

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *et al.*,

Appellants,

v.

No. 19-15472

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Appellees.

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RESPONSE TO MOTION FOR THIS COURT TO OBTAIN FROM THE  
DISTRICT COURT, AND INCLUDE AS PART OF THE RECORD ON  
APPEAL, CERTAIN SEALED MATERIALS FILED IN THE DISTRICT COURT

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Pursuant to Fed. R. App. P. 27(a)(3), the United States Department of Justice, appellee in this Court, submits this response to the April 15, 2019 motion of appellants American Civil Liberties Union Foundation, American Civil Liberties Union of Northern California, Electronic Frontier Foundation, and Riana Pfefferkorn (“appellants”). In their motion, appellants request that this Court obtain from the district court, and include in the appellate record, certain sealed materials filed in district court cases other than the right-of-access litigation that gave rise to this appeal.

The United States agrees with appellants that, in resolving this appeal, this

Court should have before it for consideration the set of sealed materials that are the subject of appellants' motion. Contemporaneous with this response, however, the United States has filed a motion in the district court requesting that court to confirm, in accordance with Federal Rule of Appellate Procedure 10(e), that the sealed materials at issue were before that court at the time it issued its challenged order. If the district court makes that determination, the United States believes that it would then be able to provide the sealed materials to this Court—in sealed, *ex parte* Excerpts of Record—at the time its Answering Brief is filed. This Court therefore may wish to hold appellants' motion in abeyance pending the district court's ruling on the Rule 10(e) motion that the government has filed.

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1. This appeal arises out of right-of-access litigation in the district court. On November 28, 2018, appellants filed a miscellaneous action in the U.S. District Court for the Eastern District of California seeking access to sealed materials docketed in Title III wiretap proceedings in that court. Doc. 1, *In re U.S. Department of Justice Motion to Compel Facebook to Provide Technical Assistance in Sealed Case*, No. 1:18-mc-0057 (E.D. Cal.). Citing media reports about a government motion to hold Facebook, Inc. in contempt of court, the motion asked the district court to unseal docket sheets, court orders on sealing requests, judicial rulings associated with the proceedings

reported in the media, and legal analysis presented in government submissions and addressed in judicial rulings. *Id.* at 2.

2. On February 7, 2019, and in accordance with their understanding of previously entered court orders, the United States and Facebook filed sealed responses to appellants' unsealing motion. Those responses were filed under seal, the district court later explained, because "the substantive nature of the responses . . . parallel[ed] the reasons the proceedings were sealed in the first instance." Doc. 26 at 1.

3. On February 11, 2019, the district court denied applicants' motion to unseal. Doc. 26 at 1-5. The court reaffirmed its earlier determination that the Title III materials at issue had been appropriately "closed and sealed" based on findings that disclosure of the materials (a) would jeopardize both then-current and future criminal investigations involving Title III wiretap processes, and (b) would reveal Facebook's proprietary information and processes, "thereby jeopardizing" certain aspects of its business operations. *Id.* at 1-2. The court next explained that the legal questions before it were whether the First Amendment or common law affords the public a right of access to the materials sought and, if so, whether compelling governmental or third-party interests outweigh that right. *Id.* at 2. The court found no First Amendment or common law right of access and further concluded that, if such a "qualified right did" exist, the government's "compelling interest" in "preserv[ing] the secrecy of law

enforcement techniques in Title III wiretap cases overwhelms that qualified right.” *Id.* at 4. Finally, the court considered whether “[r]edaction of sensitive information” was a “viable” alternative to sealing but concluded that it was not, because “sensitive investigatory information is so thoroughly intertwined with the legal and factual arguments in the record such that redaction would leave little and/or misleading substantive information.” *Id.*

4. Appellants here and the Washington Post, which had filed a separate unsealing motion in the district court, both filed notices of appeal. Appellants’ opening brief is currently due, on extension, on June 12, 2019.

5. On April 15, 2019, appellants filed the instant motion asking this Court “to obtain” from the district court what it describes as “Contempt-related Materials” . . . filed in a separate sealed matter,” and then “include them as part of the appellate record in this case.” Mot. 1. The motion states that the appellants are not privy to the docket numbers “or other identifying information” for the sealed matters in which the materials they seek were first filed, but asserts that the government has the necessary information, “as do Facebook, at least one judge” of the district court, “and likely the district court clerk’s office.” *Id.* at 3-4. The motion argues that this Court “could order any of these entities to provide [the case-identifying] information or

obtain and file the Contempt-Related Materials with this Court to ensure the Court has access to them as it considers this appeal.” *Id.* at 4.

6. The United States agrees that in resolving this appeal, this Court should have before it for consideration the set of sealed materials that were the subject of appellants’ unsealing motion in the district court. An order of this Court, however, may not be necessary to ensure that the materials are part of the appellate record. As explained above, the United States has filed on this date a motion in the district court asking that court to confirm, pursuant to Federal Rule of Appellate Procedure 10(e), that the category of sealed materials at issue were before the court and considered by the court at the time it issued the February 11, 2019 order from which appellants have appealed. The United States believes that the district court is authorized to make the requested ruling under Rule 10(e), because the court is not being asked to “enlarge the record on appeal to include material which was not before” it, *United States v. Walker*, 601 F.2d 1051, 1054 (9th Cir. 1979), but to confirm what the court’s February 11 order suggests on its face—namely, that the materials at issue were “relied upon by the district court” and “relevant to its decision[,]” *United States v. Banks*, 405 F.3d 559, 567 (7th Cir. 2005). *See id.* (explaining that Rule 10(e) “is meant to ensure that the record reflects what really happened in the district court”).

7. If the district court makes the requested determination, the United States understands that the materials at issue—even if not formally docketed as part of the miscellaneous action filed by appellants—would be included as part of the record on appeal. The United States would then be able to provide the sealed materials to this Court—in sealed, *ex parte* Excerpts of Record—at the time its Answering Brief is filed. In other words, the Court would have before it the sealed materials at issue without having to issue any orders to the parties or to the district court, and without having to decide whether to take judicial notice of the materials. *Cf. Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (explaining that this Court “may take judicial notice of court filings,” even when they are submitted “under seal”).

For these reasons, this Court may wish to hold appellants’ motion in abeyance pending the district court’s ruling on the government’s April 25, 2019 motion under Rule 10(e). The United States will promptly advise this Court of that ruling.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2019, I electronically filed the foregoing Response to Appellants' Motion for this Court to Include as Part of the Appellate Record Certain Sealed Materials Filed in the District Court with the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s Scott Meisler  
Scott A.C. Meisler