

Case No. 11-80186

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

*In re Google Inc. Street View Electronic
Communications Litigation*

**GOOGLE INC.'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN
SUPPORT OF 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, Case No. 10-MD-2184 JW
Hon. James Ware, District Judge

David H. Kramer
Michael H. Rubin
Bart E. Volkmer
Caroline E. Wilson
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Counsel for Petitioner Google Inc.

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Petitioner Google Inc. (“Google”) respectfully moves for leave to file the reply brief submitted herewith in support of its Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b).

In support of its motion, Google states as follows:

1. On July 27, 2011, pursuant to 28 U.S.C. § 1292(b) and Fed R. App. P. 5, Google filed its Petition for Permission to Appeal (“Petition”) from the district court’s order of June 29, 2011 denying Google’s motion to dismiss plaintiffs’ claim for relief under the federal Wiretap Act (“June 29 Order”).

2. On August 8, 2011, plaintiffs Benjamin Joffe, et al. filed a response to Google’s Petition. *See* Docket No. 3 (“Opp’n Brief”).

3. Notwithstanding the Court’s recent decision in *Reese* and the district court’s findings that this is “a case of first impression . . . [regarding] a novel question of statutory interpretation” that “fails to yield a definitive and unambiguous result,” (June 29 Order at 7-8, 13), and that, “in light of the novelty of the issues presented, . . . there is a credible basis for a difference of opinion” (July 18, 2011 Certification Order at 2), plaintiffs assert that the district court’s interpretation of the Wiretap Act “involved nothing ‘novel’ or ‘difficult.’” Opp’n Brief at 9.

4. Plaintiffs oppose Google’s Petition on the basis that there is no “substantial ground for difference of opinion” regarding the proper interpretation of the term “radio communication” as used in the federal Wiretap Act because controlling law dictated the district court’s ruling. Opp’n Brief at 7-20. Plaintiffs cite *In re Application of the United States for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d 1132, 1139 (9th Cir. 2003) as that controlling precedent. Any claim that *In re United States* is controlling is wrong. The case finds that cellular telephone calls are protected as “wire communications” under the Wiretap Act. That observation in no way forecloses the possibility that plaintiffs’ open and unencrypted Wi-Fi transmissions, alleged to be “electronic communications,” are also “radio communications” under the Wiretap Act.

5. Plaintiffs did not cite *In re United States* in opposition to Google’s Motion for Certification in the district court, and have never argued that it is controlling on the certified question before.

6. Google believes that a short reply is appropriate in order to address plaintiffs’ ill-considered arguments and to explain that *In re United States* actually undercuts a core tenant of the June 29 Order,

thereby emphasizing that there is a substantial ground for difference of opinion concerning the district court's Wiretap Act ruling. Such a reply brief will assist the Court by clarifying why this case is appropriate for review. Similar briefs are regularly permitted by this Court and other Courts of Appeals. *See, e.g., Pac. Merch. Shipping Assoc. v. Goldstene*, No. 09-80145, Docket No. 7 (9th Cir. Dec. 11, 2009) (granting leave to file a reply and granting the associated petition for permission to appeal pursuant to 28 U.S.C. §1292(b)); *E.E.O.C. v. Sidley Austin LLP*, No. 06-8002, 437 F.3d 695, 696 (7th Cir. 2006) (same); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, No. 07-500 (10th Cir. 2007) (same); *Alliance of Auto. Mfrs. v. Sullivan*, No. 09-8013 (1st Cir. 2009) (same).

7. The undersigned contacted counsel for plaintiffs via telephone on August 16, 2011 to request their consent to the filing of a reply. Plaintiffs denied that request.

8. For these reasons, Google respectfully requests leave to file the proposed reply brief attached hereto.

WHEREFORE, Petitioner Google Inc. respectfully requests that this Court enter an Order granting this Motion and accepting for filing Google's Reply in Support of its Petition for Permission to Appeal

Pursuant to 28 U.S.C. §1292(b) from the district court's order of June 29, 2011 denying Google's motion to dismiss plaintiffs' claim for relief under the federal Wiretap Act.

Dated: August 16, 2011

Respectfully submitted,

/s/ Michael H. Rubin

David H. Kramer

Michael H. Rubin

Bart E. Volkmer

Caroline E. Wilson

WILSON SONSINI GOODRICH &
ROSATI

650 Page Mill Road

Palo Alto, CA 94304

(650) 493-9300

Counsel for Petitioner Google Inc.