No. 19-874

In the Supreme Court of the United States

WILLIAM ALAN PESNELL AND CHRISTOPHER HOLDER, THROUGH HIS CURATOR, GARY HOLDER,
Petitioners,

v.

JILL SESSIONS, CLERK OF COURT, JENNIFER BOLDEN, CERTIFIED DIGITAL REPORTER, AND THE JUDGES OF THE 26th JUDICIAL DISTRICT COURT: MICHAEL O. CRAIG, JEFF R. THOMPSON, JEFF COX, E. CHARLES JACOBS, MICHAEL NERREN, AND PARKER O. SELF,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Do litigants have standing to challenge the constitutionality of a state statute that exempts court-created documents from public disclosure even though declaring the statute unconstitutional would not redress their injury because the judiciary—and not the legislature—has inherent, constitutional authority over its own documents?

(2) Whether it violates the First, Sixth, or Fourteenth Amendments for a court in a civil proceeding to deny access to a prisoner and his attorney to a court-created document in accordance with state law and its own local policy because (1) they sought the document through unauthorized channels and (2) they could obtain the document by employing the proper procedural mechanisms?

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INTRODUCTION

Christopher Holder was convicted of murdering his mother and sentenced to life in prison. As a result, he was disinherited in a separate, civil proceeding. Holder's conviction was upheld on direct appeal, and he has not filed for post-conviction or habeas relief in state or federal court.

This appeal does not arise directly from either Holder's criminal proceedings or the civil succession proceedings. William Alan Pesnell—a lawyer who represented Holder during his criminal and civil appeals[1]—came to believe that the official transcript of Holder's trial contains errors and that the state district court has a digital recording of the trial. Holder and Pesnell want access to the digital recording to compare it with the transcript.

Rather than seek state post-conviction relief to engage the procedural machinery that would allow Holder to ensure there are no factual problems with the trial transcript—*see* LA. C.CR. P. art. 930—Holder and Pesnell instead submitted a public record request for the recording pursuant to the Louisiana Public Records Law. Because the Louisiana Public Records Law expressly exempts court-created documents from public disclosure, a state district court denied the request on those grounds. *See* LA. R.S. 44:4(47). Holder and Pesnell also asked the state district court directly if they could access the recording. But because their request did not merit an exception to the Listening to Recordings Policy of the 26th Judicial District Court, the district court denied that request too.

[1] *See* Pet. App. at 41a.

Holder and Pesnell sued the court's clerk, court reporter, and all the district judges in state judicial district for that parish—bringing facial and as-applied challenges to the constitutionality of the Louisiana Public Records Law and the local judicial district's policy. The state courts denied relief, and Petitioners now ask this Court to grant certiorari.

Review by this Court is unwarranted. Petitioners lack standing to challenge the Louisiana Public Records Law because declaring it unconstitutional would not redress Petitioners' injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Under Louisiana law, the state judiciary has inherent constitutional authority to manage court documents within its control. *See Copeland v. Copeland*, 2007-0177 (La. 10/16/07), 966 So. 2d 1040, 1044–45; *Bester v. La. Supreme Court Comm. on Bar Admissions*, 2000-1360 (La. 2/21/01), 779 So. 2d 715, 721. The state legislature does not have power to abrogate that authority or order disclosure. *See id.* Thus, even if the public record exemption in the statute were declared unconstitutional, Petitioners still would not have access to the recording.

The district court's policy is not properly before this Court for review. Petitioners failed to adequately address the issue in their opening brief. And, in any event, Petitioners argued before the lower courts that there was no need to opine on the constitutionality of the local rule because—according to Petitioners—if La. R.S. 44:4(47) is constitutional, then "there is no need for the court's policy." *See* Pet. App. at 20a. This Court should not consider whether the policy is unconstitutional when—at Petitioners' invitation—the state intermediate appellate court did not address the

issue. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("This is "a court of review, not of first view.").

Finally, Petitioners' claims clearly fail on the merits and the lower courts' decisions created no splits with other authority. This Court has never recognized a fundamental due process right to ignore proper procedural channels to secure access to an internal court document. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). And so the state statute is entitled to a presumption of constitutionality and requires only a rational basis. *See id.* Because exempting court-created documents from public disclosure has a rational basis, that standard is easily satisfied. No other constitutional provision requires disclosure in these circumstances. The state district court's denial of Petitioners' request under the policy in light of another avenue for relief is consistent with this Court's observation that "[e]very court has supervisory power over its own records and files." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

Petitioners have failed to show that any of their constitutional rights have been violated. Respondents respectfully submit that the Court should deny certiorari.

STATEMENT OF THE CASE

Christopher Holder was convicted of murdering his mother.[2] His conviction was upheld on direct appeal.[3] As a result of the conviction, Holder was declared

[2] *See* Pet. App. at 6a.

[3] *See id.*

unworthy to inherit from his mother in a separate, civil proceeding.[4] But this appeal does not stem directly from either the criminal or succession proceedings.[5] This dispute arose when Petitioners Holder and his lawyer William Alan Pesnell sued Respondents[6]—a collection of state judges and court officials—in state court after filing a public records request under state law for a court document created during Holder's murder trial.

Petitioners allege that the official transcript of Holder's trial contains errors.[7] They claim the state court made a digital recording of the trial, and they want to review the recording to determine whether there was a problem with the transcript. Rather than initiate post-conviction proceedings, Petitioners filed a request for the recording under a Louisiana Public Records Law—LA. R.S. 44:4(47)—with the court clerk, court reporter, and judges of the state district court.[8]

Petitioners' request was denied because the Louisiana Public Records Law expressly exempts from disclosure "any electronic storage device . . . in the custody or under the control of a [court official] . . . produced . . . in any court of record of the

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[4] *See id.*

[5] Petitioners acknowledge that "Petitioner Holder is not here seeking direct or collateral review of his criminal conviction." Pet. Reply Br. at 9.

[6] Respondents are as follows: Jill Sessions, the clerk of court; Jennifer Bolden, a court reporter, and the judges of the 26th Judicial District Court of Louisiana: Michael O. Craig, Jeff R. Thompson, Jeff Cox, E. Charles Jacobs, Michael Nerren, and Parker O. Self. Petitioners also sued Louisiana, but the claims against the State were dismissed, and Petitioners do not press those claims here. *See* Pet. App. at 7a n.1.

[7] *See* Pet. App. at 41a.

[8] *See* Pet. at 7–8.

state during any proceedings before that court."[9]

The state district court staff attorney also denied Petitioners access to the recording under the "Listening to Recordings Policy of the 26th Judicial District Court."[10] The policy states that, with some exceptions, "no party, attorney or witness or any other interested person, [will] be allowed to listen to the playback of any recording of any court proceeding."[11]

Petitioners subsequently brought facial and as-applied challenges in state court to LA. R.S. 44:4(47) and the district court's local policy.[12] Respondents moved the court to dismiss, arguing that they were not proper parties to the action or that the Public Records Law exempted the recording of the trial. Sessions and Bolden separately argued that they were not proper parties because they did not have access to the electronic recording. The judges argued, among other things, that there was no need to make an exception to the policy because Petitioners have a method to correct the record in the appellate court under Louisiana Code of Civil Procedure article 2132.[13]

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[9] LA. R.S. 44:4(47); *see* Pet. App. at 7a–8a, 42a–43a.

[10] *See* Pet. App. at 7a–8a.

[11] Pet. App. at 8a.

[12] Petitioners also disputed the scope of the Louisiana Public Records Law, contending that the recording of the trial is a public record and is not exempt from disclosure. *See* Pet. App. at 8a, 13a. The state intermediate appellate court rejected that argument. Pet App. at 16a ("A review of LA. R.S. 44:4(47) supports Defendants' argument that the recording is not a public record pursuant to the Public Records Law."). Before this Court, however, Petitioners' questions presented raise only issues implicating the constitutionality of LA. R.S. 44:4(47). *See* Pet. at i. Even if Petitioners had challenged the scope of the Louisiana Public Records Law here, that issue raises only questions of state law—which do not warrant review from this Court. *See Fid. Union Tr. Co.*, 311 U.S. 169, 17 (1940) (citing *Beals v. Hale*, 4 How. 37, 54 (1846)).

[13] *See* Pet. App. 48a.

The state district court found that the judges are the official custodians of records under state law, and so it dismissed Bolden and Sessions as improper parties. The district court did not immediately address Petitioners' claims that the policy and LA. R.S. 44:4(47) are unconstitutional.[14]

Petitioners appealed to the state intermediate appellate court. That court reversed the district court in part—concluding that claims could be brought against the clerk of the court, the court reporter, the district court, and the judges because they are proper custodians of the recording under Louisiana law.[15] The appellate court remanded the case to the state district court to consider whether LA. R.S. 44:4(47) is unconstitutional.[16]

On remand, the state district court considered the constitutionality of only LA. R.S. 44:4(47), and not the district court policy.[17] The district court ultimately held that the provision did not violate Petitioners' "due process or other constitutional rights."[18]

Petitioners again appealed to the state intermediate appellate court.[19] That

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[14] *See* Pet. App. at 44a–45a.

[15] *See* Pet. App. at 55a. But, as discussed *supra* in footnote 6, the appellate court affirmed the district court's dismissal of the State because it "is not the custodian of the public record sought." Pet. App. at 55a.

[16] Pet. App. at 57a.

[17] *See* Pet. App. at 24a, 33a.

[18] Pet. App. at 33a.

[19] As an initial matter, the appellate court granted Sessions' motion to dismiss because Petitioners failed to appeal within the timeframe provided in the Louisiana Code of Civil Procedure. *See* LA. C. CIV. P. arts. 2087, 2123; Pet. App. at 12a. And Petitioners do not contest Sessions' dismissal before this Court. *See* Pet. at 18 n.4.

court held: (1) the statute does not violate the Louisiana Constitution; (2) Petitioners failed to meet their burden to show that La. R.S. 44:4(47) is unconstitutional; and (3) there was no need to opine on the constitutionality of the local rule because—according to Petitioners—if La. R.S. 44:4(47) is constitutional, then "there is no need for the court's policy."[20]

Petitioners now ask this Court to grant certiorari to decide whether LA. R.S. 44:4(47) and the policy violate Petitioners' First, Fifth,[21] Sixth, and Fourteenth Amendment rights.

REASONS FOR DENYING THE PETITION

I. Petitioners lack standing to challenge the Louisiana Public Records Law.

Petitioners challenge the constitutionality of LA. R.S. 44:4(47) in their first two questions presented. *See* Pet. at i. In their first question, they query whether the state statute can bar *public* access to the recording and pass constitutional muster under the First, Fifth, Sixth, and Fourteenth Amendments. *See id.* And, in their second question, they query whether the state statute can bar access to a *convicted defendant* consistent with the Sixth and Fourteenth Amendments. *See id.*

It is well-established that "a party invoking federal jurisdiction bears the burden of establishing [the following three] elements": (1) an injury in fact that is

[20] *See* Pet. App. at 20a. As discussed *supra* in footnote 12, the state appellate court also held that the recording was exempt from public disclosure under LA. R.S. 44:4(47). *See* Pet. App. at 13a–16a. Petitioners do not challenge that conclusion here.

[21] Petitioners reference the Fifth Amendment once in their first question presented but do not mention the provision again in their opening brief. This is insufficient to preserve the challenge for this Court's review.

concrete and particularized; (2) a causal connection between the injury and the offending conduct; and (3) an injury that is redressable by a favorable decision from the federal court. *Lujan*, 504 U.S. at 560–61; *accord Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545–47 (2016), as revised (May 24, 2016). These three factors constitute an "irreducible constitutional minimum." *Lujan*, 504 U.S. at 560. "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

This Court has explained that "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.* at 107. Petitioners lack standing to challenge LA. R.S. 44:4(47) on redressability grounds because a favorable decision from this Court declaring the statute unconstitutional would not allow Petitioners to access the recording. And it makes no difference whether their question is directed to public access or access for convicted defendants.

Under Louisiana's constitutional scheme, the ultimate authority to divulge court-created documents within a court's control is reserved to the state judiciary. *See Copeland v. Copeland*, 2007-0177 (La. 10/16/07), 966 So. 2d 1040, 1044–45; *Bester v. Louisiana Supreme Court Comm. on Bar Admissions*, 2000-1360 (La. 2/21/01), 779 So. 2d 715, 721. And no state statute could abrogate that constitutional authority. The exemption from disclosure for court documents in LA. R.S. 44:4(47) is nothing more than a recognition of the separation of powers between the branches of state

government. Because LA. R.S. 44:4(47) does not prevent the judiciary from divulging the documents, declaring LA. R.S. 44:4(47) unconstitutional is neither necessary nor sufficient to grant Petitioners' requested relief.

Two cases from the Louisiana Supreme Court explain how the state legal system provides the judicial branch with a "constitutional, inherent duty and responsibility to regulate all facets of the practice of law," which includes "the right to determine when and under what circumstances sensitive materials under [the courts'] exclusive superintendency and control should be shielded from disclosure." *Copeland*, 966 So. 2d at 1044–45 (quoting *Bester*, 779 So. 2d at 721).

Start with *Bester v. Louisiana Supreme Court Committee on Bar Admissions*. In that case, the Louisiana Supreme Court considered whether Alfreda Tillman Bester could compel the Louisiana Committee on Bar Admissions to produce her failed bar exam, model answers, and grading guidelines under the Louisiana Public Records Law. 779 So.2d at 716. The court observed that "[t]his demand squarely implicates [the court's] inherent authority to regulate all facets of the practice of law in Louisiana." *Id.* at 716.

The court began by explaining that "[g]overnmental power in Louisiana is shared by three separate branches of government." *Id.* at 717 (discussing LA. CONST. art. II, § 1). And "[t]he constitutionally mandated separation of governmental power places limitations on the authority of each branch as respects the power of the others." *Id.* (discussing LA. CONST. art. II, § 2). Importantly, "[t]his trichotomous branching of authority furnishes the basis for the existence of an inherent judicial power *which the*

legislative and executive branches cannot abridge." *Id.* (emphasis added) (citations omitted). This constitutional well of inherent judicial power "confers upon courts the authority to do all things reasonably necessary for the exercise of their functions as courts." *Id.* (internal quotations marks omitted). The bottom line is that the Louisiana Supreme Court "has exclusive and plenary power to define and regulate all facets of the practice of law." *Id.* And so "the Legislature cannot enact laws defining or regulating the practice of law in any aspect without [the Louisiana Supreme Court's] approval or acquiescence because that power properly belongs to [that] court and is reserved for it by the constitutional separation of powers." *Id.* at 718.

After defining the contours of the inherent constitutional power wielded by the state judiciary, the court considered the scope of the Louisiana Public Records Law. *Id.* at 719. The court noted that "the public's right of access to public records also has a constitutional basis." *Id.* (discussing LA. CONST. art. XII, § 3). But that right is qualified: "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, *except in cases established by law*." LA. CONST. art. XII, § 3 (emphasis added).

The court next considered the relationship between the inherent authority of the judicial branch and the Louisiana Public Records Law. The Court observed that, although the state legislature built numerous exceptions into the Louisiana Public Records Law, there was no exception for the Committee on Bar Admissions. 779 So.2d at 721. That did "not, however, mean that [the Louisiana Supreme Court was] without authority to protect itself and its committees from being required to disclose

sensitive examination documents." *Id.* "The inherent powers doctrine exists as a protective mechanism to ensure [its] independence as the head of a separate branch of state government." *Id.* at 721.

Armed with that authority, the Louisiana Supreme Court read an exception into the Louisiana Public Records Law for bar examination materials. *See id.* ("We now hold that an additional, limited exception to public disclosure exists for documents we determine should remain confidential, in situations where we are exercising our inherent authority as the head of a separate and independent branch of state government."). And so Bester was unable to access the materials she sought because the legislature lacked power to supersede the inherent constitutional authority the state judiciary wields over all facets of the practice of law.

Next, consider the Louisiana Supreme Court's opinion in *Copeland v. Copeland*, where the court expanded *Bester* and further explained the judiciary's inherent authority over documents within its control. In *Copeland*, the court was asked to decide whether a couple in divorce proceedings could seal the record even though a newspaper wanted to access their court filings. The court explained that "the fact that a document is filed in the court record does not necessarily mean that it will be accessible by the public." *Copeland*, 966 So. 2d at 1044.

The court relied on *Bester* when it held that "regardless of the fact that the public records law does not contain any specific exceptions for records and documents maintained by this Court, this Court has a 'constitutional, inherent duty and responsibility to regulate all facets of the practice of law,' which includes 'the right to

determine when and under what circumstances sensitive materials under our exclusive superintendency and control should be shielded from disclosure.'" *Id.* at 1044–45 (quoting *Bester*, 779 So.2d at 721). "A trial court's discretion in exercising this right often comes in the form of *sealing all or part of a court record*." *Id.* at 1045 (emphasis added). Even though "Louisiana has a constitutional open courts provision and a constitutional public records provision," the court held that some information from the divorce proceeding, including the name of the children's school and the location of the family home, could be redacted. *Id.* at 1045, 1048. The court exercised its own inherent authority to decide that the couple's "interest in keeping this information private outweigh[s] the public's right of access to this information." *Id.* at 1048.

At bottom, these cases stand for the proposition that the state judiciary has inherent constitutional authority over the practice of law in the state, including the documents within its control. Here, the Louisiana Public Records Law expressly exempts the recording at issue from disclosure, and Petitioners challenge its constitutionality on that basis. Even if this Court agreed with Petitioners that they had an absolute constitutional right to the recording, declaring the statute unconstitutional would not give Petitioners access to the recording because it remains within the control of the state judiciary. Although the statute exempts the recording from public disclosure, it does not forbid the judiciary from disclosing the information. And so, because declaring the statute unconstitutional is neither necessary nor sufficient to granting relief to Petitioners, they lack standing to challenge the statute

on redressability grounds.

II. The state district court local policy is not properly before this Court.

In addition to challenging the Louisiana Public Record Law, Petitioners' first two questions presented also purport to challenge the Listening to Recordings Policy of the 26th Judicial District Court. *See* Pet. at i. But there are at least two reasons why the policy is not properly before this Court. First, as Bolden explained in her brief in opposition here, Petitioners failed to identify the rule and its content in their opening brief. *See* Bolden Br. in Op. at 1 n.2. And second, the court below declined to the rule on the constitutionality of the policy *at the invitation of Petitioners*. And so there is no ruling on the merits for this Court to review.

A. Petitioners do not identify the policy or offer any arguments attacking its constitutionality.

As footnote 2 of Bolden's brief in opposition carefully explains, Petitioners never identified the policy's rule or content in their original brief. And so the policy is not properly before this Court.

B. Petitioners invited the lower court not to rule on the constitutionality of the district court's policy.

Petitioners' decision not to attack or even address the constitutionality of the district court policy in their opening brief does not appear to be merely an oversight. Rather, as the lower court observed, Petitioners argued below that "if La. R.S. 44:4(47) is constitutional, then there is no need for the court's policy." Pet. App. at 20a; *accord* Pet. at 18; Bolden Br. in Op. at 1 n.2. The intermediate court of appeals adopted Petitioners' position. *See* Pet. App. at 20a. After determining that LA. R.S. 44:4(47) was constitutional, it concluded that "[a]ny opinion from this court regarding

the issue of the court's policy would constitute an advisory opinion." *Id.*

But Petitioners' position below and before this Court[22] is wrong—as explained above. Even if LA. R.S. 44:4(47) required public disclosure of the recording, the state judiciary would still have final say over whether it could be produced. *See Copeland*, 966 So. 2d at 1044–45; *Bester*, 779 So. 2d at 721. By focusing solely on LA. R.S. 44:4(47), and by failing to challenge properly the state district court policy here and below, Petitioners have left this Court in a position where it would be the first appellate court ever to address the constitutionality of the district court policy. But this is "a court of review, not of first view." *Cutter*, 544 U.S. at 719 n.7. This Court should decline Petitioners' invitation to be the first to pass upon the constitutionality of the local district policy when the lower court did not address that issue because of Petitioners' mistaken view of the law.

III. Petitioners' arguments against the Louisiana Public Records Law and local district court policy fail on the merits.

Even if the Court is undaunted by the jurisdictional and procedural problems plaguing the petition, review is unwarranted here because Petitioners' arguments clearly fail on the merits and the lower court's holding creates no splits with other authorities.

[22] Even if the Court believed that Petitioners had properly raised their challenge to the district court's policy here, this Court has said, while discussing the "invited error" doctrine, that it will consider an inconsistency between a party's position below and its position before this Court when deciding whether to decide a question presented. *See United States v. Wells*, 519 U.S. 482, 488 (1997).

A. There is no fundamental right under the due process clause of the Fourteenth Amendment to ignore established procedures to obtain an internal judicial document.

The state district courts' recordings are court documents—replete with confidential material[23]—that *the court produces to facilitate its own innerworkings*.[24] As Bolden's brief in opposition to this Court explains—Petitioners *have* a procedural mechanism to obtain the recording under Louisiana law. *See* Bolden Br. in Op. at 3, 6–7. Holder can file for post-conviction relief and move for an evidentiary hearing to clear up questions of fact surrounding the conviction under Louisiana Code of Criminal Procedure article 930.

Under Louisiana law, it is irrelevant that Petitioners additionally seek the recording for purposes of the succession proceeding—and not merely for obtaining post-conviction relief. The Louisiana Civil Code states that "[a] successor shall be declared unworthy *if he is convicted of a crime involving the intentional killing*, or attempted killing, of the decedent . . . ." LA. CIV. CODE. art. 941 (emphasis added). Even if the recording proved that Holder was not guilty of killing his mother, he would still need to obtain post-conviction relief before he could even attempt to change the outcome of the civil proceeding where he was disinherited. The Louisiana intermediate state appellate court addressing Holder's succession proceeding expressly held as much.[25] *See In re Succession of Holder*, 50,824 (La. App. 2 Cir.

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[23] *See* Pet. App. at 7a n.2.

[24] There is no dispute that the recording is a court document. *See Warth v. Dep't of Justice*, 595 F.2d 521, 523 (9th Cir. 1979) (concluding that a court transcript is a court document).

[25] Even if Holder obtained post-conviction relief reversing the conviction, that act alone would not necessarily change the factual conclusion in a civil proceeding that he was involved in the death of his

8/10/16), 200 So. 3d 878, 881, writ denied sub nom. *Green v. Holder*, 2016-1694 (La. 12/16/16), 212 So. 3d 1169.

No court has ever recognized a "fundamental" due process[26] right for a litigant to ignore proper procedural channels to secure access to an internal court document.[27] *See Glucksberg*, 521 U.S. at 720 ("We have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended."); *accord Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005) ("The list of fundamental rights is short." (internal quotations marks omitted)).

As the court below correctly recognized, because no fundamental interest is at stake, the Louisiana Public Records Law is afforded a strong presumption of constitutionality. *See* Pet. App. at 18a ("Unless the fundamental rights, privileges and immunities of a person are involved, there is a strong presumption that the legislature in adopting a statute has acted within its constitutional powers." (citations omitted)). The statute merely must be "rationally related to legitimate

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mother. Though these are clearly issues of state law and procedure not at issue here, the State makes the observation to further show the lack of any connection between the tape and the relief he seeks in that proceeding.

[26] Some of the cases Petitioners cite in support of their position are grounded in the Equal Protection clause of the Fourteenth Amendment. *See* Pet. at 25 (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)). Petitioners have alleged no equal protection claim. Respondents assume that Petitioners proceed only on a due process theory. *See* Pet. at 9 ("The petition further specifically alleged that La. R.S. 44:4(47) did not provide an exception to the public records request, and that if it did, then such exception was unconstitutional as a denial of due process . . . .").

[27] Petitioners have not made a "procedural due process" claim. *See generally* Pet. But that claim would fail in any event. "A fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks and citations omitted). Petitioners have a meaningful time and manner to seek to obtain the recording by filing for post-conviction relief.

government interests" to survive judicial review under the due process clause of the Fourteenth Amendment.[28] *Glucksberg*, 521 U.S. at 728 (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993); *Reno v. Flores*, 507 U.S. 292, 305 (1993)).

The Louisiana Public Records Law's exemption for court documents has a rational basis. As the court below found, "if an audio recording could be disclosed to any person requesting it, every comment picked up by the recording device, including whispered conversations between a defendant and his counsel or a sidebar conference with the judge." Pet. App. at 11a. And, as discussed above, a statute requiring a court to divulge sensitive court-created documents would violate state separation of powers principles. *See supra*, section I.

Of course, the separation of powers principles in the Louisiana constitution also animate the federal constitution. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 704–05 (1974). It bears emphasis that the Freedom of Information Act (FOIA)—a federal statute similar to the Louisiana Public Records Law—exempts disclosure of federal judicially-created documents from public disclosure. 5 U.S.C. § 551; *see Berry v. Dep't of Justice*, 733 F.2d 1343, 1349 (9th Cir. 1984); *Warth v. Dep't of Justice*, 595 F.2d 521, 523 (9th Cir. 1979) ("Courts are exempt from the FOIA's disclosure requirements in order to assure that the Act would not impinge upon the court's authority to control the dissemination of its documents to the public."). No court has ever questioned the constitutionality of that exemption. Granting certiorari could

[28] Petitioners' third question asks the Court "[w]hether a state can alter the burdens of the parties for determinations of the validity of statutes impairing fundamental rights . . . ." Pet. at i. As the court below correctly recognized, Petitioners have failed to show that any of their fundamental rights have been implicated. *See* Pet. App. at 19a. And so their third question before this Court is inapposite.

have far-reaching impacts that Petitioners have not discussed, and the courts below have not considered.

B. No constitutional provision requires state courts to divulge internal documents when litigants fail to employ the proper procedural mechanisms to obtain them.

For the same reasons, there is no colorable challenge to the state statute under the First or Sixth Amendments.[29] Petitioners bring facial and as-applied challenges to the Louisiana Public Records Law. "Facial challenges are disfavored." *Wash. St. Grange v. Wash. St. Repub. Party*, 552 U.S. 442, 450 (2008). Indeed, "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid"—or at least that the statute is without "a plainly legitimate sweep." *Id.* at 449 (cleaned up). This Court has explained that "exercising judicial restraint in a facial challenge frees the Court . . . from unnecessary pronouncement on constitutional issues." *Id.* Petitioners' challenges under the Sixth and First Amendments fail under this rigorous standard.

The Sixth Amendment is not implicated here. This is not a criminal proceeding, and the Sixth Amendment—by its own terms—applies to "criminal prosecutions." U.S. CONST. amend. VI. This Court has expressly said that "the Sixth Amendment does not govern civil cases." *Turner v. Rogers*, 564 U.S. 431, 441 (2011). And courts have not extended Sixth Amendment rights to civil proceedings. *See, e.g.*, *id.*; *Sanchez v. U.S. Postal Serv.*, 785 F.2d 1236, 1237 (5th Cir. 1986) ("[W]e now expressly hold that the sixth amendment right to effective assistance of counsel does not apply to

[29] As discussed *supra* in footnote 21, Petitioners have failed to adequately brief their challenge under the Fifth Amendment before this Court. Accordingly, Respondents do not address that issue.

civil litigation."). This Court's "cases have uniformly recognized the public-trial guarantee as one created *for the benefit of the defendant*." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (emphasis added) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). "[M]embers of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Gannett*, 443 U.S. at 391; *see Warner Commc'ns*, 435 U.S. at 610 ("The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."). This is not the place for Petitioners to raise claims under the Sixth Amendment.

Nor is the First Amendment implicated here. To be sure, this Court has recognized a First Amendment right to access court *proceedings*. *See, e.g.*, *Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). And the Court has developed a two-part "experience and logic" test to determine when access to proceedings should be granted. *Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 8 (1986). For example, in *Press-Enterprise Co. v. Superior Court of California for Riverside County*, this Court held that the First Amendment allowed access to the transcripts of "a preliminary hearing growing out of a criminal prosecution." 478 U.S. at 3, 9. But the Court has never extended that right to include access to *internal court documents* like the recording Petitioners seek. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."). Importantly, the recording at issue here is unlike

the transcript at issue in *Press-Enterprise*. As the courts below explained, the recording was created to facilitate the trial court's internal workings. Like all such recordings, it is rife with sensitive and confidential materials, including whispered conversations between attorneys and their clients. *See* Pet. App. at 7a n.2.

Even if the Court extended *Press-Enterprise* to include Court documents (as opposed to proceedings or official transcripts), Petitioners should lose anyway under the first prong of the experience and logic test because *internally* created documents have not traditionally been accessible to the public. *Press-Enter.*, 478 U.S. at 8 ("[W]e have considered whether the place and process have historically been open to the press and general public."). By way of example, there is no First Amendment right to access internal court bench memoranda.

Finally, the "common-law right of access to judicial records" is not constitutionally required and so does not apply in Louisiana, except where state law expressly allows. *Warner Commc'ns*, 435 U.S. at 597; *see* LA. CONST. art. III, § 15 ("No system or code of laws shall be adopted by general reference.").

Even assuming for the sake of argument that the federal constitution requires courts to divulge access to internal court documents in some situations, litigants can neither ignore the established procedures nor insist upon their own preferred method for obtaining those documents. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The court below found that Petitioners had failed to meet their burden that the statute was unconstitutional as applied to them. *See* Pet. App. at 19a. For that reason, the court found it was unnecessary to consider whether the statute was facially

unconstitutional. That was entirely appropriate.

C. The state district court's application of its policy here is consistent with its inherent constitutional authority over its own records and files.

This Court has observed that "[e]very court has supervisory power over its own records and files." *Warner Commc'ns*, 435 U.S. at 598. The local district court policy states that, unless exceptional circumstances occur, "no party, attorney or witness or any other interested person, [will] be allowed to listen to the playback of any recording of any court proceeding." *See* Pet. App. at 7a n.2. The state district court's refusal to make an exception to the policy when Petitioners had not employed the proper procedural mechanisms to obtain the recording is unremarkable and consistent with the supervisory power that this Court has recognized. Any challenges to the policy under the Fourteenth, Sixth, and First Amendments must fail for the same reasons that they fail against the Louisiana Public Records Law, as discussed above.

Once again, at Petitioners' invitation, the lower court did not discuss the constitutionality of the policy. The Court's review under these circumstances is unnecessary and inadvisable.

CONCLUSION

Respondents ask the Court to deny the petition for certiorari.

Respectfully submitted,

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