Case No. 11-80186

In the

United States Court Of Appeals

For the

Ninth Circuit

In re Google Inc. Street View
Electronic Communications Litigation

PLAINTIFFS-RESPONDENTS' ANSWER IN OPPOSITION TO GOOGLE INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Petition from the United States District Court
for the Northern District of California
San Jose Division
Case No. 5:10-md-02184 JW (HRL)
Hon. James Ware, District Judge

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INTRODUCTION

As a "narrow exception" to the rule that appellate review must await a final judgment, 28 U.S.C. Section 1292(b) permits interlocutory appeal only in rare instances—not simply to afford the dissatisfied petitioner relief from an adverse ruling or to provide a second opinion where the district court faced an issue of first impression. *Couch v. Telescope Inc.*, 611 F.3d 629, 632-33 (9th Cir. 2010); *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 (9th Cir. 2002) (Kozinski, J.). Even where the petitioner makes the tripartite showing Section 1292(b) mandates, a court "need not[] exercise jurisdiction." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026, 1027-28 (9th Cir. 1982). Indeed, appellate courts "quite frequently" reject interlocutory appeals despite district courts' certifications. *James*, 283 F.3d at 1068. This Court should do so here.

The legal question presented in Google's petition entails straightforward statutory interpretation and application of Ninth Circuit precedent. In upholding Plaintiffs' claims under the federal Wiretap Act (18 U.S.C. §§ 2510 *et seq.*) arising from Google's admitted interception of data Plaintiffs sent or received on their privately owned, individual home wireless internet ("WiFi") connections, the district court undertook a comprehensive analysis of the text, legislative history and purpose of the Act and looked to apposite authority from this Court. The district court reasoned Google's interpretation of the Act could lead to "absurd" or

"arbitrary" results, would undermine congressional intent "to provide protection for technology . . . architected in such a way as to be private," and would "contravene" this Court's precedent. June 29, 2011 Order on Google's Mot. to Dismiss ("June 29 Order"), Dist. Ct. Dkt. No. 82, at 10, 12-13, 17.

Google nonetheless insists its interpretations of the "plain meaning" and legislative history of the Wiretap Act are preferable to those of the district court. But Google's disagreement—unsupported by persuasive authority and silent as to the Ninth Circuit precedent the district court cited—does not amount to "substantial ground" for differing opinions, as this Court and others have articulated that standard. Nor does the fact that the district court's interpretation of the term "radio communication" under the Act was a matter of first impression meet the high "substantial ground" threshold. Plagued by those infirmities, Google's petition for interlocutory appeal should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs Have Alleged Google Illegally Intercepted Personal Data From Plaintiffs' Wi-Fi Networks And Concealed Its Conduct.

This case arises from Google's intentional, systematic interception of personal data Plaintiffs and other Class members sent and received on private

home WiFi connections beginning no later than May 25, 2007. Compl. ¶ 1.[1] Misrepresenting that its "Street View" service was merely collecting and displaying panoramic views of homes, offices and other buildings, Google in fact was also secretly using sophisticated technology it had developed to seize, download and store Plaintiffs' personal data. ¶¶ 1-3.

In creating Google's data collection system, commonly known as a "packet analyzer" or "wireless sniffer," for the specially-rigged Street View vehicles that traversed the globe, Google engineers—with the approval of Google's project team leaders—"intentionally included computer code in the system that was designed to and did sample, collect, decode, and analyze all types of data sent and received over the WiFi connections of Class members." ¶ 4; *see also* ¶¶ 53-68. The data Google collected also included "all or part of any personal emails, passwords, videos, audio, documents, and Voice Over Internet Protocol ('VOIP') information (collectively, 'payload data') transmitted over Class members' WiFi networks in which plaintiffs had a reasonable expectation of privacy." ¶ 4. The WiFi networks from which Google collected data were not configured to render them readily accessible to the general public; members of the public cannot intercept or read those data without using sophisticated decoding and processing technology. ¶ 5.

[1] References to "¶ __" are to Plaintiffs' Consolidated Class Action Complaint filed on November 8, 2010 ("Complaint"), Dist. Ct. Dkt. No. 54.

Although Google initially denied it had collected and stored private data, from Spring 2010 onward it made numerous admissions that have (partly) revealed its unlawful conduct, inciting worldwide condemnation. ¶¶ 69-109. Among those decrying Google's actions, Canadian privacy commissioner Jennifer Stoddart stated her office's investigation "shows that Google did capture personal information—and, in some cases, highly sensitive personal information such as complete e-mail addresses, usernames and passwords." ¶ 103 (citation and internal quotation marks omitted). Domestically, top members of the House Energy and Commerce Committee have commenced an investigation into Google's conduct. In a May 26, 2010 letter to Google CEO Eric Schmidt, the congressmen expressed concern "that Google did not disclose until long after the fact that consumers' Internet use was being recorded, analyzed and perhaps profiled," and questioned "the completeness and accuracy of Google's public explanations about this matter." ¶ 79 (quoting letter).

II. The District Court (Correctly) Upheld Plaintiffs' Wiretap Act Claims But (Erroneously) Certified Its Opinion For Interlocutory Appeal.

Plaintiffs' Complaint asserts claims under (i) the federal Wiretap Act; (ii) the wiretap statutes of several states; and (iii) California's unfair competition law ("UCL"). In its June 29 Order, the district court held that Plaintiffs stated cognizable Wiretap Act claims, but the court dismissed, with prejudice, Plaintiffs'

state wiretap claims on preemption grounds and dismissed, without prejudice, the California UCL claims based on lack of standing. *Id.* at 6-24. Regarding the Wiretap Act claims, Plaintiffs argued, and the court held, Google's alleged interception of personal WiFi data did not fall within the Act's exemptions from civil liability for intercepting an "electronic communication" that is "readily accessible to the general public," or a "radio communication" transmitted by certain means set forth in the Act.

The district court's ruling turned on its determination of how WiFi data are treated under two provisions of the Wiretap Act: (1) Section 2511(2), stating (in subsection (g)(i)) it is not unlawful for any person "to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public," and further providing (in subsection (g)(ii)) it is not unlawful to intercept any "radio communication" transmitted in one of four enumerated ways, for example, "by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress"; and (2) Section 2510(16), which defines "readily accessible to the general public" with respect to "a radio communication." Plaintiffs argued the Act's plain language, purpose, legislative history and amendments dictate that Internet communications—even those partially transmitted (a very short distance) by WiFi systems—do not constitute

"radio communications," but rather are "electronic communications" under the Act. Google asserted the WiFi data at issue, which were transmitted in small part by radio waves, constitute "radio communications," a term the Act does not define. Google argued the term "radio communications" should merely combine the meanings of "radio" and "communication," to encompass "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted over the radio spectrum." *See* Petition 12.

Upon analyzing the text, legislative history and purpose of the Wiretap Act, as well as pertinent Ninth Circuit authority, the district court determined, among other things, "radio communications" referred only to "traditional radio services," not transmissions of WiFi data. The court also concluded that while Congress intended to apply Section 2510(16)'s definition of "readily accessible to the general public" to both the "radio communication" provision set forth in Section 2511(g)(2) and the "electronic communication" provision set forth in Section 2511(g)(i), "Section 2510(16)'s presumption of [public] accessibility and the requirement that a communications technology must fit within one of five exceptions were solely intended to apply to 'traditional radio services.'" June 29 Order at 17. The court therefore upheld Plaintiffs' Wiretap Act claims.

On July 8, 2011, Google moved the district court to certify its June 29 Order for interlocutory review and to stay this action during the appeal. Plaintiffs

opposed the motion. By an order of July 18, 2011 that neither cited authority contrary to its holding on Plaintiffs' Wiretap Act claims nor identified reasons favoring a stay, the court granted Google's motion. *See* Dist. Ct. Dkt. No. 90.

QUESTION PRESENTED

Section 1292(b) permits interlocutory appeal where the petitioner establishes, *inter alia*, "substantial ground for difference of opinion" exists as to the district court's ruling on a controlling legal question. Upholding Plaintiffs' Wiretap Act claims, the district court here thoroughly analyzed the statute's text, legislative history and purpose, and identified Ninth Circuit precedent foreclosing Google's interpretation of the Act. Should this Court nonetheless undertake interlocutory review solely because the legal question was one of first impression?

ARGUMENT

I. Google Cannot Meet Its Heavy Burden To Demonstrate "Substantial Ground For Difference Of Opinion."

Congress intended that courts would use Section 1292(b) only where "serious doubt" concerning a significant matter of controversy exists and where applying the final judgment standard threatens to prolong complex and already protracted litigation, such as in the antitrust context. *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 n.2 (9th Cir. 1966) (citation omitted). "[M]ere question as to the correctness of the ruling" does not justify invoking interlocutory review. *Id.* (citation omitted). To prevent the 1292(b) exception from swallowing the final

judgment rule, Congress imposed stringent requirements to ensure courts are abstemious in allowing interlocutory appeal—including that the petitioner must establish "substantial ground for difference of opinion" regarding the subject legal question. 28 U.S.C. § 1292(b).

Because the 1292(b) factors constitute jurisdictional prerequisites, in evaluating Google's petition this Court must scrutinize them carefully and *de novo*. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) ("[E]ven if the district judge certifies the order under *§ 1292(b)*, the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.") (citation and internal quotation marks omitted). Moreover, this Court has set a high bar for a petitioner to establish substantial ground for difference of opinion: "where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if *novel* and *difficult* questions of first impression are presented." *Couch*, 611 F.3d at 633 (emphasis added).

Identifying no dispute among the federal appellate courts (or a complicated question under foreign law), Google points to the absence of other decisions addressing whether "radio communication" as used in the Wiretap Act applies to the type of data at issue in this case. That the district court confronted a question

of first impression, though, "does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Id.* (citation and internal quotation marks omitted). Interpreting the Wiretap Act with respect to personal data transmitted through private home WiFi connections involved nothing "novel" or "difficult."[2] As the June 29 Order makes clear, the court's determination that Google's expansive interpretation of "radio communication" is incorrect comports with Ninth Circuit precedent and follows from established principles of statutory construction. *See* June 29 Order at 8-18; *Lucas v. Bell Trans*, No. 2:08-cv-01792-RCJ-RJJ, 2009 U.S. Dist. LEXIS 101836, at *9-15 (D. Nev. Oct. 14, 2009) (while legal issue that turned on interpretation of statute was a matter of first impression, it was "neither novel nor particularly difficult").[3]

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[2] That a legal question is one of first impression does not automatically render it "novel." *See Couch*, 611 F.3d at 633; *Concise Oxford English Dictionary* ("*OED*") (rev. 11th ed. 2009) (defining "novel" as "interestingly new or *unusual*") (emphasis added). And even if the question here were "novel," the clarity, consistency and common sense with which the district court approached and answered the question bespeak no difficulty. *See OED* 978 (defining "difficult" as "needing much effort or skill to accomplish, deal with, or understand").

[3] With respect to the other two prongs of the 1292(b) standard, although the June 29 Order resolved a "controlling question of law," Google overstates the extent to which reversal "would materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A ruling by this Court in Google's favor would not, as Google suggests, terminate the litigation. For instance, even if the Court were to deem the subject data "radio communications," most of the data would nonetheless be protected from interception under at least two exceptions listed in Section 2510(16) of the Act. Additionally, voice communications using "Voice

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A. Because Ninth Circuit precedent compelled the district court's ruling, "substantial ground for difference of opinion" cannot exist.

The district court aptly determined that adopting Google's interpretation of the Wiretap Act would run afoul of this Court's holding in *In re Application of the United States, for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d 1132 (9th Cir. 2003) ("*In re United States*"). Though Google ignores it, that aspect of the district court's decision obviates any "difference of opinion."

In *In re United States*, the appellant company, whose telecommunications product allowed it "to open a cellular connection to a vehicle and listen to oral communications within the car," challenged a series of court orders requiring that the company assist the FBI "in intercepting conversations taking place in a car equipped with" the product, in accordance with Section 2518(4) of the Wiretap Act. Section 2518(4) mandates (in relevant part) that an order "authorizing the interception of a wire, oral, or electronic communication" under the Act shall, upon the applicant's request, "direct that a provider of wire or electronic communication service" shall furnish to law enforcement "all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a

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over Internet Protocol," or VoIP, services—which were among the data Google intercepted—constitute "wire communications" protected under the Act. *See* 18 U.S.C. §§ 2510(1) & 2511(1).

minimum of interference with the services that such service provider . . . is according the person whose communications are to be intercepted." *In re United States*, 349 F.3d at 1134, 1137 (quoting 18 U.S.C. § 2518(4)). Determining the "in-person voice communications" the FBI intercepted were "oral communications" under the Act, this Court also examined the Act's use of "wire communications." *Id.* at 1137-38. Looking to the statutory text and legislative history, the Court held that "[d]espite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the statute, because cellular telephones use wire and cable connections when connecting calls." *Id.* at 1138 n.12.

Relying on *In re United States*, the district court here concluded "[a]n interpretation of 'radio communication' that [as Google argues] presumptively included all technologies that transmit over radio waves, such as cellular phones, under the purview of electronic communications and held that technology bound by Section 2510(16)'s definition of 'readily accessible to the general public,' *would contravene*" this Court's holding in that case. June 29 Order at 12-13 (emphasis added). The district court further observed that rather than "simply interpret 'wire communications' as all communications by wire" (as Google urges), this Court in *In re United States* "found that Congress intended compound terms that prefixed 'communication' with a type of media to have specialized and,

at times, counter-intuitive definitions." June 29 Order at 13. Moreover, that the Wiretap Act does not explicitly provide a specialized definition of "radio communication" does not "preclude a finding that Congress intended a more sophisticated compound meaning." *Id.* The court's application of Ninth Circuit authority bearing significantly on the legal question at issue here renders Google's petition for appellate review meritless. *See Gerhardson v. Gopher News Co.*, No. 08-537 (JRT/JJK), 2011 WL 2912715 at *2 (D. Minn. July 18, 2011) (denying 1292(b) motion where Eighth Circuit precedent regarding effect of grant of motion to dismiss on tolling of statute of limitations "clearly dictated" district court's determination that limitations period was not tolled during pendency of plaintiffs' unsuccessful motion to intervene).[4]

The Eighth Circuit's decision in *White v. Nix*, 43 F.3d 374 (8th Cir. 1994), resounds here. Plaintiff in that case, a prison inmate, brought an action under 42

[4] The district court's distinguishing of *United States v. Ahrndt*, No. 08-468-KI, 2010 WL 373994 (D. Or. Jan. 28, 2010), on which Google relied heavily, further illustrates the absence of substantial ground for difference of opinion as to Google's interpretation of the Wiretap Act. In *Ahrndt*, a neighbor joined Ahrndt's wireless network and accessed information stored on one of his computers. The court held that the Wiretap Act permitted the interception of the communications at issue because Ahrndt had specifically set his iTunes software to "share," which diminished his reasonable expectation of privacy by enabling his neighbor to access Ahrndt's saved files using standard, widely available software for personal computers. The district court here concluded Plaintiffs' allegations differ from those in *Ahrndt*, as Plaintiffs allege their WiFi networks "were configured to prevent the general public from gaining access to the[] data packets without the assistance of sophisticated technology." June 29 Order at 21.

U.S.C. § 1983 alleging his placement in "non-punitive investigative segregation" after an assault involving several inmates was "punishment for his refusal to reveal privileged attorney/client communications." 43 F.3d at 375. Plaintiff sought discovery of files prison officials created while investigating his possible involvement in the assault. *Id.* After affirming a magistrate judge's ruling that defendants must produce the files to plaintiff's counsel, the district court certified its order for interlocutory appeal. *Id.* at 376.

The Eighth Circuit disagreed with the district court that substantial ground for differing opinion existed. Observing that it had "been presented with no case directly dealing with the issue of inmate discovery of confidential investigative files in the context of a *§ 1983* suit similar to [plaintiff]'s," the court of appeals relied on "[a] closely analogous body of case law concerning discovery of investigative files during disciplinary proceedings and subsequent petitions for habeas corpus," which accorded with the district court's ruling. *Id.* at 378.

Similar to *White*, the district court in this case applied Ninth Circuit caselaw on the scope of "wire communication" under the Wiretap Act, which serves as a "closely analogous" polestar for interpreting the meaning of "radio communication" as used in the same statute. The court also analyzed, and distinguished, *Ahrndt*, the principal authority Google cited in support of its argument that Plaintiffs' WiFi data were "readily accessible to the general public"

under the Act. Google, on the other hand, offers no controlling, or even persuasive, authority to support its reading of the Wiretap Act.

This is not to suggest that, to demonstrate substantial ground for difference of opinion, Google must identify cases "directly conflicting with" the district court's interpretation of the law. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Rather, the presence of Ninth Circuit precedent and the absence of authority at odds with the district court's reasoning or conclusions undermine Google's contention that "reasonable jurists might disagree" about the court's interpretation of the Wiretap Act. *See id.* Therefore, *Reese*—on which Google relies—is inapposite.[5]

[5] Google's other citations fare no better. In *Helman v. Alcoa Global Fasteners Inc.*, No. 09-cv-1353 SVW (FFMx), 2009 WL 2058541 (C.D. Cal. June 16, 2009), *aff'd*, 637 F.3d 986 (9th Cir. 2011), the district court relied on a dissenting opinion in a Second Circuit case, noting the panel divided "sharply" over the subject legal question, and further observed that the question "implicate[d] the interpretation of a little-used statute." *Id.* at *6. *See also E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1032-33 (9th Cir. 2007) (observing only that the district court certified its order "because the applicability of the filed rate doctrine is a controlling question of law in this case"); *Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993) (not elaborating on "substantial ground for difference of opinion" factor); *Driscoll v. Gebert*, 458 F.2d 421, 423-24 (9th Cir. 1972) (district court certified its order under Section 1292(b) "[b]ecause of the newness of the . . . statute and the absence of case guidance").

B. The district court's cogent analysis of the Wiretap Act's text, legislative history and purpose does not warrant interlocutory review by this Court.

In addition to following this Court's holding in *In re United States*, the district court applied established methods of statutory construction—examining the Wiretap Act's text, legislative history and purpose—which counsel against Google's interpretation of the Act to allow interception of any communications sent over the radio spectrum that are not encrypted or that do not fall within one of Section 2510(16)'s other specified exceptions. Specifically, the court concluded:

(i) references to "radio communication" in the Act predominantly "pertain to and are drafted for the particular design of radio *broadcast* technologies, and do not address other communications technologies that transmit using radio waves," June 29 Order at 10 (emphasis added);[6]

(ii) interpreting "radio communication" to include "such technologies as wireless internet and cellular phones" could lead to "absurd" or "arbitrary" results, e.g., "an unauthorized intentional monitoring of a cellular phone call could be lawful should the content of the communication relate to vehicles or persons in distress, but unlawful otherwise," June 29 Order at 10;

[6] *See, e.g.*, 18 U.S.C. § 2510(16); June 29 Order at 9 ("Notably, none of the five express exemptions from ready accessibility under Section 2510(16) specifically address wireless internet technologies, as the list predominantly addresses radio broadcast technologies."); 18 U.S.C. § 2511(2)(g)(ii) & (v); 18 U.S.C. 2511(5)(a)(i)(B).

(iii) rather than defining "radio communication" as "simply 'communication by radio waves,'" Congress "chose to use the compound term, 'radio communication,' a term that shares a likeness with other compound terms used throughout the Act that prefix 'communication' with reference to a particular form of media; each of which are provided specialized definitions in the Act," *id.* at 11-12 (referencing 18 U.S.C. § 2510);

(iv) the legislative history of the Wiretap Act illustrates that Congress added, among other things, Section 2510(16)—establishing a "presumption of [public] accessibility" with respect to "'radio communication,'" as long as the communication does not fit within one of five stated exceptions—"to clarify that 'intercepting traditional radio services' was not a violation of the Act in order to quiet the concerns raised by *radio hobbyists*," *id.* at 13-15 (emphasis added);

(v) the Act's legislative history and the context in which the term "radio communication" is used in Section 2510(16) "make clear . . . that Congress intended 'radio communication' to include 'traditional radio services,' such that public-directed radio broadcast communication, as the technology was understood at the time, would be clearly excluded from liability under the Act," and the legislative history likewise "reveals . . . that Congress did not intend 'radio communications' to be defined so broadly such that it would encompass all

communications transmitted over radio waves," *id*. at 16 (citing S. REP. NO. 99-541, at 6, 11 (1986)); and

(vi) "applying Section 2510(16)'s narrow definition of 'readily accessible to the general public' to wireless networks, a technology unknown to the 99th Congress who drafted and passed the [Electronic Communications Privacy Act, which amended the Wiretap Act], would contravene the primary stated purpose of the amendment, which was to update the Wiretap Act to include within the Act specific protections against intentional interceptions of computer-to-computer communications and so-called 'electronic mail' or email; data Plaintiffs plead was included in the data packets intercepted by Defendant," *id.* at 19.

Where, as here, the subject legal question "is a relatively straightforward matter of statutory construction," this Court need not (and should not) review it. *Lucas*, 2009 U.S. Dist. LEXIS 101836, at *12. Moreover, Google provides no persuasive support indicating this Court "could reverse" the district court's interpretation of "radio communication" based on "the plain meaning of the statute," purported "oversights" in the court's statutory interpretation, and "the rule of lenity" applicable to statutes premised on criminal wrongdoing. Petition 12.

Google first asserts the district court erred in interpreting "radio communication" as a compound term, consistent with the Wiretap Act's use of "wire communication," "oral communication" and "electronic communication."

But none of those terms are defined as the mere sum of the definitions of their component terms. *See* 18 U.S.C. § 2510(1), (2) & (12). And, failing to explain why the term "radio communication" warrants disparate treatment, Google instead declares—tautologically—its asserted definition "comports with the plain, ordinary meaning of the term." Petition 12. Additionally, relying on repealed language from an earlier version of the Wiretap Act (before it was amended in 2002), Google posits this Court "is likely to disagree" with the district court's conclusion that "radio communication" consists of "traditional radio services," and with the district court's method of statutory interpretation. *See* Petition 13-15.

In light of the Ninth Circuit precedent discussed above and the district court's citations to myriad provisions of the Wiretap Act describing "radio communication" in the context of traditional radio services, neither of Google's bones of contention merits interlocutory review. Moreover, the district court was not alone in its reading of the Act's legislative history—specifically relating to the exceptions Section 2511(2)(g)(ii) enumerates with respect to "any radio communication." *See United States v. Gass*, 936 F. Supp. 810, 814 n.2 (N.D. Okla. 1996) (legislative history regarding 18 U.S.C. § 2511(2)(g)(ii) "states that the exceptions contained therein 'relate to specific types of radio communications which have *traditionally* been free from prohibitions on mere interception'") (emphasis in original) (quoting H.R. REP. NO. 99-647, at 41-42 (1986)). And even

assuming *arguendo* another judge would have analyzed the statute or *In re United States* differently and reached a different result, that does not demonstrate substantial ground for differing opinion. *See Couch*, 611 F.3d at 633 ("[t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion"); *Anschutz Corp. v. Merrill Lynch & Co.*, No. C 09-03780 SI, 2011 WL 2160888 at *3 (N.D. Cal. June 1, 2011) (that another court "applied the same California legal principle to the same facts and reached a different conclusion" did not demonstrate substantial ground for difference of opinion).

Finally, Google's reference to the rule of lenity—which applies only where a statute suffers from "grievous ambiguity or uncertainty"—is misplaced. *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (citation and internal quotation marks omitted). Google could invoke the rule of lenity "only if, after seizing everything from which aid can be derived," the district court could "make no more than a guess as to what Congress intended." *Id.* at 138 (citation and internal quotation marks omitted). But interpreting "radio communications" and "readily accessible to the general public" under the Wiretap Act is not so bedeviling. *See United States v. Councilman*, 418 F.3d 67, 82-84 (1st Cir. 2005) (en banc) (finding that "while the [Wiretap Act] contains some textual ambiguity, it is not 'grievous'"; court of appeals construed the statute "using traditional tools of construction, particularly legislative history," thus lenity did not apply).

In short, confronted with the district court's perspicacious reasoning and well-substantiated conclusions, Google's meek rebuttal cannot overcome the 1292(b) hurdle. *See Union Cnty. v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008) ("While identification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for disagreement, [plaintiff] offered no such [pertinent] opinions, statutes or rules . . . .") (citations and internal quotation marks omitted). This Court therefore should not allow interlocutory appeal in this instance.[7]

CONCLUSION

The district court's interpretation of the Wiretap Act followed sound reasoning and Ninth Circuit authority. To grant the extraordinary measure of interlocutory review in these circumstances would substitute indulgence for restraint, promote argument over precedent, and—as the district court itself recognized—invite absurdity to the exclusion of logic. This Court therefore should deny Google's petition under Section 1292(b).

[7] Granting interlocutory appeal would be particularly improvident in this case given the absence of discovery, leaving this Court without "a factual record that likely would aid its consideration of the legal questions presented." *Rafton v. Rydex Series Funds*, No. 10-CV-01171-LHK, 2011 WL 1642588, at *1 (N.D. Cal. May 2, 2011) (citation and internal quotation marks omitted).

Dated: August 8, 2011

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CERTIFICATE OF COMPLIANCE

This Answer in Opposition to Google Inc.'s Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) complies with the page limitation of Fed. R. App. P. 5(c) and 32(c)(2) because it contains 20 pages, excluding the parts of the Answer exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Answer complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2011, I caused the foregoing Answer in Opposition to Google Inc.'s Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have caused the foregoing document to be sent by electronic mail to the following non-CM/ECF participant:

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