No. 20-727

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

PERRIN AIKENS DAVIS ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit's decision implicates an entrenched conflict on how the Wiretap Act applies to a ubiquitous and routine phenomenon when people browse the Internet: automatic requests by a user's browser to multiple computer servers so that the browser can display content on a webpage the user visits. These requests occur millions of times each day, sometimes hundreds of times on a single page—triggered by the webpage designer's decision to integrate third-party features into the site to which the user navigated. Respondents minimize the conflict and deny the continuing importance of the issue, but neither attempt is persuasive. Respondents' defense of the decision below likewise fails: hackers are obviously not statutory "parties" to other persons' communications. But just as obviously, Facebook—the sole designated recipient of the request that it provide content—*is* a statutory "party," exempt from liability.

The Ninth Circuit's holding sows confusion in an area that demands clarity. Absent this Court's intervention, Wiretap Act class actions will proliferate in the circuit that is home to the heart of the internet industry. And as the Internet Association *et al.* amicus brief attests, the decision below will have immediate, sweeping, and detrimental consequences. Contrary to respondents' suggestion, this statutory issue is ripe for review, and only this Court's intervention can provide a uniform answer. Certiorari is warranted.

A. The Decision Below Cements A Square Circuit Conflict

1. In announcing its holding, the Ninth Circuit recognized that "the Third Circuit has held to the contrary" in construing the same provision of the Wiretap Act on materially identical facts. App. 32a. The Ninth Circuit's statement was correct: *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, 806 F.3d 125 (3d Cir. 2015), addressed the same class of browser-to-server communications and held—contrary to the decision below—that the Wiretap Act's "party" exemption precludes liability for internet companies that receive "information by way of GET requests" "sent directly" to them with or without the user's knowledge or authorization. *Id.* at 142-43.

Respondents do not deny the conflict between *In re Google* and the decision below. Instead, respondents claim that a "more recent" decision—*United States v. Eady*, 648 F. App'x 188 (3d Cir. 2016)—"walk[ed] back" the Third Circuit's decision in *In re Google*. BIO 16-18. But *Eady* did no such thing. *Eady* is an unpublished, nonprecedential decision that *reaffirmed* the court's holding in *In re Google*. *See* 648 F. App'x at 192 ("We have also held that a 'party' is 'one who takes part in the conversation.'").

Eady held only that the use of a prank-call service that allowed the defendant to eavesdrop on a private call between two other people can trigger Wiretap Act liability. *Id.* at 190-92. That unremarkable holding has no bearing on the practice at issue in *In re Google* and here, where the defendant is the sole designated recipient of a unique communication necessary to a webpage's function. The Third Circuit's subsequent

decision in *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262 (3d Cir. 2016)—holding that *In re Google* was "fatal" to the plaintiffs' claim that the defendant was not a "party" to similar GET requests, *id.* at 272—confirms that the Third Circuit remains squarely at odds with the Ninth.

This Court frequently grants certiorari to resolve conflicts between two courts of appeals over the interpretation of an important federal law.[1] Certiorari is all the more warranted here because so many technology companies are based in the Ninth Circuit; the incentive to sue there to take advantage of the decision is and will continue to be irresistable. Pet. 14-15.

2. As both the Ninth and Third Circuits recognized, however, the conflict runs deeper. App. 33a ("adopt[ing]" the same "understanding" of the "party exception" as the First and Seventh Circuits); *In re Google*, 806 F.3d at 143-44 ("agree[ing] with" Second and Fifth Circuits). Respondents' attempts to "clear[] away" these decisions, BIO 16, fail.

Respondents assert that *In re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003), and *United States v. Szymuszkiewicz*, 622 F.3d 701 (7th Cir. 2010), focus on a different Wiretap Act term—namely, "intercept" rather than "party." But as the Ninth Circuit explained in "adopt[ing]" these decisions, the First and

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[1] *See, e.g.*, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019).

Seventh Circuits necessarily "assumed" that secondary GET request recipients "are not parties to communications within the meaning of the Act." App. 31a-33a. The Wiretap Act's "party" and "intercept" requirements are two sides of the same coin; if, as the First and Seventh Circuits held, an "intercept[ion]" was unlawful, then the defendant could not be a "party." 18 U.S.C. § 2511(2)(d).

That is just how *respondents* characterized these decisions below. ECF 38, at 45-46 (*Pharmatrak* and *Szymuszkiewicz* "refus[ed] to apply the 'party to the communication' exception under similar circumstances"). And lower courts rely on both cases in construing the Wiretap Act's "party" provision.[2]

On the other side of the conflict, respondents contend that the Second, Fifth, and Sixth Circuit decisions do not involve browser-to-server communications and thus never "even hinted" how they "would apply the Act's party exception to the facts presented here." BIO 13. But the Wiretap Act applies equally to "oral" and "electronic" communications, 18 U.S.C. § 2511, and holdings on whether the "party" exemption incorporates a knowledge-and-authorization requirement logically control cases involving electronic communications.

Respondents emphasize that the callers in *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979), and *United States v. Passarella*, 788 F.2d 377 (6th Cir.

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[2] *See, e.g.*, *Vasil v. Kiip, Inc.*, 2018 WL 1156328, at *7 (N.D. Ill. Mar. 5, 2018); *Jurgens v. Build.com, Inc.*, 2017 WL 5277679, at *5 (E.D. Mo. Nov. 13, 2017).

1986), knew of the communication's existence, just not the identity of the other party. BIO 13-14. But that was not the critical consideration for these courts. Those decisions reasoned that when there are only two participants in a communication, they are both parties; specific knowledge or authorization is unnecessary. *Campagnuolo*, 592 F.2d at 862-63 & n.13; *Passarella*, 788 F.2d at 379. That principle applies equally here.

Finally, *Caro v. Weintraub*, 618 F.3d 94 (2d Cir. 2010)—on which the Third Circuit also relied—forms part of the split. *Contra* BIO 15-16. There, the defendant recorded a conversation "unbeknownst" to the plaintiff. *Caro*, 618 F.3d at 97. The court held that the defendant was nonetheless a "party," rejecting a rule that "one must be invited to a conversation in order to be a party to it." *Id*. The Ninth Circuit, by contrast, embraced that rule, holding that Facebook could not be a "party" because respondents allegedly had not "[]authorized" their browsers' communication with Facebook (even though their browsers initiated the very communications at issue). App. 30a-33a.

B. The Ninth Circuit's Error Has Great Practical Importance

Respondents' attempt to downplay the significance of the circuit conflict on the question presented likewise fails.

1. Although Facebook's practices have evolved, it is undisputed that Facebook and other internet companies currently engage in the browser-to-server communications at issue here. Pet. 27-31. Indeed, as Facebook's amici explain, these communications "could

scarcely be more common." Internet Association Br. 3. The overwhelming majority of websites—including, for instance, supremecourt.gov and whitehouse.gov—instruct users' browsers to send secondary GET requests, which typically transmit URL information to content providers "unknown" to the user. *Id.* at 11, 13-14, 17. "The web relies on [these requests] to display a whole universe of content"—such as payment modules, ads, CAPTCHA anti-bot tests, and YouTube videos. *Id.* at 12-14, 17. A recent study found that 88% of popular webpages instruct the user's browser to send secondary GET requests; those webpages cause the user's browser to contact, on average, 9.47 distinct content providers—but often hundreds more—to display a single webpage. *Id.* at 11-12, 16.

The decision below therefore has enormous consequences, both for current practices and future innovation. Pet. 27-31. If, as the Ninth Circuit held, a secondary GET request recipient is not a "party" to that communication, these routine communications when people surf the Internet could expose companies to massive claims of civil liability and even prosecution.

2. Respondents do not contest that secondary GET requests are commonplace, or that Wiretap Act liability for these essential practices would destabilize the technology industry and chill innovation. Instead, they predict that companies can escape liability by relying on *other* Wiretap Act provisions. BIO 18-23. Respondents are wrong that other possible defenses make the conflict over the "party" exemption "essentially academic." *Id.* at 18.

Respondents principally point to the Wiretap Act's consent exemption. Facebook does include consent

provisions in its terms of service and provides privacy choices to users. But plaintiffs often challenge the validity or applicability of consent provisions—and courts' responses to such challenges have been unpredictable. Respondents' citation to *Smith v. Facebook, Inc.*, 745 F. App'x 8 (9th Cir. 2018), confirms that plaintiffs will inevitably challenge how the consent exemption applies to various internet communications (there, certain health-related data). Respondents' own attempt to cast doubt on Facebook's practices—arguing that Facebook "now seeks (*or at least claims to seek*) users' consent," BIO 18 (emphasis added)—is illustrative.[3]

Respondents likewise err in suggesting that internet companies will necessarily satisfy the Wiretap Act's "consent" exemption because of the California Consumer Privacy Act's disclosure requirement. That Act nowhere explains *how* businesses must "inform consumers as to the categories of personal information to be collected." Cal. Civ. Code § 1798.100(b). And plaintiffs and their amici consistently argue that notice is *not* coextensive with consent under the Wiretap Act, which requires "actual consent rather than constructive consent." *Pharmatrak*, 329 F.3d at 19; *see, e.g.*, Electronic Privacy Information Ctr. Amicus

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[3] *See also, e.g.*, *Lopez v. Apple, Inc.*, No. 5:19-cv-04577 (N.D. Cal. Feb. 10, 2021), ECF No. 65 (Apple's "disclaimer" "nowhere near specific and unambiguous enough" to constitute consent); *Campbell v. Facebook Inc.*, 77 F. Supp. 3d 836, 848 (N.D. Cal. 2014) ("consent" to send messages "not necessarily" "consent to … scan[] message content"); *In re Google Inc. Gmail Litig.*, 2013 WL 5423918, at *12-15 (N.D. Cal. Sept. 26, 2013) (Google's Terms of Service "do[] not establish explicit consent").

Br., *Smith*, 745 F. App'x 8, *available at* 2017 WL 4392764, at *8.

Respondents' argument that some communications may not qualify as "contents" of a communication, BIO 21, fares no better. What qualifies as "contents" of a communication is yet another frequently litigated question.[4] For example, *In re Zynga Privacy Litigation*, 750 F.3d 1098 (9th Cir. 2014), suggested that "[u]nder some circumstances," GET requests "could constitute … the contents of a communication"—such as when they contain detailed URLs. *Id.* at 1108-09. As the decision below illustrates, courts may be receptive to such arguments. App. 27a; *accord In re Google*, 806 F.3d at 139; Internet Association Br. 19.

The best proof of the enduring importance of this circuit split is that these supposedly "simpl[e]" defenses, BIO 22, have not deterred plaintiffs from capitalizing on the decision below, *see* Pet. 28-30. Respondents do not deny that the "party" exception is critically important in one such case, *Russo v. Microsoft*, No. 4:20-cv-04818 (N.D. Cal.). And respondents are incorrect that the "party" exception is irrelevant in *Rodriguez v. Google*, No. 3:20-cv-04688 (N.D. Cal.); the plaintiffs there dispute the validity of Google's "consent" defense, ECF No. 71, at 5-13 (filed Jan. 14, 2021). And another set of plaintiffs recently

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[4] *See, e.g.*, *Brodsky v. Apple Inc.*, 2019 WL 4141936, at *6 (N.D. Cal. Aug. 30, 2019); *S.D. v. Hytto Ltd.*, 2019 WL 8333519, at *7 (N.D. Cal. May 15, 2019); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1061 (N.D. Cal. 2012).

amended their complaint to take advantage of the decision below. *See* Am. Compl., *In re Google Assistant Privacy Litig.*, No. 5:19-cv-04286 (N.D. Cal. Nov. 9, 2020), ECF No. 118, at 41 (filed Nov. 9, 2020).

C. Respondents' Merits Defense Fails

Respondents' merits defense is no reason to leave the circuit conflict unresolved. Beyond that, it distorts Facebook's position and fails to bolster the decision below—which impermissibly elevated perceived legislative purpose over text.

1. *Text*. Respondents favor the Ninth Circuit's atextual definition of "party" because (they assert) Facebook's interpretation would protect even hackers and wiretappers. BIO 28-30. But Facebook's receipt of secondary GET requests bears no resemblance to those scenarios. In each, the interloper receives—either directly or through duplication—a communication designated for a *different* recipient. Here, in contrast, Facebook is invited to a unique conversation by the webpage that the user chose to visit: the webpage designer—not Facebook—chose to integrate Facebook features and then instructed the user's browser to send a GET request directly to Facebook to obtain content that completed the webpage the user visited. Pet. 22-23. Respondents thus err in suggesting that Facebook "designate[d] itself" a party to the conversation. BIO 30.

And, as respondents' complaint recognizes, rather than eavesdropping on a separate communication, the communication with Facebook contained distinct content intended for Facebook. *See* 7ER1209; Internet Association Br. 23-24. In particular, *only* the browser-

to-Facebook GET request includes a referrer header for the primary webpage the user visited—*i.e.*, the allegedly "intercepted" URL content. 7ER1209-10. Likewise, any individualizing information from a cookie on the user's browser was transmitted *only* to Facebook. 7ER1206-11. And confirming that the GET request paradigm stands miles apart from hacking, the browser-to-Facebook GET request served a critical independent function: telling Facebook to load essential content for the webpage the user visited.

Respondents suggest that even if Facebook is right that "a party to a communication" includes the sole designated recipient of the information conveyed, Facebook itself would not qualify. BIO 28-30. That suggestion misconceives the relevant communications. When respondents navigated to websites that had integrated Facebook plug-ins (for instance, a "Like" or "Share" button), respondents' browsers sent two distinct communications: (i) a GET request to the webpage respondents sought to visit, and (ii) following that webpage's directions, a *separate* GET request to instruct Facebook to populate features on the requested webpage. That second GET request is the only communication Facebook accessed. Pet. 13-14. And that communication involves just two participants: the user and Facebook. Facebook is thus the sole designated recipient of that communication and necessarily a "party" under the Wiretap Act.[5]

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[5] Facebook's interpretation does not protect hackers for yet another reason that respondents overlook: the Wiretap Act forecloses application of the "party" exception where a "communication is intercepted for the purpose of committing any criminal or

2. *History and purpose.* Respondents' account of the Wiretap Act's history and purpose cannot rescue the Ninth Circuit's rewrite of the statutory text. *See* Pet. 24-26. For instance, respondents selectively rely on the Wiretap Act's predecessor statutes, but ignore that courts construed those statutes' prohibitions on "intercept[ion]" to exempt direct participants—even if unknown or unauthorized. *In re Google*, 806 F.3d at 144 n.80 ("If the plaintiffs' claims had been brought under" the predecessor statutes, "plaintiffs would likely fail to show an 'interception' for the same reason that, today, they fail to show that the defendants were not parties.").

Similarly, respondents minimize Congress's reliance on *United States v. Pasha*, 332 F.2d 193 (7th Cir. 1964), but offer no evidence that Congress intended to exempt an impersonator from liability, but not the sole designated recipient of the information conveyed. *See supra* at 4-5. And respondents' reliance on Congress's privacy concerns overlooks that the Wiretap Act prohibits interceptions "except those specifically provided for in the Act." *United States v. Giordano*, 416 U.S. 505, 514 (1974). Respondents' policy

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tortious act." 18 U.S.C. § 2511(2)(d). Courts routinely find that interceptions for the purpose of "spying" or "steal[ing]"—rather than for "legitimate purposes" such as "providing a valued service to commercial Web sites"—are not exempt from liability, regardless of the "party" exemption. *In re Toys R Us, Inc., Privacy Litig.*, 2001 WL 34517252, at *8 (N.D. Cal. Oct. 9, 2001); *accord*, *e.g.*, *Hawaii Reg'l Council of Carpenters v. Yoshimura*, 2016 WL 4745169, at *8 (D. Haw. Sept. 12, 2016).

argument does not help define the scope of one such express exemption.

D. This Case Is An Ideal Vehicle For Review

Contrary to respondents' contentions, this case is an excellent vehicle to resolve the conflict over the Wiretap Act's "party" exemption.

1. Respondents assert that even if Facebook is a "party" to the "secondary GET request" between the user's browser and Facebook, Facebook is not a "party" to the "initial GET request," and Facebook unlawfully "intercepted" "*that* initial communication." BIO 25-27. This so-called "vehicle" argument repackages respondents' merits arguments. The district court found—and the Ninth Circuit agreed—that the *only* communication Facebook accesses is the secondary GET request; Facebook has no access to the initial GET request and "does not intercept any data" in it. App. 63a-64a; *see also* App. 31a-33a.

2. Respondents' argument that review would be premature also lacks merit. BIO 27. This Court often grants certiorari where, as here, a court of appeals remands for further proceedings after resolving a critical statutory question in conflict with other circuits. Such review is particularly appropriate where the decision below creates the risk of settlement pressure that will often preclude any further review. Pet. 32-33. If the Ninth Circuit's understanding of the Wiretap Act is wrong, respondents' claim fails; that *other* grounds may also call for dismissal is immaterial. Respondents' passing reference to non-Wiretap Act claims is even further afield; these claims have no

bearing on the Court's ability to resolve the question presented here or the importance of doing so.

That the Ninth Circuit's expansive construction of Wiretap Act liability could have serious criminal consequences is all the more reason to grant certiorari now—not a reason to abstain. The Court routinely grants certiorari in civil cases where the relevant statute has criminal applications too. Pet. 26.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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