No. 11-17483

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN JOFFE, *et al.*,

Plaintiffs-Appellees,

v.

GOOGLE INC.,

Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of California, Case No. 5:10-MD-2184-JW
Hon. James Ware, U.S. District Judge

BRIEF OF APPELLANT GOOGLE INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellant Google Inc. states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

The question presented in this appeal is whether Wi-Fi transmissions—radio waves that wirelessly transmit information between computers and other devices—are "radio communications" under the federal Wiretap Act (18 U.S.C. § 2510 *et seq*.). The answer to that question is clear: while the Wiretap Act may not expressly define "radio communication," the statute's text, background, and structure all establish that the term refers to any communication transmitted using radio waves. That unquestionably includes the unencrypted Wi-Fi transmissions at issue in this case.

Because Wi-Fi transmissions are "radio communications," they are expressly defined by the Wiretap Act as "readily accessible to the general public," and their acquisition is not unlawful unless one of the statute's specific exceptions applies. Plaintiffs did not plead that any of those exceptions covers their unencrypted Wi-Fi transmissions, and none does. Based on this, the district court should have dismissed Plaintiffs' Wiretap Act claim.

Instead, however, the court adopted a novel interpretation of "radio communication" that cabined the term to an undefined set of "tradi-

tional radio services." That approach defies basic canons of statutory construction and is irreconcilable with how the term "radio communication" is used throughout the Wiretap Act. The court's interpretation also introduced significant ambiguities into the statute that improperly leave the public to guess, on pain of criminal liability, which radio-based communications are lawful to acquire.

This Court should reverse the district court's ruling and remand with instructions to grant Google's motion to dismiss.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' Wiretap Act claim arises under federal law. This Court has jurisdiction under 28 U.S.C. § 1292(b), pursuant to which the district court certified its order granting in part and denying in part Google's motion to dismiss. This Court granted Google's petition for permission to appeal on October 17, 2011. ER 1.

ISSUE PRESENTED FOR REVIEW

The question certified for appeal is whether Wi-Fi transmissions are "radio communications" under section 2510(16) of the Wiretap Act and thus presumptively "readily accessible to the general public."

STATEMENT PURSUANT TO CIRCUIT RULE 28-2.7

Pertinent statutes and technical references are included in an addendum at the end of this brief.

STATEMENT OF THE CASE

This case arises out of Google's limited acquisition of information allegedly sent over Plaintiffs' unencrypted Wi-Fi networks. On behalf of a putative class, Plaintiffs seek damages and injunctive relief, contending that Google's acquisition violated the federal Wiretap Act, various state wiretapping laws, and California's unfair-competition law. The district court granted Google's motion to dismiss the state-law claims but declined to dismiss the federal Wiretap Act claim based on its interpretation of "radio communication." Recognizing the novelty and uncertainty of that interpretation, the district court certified its order for interlocutory review, and this Court accepted Google's petition for permission to appeal.

STATEMENT OF FACTS

A. Wi-Fi Technology.

The term "Wi-Fi" refers to "a wireless local area network that uses radio waves to connect computers and other devices to the Internet." Webster's New College Dictionary 1636 (Michael Agnes ed., Wiley

Publ'g, Inc. 2007). Wi-Fi signals are broadcast by radio-transmitting devices known as "access points" or routers. *See* K.V. Shibu, *Introduction to Embedded Systems* 57 (Tata McGraw Hill Education Private Ltd. 2009); *Commonwealth Scientific & Indus. Research Org. v. Buffalo Tech. (USA), Inc.*, 542 F.3d 1363, 1367 (Fed. Cir. 2008) (explaining that Wi-Fi allows "remote devices [to] communicate with the network access points by way of radio wave transmissions").[1]

Every individual Wi-Fi device is assigned by its manufacturer a unique number called a MAC address. ER 55. In addition, wireless routers and other Wi-Fi access points are assigned an alpha-numeric "service set identifier" ("SSID"). *Id.* Routers broadcast MAC addresses and SSIDs, and that identifying information can automatically be detected by most computers and cell phones. *Id.* This is how individuals

[1] In 1985, the Federal Communications Commission (the "FCC") enabled the development of Wi-Fi technology by amending Part 15 of its rules to allocate a portion of the radio spectrum for unlicensed use by certain communication devices. *In the Matter of Authorization of Spread Spectrum and Other Wideband Emissions Not Presently Provided for in the FCC Rules and Regulations*, Gen. Docket No. 81-413, 101 F.C.C. 2d 419, 428-30 (1985). Today, "Wi-Fi networks comprise the radio technologies associated with IEEE Standards 802.11a, 802.11b, and 802.11g". Simon Haykin *et al.*, *Modern Wireless Communications* 328 (Pearson Education Inc. 2005); *see generally* Encyclopædia Britannica Online, "Wi-Fi,", http://www.britannica.com/EBchecked/topic/1473553/Wi-Fi (last accessed February 08, 2012).

are able to find and connect to available Wi-Fi networks in hotels, airports, and other public places, as well as in their homes and offices.

The Wi-Fi networks that individuals use to connect to the Internet can either be encrypted or unencrypted at the election of the network owner. Wi-Fi encryption options are included in Wi-Fi transmitting devices, and allow network owners to ensure that the transmissions made over their Wi-Fi networks are secured from public acquisition. *See Handbook of Electronic Security and Digital Forensics* 85 (Hamid Jahamkhani *et al.* eds., World Scientific Publ'g Co. Pte. Ltd. 2010). Nevertheless, it is common for Wi-Fi network owners to forego encryption to foster public access to information that is transmitted over their networks.[2]

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[2] Examples of these public Wi-Fi transmissions abound: operators of Wi-Fi networks often set-up introductory pages that are automatically displayed to users who connect to their network; sports stadiums use Wi-Fi to send interactive digital messages to spectators; theatres use it to transmit subtitles with real-time translation of foreign-language works; and many purveyors of public Wi-Fi networks configure them to broadcast advertisements to users as they browse the Internet. *See, e.g.*, *Emerging Technologies in Wireless LANs* 612, 618 (Benny Bing ed., Cambridge Univ. Press 2008); Daniel Terdiman, *SF Giants bring new tech out to the ballpark* (May 11, 2009), *available at* http://news.cnet.com/8301-13772_3-10238394-52.html (last visited Feb 8, 2012); *Theatre performances available in eight languages*, *available at* http://news.bbc.co.uk/2/hi/8380266.stm (last visited Feb. 8, 2012);

B. Google's Street View Service and The Collection of Wi-Fi Information.

Google's Street View feature complements Google's online map service by providing users with panoramic, street-level photographs of roads in the United States and abroad. ER 56, 228. Street View images are taken by cameras mounted on cars that drive down public roads and photograph their surroundings. *Id*. For a time, Google's Street View vehicles were also outfitted with off-the-shelf radio equipment and open-source software that enabled them to collect publicly available network information (such as SSIDs and MAC addresses) from Wi-Fi networks along the roads they travelled. ER 55-56.

As Wi-Fi networks have proliferated, the gathering of public data identifying those networks has become a common business practice designed to enable or enhance so-called "location aware" services. Because Wi-Fi networks have a limited range, the presence of any particular network acts as a unique geographical landmark. Knowing the combination of Wi-Fi networks in range of their devices allows individ-

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Shirley Christie, *Could the Dream of Free Wireless On the Go Soon Be a Reality in Jakarta?* (Oct. 20, 2010) *available at* http://www.thejakartaglobe.com/jakarta/could-the-dream-of-free-wireless-on-the-go-soon-be-a-reality-in-jakarta/402262 (last visited Feb. 8, 2012).

uals to pinpoint their approximate locations in situations where satellite-based Global Positioning Service (GPS) is either unavailable or inconvenient. By detecting the Wi-Fi networks available in a given area, Google and other companies can provide services that enable people to find locally relevant information about weather conditions, shopping and restaurant options, and directions to places of interest, among many other things, using their cell phones or other Wi-Fi enabled devices. ER 50, 55.

In May 2010, Google learned that its Street View vehicles had been collecting more than just identifying information about Wi-Fi networks. ER 47, 50, 244 (¶71). The vehicles had also acquired data that was sent over unencrypted Wi-Fi networks (so-called "payload data") if that data was being transmitted at the particular moment a Street View car happened to drive by. *Id.* Google had no interest in acquiring payload data, and has never used it in any of its products or services. Upon learning of the unwanted collection, Google promptly grounded its Street View cars, segregated and rendered inaccessible the payload data that had been acquired, and hired a third party to review what had happened. ER 51, 56-57. Google also publicly described these events on

its official blog, apologized for collecting payload data, and put steps in place to prevent such collection from occurring again. ER 50-51, 55-61.

C. Plaintiffs' Lawsuits Against Google.

Starting in May 2010, shortly after Google described its collection of payload information, more than a dozen putative class-actions lawsuits challenging that activity were filed in courts around the country. Those cases were eventually transferred by the Judicial Panel on Multidistrict Litigation to the Northern District of California for pretrial coordination. ER 260-62.

Plaintiffs are individuals who allege that payload data transmitted over their unencrypted Wi-Fi networks was collected by Google. ER 231-37 (¶¶18-38), 260.[3] In addition to bringing claims on their own behalf, Plaintiffs seek to represent a class consisting of all individuals whose Wi-Fi payload data was collected. ER 252 (¶119). Plaintiffs filed a Consolidated Class Action Complaint in November 2010, asserting

[3] Plaintiffs have specifically admitted that the wireless networks they maintained were "open" and "unencrypted." ER 39-41, 64-65 (¶4), 78 (¶5), 87 (¶1), 118 (¶¶6-7), 130-31 (¶¶5-7), 148 (¶¶10-11), 151 (¶31), 164 (¶3), 175-76 (¶¶3-5), 179 (¶21), 189 (¶¶10-11), 192 (¶31), 208 (¶19); *see also* ER 260 (MDL panel explaining that these actions arise "out of allegations that Google intentionally intercepted electronic communications sent or received over class members' open, nonsecured wireless networks").

claims under the federal Wiretap Act, various state wiretap statutes, and California's unfair competition law (UCL). ER 227-59.

D. Google's Motion To Dismiss Plaintiffs' Wiretap Act Claim.

In December 2010, Google filed a motion to dismiss Plaintiffs' complaint. With respect to the federal Wiretap Act claim, Google argued that the acquisition of data allegedly transmitted over Plaintiffs' unencrypted Wi-Fi networks was covered by section 2511(2)(g)(i) of the Wiretap Act, which expressly makes it lawful 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." 18 U.S.C. § 2511(2)(g)(i).[4]

Google further argued that because Wi-Fi transmissions are carried on radio waves, they also constitute "radio communications" under the Wiretap Act. As a result, they are governed by section 2510(16) of the statute, which expressly defines a "radio communication" as "readily

[4] It is undisputed that Plaintiffs' alleged transmissions were "electronic communications," as each was a "transfer of … data … transmitted in whole or in part by … radio" (18 U.S.C. § 2510(12)). *See* ER 228 (¶¶1-2), 252 (¶119), 253 (¶122(a)) (Plaintiffs pleading that the transmissions at issue were "electronic communications" "sent or received on wireless internet connections ('WiFi connections')").

accessible to the general public" unless it falls within one of five specific exceptions. 18 U.S.C. § 2510(16).[5] Because Plaintiffs' unencrypted Wi-Fi transmissions did not fall within any of those exceptions, Google explained that their acquisition, as a matter of law, did not violate the Wiretap Act.

After oral argument, the district court asked the parties to provide supplemental briefs addressing three questions:

(1) What the term "radio communication" means under the Wiretap Act;

(2) Whether Wi-Fi transmissions are "radio communications"; and

(3) Whether cellular telephone calls constitute "radio communications" and, if so, whether such communications fall within any of the section 2510(16) exceptions.

See ER 32-33. In response, Google explained (1) that "radio communication" carries its ordinary meaning of any communication made over radio waves; (2) that Wi-Fi transmissions, which are indisputably transmitted over radio waves, therefore readily come within the mean-

[5] The provisions defining "electronic communication" and "readily accessible to the general public … with respect to a radio communication" were added to the Wiretap Act by the Electronic Communications Privacy Act of 1986 ("ECPA"). Pub. L. No. 99-508, 100 Stat. 1848 (1986). As originally enacted in 1968 and before the passage of ECPA, the Wiretap Act did not address electronic communications or radio communications in any way.

ing of the term; and (3) that cellular telephone transmissions (which have never been at issue in this case) both constitute "radio communications" under the Wiretap Act and fall within at least one of section 2510(16)'s exceptions.

With regard to (3), Google showed that the statute's legislative history makes clear that Congress intended to protect cellular communications from interception through the Common-Carrier Exception in section 2510(16), which applies to a "radio communication" that is "transmitted over a communication system provided by a common carrier" (18 U.S.C. § 2510(16)(D)). *See* H.R. Rep. No. 99-647, at 32 (1986).[6] In light of this statutory protection, Google reassured the district court that it had no reason to be concerned that giving "radio communication" its ordinary meaning would leave cellular transmissions open to interception under the Wiretap Act.

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[6] Google further explained that cellular transmissions are also protected as "wire communications" insofar as they contain the human voice and are made in whole or in part "by the aid of wire, cable, or other like connection." 18 U.S.C. §§ 2510(1), 2510(18); H.R. Rep. No. 99-647, at 31 (legislative history explaining Wiretap Act protection for cellular transmissions as "wire communications").

E. The District Court's Interpretation Of "Radio Communication."

This appeal arises from the district court's decision not to dismiss Plaintiffs' Wiretap Act claim. ER 11-26.[7] In addressing that claim, the court recognized that it was confronting an issue 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." ER 12-13.

The court agreed with Google that if Plaintiffs' Wi-Fi transmissions were "radio communications," they would be deemed "readily accessible to the general public" by section 2510(16), which would make their interception lawful under section 2511(2)(g)(i). ER 13-14, 22. And the court acknowledged that "Plaintiffs fail to plead that the wireless networks fall into at least one of the five enumerated exceptions to Section 2510(16)'s definition of 'readily accessible to the general public' for radio communications." ER 23-24.

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[7] The district court dismissed with prejudice Plaintiffs' claims under the state wiretap statutes, which it held were preempted by federal law. ER 28. The court also dismissed Plaintiffs' claims under the UCL for lack of standing. ER 29. Plaintiffs did not seek certification of those rulings, and neither is at issue here.

But the court nevertheless declined to dismiss the Wiretap Act claim because it concluded that a Wi-Fi transmission is not a "radio communication" under the statute. The court declined to give "radio communication" its ordinary meaning of all communications transmitted via radio waves. Instead, the court invoked a "specialized definition" under which "radio communication" was limited to what it termed "traditional radio services." ER 21. The court did not explain what a "traditional radio service" is, except to suggest that it is limited to communications "designed or intended to be public" and thus excludes radio transmissions made by cellular phones and Wi-Fi networks. ER 24.[8]

Having concluded that the unencrypted Wi-Fi transmissions at issue were not "radio communications" subject to section 2510(16), the district court held that Plaintiffs had adequately pleaded that those transmissions were "electronic communications" and not "readily ac-

[8] Elsewhere, the court intimated that "radio communication" also included "radio broadcast technology," but it did not elaborate on what that meant or why Wi-Fi is not such a technology. *See* ER 23 ("for all electronic communications that could not be fairly classified as 'traditional radio services' or radio broadcast technology, regardless of the technology's use of radio waves as the medium of transmission, the Court finds that Congress did not intend Section 2510(16)'s narrow definition of 'readily accessible to the general public' to apply for purposes of exemption G1").

cessible to the general public" under section 2511(2)(g)(i). ER 23-26. On that basis, the court allowed Plaintiffs' Wiretap Act claim to survive. ER 30.

Google asked the district court to certify its Wiretap Act ruling for interlocutory appeal under 28 U.S.C. § 1292(b). ER 2. Recognizing that the interpretation of "radio communication" presented a question of "first impression" about which "there is a credible basis for a difference of opinion," the district court granted Google's request. ER 3-4. On October 17, 2011, this Court granted Google's Petition for Permission to Appeal. ER 1.

SUMMARY OF ARGUMENT

Google's alleged acquisition of information sent over Plaintiffs' unencrypted Wi-Fi networks did not violate the Wiretap Act. The statute makes it lawful to intercept "electronic communications" that are "readily accessible to the general public." 18 U.S.C. § 2511(2)(g)(i). And when those electronic communications are also "radio communications," the statute defines what "readily accessible to the general public" means: such a communication is expressly designated as "readily accessible to the general public" unless it falls within one of five specific

exceptions. 18 U.S.C. § 2510(16). Plaintiffs have not alleged (and cannot plausibly allege) that any of those exceptions applies here.

Instead, Plaintiffs argued below that the definition of "readily accessible to the general public" in section 2510(16) somehow does not apply to the use of that phrase in section 2511(2)(g)(i). The district court properly rejected that argument as contrary to the text and legislative history of the Wiretap Act. But the court nevertheless adopted an alternative approach that allowed Plaintiffs' claim to survive. It held that even though Wi-Fi transmissions are made using radio waves, they are not "radio communications" because that term should be given a specialized definition limited to "traditional radio services." The district court's novel interpretation is untenable for multiple reasons.

First, the court's definition of "radio communication" is contrary to the term's ordinary meaning of any communication transmitted by radio waves. It is well settled that ordinary meaning controls where, as here, a term is not specifically defined by the statute. That rule is particularly appropriate in this case given that "radio communication" is expressly defined according to its natural meaning in the Communications Act, a closely related federal statute.

Second, the district court's ruling that a Wi-Fi transmission is not a "radio communication" is refuted by the history of the Wiretap Act. In 1994, Congress enacted an amendment that extended the Wiretap Act to cover transmissions made over what Congress described as "wireless data networks." That amendment brought unencrypted data transmissions like Wi-Fi within Wiretap Act protection for the first time. But Congress quickly recognized that this new protection swept too broadly, ***and it was repealed just two years later***. Congress's actions establish beyond any doubt both that Wi-Fi transmissions are (and always have been) "radio communications" under the Wiretap Act and that acquiring transmissions from unencrypted Wi-Fi networks does not violate the statute.

Third, the district court's interpretation is irreconcilable with the way "radio communication" is used throughout the Wiretap Act. For example, the statute's Common-Carrier Exception (§ 2510(16)(D)) shows clearly that the term "radio communication" was intended to sweep broadly and cover all radio-based transmissions, including those involving handheld pagers and cellular telephones. These transmissions would be excluded from the district court's understanding of "tra-

ditional radio service" because they are not designed to be public. Yet each indisputably is a "radio communication." What makes them so is that each is transmitted using radio waves. The same is true of Wi-Fi, and there is no basis for treating a Wi-Fi transmission as anything other than a radio communication.

While there is no ambiguity about the meaning of "radio communication," even if there were, the rule of lenity, under which ambiguous criminal statutes must be construed narrowly, would require that the Wiretap Act not be read to criminalize conduct it does not clearly forbid. Even though the district court believed that the statute's use of "radio communication" was ambiguous, it failed to apply the rule of lenity and thus impermissibly broadened the scope of conduct that the Wiretap Act proscribes. Compounding that problem, the court adopted an interpretation of "radio communication" that is itself highly ambiguous and leaves members of the public uncertain about what radio-based transmissions are lawful to acquire.

The district court offered various reasons for restricting "radio communication" to "traditional radio services," but none withstands scrutiny. *First*, the court suggested that interpreting the term accor-

dingly to its ordinary meaning would leave cellular telephone transmissions unprotected from interception. That is not so. The Wiretap Act protects cellular phone transmissions in multiple ways, including by classifying them as "radio communications" transmitted by common carriers. That protection is in no way diminished—indeed it requires—understanding "radio communications" to include all transmissions made by radio.

Second, the district court suggested that treating Wi-Fi transmissions as presumptively "readily accessible to the general public" would contravene congressional intent. But the court erred in asserting that the intent of section 2510(16)—the provision making it generally permissible to intercept radio communications—was solely to protect the interests of radio hobbyists. That provision serves a broader public interest: to declare all transmissions by radio presumptively accessible to the general public. That way, anyone (hobbyist or otherwise) can lawfully acquire radio transmissions unless they fall within one of a few objectively identifiable categories. Transmissions over unencrypted Wi-Fi networks are not among the categories deemed off limits. To the contrary, although Congress in 1994 enacted an exception to the presump-

tion of ready accessibility that actually covered wireless data transmissions like Wi-Fi, that exception was promptly repealed. Congress's repeal of the 1994 amendment makes clear that the result Google seeks is entirely consistent with legislative intent.

Third, the court asserted that a plain-language interpretation of "radio communication" would lead to absurd results, suggesting for example that Wi-Fi transmissions that were encrypted would still be subject to interception if made on board a ship or airplane. But that simply is not so: nothing unanticipated by Congress or out of line with the Wiretap Act's statutory scheme follows from giving "radio communication" its ordinary meaning.

For these reasons, Plaintiffs' Wiretap Act claim fails as a matter of law, and this Court should enter an order requiring its dismissal.

ARGUMENT

The district court's interpretation of the Wiretap Act presents a question of law that this Court reviews de novo. *See, e.g., S.E.C. v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1044 (9th Cir. 2005).

I. THE WIRETAP ACT PERMITS INTERCEPTION OF RADIO COMMUNICATIONS THAT ARE READILY ACCESSIBLE TO THE GENERAL PUBLIC.

Plaintiffs' Wiretap Act claim is premised on the allegation that Google acquired unencrypted Wi-Fi transmissions. But Google's actions did not violate the Wiretap Act. The statute makes it lawful to acquire "electronic communications" that are "readily accessible to the general public." 18 U.S.C. § 2511(2)(g)(i). And it expressly defines as "readily accessible to the general public" any "radio communication" that does not fall into one of five specific exceptions. 18 U.S.C. § 2510(16). Because Plaintiffs' Wi-Fi transmissions do not fall within any of those exceptions, their acquisition was not unlawful.

A. Radio Communications Are Presumptively Accessible To The General Public.

The Wiretap Act provides that it "shall not be unlawful" 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." 18 U.S.C. § 2511(2)(g)(i). It is undisputed that the transmissions at issue here were "electronic communications." Plaintiffs pleaded as much (ER 228 (¶¶1-2), 252 (¶119), 253 (¶122(a))), and that is confirmed by the Wiretap

Act's definition of "electronic communication," which includes the transfer of "data" "in whole or in part" by "radio." 18 U.S.C. § 2510(12); *see also* H.R. Rep. No. 99-647, at 35.

Plaintiffs' transmissions were also "radio communications" under the Wiretap Act. *Accord* H.R. Rep. No. 99-647, at 36 ("Inclusion of the term 'radio' in the definition of 'electronic communication' in Section 2510(12) reflects the fact that radio communications come within the scope of chapter 119."). Like all Wi-Fi transmissions, those at issue here were made using a radio transmitter (a wireless access point) that conveyed them via radio waves to computers or other similar devices. *See supra* at pp 3-4.

The fact that Wi-Fi transmissions are radio based is fatal to Plaintiffs' claim. Section 2510(16) of the Wiretap Act expressly designates any "radio communication" (*i.e.*, any transmission made over radio waves) as "readily accessible to the general public"—and thus not unlawful to intercept under section 2511(2)(g)(i)—unless it falls within one of five carefully delineated exceptions. 18 U.S.C. § 2510(16); *see also* H.R. Rep. No. 99-647, at 37 ("The new paragraph (16) states 'readily accessible to the general public' means with respect to a radio communica-

tion, that such is not in one of five separate categories."); ER 13-14. As the district court recognized, Plaintiffs' complaint makes no allegation that any of those exceptions applies to their Wi-Fi transmissions. ER 23-24.

In fact, Plaintiffs specifically admitted that they left their Wi-Fi networks "open" and "unencrypted," thereby taking their Wi-Fi transmissions outside section 2510(16)(A)'s Encryption Exception. *See* ER 39-41, 64-65 (¶4), 78 (¶5), 87 (¶1), 118 (¶¶6-7), 130-31 (¶¶5-7), 148 (¶¶10-11), 151 (¶31), 164 (¶3), 175-76 (¶¶3-5), 179 (¶21), 189 (¶¶10-11), 192 (¶31), 208 (¶19). The Encryption Exception—which renders radio communications that are "scrambled or encrypted" off limits from interception—is a way to bring virtually any radio transmission, including those sent over Wi-Fi networks, within the protection of the Wiretap Act. But as Plaintiffs themselves acknowledged, they did not avail themselves of that option.

While Google believes that Plaintiffs cannot plausibly allege that their Wi-Fi transmissions were protected by any of the other section 2510(16) exceptions, this Court need not address that issue. The complaint that the district court evaluated includes no such allegations. On

the record before this Court, therefore, Plaintiffs' Wiretap Act claim is not and cannot be saved by the section 2510(16) exceptions.

B. The Act's Definition Of "Readily Accessible To The General Public" Applies To Section 2511(2)(g)(i).

Unable to bring their Wi-Fi transmissions within any of section 2510(16)'s exceptions, Plaintiffs argued that the Wiretap Act's definition of "readily accessible to the general public" in section 2510(16) does not apply when that phrase is used in section 2511(2)(g)(i) of the statute. The district court rejected this argument (ER 22), and for good reason.

The phrase "readily accessible to the general public" appears in two places in the Wiretap Act. *See* 18 U.S.C. § 2511(2)(g)(i); 18 U.S.C. § 2511(2)(g)(ii)(II). That phrase is defined in section 2510(16), which provides that "'readily accessible to the general public means, with respect to a radio communication, that such communication is not" one of the five enumerated exceptions. There is no basis for applying section 2510(16)'s definition of "readily accessible to the general public" to the phrase's second appearance in the statute, but not to its first.

Doing so would violate the plain language of the Wiretap Act. Section 2510 says expressly that its definitions apply to those terms "[a]s used in this chapter." Section 2511(2)(g)(i) is certainly "in" chapter

119, and the statute thus directs that the term "readily accessible to the general public" as used there be given its defined meaning. *Cf. United States v. Migi*, 329 F.3d 1085, 1087 (9th Cir. 2003) ("When we interpret a word in a statute, we use the statute's definition of that word."). Giving different definitions to the two appearances of the phrase, as Plaintiffs urged, also violates the rule "that words used more than once in the same statute have the same meaning." *Boise Cascade Corp. v. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991); *see also Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986).

That section 2511(2)(g)(i) refers to "electronic communication" (and not specifically to "radio communication") does not advance Plaintiffs' argument. Under the Wiretap Act, the terms "electronic communication" and "radio communication" are not mutually exclusive. The definition of "electronic communication" makes clear that a communication can be both concurrently. 18 U.S.C. § 2510(12) ("electronic communication" includes communications "transmitted in whole or in part by … radio"); *see also* H.R. Rep. No. 99-647, at 35-36. During the time that an "electronic communication" is being transmitted by radio it is also a "radio communication," and may be acquired without liability

under section 2511(2)(g)(i), so long as it does not fall within one of section 2510(16)'s five specific exceptions.

The inter-relationship between those two provisions is confirmed by their legislative history. The Senate Committee Report introducing section 2511(2)(g)(i) says expressly that it:

> provides an exception to the general prohibition on interception for electronic communications which are configured to be readily accessible to the general public. Thus, the radio communications specified in proposed subsection 2510(16) are afforded privacy protections under this legislation unless another exception applies.

S. Rep. No. 99-541, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555; *see also* H.R. Rep. No. 99-647, at 41. This passage shows beyond all doubt that section 2510(16)'s definition of the phrase "readily accessible to the general public" "with respect to a radio communication" applies fully to section 2511(2)(g)(i) whenever the "electronic communication" in question is also a "radio communication."

In sum, the text and structure of the Wiretap Act make clear that insofar as Plaintiffs' Wi-Fi transmissions are "radio communications," they were presumptively "readily accessible to the general public" under section 2510(16), and their interception was lawful under section 2511(2)(g)(i).

II. PLAINTIFFS' WI-FI TRANSMISSIONS ARE "RADIO COMMUNICATIONS" UNDER THE WIRETAP ACT.

Having agreed with Google on all of the points above (ER 13-14, 22), the district court should have dismissed Plaintiffs' Wiretap Act claim. Instead, however, the court held that Plaintiffs' Wi-Fi transmissions were not "radio communications" because they were not what it labeled "traditional radio services." ER 25. Without explaining what a "traditional radio service" is, the court suggested that its new definition covered only communications intended to be public, and thus excluded transmissions from cellular telephones and Wi-Fi networks. ER 24-25. The district court's decision to confine "radio communication" to "traditional radio services" was incorrect. That limiting construction ignores the plain language of the Wiretap Act, ignores fundamental principles of statutory interpretation, and is irreconcilable with the Act's history and structure.

A. The Term "Radio Communication" Refers To All Transmissions Made Using Radio Waves.

1. The ordinary meaning of "radio communication" extends beyond "traditional radio services."

"Radio communication" is not expressly defined by the Wiretap Act. Any interpretation of "radio communication" must therefore begin

with the ordinary meaning of those words. It is a basic rule of statutory construction that when "terms used in a statute are undefined, we give them their ordinary meaning." *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) (quotations and citations omitted); *see also United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998) ("When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used.").

The ordinary meaning of the term "radio communication" is straightforward. "Radio" refers to the radio frequency ("RF") portion of the electromagnetic spectrum, which is "generally defined as the part of the spectrum where electromagnetic waves have frequencies in the range of about 3 kilohertz to 300 gigahertz." FCC Office of Engineering & Technology, Bulletin 56, *Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, at 2-3 (4th Ed. 1999) ("FCC Bulletin 56").[9] In turn, the dictionary de-

[9] *See also, e.g.*, Rudolph F. Graf, Modern Dictionary of Electronics 615 (7th Ed. Newnes 1999) (defining "radio" as "[a] general term, principally an adjective, applied to the use of electromagnetic waves between 10 KHz and 3000 GHz); Martin H. Weik, Communications Standard Dictionary 883 (2d Ed. Van Nostrand Reinhold 1989)

fines "communication" as "the information, signals, or message." Webster's New College Dictionary 295; *see also* Communications Standard Dictionary 178 (defining "communication" as "[a] method or means of conveying information of any kind from one person or place to another, except by direct unassisted conversation or correspondence.").

Accordingly, "radio communication" by its terms refers to any information transmitted using radio waves, *i.e.*, the radio frequency portion of the electromagnetic spectrum. This is an objective definition that allows individuals to determine easily whether something is or is not a radio communication: if a communication is transmitted via radio waves, it is a radio communication. That is true whether or not it is what someone might think of as a "traditional radio service."

Disregarding these points, the district court gave the term "radio communication" a meaning significantly narrower than the ordinary understanding of those words. In explaining its decision to depart from ordinary meaning, the court pointed to the fact that other compound terms in the Wiretap Act such as "wire communication" and "electronic

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(defining radio as "[a] device, or pertaining to a device, that transits or receives electromagnetic waves in the frequency bands that are between 10 KHz and 3000 GHz.").

communication" are defined in specialized ways.[10] The court suggested that this indicated that Congress intended all the Act's compound terms, including "radio communication" to have "more refined definitions than simply combining the independent meanings of each word into a unified whole." ER 17-18.

That approach gets it backwards. The fact that the Wiretap Act provides specialized definitions for certain compound terms—but not for "radio communication"—is powerful evidence that the undefined term was ***not*** similarly intended be defined in a specialized or narrow way. That contrast is all the more reason to understand "radio communication" according to its ordinary meaning. The statutory definitions expressly providing for "electronic communication" and "wire communication" illustrate that Congress knew how to indicate when it wanted terms to have specialized meanings. By not providing such a definition

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[10] For example, the Wiretap Act defines "wire communication" to require an "aural transfer," *i.e.*, a transmission "containing the human voice." 18 U.S.C §§ 2510(1), 2510(18). And it defines "electronic communication" broadly, but specifically to exclude, among other things, any "wire communication," "any communication made through a tone-only paging device," and "any communication from a tracking device." 18 U.S.C. § 2510(12). These specialized definitions are the careful product of a statute that has been amended multiple times over several decades to adapt to evolving technologies.

for "radio communication," Congress indicated its expectation that that term would bear its ordinary meaning—not some more "refined" definition. And under that ordinary meaning, Wi-Fi transmissions, which are carried by radio waves, are unquestionably radio communications.

2. The Communications Act definition of "radio communication" confirms that the term carries its ordinary meaning in the Wiretap Act.

Further proof of what "radio communication" means in the Wiretap Act comes from the definition given to that term in a related statute, the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*.

Like the Wiretap Act, the Communications Act repeatedly uses the term "radio communication." *See, e.g.*, 47 U.S.C. §§ 306, 322, 605. And the Communications Act provides an express definition:

> The term 'radio communication' or 'communication by radio' means the ***transmission by radio*** of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services … incidental to such transmission.

47 U.S.C. § 153(40) (emphasis added). This definition is not limited to "traditional radio services," but instead sweeps in any communication transmitted via radio waves. That is confirmed by the FCC regulation defining "radiocommunication" as "[t]elecommunication by means of ra-

dio waves." 47 C.F.R. § 2.1. The Communications Act definition illustrates that the ordinary meaning of "radio communication" is broad and includes all transmissions made by radio.[11]

The Communications Act is a "reliable extrinsic source" for interpreting the term "radio communication" in the Wiretap Act. *Cooper v. FAA*, 622 F.3d 1016, 1032 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3025 (2011). "[C]ourts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter." *United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) (*en banc*); *see also Northcross v. Bd. of Educ. of the Memphis City Sch.*, 412 U.S. 427, 428 (1973). Applying that rule, this Court has looked to analogous federal statutes to ascertain the meaning of undefined terms in the Wiretap Act. *See, e.g.*, *United States v. Hermanek*, 289 F.3d 1076, 1086 n.3 (9th Cir. 2002).

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[11] *See, e.g.*, Newton's Telecom Dictionary 608 (18th Ed. CMP Books 2002) (radio communication means "[a]ny telecommunication by means of radio waves"); Gilbert Held, Dictionary of Communications Technology 437 (3d Ed. John Wiley & Sons 1998) (radio communication means "[c]ommunications by means of radio waves"); Xerxes Mazda *et al.*, The Focal Illustrated Dictionary of Telecommunications 510 (Focal Press 1999) ("radiocommunications" is a "[g]eneric term used to cover any form of communications which occurs using radio waves and operating within the radio frequency spectrum.").

The Communications Act and the Wiretap Act both regulate the collection of, and permissible access to, information transmitted via various communications media. Moreover, the two statutes expressly depend on one another. They cross reference in several places and together provide an integrated regime regulating the transmission and interception of a wide variety of communications. *See, e.g.*, 47 U.S.C. § 605(a); 18 U.S.C. § 2511(2)(g)(iii). The statutory overlap extends to the regulation of radio communications themselves. In proscribing certain conduct relating to the unauthorized use of "any interstate or foreign communication by … radio," the Communications Act expressly exempts conduct "authorized by chapter 119, Title 18"—the Wiretap Act. 47 U.S.C. § 605(a). This intimate relationship between the two statutes provides an especially compelling reason to look to the Communications Act definition to understand what radio communication means in the Wiretap Act.

B. The Wiretap Act's History Eliminates Any Doubt That "Radio Communication" Includes WiFi Transmissions.

The Wiretap Act's history confirms the statute's plain meaning, and establishes beyond any doubt that transmissions made via wireless data networks such as Wi-Fi are "radio communications."

Shortly after amending the Wiretap Act through ECPA in 1986, Congress commissioned a task force charged with "examining current developments in communications technology and how they relate to the legal framework for protecting communications privacy." Final Report of the Privacy and Technology Task Force Submitted to Senator Patrick Leahy (May 29, 1991), *reprinted in* S. Hrg. 103-1022, at 179 (Mar. 18 & Aug. 11, 1994). The task force issued its report in 1991. Among the new technologies that the task force studied were "wireless modems" and "wireless local area networks." S. Hrg. 103-1022, at 179. The task force expressly acknowledged that those "new radio-based communications technologies … do not fall clearly within the protections afforded by ECPA." *Id.* at 180.

As the task force explained, that was because of section 2510(16)'s definition of "readily accessible to the general public," which applied "[w]ith regard to radio-based technologies." *Id.* at 181. The task force understood that "wireless data communications" (including wireless modems "which can transmit data between computers without the computers being wired together") were "radio communications" under the Act, and thus that their protection depended on whether they fell with-

in one of the section 2510(16) exceptions. *Id.* at 183. The task force concluded: "Under current FCC proceedings, there is a likelihood that such communications will not be protected unless the user goes to the expense of full data encryption" (thus bringing the communication within the Encryption Exception). *Id.* Accordingly, the task force recommended that Congress consider "appropriate amendments" to protect such communications under the Wiretap Act. *Id.*

In 1994, Congress acted on the task force's recommendations and amended the Wiretap Act. *See* Pub. L. No. 103-414, § 203, 108 Stat. 4279, 4291 (1994); H.R. Rep. No. 103-827, pt. 1, at 14 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489 (discussing recommendations that "the legal protections of ECPA be extended to cover new wireless data communications, such as those occurring over cellular laptop computers and wireless local area networks (LANs), and cordless phones"); *id.* at 18 (describing how 1994 amendments extended "privacy protections of the Electronic Communications Privacy Act to cordless phones and certain data communications transmitted by radio").

When Congress acted to protect what it termed "wireless data communications," it did so by recognizing that such transmissions are

"radio communications" under section 2510(16). The 1994 legislation thus amended section 2510(16) to add "electronic communication" as a new category of radio communication that was specifically excepted from the provision's presumption that radio communications are readily accessible to the general public. *See* H.R. Rep. No. 103-827, pt. 1, at 30; S. Rep. No. 103-402, at 32 (1994). Congress explained that with this change the Wiretap Act provided "protection for all forms of electronic communications, including data, even when they may be transmitted by radio." *Id.*

Congress thus premised the 1994 amendments on precisely the understanding of the statute that Google has advanced in this case: (1) under the Wiretap Act, transmissions from wireless data networks are "radio communications"; (2) the Act did not protect those transmissions from interception unless they fell within one of the existing section 2510(16) exceptions; and (3) to protect wireless data communications, Congress had to change the law by creating a ***new*** exception to section 2510(16)'s presumption of ready accessibility.

Understanding the basis for the 1994 amendment is critical because the statutory protections that Congress created for "wireless data

communications" were short-lived. Just two years later, ***Congress repealed the 1994 amendment.*** Pub. L. No. 104-132, § 731(2), 110 Stat. 1214, 1303 (1996). The 1996 legislation eliminated section 2510(16)'s newly created sixth exception in section 2510(16) for "electronic communications" sent by radio. H.R. Rep. No. 104-518, at 80, 93 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 944; *compare* Pub. L. No.103-414, §203, 108 Stat. 4279, 4291 (1994) *with* Pub. L. No. 104-132, §731, 110 Stat. 1214, 1303 (1996) *and* 18 U.S.C. § 2510(16). The effect of the 1996 repeal was to return the Wiretap Act's treatment of wireless data communications to the pre-1994 status quo under which they were presumptively deemed "readily accessible to the general public." *See* H.R. Rep. No. 104-518, at 124. And Congress has not revisited the issue since. From 1996 through the present, therefore, unencrypted wireless data communications (including Wi-Fi transmissions) have enjoyed no Wiretap Act protection.

This history, which the parties discussed in their briefs below but which the district court did not mention, directly undermines the court's ruling. The 1994 amendment and its repeal confirm both that Wi-Fi transmissions are "radio communications" and that the Wiretap Act

protects Wi-Fi transmissions only if they fall within one of the five remaining section 2510(16) exceptions. That decides this case. None of those exceptions applies to Plaintiffs' unencrypted Wi-Fi transmissions, and Google's acquisition thus did not violate the Wiretap Act.

C. Section 2510(16)'s Common-Carrier Exception Confirms That "Radio Communication" Includes All Transmissions Made By Radio Waves.

That radio transmissions, including Wi-Fi, are "radio communications" under the Wiretap Act is further confirmed by the way that term is used throughout the statute, particularly in section 2510(16)'s Common-Carrier Exception.

That exception provides that a "radio communication" transmitted "over a communication system provided by a common carrier" is protected from interception "unless the communication is a tone only paging system communication." 18 U.S.C. § 2510(16)(D). This provision and its legislative history clearly establish that "radio communication" includes transmissions from cellular telephones and from paging systems. That is so even though neither fits the district court's apparent understanding of "traditional radio service."

Congress enacted the Common-Carrier Exception in 1986 with the intention that it would protect cellular communications from interception. Congress understood that cellular transmissions are radio-based. S. Rep. No. 99-541, at 9 (explaining that cellular telephone technology "uses both radio transmissions and wire"); H.R. Rep. No. 99-647, at 31 (referring to cellular transmissions as "communications utilizing cellular radio").[12] In light of that, Congress amended the Wiretap Act to ensure protection of cellular transmissions in two distinct ways.

Congress first redefined the term "wire communication" to include any transmission "containing the human voice at any point" so long as it occurred "in whole or in part" though a wire or cable. 18 U.S.C. § 2510(1), (18); H.R. Rep. No. 99-647, at 31, 35, 41. Although this change covered most cellular telephone transmissions at the time (H.R. Rep. No. 99-647, at 31), Congress also recognized that it might not protect all future cellular transmissions. *Id.* at 32 (explaining that cellular trans-

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[12] As the district court recognized, cellular technology "uses radio-waves to transmit communications." ER 21; *see also, e.g.*, *Farina v. Nokia Inc.*, 625 F.3d 97, 104 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 364 (2011) ("A cell phone functions by transmitting information between its low-powered radio transmitter and a base station"); *Pinney v. Nokia, Inc.*, 402 F.3d 430, 439 (4th Cir. 2005) ("A wireless telephone (commonly called a cell phone) is actually a radio containing a low power transmitter.").

missions would not be protected as wire communications insofar as "the evolution of cellular technology permits the switching or transmission of mobile-to-mobile service (or mobile-to-landline service) without the use of wire, cable, or other like connection)." Purely radio-based cellular transmissions that never touched a "wire or cable," and those that lacked the human voice would fall out of the definition of "wire communications" and instead be "electronic communications." *Id.* at 35 ("Communications consisting solely of data, for example, and all communications transmitted only by radio would be electronic communications.").

It was to ensure that those cellular transmissions would be protected by the Wiretap Act that Congress enacted the Common-Carrier Exception in section 2510(16). The legislative history explains what Congress intended:

> Because cellular communication is transmitted over a communications system currently regarded by the FCC as a common carrier, the Committee also intends that such communication not be considered 'readily accessible to the general public' at any time subsequent to the date of enactment, regardless of how a provider of cellular service is denominated by any state or how the FCC may classify any such provider in the future.

H.R. Rep. No. 99-647, at 32 (footnote omitted).

This legislative history collapses the district court's effort to limit "radio communication" to "traditional radio services." In the court's view, cellular transmissions are not a "traditional radio service" (and thus not a "radio communication" under the Wiretap Act) because they "are designed to send communications privately." ER 24. But the Common-Carrier Exception shows clearly that cellular transmissions are radio communications. Because section 2510(16) applies only to "radio communications," protecting cellular transmissions under the Common-Carrier Exception ***requires*** that they be radio communications. The district court's contrary interpretation thus cannot be correct.[13]

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[13] Further confirmation that the term "radio communication" includes cellular communications (and other radio-based telephone transmissions) is provided by a provision that existed in the Wiretap Act from 1986 until 2002. That provision imposed a reduced penalty for the interception of certain kinds of "radio communications," including "the radio portion of a cellular telephone communication" and "a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." ECPA § 101(d)(2) (former version of 18 U.S.C. § 2511(4)(b)). While Congress repealed this provision in 2002 (*see* Pub. L. No. 107-296 § 225(j), 116 Stat. 2135, 2158 (2002)), it did so because it came to believe that "the special penalty scheme for cell phone violations should be eliminated" (H.R. Rep. No. 107-609(I), at 17 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1352)—not because it wanted to narrow in any way the scope of the term "radio communication." The

Cellular transmissions are not the only non-traditional radio service that qualifies as a "radio communication" under the Common-Carrier Exception. The exception by its terms makes clear that it also covers paging-system transmissions. 18 U.S.C. § 2510(16)(D); *see also* H.R. Rep. No. 99-647, at 37. Like cell phone transmissions, paging communications are not "designed or intended to be public." ER 24. They are private transmissions made to particular individuals. Yet, like cellular transmissions, paging-system communications, which similarly use radio waves to wirelessly transmit information,[14] are "radio communications" for purposes of the Wiretap Act.

Congress's classification of paging transmissions as "radio communications" further refutes the district court's interpretation. It shows beyond all doubt that what makes something a radio communication has nothing to do with whether it is a "traditional radio service" (or whether it was meant to be public). What matters is that the communi-

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elimination of the penalty provision thus left the meaning of "radio communication" exactly as it was before.

[14] *See* H.R. Rep. No. 99-647, at 23-24 (explaining that "[r]adio paging" "uses radio signals" to send tones or alphanumeric messages to users' pagers); *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 895 (9th Cir. 2008) (describing paging-system communication as "a radio frequency transmission").

cation is transmitted using radio waves. Transmissions made using pagers, cellular telephones, wireless modems, and Wi-Fi networks all are "radio communications" for exactly this reason.

D. The Rule of Lenity Would Require Giving "Radio Communication" Its Ordinary Meaning.

Even if understanding "radio communication" by its ordinary meaning did not so clearly follow from the Wiretap Act's text and history, the proper interpretation of "radio communication" would at the very least be ambiguous. If that were case, the rule of lenity would require that any such ambiguity be resolved in favor of Google's interpretation.

Under the rule of lenity, any ambiguity in the Wiretap Act would have to be read to minimize the range of potentially criminal conduct created by the statute. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *LVRC Holdings LLC v. Brekka*,

581 F.3d 1127, 1134 (9th Cir. 2009) ("The Supreme Court has long warned against interpreting criminal statutes in surprising and novel ways that impose unexpected burdens on defendants.").[15] Thus, if it really were ambiguous whether the Wiretap Act makes it unlawful to acquire unencrypted Wi-Fi transmissions then the Act would have to be construed to avoid that result.

The district court ignored these principles of lenity, even though the court itself believed that the statute was ambiguous. ER 18 (asserting that reading the term "radio communication," even in the context of the text, structure, and purpose of the Wiretap Act, "fails to yield a definitive and unambiguous result"). Given its own uncertainty about whether the statute actually proscribes the interception of unencrypted Wi-Fi transmissions, the court was required by the rule of lenity to avoid "deriv[ing] criminal outlawry from some ambiguous implication."

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[15] Although it is being applied civilly here, the Wiretap Act is a criminal statute and it is a "familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)); *accord Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (applying rule of lenity in a civil context to a statute that "has both criminal and noncriminal applications"); *Brekka*, 581 F.3d 1134-35 (same); *In re Doubleclick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 513 (S.D.N.Y. 2001) (applying lenity in civil action brought under the Wiretap Act).

Universal C.I.T. Credit, 344 U.S. at 222. It did the opposite. By reading "radio communication" narrowly, the court increased for everyone the set of interceptions made criminal by the Wiretap Act without any definite indication from Congress that such a result was intended. That approach "turns the rule of lenity upside down." *Santos*, 553 U.S. at 519.

The district court's ambiguous interpretation of "radio communication" only compounds its error. The court did not explain what it meant by a "traditional radio service" or precisely what kinds of radio-based transmissions are supposed to qualify. It is unclear, for example, whether the court's definition is supposed to turn on objective factors (as do all of the section 2510(16) exceptions) or instead on some subjective determination of whether the broadcaster intended the radio communication to be private. *Cf.* ER 24 ("Unlike in the traditional radio services context, communications sent via Wi-Fi technology, as pleaded by Plaintiffs, are not designed or intended to be public.").[16] In this re-

[16] The district court also intimated, without elaboration, that what it called "radio broadcast technology" would also meet the definition of "radio communication." ER 23; *see also id.* 22. This aspect of the decision below is particularly mystifying. After all, everyone agreed that Wi-Fi transmissions are radio waves. And they certainly emanate

spect, the court's approach transforms what is supposed to be a clear, definite, and objective term (describing any transmission made using radio frequencies) into an unclear and indeterminate one, which may turn on the subjective intent of the person doing the transmitting. And it does so in a way that exposes members of the public to criminal and civil liability if they guess wrong. Beyond all the other problems with the court's interpretation, and given the imperatives of the rule of lenity, the district court's creation of this ambiguity is reason alone to reject the ruling below.

III. THE DISTRICT COURT'S REASONS FOR NARROWLY CONSTRUING "RADIO COMMUNICATION" ARE NOT PERSUASIVE.

As discussed above, the district court's interpretation of the term "radio communication" is contrary to the Wiretap Act's text, history,

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from "radio broadcast technology." Based on that, Wi-Fi transmissions should have qualified as a radio communication even under the district court's reasoning (or any normal understanding of the phrase "radio broadcast technology"). That the district court nevertheless excluded Wi-Fi from its interpretation of "radio communication" only further illustrates the problems with the court's understanding of the term. The court's approach offers members of the public no guidance about which radio-based transmissions are "radio communications" and which are not. This uncertainly about what can lawfully be acquired and what acts can subject a person to criminal punishment is exactly the problem that the rule of lenity is meant to avoid.

and structure—and violates basic canons of statutory construction. The district court offered several explanations for why it reached its erroneous result, but none of them withstands scrutiny.

A. Protecting Cellular Telephone Transmissions Does Not Require A Narrow Interpretation of "Radio Communication."

The district court expressed concern that giving "radio communication" its ordinary meaning would sweep in transmissions made via cellular telephones. ER 17-18, 21-23, 24. The court assumed that if the term were understood broadly enough to include cellular telephone calls, those calls could be freely intercepted under the Wiretap Act. ER 22. That concern is misplaced.

As explained above, the Wiretap Act fully protects cellular transmissions. A cellular transmission is protected as a "wire communication" provided that it includes the human voice and is made "by the aid of wire, cable or other like connection." 18 U.S.C. § 2510(1). Wire communications are not subject to the provision making it lawful to intercept electronic communications that are "readily accessible to the general public." 18 U.S.C. § 2511(2)(g)(i); *see also* H.R. Rep. No. 99-647, at 41 ("nothing carried by wire is 'readily accessible to the general pub-

lic'"). There thus was no reason for the district court to worry that treating cellular transmissions as radio communications would make them fair game for interception.

The district court apparently believed that Google's interpretation of "radio communication" would contravene *In re Application of the United States for an Order Authorizing Roving Interception of Oral Communications*, 349 F.3d 1132 (9th Cir. 2003). ER 17-18, 22-23. But *In re United States* merely confirms that "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. That is quite right, but it says nothing about the meaning of "radio communication." *In re United States* does not mention the term "radio communication" or purport to interpret it, and certainly provides no support for the district court's approach.

Even more significantly, the court ignored the alternative form of protection that Congress contemplated for cellular communications—as "radio communications" carried by a common carrier. *See* H.R. Rep. No. 99-647, at 32 (explaining that the common-carrier exception would cover cellular communications that did not qualify as wire communica-

tions). Protecting cellular transmissions under the Common-Carrier Exception is not merely consistent with their being classified as "radio communications," it demands it. *See supra* pp. 37-42.

The district court thus had it backwards when it asserted that interpreting "Section 2510(16) so broadly as to apply its strict presumption of accessibility to all communications technology that uses radio waves, regardless of the technology's design, would disregard explicit congressional intent to include cellular phone technology within the protection of the Act." ER 22. Honoring Congress's intent to protect cellular communications via the Common-Carrier Exception requires interpreting section 2510(16) to apply to communications—including cellular transmissions—made via radio waves, regardless of whether those communications are "traditional radio services."

Beyond all that, the district court drew the wrong conclusion from the fact that Congress amended the Wiretap Act expressly to include protections for cellular telephone transmissions. While it went out of its way to make it unlawful to intercept cellular telephone calls (and other radio-based communications, such as certain kinds of paging transmissions), Congress has done nothing similar for Wi-Fi. To the contrary,

Congress specifically undid the statutory protections it briefly extended to wireless data transmissions like Wi-Fi. *See supra* pp. 32-37.

In short, Google's interpretation of "radio communication" poses no threat to the security of cellular transmissions, and the protections the Wiretap Act affords to cellular communications provide no basis for misreading the statute to protect unencrypted Wi-Fi transmissions.

B. Treating Wi-Fi Transmissions As "Radio Communications" Is Consistent With The Intent of The Wiretap Act.

The district court appealed in various places to its understanding of Congress's purpose in enacting and amending the Wiretap Act, but it misapprehended the legislative history it discussed.

One reason that the district court gave for limiting "radio communication" to traditional radio services was its belief that section 2510(16) was intended solely to protect radio hobbyists from liability for "the innocent act of scanning radio broadcast frequencies in order to reach public communications." ER 19-20. That mistakes the purpose and effect of section 2510(16).

Section 2510(16) was added to the Wiretap Act in 1986 via ECPA. One aim of the provision was to ensure that the Wiretap Act would not

make it illegal for radio hobbyists to intercept radio transmissions. *See* S. Rep. No. 99-541, at 4; 132 Cong. Rec. S7987-04, at 15 (1986). But that was not the provision's only purpose—and it certainly is not its only consequence. If Congress's goal was merely to protect a few discrete forms of radio transmission that were routinely intercepted by hobbyists, it would have been easy for it to identify and exempt those particular transmissions. Indeed, that is precisely what Congress did in enacting section 2511(2)(g)(i)-(ii). That provision expressly makes it lawful to intercept "specific types of radio communications which have traditionally been free from prohibitions on mere interception." H.R. Rep. No. 99-647, at 41.

But section 2510(16) takes the opposite approach. It creates a presumption that ***all*** radio communications are "readily accessible to the general public" and then carves out a few specific radio communications from that broad presumption and deems them protected. *See* H.R. Rep. No. 99-647, at 37 (explaining that "if a radio communication fits into one of the five categories then it will have privacy protection (unless some other exception applies to preclude coverage)"). Congress took that tack precisely in order to avoid "listing all the existing radio servic-

es which are exempt from the bar on interceptions"—an approach that it rejected because it "would have been cumbersome, possibly redundant, and would have had a built-in obsolescence." *Id*. at 42.

Thus, while Congress "listed some of the more common radio services" that it specifically wanted to make open to interception (in the provision that became section 2511(2)(g)(ii)), it simultaneously included (in what became section 2510(16)) "a 'generic' exception" making radio communications presumptively free to acquire unless they are specifically exempted from that presumption. And the list of radio communications exempted—which ranges from cellular telephone transmissions (H.R. Rep. No. 99-647, at 32); to "data carried on the vertical blanking interval (VBI) of a television signal" (H.R. Rep. No. 99-647, at 37); to certain transmissions via audio subcarrier (18 U.S.C. § 2510(16)(C))—goes well beyond the types of communications that were regularly (or even could have been) intercepted by radio hobbyists. *See generally* 132 Cong. Rec. S14441-04, at 28-29 (1986).

Nor is it remotely the case, as the district court believed, that "each of the five exceptions" in section 2510(16) "are drafted for the particular technology of traditional radio broadcast mediums and do not

address any broader radio-based communications technology of the time, including cellular phones." ER 20. Those exceptions cover an array of communications—from paging transmissions to private microwave services—broader than anything that could plausibly be considered traditional radio broadcasting. Particularly bewildering in this respect is the district court's statement that the section 2510(16) exceptions do not address cell phones. As discussed above, the Common-Carrier Exception (18 U.S.C. § 2510(16)(D)) was specifically intended to cover cellular transmissions. *See supra* pp. 32-37. The set of transmissions encompassed by section 2510(16)'s presumption of ready accessibility (and its exceptions to that presumption) destroys any suggestion that the provision was "solely intended to apply to 'traditional radio services.'" ER 22.

The district court also expressed concern that treating Wi-Fi transmissions as "radio communications" under section 2510(16) "would contravene the primary stated purpose" of enacting ECPA in 1986. ER 24. Any concern about that is directly answered by the 1994 amendment to section 2510(16) and its prompt repeal in 1996. *See supra* pp. 32-37.

Those actions make clear that Congress understood the issues raised under the Wiretap Act by wireless data networks like Wi-Fi. One Congress acted to extend the statute's protections to cover transmissions from wireless data networks, but ***the very next Congress undid those protections***.

Given that history, it is entirely consistent with congressional intent to apply section 2510(16)'s presumption of ready public accessibility to radio transmissions occurring over Wi-Fi networks. That approach advances the purpose of the 1996 amendment: it eliminates a categorical statutory protection for radio-based data transmissions, while leaving those transmissions subject to Wiretap Act protection if they come within one of the other section 2510(16) exceptions, such as the Encryption Exception.

Accordingly, if unencrypted Wi-Fi transmissions are to be protected under the Wiretap Act, the way to achieve that result is for Congress to revisit the statute. It is not for the courts to construe the Act in a way that distorts its meaning and usurps congressional prerogatives.

C. Giving "Radio Communication" Its Natural Meaning Would Not Lead To Absurd Results.

Finally, the district court suggested that understanding "radio communication" to include all transmissions made via radio frequencies would lead to absurd results. Its concern centered on section 2511(2)(g)(ii), which identifies a specific set of radio communications that may always be lawfully intercepted. 18 U.S.C. § 2511(2)(g)(ii). The district court had no reason to worry.

The court first alluded to section 2511(2)(g)(ii)(I). According to the court, this provision

> makes it lawful to intentionally intercept any radio communication that [sic] 'that relates to ships, aircraft, vehicles, or person in distress,' without reference to whether such radio communication was readily accessible to the general public and not scrambled or encrypted. Should the Court interpret radio communication so broadly within the Act to include such technologies as wireless internet and cellular phones, this exception could lead to absurd results. Specifically, pursuant to this interpretation, 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.

ER 15. This analysis is misguided.

First, the district court appeared to misunderstand what section 2511(2)(g)(ii)(I) actually covers. By its terms, section 2511(2)(g)(ii)(I)

makes it lawful to intercept any "radio communication which is transmitted—***by any station*** for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress." (Emphasis added). As the italicized language shows, the provision focuses on the purpose of the "station" that is responsible for the radio transmission, not (as the district court assumed) on the substance of the particular communication that is transmitted. Radio communications—including private cellular telephone transmissions—that are otherwise protected by the Wiretap Act, would not be exempted from protection by section 2511(2)(g)(ii)(I) merely because their contents happened to relate to a person (or ship or airplane) in distress.

Second, the idea that unintended results would flow from section 2511(2)(g)(ii)(I) unless "radio communication" is limited to traditional radio services is refuted by 47 U.S.C. § 605(a). That provision of the Communications Act generally makes it unlawful to divulge the contents of an intercepted communication without the authorization of the sender. But that prohibition does not apply to "any radio communication ***which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in***

distress, or which is transmitted by an amateur radio station operator …" (emphasis added).

That is significant because, as discussed above (*See supra* pp. 30), the Communications Act expressly defines "radio communication" to include any information transmitted by radio. 47 U.S.C. § 153(40). Yet, despite that broad definition, Congress still considered it appropriate to immunize the interception (and use) of radio communications insofar as they related to "ships, aircraft, vehicles, or persons in distress." This provision thus directly counters the district court's suggestion that the use of "radio communication" in section 2511(2)(g)(ii)(I) of the Wiretap Act "does not lend itself to a broad interpretation of the term." ER 15. Section 605(a) makes clear that Congress saw nothing absurd about the result that concerned the district court here.

The district court also referred to section 2511(2)(g)(ii)(IV) of the Wiretap Act, which "makes it lawful to intentionally intercept any radio communication transmitted by 'any marine or aeronautical communications system.'" ER 15. The court suggested that a broad understanding of radio communication "could lead to equally arbitrary results when applying the exception to communications technologies other than radio

broadcast technologies, *e.g.*, a Wi-Fi network aboard an airplane." *Id.* This concern is equally unwarranted.

As the only reported decision interpreting section 2511(2)(g)(ii)(IV) confirms, the phrase "marine or aeronautical communications system" focuses narrowly on the systems used by ships or airplanes to communicate with one another or with controllers. *DirecTV, Inc. v. Barczewski*, 604 F.3d 1004, 1006 (7th Cir. 2010) ("aeronautical communication system" means "a system of communications to and from airplanes"—more specifically, "a system for issuing navigation instructions to aircraft or receiving their distress calls"). The Seventh Circuit's ruling puts the district court's fear to rest. Adopting the plain meaning of "radio communication" will not leave all radio-based communications used by airplane passengers open to interception. Only the narrow set of radio transmissions occurring over specialized systems relating to aeronautical or marine navigation or interaction are interceptable under section 2511(2)(g)(ii)(IV).

The district court's misplaced concerns provide no basis for construing "radio communication" in a way contrary to its ordinary meaning, to the structure and legislative history of the Wiretap Act, and to

the definition that the term is expressly given in the Communications Act.

CONCLUSION

For the reasons given above, the district court's decision should be reversed.

Respectfully submitted,

DATED: February 8, 2012

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STATEMENT OF RELATED CASE

Appellant is not aware of any related case pending before this Court.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,676 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type-face using Microsoft Word in 14-point Century Schoolbook font.

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