

Nos. 19-15472, 19-15473

---

---

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

---

UNITED STATES DEPARTMENT OF JUSTICE; FACEBOOK, INC.,  
*Respondents-Appellees,*

v.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL  
LIBERTIES UNION OF NORTHERN CALIFORNIA; ELECTRONIC  
FRONTIER FOUNDATION; RIANA PFEFFERKORN; WP COMPANY LLC,  
DBA the Washington Post  
*Movants-Appellants.*

---

On Appeal From the U.S. District Court for Eastern California, Fresno  
Case No. 1:18-mc-00057-LJO-EPG  
The Honorable Lawrence J. O'Neill

---

**BRIEF OF RESPONDENT-APPELLEE FACEBOOK, INC.**

---

BENJAMIN WAGNER, SBN 163581,  
BWAGNER@GIBSONDUNN.COM  
ROBERT E. DUNN, SBN 275600,  
RDUNN@GIBSONDUNN.COM  
MARTIE KUTSCHER CLARK, SBN 302650,  
MKUTSCHERCLARK@GIBSONDUNN.COM  
GIBSON, DUNN & CRUTCHER LLP  
1881 Page Mill Road  
Palo Alto, CA 94304-1211  
Telephone: 650.849.5300  
Facsimile: 650.849.5333

---

*Attorneys for Facebook, Inc.*

---

---

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Facebook, Inc. states that it is a publicly held non-governmental corporation, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
A.    The legal arguments and rulings presented in the Title III proceeding should be unsealed because they concern Facebook’s legal obligation to provide technical assistance to law enforcement—an issue of widespread importance. ....	3
B.    Any unsealing order should allow for limited redactions to protect sensitive information.....	6
CONCLUSION.....	8

## TABLE OF AUTHORITIES

### Cases

<i>Bell v. Home Depot U.S.A., Inc.</i> , No. 2:12-CV-02499-GEB-CKD, 2015 WL 6082460 (E.D. Cal. Oct. 15, 2015) .....	7
<i>In re Google Inc. Gmail Litigation</i> , No. 13–MD–02430–LHK, 2013 WL 5366963 (N.D. Cal. Sept. 25, 2013) .....	7
<i>Nixon v. Warner Commc’ns, Inc.</i> , 435 U.S. 589 (1978).....	7
<i>Times Mirror Co. v. United States</i> , 873 F.2d 1210 (9th Cir. 1989) .....	2
<i>United States v. Doe</i> , 870 F.3d 991 (9th Cir. 2017) .....	7

### Statutes

18 U.S.C. § 2517 .....	2
------------------------	---

### Other Authorities

Facebook Transparency, United States <a href="https://transparency.facebook.com/government-data-requests/country/US//jan-jun-2018/jul-dec-2018">https://transparency.facebook.com/government-data-requests/country/US//jan-jun-2018/jul-dec-2018</a> .....	4
---	---

### Rules

E.D. Cal. Local Rule 140(a) .....	7
-----------------------------------	---

## STATEMENT OF THE CASE<sup>1</sup>

Appellants in these consolidated appeals seek documents from a sealed Title III proceeding in the Eastern District of California, in which the district court “issued a sealed opinion denying a government effort to hold Facebook in contempt for its refusal to provide certain technical assistance in accomplishing a wiretap.” Opening Br. (Dkt. 20) at 5. Facebook generally supports Appellants’ requests.

In August 2018, media outlets reported that the Department of Justice (“DOJ”) had “tried to compel Facebook to break . . . end-to-end encryption of” voice calls made on Facebook’s Messenger service and that “the court had denied DOJ’s motion in a sealed opinion,” in which it refused to compel Facebook to design and implement a system capable of intercepting and decrypting encrypted Voice over Internet Protocol (“VoIP”) communications. *Id.* at 9-10; WP Company LLC Opening Br. (No. 19-15473, Dkt. 12) (“WP Br.”) at 8. The docket in the matter was—and remains—sealed. Opening Br. at 5; WP Br. at 10.

On November 28, 2018, Appellants filed the underlying action—a miscellaneous proceeding in which they asked the district court to unseal the legal

---

<sup>1</sup> Because Facebook remains subject to the district court’s sealing orders in the underlying Title III proceeding, Facebook recites only those facts that appear in the district court’s publicly issued order denying Appellants’ unsealing motion and Appellants’ and amici’s publicly-filed briefs.

analysis, legal arguments, and legal rulings presented in the Title III wiretap proceeding. Excerpts of Record (“ER”) 10. DOJ opposed Appellants’ unsealing requests. ER 2. Facebook supported the requests, on the condition that any disclosed materials be subject to limited redactions in order to protect Facebook’s network security, proprietary information, and intellectual property, as well as identifying information concerning Facebook employees assigned to respond to law enforcement requests. ER 2.

On February 11, 2019, the district court denied Appellants’ requests to unseal portions of the sealed Title III proceeding. ER 1-5. In so doing, the district court held that: (1) “The unsealing and disclosure of Title III [materials] is governed by a comprehensive statutory scheme that establishes a presumption against disclosure,” (ER 2, citing 18 U.S.C. §§ 2517(1)-(8)); (2) “the common law right of access does not attach to the materials requested,” (ER 4, citing *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)); and (3) “the requested material is so entangled with investigatory secrets that effective redaction is not possible,” (ER 4). Appellants timely appealed. ER 11.

### **SUMMARY OF ARGUMENT**

Facebook supports Appellants’ requests for access to the legal arguments and rulings in the underlying Title III proceeding, which are of widespread interest and importance. The legal ruling is particularly important for information services

providers, who must understand their obligations under the technical assistance provision of Title III and must also provide their account holders with accurate information about the security of their data. While Facebook supports unsealing the legal arguments and rulings from the Title III proceeding, both the district court's order and the parties' submissions contain sensitive information that can and should be protected. Therefore, Facebook respectfully requests that any unsealing order allow Facebook and DOJ an opportunity to propose limited redactions.

### **ARGUMENT**

**A. The legal arguments and rulings presented in the Title III proceeding should be unsealed because they concern Facebook's legal obligation to provide technical assistance to law enforcement—an issue of widespread importance.**

The documents that Appellants seek concern Facebook's legal obligation to provide certain technical assistance when law enforcement attempts to intercept communications in compliance with the Wiretap Act. As Appellants and Amici highlight, the extent of such obligations is of widespread interest and importance—not only to providers of information services, but also to advocacy groups, policymakers, and the millions of individuals who use those services.

Unsealing the legal arguments and rulings from the Title III action is also consistent with the commitment of Facebook—and other information services providers—to provide meaningful transparency to their communities and the

public about the privacy of people’s information. Facebook and the people who use its service highly value transparency regarding law enforcement demands for people’s data. For this reason, since 2013, Facebook has published a semiannual “transparency report” detailing the types and numbers of requests for account-holder information received from governments across the globe, including the United States, as well as how Facebook complies with those requests.

<https://transparency.facebook.com/government-data-requests/country/US//jan-jun-2018/jul-dec-2018>.

Other information services providers similarly seek to provide people with meaningful transparency about data privacy. But satisfying that commitment is difficult when providers are in the dark as to when and how they must turn over people’s data to law enforcement. Law enforcement regularly issues subpoenas, court orders, warrants, and Title III orders to information services providers. People cannot be asked to trust providers’ assurances that their data is secure when providers themselves do not know what information law enforcement can compel them to provide. To provide meaningful transparency, information services providers must be able to effectively communicate to their communities what information law enforcement can and cannot reasonably demand.

As Amici observe, information services providers would also benefit from clear rules of the road regarding their technical-assistance obligations. *See* Brief of

Amici Curiae Mozilla and Atlassian (Dkt. 26) at 6-12. The public records in this case indicate that the government sought to use Title III to compel Facebook to redesign its entire VoIP system. Information services providers should not have to wait until confronted with government requests to know whether or not they can be compelled to make these types of system-wide changes. Yet, when only the parties to a Title III proceeding are privy to its outcome, other information services providers are left without meaningful guidance.

Further, while Facebook is able to challenge overbroad wiretap requests, not all private companies have the resources to do so—particularly when wiretap orders implicate unresolved legal questions. Information services providers and account holders rely on prior judicial opinions to understand and protect their legal rights. They should have the benefit of the legal arguments and rulings in the underlying Title III action, so that they may rely on these materials if similar cases arise in the future.

Finally, when orders like those underlying this case are kept sealed, judges are deprived of their colleagues' legal reasoning, forcing each judge confronted with these thorny interpretive questions to reach a decision without the benefit of precedent. *See* Brief of Amici Curiae Former United States Magistrate Judges (Dkt. 27) at 14-19. Sealing decisions and the legal reasoning underlying them undermines the functioning of our precedent-based legal system.

**B. Any unsealing order should allow for limited redactions to protect sensitive information.**

Although Facebook supports Appellants' request for access to the legal arguments and rulings provided in the underlying Title III proceeding, Facebook appreciates that the district court's order and the parties' submissions contain sensitive information that can and should be protected. Facebook also appreciates the efforts of law enforcement to investigate and prosecute violent crime, and understands that the government has legitimate law enforcement interests in maintaining certain investigatory and wiretap information under seal.<sup>2</sup>

Accordingly, Facebook agrees that if the Court is inclined to order the district court to unseal portions of the Title III proceeding, the government should be given the opportunity to propose redactions that protect its legitimate law enforcement interests.

Facebook also has its own interests in maintaining the confidentiality of certain information contained in the district court's order and the parties' submissions. Facebook thus asks that any unsealing order provide Facebook with

---

<sup>2</sup> Facebook does not challenge Title III's sealing requirements; however, Facebook agrees with Appellants' and Amici's position that the legal reasoning contained in the district court's opinion and the parties' briefing is not subject to Title III's sealing requirements and can be unsealed without undermining DOJ's investigatory interests.

an opportunity to propose targeted redactions to protect the following types of information: (i) information relating to the security of Facebook’s platform,<sup>3</sup> (ii) Facebook’s proprietary information and intellectual property,<sup>4</sup> and (iii) identifying information concerning Facebook employees who are assigned to respond to lawful orders from law enforcement.<sup>5</sup> Facebook would request redaction of such information in any litigation, civil or criminal.<sup>6</sup>

Facebook believes that the government’s legitimate law enforcement interests, and Facebook’s more limited privacy and security interests, can be protected by redacting sensitive information so that account holders, advocacy groups, policymakers, and similarly-situated companies can understand the legal

---

<sup>3</sup> See *In re Google Inc. Gmail Litigation*, No. 13–MD–02430–LHK, 2013 WL 5366963, at \*3 (N.D. Cal. Sept. 25, 2013) (sealing “information that if made public . . . could lead to a breach in the security of [Google’s] Gmail system”); *Bell v. Home Depot U.S.A., Inc.*, No. 2:12-CV-02499-GEB-CKD, 2015 WL 6082460, at \*2 (E.D. Cal. Oct. 15, 2015) (sealing information “contain[ing] Home Depot’s security protocols”).

<sup>4</sup> *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978).

<sup>5</sup> See E.D. Cal. Local Rule 140(a) (citing Judicial Conference Policy on Privacy and Electronic Access to Case Files and the E-Government Act of 2002, Pub. L. No. 107-347, effective April 16, 2003); *United States v. Doe*, 870 F.3d 991, 998 (9th Cir. 2017).

<sup>6</sup> The district court erroneously construed Facebook’s position in the district court as a concern about disclosure of its “trademark and protected material and information.” ER 2. As Appellants and Amici have recognized, Facebook has no “trademark” concerns in this action, but rather is concerned about disclosure of proprietary information essential to the security of its network.

issues addressed and resolved in these wiretap proceedings. Facebook recognizes that the district court's legal analysis in this case was closely intertwined with its understanding of the facts and that appropriately redacting sensitive information from the order may be burdensome. Facebook believes that the effort is warranted here, however, given the widespread importance of the issue involved and the fact that this issue has rarely been litigated to a final decision.

**CONCLUSION**

For the foregoing reasons, Facebook agrees that the legal arguments and reasoning from the Title III wiretap proceeding should be unsealed, but that Appellees should be given an opportunity to protect sensitive information.

August 12, 2019

BENJAMIN WAGNER  
ROBERT E. DUNN  
MARTIE KUTSCHER CLARK  
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Martie Kutscher Clark  
Martie Kutscher Clark

Attorneys for Facebook, Inc.

### **CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Fed. R. App. P. 32(g)(1), the attached contains 1675 words and complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, size 14.

August 12, 2019

By: /s/ Martie Kutscher Clark

Martie Kutscher Clark

## CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2019, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

August 12, 2019

By: /s/ Martie Kutscher Clark

Martie Kutscher Clark