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 REPLY 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

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INTRODUCTION

Defendant-petitioner Google Inc. ("Google") submits this reply in support of its petition pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5 for permission to appeal the district court's certified order of June, 29, 2011 denying Google's motion to dismiss plaintiffs' claim for relief under the federal Wiretap Act (the "June 29 Order").

Plaintiffs agree, as they did below, that two elements of 28 U.S.C. § 1292(b)'s three-part test are satisfied here: the certified issue involves a "controlling question of law" and interlocutory appeal "may materially advance the litigation." Plaintiffs argue only that there are not substantial grounds for difference of opinion concerning the certified question. But, as District Court Judge Ware himself concluded in granting certification, plaintiffs are wrong: there are compelling grounds for a conclusion different from the one he reached. The question presented is novel and there is no controlling precedent in the Ninth Circuit or elsewhere that answers it. Indeed, the case that plaintiffs rely on in their opposition to this motion (a case they have never previously cited as on-point despite multiple opportunities below) actually further supports the conclusion that Judge Ware erred in

excluding the Wi-Fi transmissions at issue in this case from the Wiretap Act's definition of "radio communication."

Because all three Section 1292(b) elements have been satisfied, immediate appeal is appropriate.

ARGUMENT

A. The District Court's Wiretap Act Ruling Concerns a Novel Issue of Law Over Which Reasonable Jurists Could Disagree, Satisfying the Substantial Ground for Difference of Opinion Element.

This Court recently made clear that Section 1292(b)'s substantial ground for difference of opinion element is satisfied where the certified question involves a novel legal issue on which fair-minded jurists might reach contradictory conclusions. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). That is precisely what happened here: after defining "radio communications" to exclude Wi-Fi transmissions and to cover only "traditional radio services," Judge Ware agreed with Google that his definition afforded a credible basis for a difference of opinion. July 18, 2011 Certification Order ("Certification Order") at 2.

By its own terms, the June 29 Order makes clear that this action involves novel issues:

> The matter before the Court *presents a case of first impression* as to whether the Wiretap Act imposes liability upon a defendant who allegedly intentionally intercepts data packets from a wireless home network. *The case also presents a novel question* of statutory interpretation as to how the definition in Section 2510(16) of "readily accessible to the general public" modifies exemption [18 U.S.C. § 2511(2)(g)(i)], if at all.

June 29 Order at 7-8 (emphasis added). The district court affirmed this view in its Certification Order, holding that "in light of the novelty of the issues presented, the Court finds that its June 29 Order involves a controlling question of law as to which there is a credible basis for a difference of opinion . . . ." Certification Order at 2.

In light of that ruling from the very judge whose substantive decision they embrace, plaintiffs should bear a heavy burden to show the impropriety of permission to appeal. But plaintiffs instead offer word play, attempting to draw a distinction between a *novel issue* and an *issue of first impression*, arguing that only the former satisfies the test. Opp'n Brief at 9 n.2. That is a distinction without a difference in any case, but all the more so here, where the district court expressly determined that this matter involves both "novel" issues and "issues of first impression." June 29 Order at 7-8. And Judge Ware was correct in that regard: no other court has interpreted "radio communication."

Plaintiffs, however, now claim that *In re Application of the United States, for an Order Authorizing the Roving Interception of Oral Communications*, 349 F.3d 1132 (9th Cir. 2003) is controlling precedent that forecloses any difference of opinion. That is meritless.

In re United States does not in any way purport to define the term "radio communication," or even offer any meaningful guidance on how the term ought to be defined. The panel in that case merely observed that cellular telephone calls are "wire communications" within the meaning of the Wiretap Act.[1] To the extent that decision bears at all on the certified question, the case supports Google's position, not plaintiffs.

In the June 29 Order, the district court expressed concern that the definition of "radio communication" that Google advanced would allow for the interception of cellular telephone calls. To avoid that outcome,

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[1] The Wiretap Act defines "wire communication" to mean "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection . . . ." 18 U.S.C. § 2510(1). It defines "aural transfer" as "a transfer containing the human voice . . . ." *Id.* § 2510(18). Based on these definitions, the *In re United States* panel found that "despite 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." 349 F.3d at 1138 n.12.

which it felt was not consistent with Congressional intent, the court defined the phrase "radio communication" narrowly, to apply only to "traditional radio services." In so doing, the court eschewed a plain language interpretation, disregarded clear legislative history, and ignored key interpretative cannons.[2] But *In re United States* makes plain that the concern that guided the district court – that cellular telephone calls could be intercepted if the phrase "radio communications" took its ordinary meaning – is misplaced. The *In re United States* panel held that although cellular telephone calls are

[2] Plaintiffs' contention that the district court applied "established methods of statutory construction" is wrong. Opp'n Brief at 15. There is nothing traditional in departing from a plain language analysis in the way the district court did. Likewise, plaintiffs' suggestion that the Rule of Lenity is inapplicable here because the certified question is "not so bedeviling" makes little sense when the district court itself found the Wiretap Act ambiguous, and this Court has recognized that the Wiretap Act is famously unclear (even with regard to the unrelated issues in the *Councilman* case upon which plaintiffs rely). *See U.S. v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998) ("When the Fifth Circuit observed that the Wiretap Act 'is famous (if not infamous) for its lack of clarity,' *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457, 462 (5th Cir.1994), it might have put the matter too mildly."); June 29 Order at 13 ("[T]he Court finds that a plain reading of 'radio communication' from the statutory text, as well as reading the text in the context of the structure and purpose of the Act, fails to yield a definitive and unambiguous result.").

"radio communications,"[3] their status as "wire communications" protects them from interception. 18 U.S.C. § 2511(1)(a) *et seq.*[4]

The only bearing *In re United States* has on this motion and the certified issue is to demonstrate that one need not interpret "radio communications" to exclude new technologies in order to protect cellular telephone calls from interception. They are already protected.

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[3] Before it was amended in 2002, the Wiretap Act specifically referred to cellular telephone calls as "radio communications." 18 U.S.C. § 2511(4)(b)(ii) (repealed 2002, Pub. L. 107-296, § 225(j)(1)). And the legislative history of the 1986 ECPA amendments to the Wiretap Act explicitly refers to cellular telephone calls as radio communications. *See* S. Rep. 99-541 at 7 ("cellular calls are radio-based communications"), 20 (referring to "the radio portion of a cellular telephone" call as a "radio communication").

[4] The term "wire communication" – as defined in the Wiretap Act and construed by *In re United States* – provides no guidance to the proper definition of the phrase "radio communication" and is certainly not a "polestar," as plaintiffs suggest. Opp'n brief at 13. The Wi-Fi transmissions at issue in this case are "electronic communications," not "wire communications." *See* Dist. Ct. Dkt. No. 54 at ¶¶ 1, 2, 4, 119, 122, 129, 130 (alleging interception of "electronic communications" and not referencing "wire communications"). And the definitions of "wire communication" and "electronic communication" are wildly different, expressly mutually exclusive under the statute, and subject to significantly different parts of the Wiretap Act. *Compare* 18 U.S.C. § 2510(1) *to* § 2510(12); *see also* §§ 2511(1), 2511(2)(g)(i).

Google has shown, and the district court has agreed that fair-minded jurists could reach differing conclusions about the proper definition of "radio communication." Plaintiffs' opposition has not overcome that showing. With all three elements of the Section 1292(b) analysis established, immediate appeal of the certified question should be granted.

CONCLUSION

For the reasons stated above, the Court should grant Google's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted.

DATED: August 16, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(1)(E), this brief 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 is written in 14-point Century Schoolbook font, and with the length limitations of Fed. R. App. P. 5(c) and Fed. P. App. P. 27(d)(2) because it contains 7 pages, excluding the portions exempted thereunder.

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