. The common-law right of access does not support a presumption to unseal these materials.

The common-law right of access to public documents does not require a change in this District's approach to these materials, either. While courts have long recognized "a general right to inspect and copy public records and documents, including judicial records and documents," the common-law right is not absolute and, like any First Amendment right of access, must be balanced against countervailing interests. *See Nixon*, 435 U.S. at 597-98. It does not apply to documents that "have traditionally been kept secret for important policy reasons." *Times Mirror Co.*, 873 F.2d at 1219. Here, Petitioner's claim of a common-law right of access fails in light of the deferential, multi-factor balancing test repeatedly recognized by the Eighth Circuit.

1. The Eighth Circuit's approach

Petitioner mischaracterizes the Eighth Circuit's approach to access under the common law. While the court in *In re Neal* did quote a First Circuit case saying "only the most compelling reasons" could justify non-disclosure, both decisions in fact arose in the bankruptcy context and their holdings turned on statutory rather than common-law analyses. *See In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005)). Eighth Circuit decisions that actually analyze and apply the common-law right of access have expressly rejected the "strong presumption" of access recognized by some circuits. *See United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (finding no right of access by television station wishing to copy tapes admitted into evidence at trial; "We decline to adopt in toto the reasoning of the Second, Third, Seventh, and District of Columbia Circuits in recognizing a 'strong presumption' in favor of the common law right of access.").

The Eighth Circuit agreed with the Fifth Circuit that those courts had "created standards more appropriate for protection of constitutional than of common law rights." *Id.* (quoting *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 434 (5h Cir. 1981)).

The Eighth Circuit's approach to the common-law right of access emphasizes deference to district courts. The Eighth Circuit has explained that a district court should make the decision as to access "on an ad hoc basis . . .

weigh[ing] the appropriate factors on both sides of the issue." *Id.* at 107; *see also United States v. McDougal,* 103 F.3d 651, 654, 657 (8th Cir. 1996) (rejecting contention that *In re Gunn* had "overruled *Webbe*" and observing the "legal standards governing the common law right are well-established in this circuit").

Pertinent factors the Eighth Circuit has found constitute overriding countervailing interests include the integrity of ongoing investigations, *In re Gunn*, 855 F.2d at 574; "the public interest in fairness to any innocent persons," *id.* at 575 (concurrence); the "personal and professional safety" of persons who may be "harassed and threatened" as a result of disclosure of certain information, *Flynt*, 885 F.3d at 511-12; the need for courts to "avoid becoming the instrumentalities of commercial or other private pursuits" by providing information, *McDougal*, 103 F.3d at 658; the "only marginal" nature of the public's interest in access to certain types of judicial records, *id.*; the "strong public policy" of keeping "possibly stigmatizing matters" involving minors out of the public sphere, *Webster Groves School Dist.*, 898 F.2d at 1375; and "the administrative difficulties in providing access" in some circumstances, *Webbe*, 791 F.2d at 107. This list is far from exhaustive.

2. The common-law right does not overcome the strong countervailing interests here.

Applying that approach here, the common-law right of access does not attach to PR/TT and SCA materials in a way that would dictate Petitioner's proposed policy change. As with grand jury materials and Wiretap Act materials, PR/TT and § 2703(d) orders have traditionally been kept secret for important policy reasons. Also, as the concurring judge in *Appelbaum* explained, when a statutory scheme is enacted in order to protect the privacy interests of individuals subject to government process, the common-law right of access is "squarely at odds with the Act's essential purpose." *Appelbaum*, 707 F.3d at 297 (Wilson, D.J., concurring).

Just so here. Creating a presumption of access to these orders, which "implicate or directly convey highly private information and confirm the existence of a criminal investigation," would mean that, "[r]ather than serving as a check against invasions of privacy, the Act would serve to magnify them." *Id.* Such a presumption would "irreconcilably conflict[] with the statutory scheme of the Electronic Communications Privacy Act," in which "Congress's primary concern . . . is revealed by the Act's very name." *Id.*

Moreover, the Pen Register Statute expressly requires sealing "until otherwise ordered by the court." 18 U.S.C. § 3123(d)(1). In so providing, Congress has addressed the problem of access, and cut off any common-law

right to presumptive unsealing of these materials. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315 (1981); *In re New York Times Co.*, 577 F.3d 401, 405 (2d Cir. 2009). The Pen Register Act further provides for annual reporting by the Attorney General of specified information, 18 U.S.C. § 3126, reflecting Congress's judgment with respect to the categories of PR/TT information important for public oversight. *In re Application of Leopold*, 327 F. Supp. 3d 1, 20 (D.D.C. 2018) (*Leopold II*).

Contrary to Petitioner's suggestion, the D.C. Circuit's decision in *Leopold* is far from dispositive here. That case, unlike this one, focused almost entirely on retrospective access to records. *See In re Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 964 F.3d 1121, 1133-34 (D.C. Cir. 2020). To the extent prospective relief was under discussion at all, it was against the backdrop of an extensive Memorandum of Understanding reflecting specific arrangements between the U.S. Attorney's Office and the Clerk of Court in the District of Columbia, which historically had sealing practices very different from (and far less transparent than) the District of Minnesota. *Id.* at 1125.

The court of appeals in *Leopold* made no determination as to the existence of a First Amendment right of access, *id.* at 1126, and the court applied D.C. Circuit law, not the law of this circuit. *Compare Leopold*, 964 F.3d at 1127 (discussing six-factor *Hubbard* test and "strong presumption in favor

of public access") *with United States v. McDougal*, 103 F.3d 651, 657-58 (8th Cir. 1996) (noting that Eighth Circuit "specifically rejected the *strong* presumption standard adopted by some circuits," and referencing "our deferential standard under the common law") (emphasis in original). Accordingly, *Leopold* cannot answer the questions before this Court.

III. Multiple compelling interests outweigh any qualified right of access here.

Even assuming a qualified right of access applies to PR/TT or §2703(d) materials, any such right is outweighed by strong interests in favor of retaining a presumption that these materials should generally remain sealed. A right of access, whether grounded in the First Amendment or the common law, can be overridden by the showing of a compelling governmental interest. *See, e.g.*, *In re Gunn*, 855 F.2d at 574-75; *CBS, Inc. v. Dist. Court for Cent. Dist. of Calif.*, 765 F.2d 823, 825 (9th Cir. 1985). As for the common-law right, interests short of "compelling" will also suffice, *see McDougal*, 103 F.3d at 657-58, and include (but are not limited to) all the interests noted at pages 34-35 above.

In balancing the relevant interests, courts have often avoided any need to reach a conclusion as to the existence of a right of access at all, where the countervailing interests are strong enough. *See, e.g.*, *McDougal*, 103 F.3d at 657 ("Even if we were to assume that the videotape is a judicial record subject to the common law right of public access, we would hold that the district court

did not abuse its discretion in denying access in the present case."); *In re Gunn*, 855 F.2d at 575-76 ("Because the case for keeping these documents under seal for the time being is overwhelming, it necessarily overrides any qualified right of public access of which I can conceive.") (concurring opinion); *United States Dep't of Justice v. ACLU*, 812 Fed. App'x at 723 ("We decline to consider whether there is a separate common law right of access to the documents because any presumption in favor of access would be outweighed by a compelling government interest in maintaining secrecy in an ongoing investigation.").

If it reaches the issue, this Court should conclude likewise. Given the nature of the investigative tools at issue, the benefits of their remaining sealed in most cases will clearly outweigh the marginal public benefit in allowing access. As the Eighth Circuit found in *In re Gunn*, even where a First Amendment right of access exists, the compromising of an ongoing investigation amounts to a "compelling interest" in favor of keeping investigative materials under seal. 855 F.2d at 574. Likewise in *Appelbaum*, the Fourth Circuit concluded even though there was a common-law right of access to § 2703(d) matters even for open investigations, the government's interests in "maintaining the secrecy of its investigation, preventing potential subjects from being tipped off, or altering behavior to thwart the Government's

ongoing investigation" outweighed the public's common-law right of access. 707 F.3d at 293-94.

Here, the relevant public interests can and should also include the interest in preserving judicial and prosecutorial resources, especially in light of the limited value that redacted materials would provide, and the fact that service providers and criminal defendants regularly litigate the lawfulness of the processes at issue. *See, e.g.*, *Webbe*, 791 F.2d at 107 (relevance of administrative considerations); *McDougal*, 103 F.3d at 658 (relevance of "only marginal" nature of public interest in access to particular records). Because PR/TT and § 2703(d) orders often issue at the earliest phases of an investigation, imposing an unsealing presumption after 180 days would lead to a substantial volume of new motion practice, as well as a heightened risk of harming the reputations of innocent persons through administrative errors. *See, e.g.*, *In re Gunn*, 855 F.2d at 575 ("However, due to government inadvertence, the seal expired without government opposition, and the affidavits were released to the public and the press."). Moreover, the parties with the most potential for harm – the targets of the investigation – would not even be in a position to protect their interests.

In sum, Petitioner has failed to demonstrate either a First Amendment or common-law right to access of the PR/TT or § 2703(d) materials. Even if

Petitioner had made such a showing, compelling governmental interests would override any right of access. The Amended Petition should be denied.

IV. Neither the First Amendment nor the common law requires the docketing of denied or amended applications.

Reporters Committee's other request is equally unavailing. Citing no pertinent authority, it asks the Court to order "that amended and denied applications for warrants and other surveillance orders be docketed and subjected to the same unsealing procedures that apply to granted applications of a similar type." Doc. No. 36 at 13. This novel request would apply not only to PR/TT and § 2703(d) orders, but also to Rule 41 search warrants, SCA warrants, and § 3117 tracking-device warrants and orders. *Id.*

Petitioner devotes much of its memorandum on this point to the unremarkable proposition that courts have traditionally maintained dockets, and that dockets are commonly available to the public. *See id.* at 29-31. But this sheds little light on the question here: whether the law requires a court to record on a docket each and every preliminary or unsuccessful ex parte request for a warrant or order at the earliest phase of an investigation, often before a grand jury has become involved and before probable cause has been developed.

No such requirement exists. By their very nature, these are not traditionally or inherently public matters, nor should they be. As for PR/TT and § 2703(d) orders, the same considerations discussed above with respect to

the underlying materials apply equally to information about inchoate requests for such orders. Likewise, when a magistrate judge rejects, or suggests a need for revision of, an application for a search warrant or other type of investigative tool, little benefit would come from making public such a preliminary interchange with the government. *See, e.g., Appelbaum*, 707 F3d at 295 ("[W]e have never held, nor has any other federal court determined, that pre-indictment investigative matters such as § 2703(d) orders, pen registers, and wiretaps, which are all akin to grand jury investigations, must be publicly docketed.") (citations omitted). What matters are the warrants that are issued and executed, and those warrants are subject to unsealing as a matter of course in this District. Also, to the extent the purpose of dockets is alerting the public to court proceedings so it may attend those proceedings, that purpose does not suggest these processes must be docketed. *Cf. In re Gunn*, 855 F.2d at 575 (noting that court docket "affords the public and the press an opportunity to present objections to the motion" at issue).

The authorities Petitioner cites (at 30-31) stand only for the proposition that the dockets for judicial proceedings that are themselves required to be open must also be open. *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) (First Amendment right of access applies to summary judgment proceedings and associated documents); *United States v. Mendoza*, 698 F.3d 1303, 1304 (10th Cir. 2012) (criminal judgment must be entered on public

docket); *Hartford Courant Co.*, 380 F.3d 83, 98 (2d Cir. 2004) (disapproving state court practice of sealing dockets for cases concerning prominent individuals, holding "the right to inspect documents derives from the public nature of particular tribunals"); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (requiring public docketing of post-indictment criminal proceedings); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 510-11 (1st Cir. 1989) (holding unconstitutional state law creating "blanket restriction" against access to all records of certain closed criminal cases).

That the dockets must be public for matters that must themselves be public sheds no light on whether dockets must be public for historically non-public investigative processes, and even less light on whether preliminary ex parte matters must be docketed at all. The test for whether a particular document is subject to a right of access is whether that document relates to a *proceeding* where the right applies. *See Applebaum,* 707 F.3d at 295. As the *Applebaum* court explained, dockets exist to "'provide a map of proceedings in the underlying case,' ensuring 'meaningful access'" to it. 707 F.3d at 295 (quoting *Hartford Courant Co.*, 380 F.3d at 95). That purpose does not suggest docket sheets must be publicly available for proceedings that are themselves not public. *Id.*[9] Nor does it provide support for a requirement to docket

[9] *See also United States v. Index Newspapers LLC*, 766 F.3d 1072, 1091-92 (9th Cir. 2014) (holding that docket sheet for contempt proceeding ancillary to

preliminary or unsuccessful requests by the government to employ various investigative tools.

In sum, the government is not aware of any case in which a court has ordered the docketing of applications for warrants or investigative orders that were rejected or later revised and re-submitted. Petitioner has cited no such case, and the rationale it offers provides no real support for such a change of process. Moreover, even if a qualified right of access might theoretically support the docketing practices Petitioner seeks, the government's interest in protecting the secrecy of its investigations and other compelling interests addressed above would outweigh it. The request should be denied.

---

grand jury proceeding should be public because the contempt proceedings themselves were required to be open but making no suggestion that any docket pertaining to the underlying grand jury matter should be unsealed); *In re Sealed Case*, 199 F.3d at 525 (there "is no constitutional, statutory, or common law right requiring" a "generic rule requiring public docketing of all grand jury matters"; rejecting claim for mandatory public docketing of grand jury ancillary proceedings); *In re Granick*, 388 F.Supp. 3d at 1131 (denying retrospective request for "public access to docket sheets for sealed wiretap, SCA, PRA and [All Writs Act] materials," finding no First Amendment right to such access and that common-law right was overridden).

CONCLUSION

For all these reasons, Respondent respectfully asks that the Court deny the Amended Application in its entirety.

Respectfully submitted,

Dated: March 11, 2022

CHARLES J. KOVATS, JR.
Acting United States Attorney

s/ David W. Fuller

By: DAVID W. FULLER
Attorney ID Number 390922
TIMOTHY C. RANK
Attorney ID Number 245392
Assistant U.S. Attorneys
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
Phone: 612-664-5600
Email: David.Fuller@usdoj.gov

Attorneys for Respondent
United States of America

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 20-mc-00082 (PJS/TNL)

IN THE MATTER OF THE APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS TO UNSEAL CERTAIN SEARCH WARRANT MATERIALS,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this memorandum complies with the type-volume limitation of D. Minn. LR 7.1(f) and the type size limitation of D. Minn. LR 7.1(h). The memorandum has 10,270 words of type, font size 13. The memorandum was prepared using Microsoft Word 2019, which includes all text, including headings, footnotes and quotations in the word count.

Signature Page to Follow

Dated: March 14, 2022

CHARLES J. KOVATS, JR
Acting United States Attorney

s/ David W. Fuller

BY: DAVID W. FULLER
Assistant U.S. Attorney
Attorney ID Number 390922
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
Phone: 612-664-5600
Email: David.Fuller@usdoj.gov