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8

9 IN THE UNITED STATES DISTRICT COURT

10 EASTERN DISTRICT OF CALIFORNIA

11 IN RE U.S. DEPARTMENT OF JUSTICE  
12 MOTION TO COMPEL FACEBOOK TO  
13 PROVIDE TECHNICAL ASSISTANCE IN  
14 SEALED CASE, OPINION ISSUED IN OR  
ABOUT SEPTEMBER 2018

CASE NO. 1:18-MC-00057-LJO-EPG

MOTION TO CONFIRM, PURSUANT TO  
FEDERAL RULE OF APPELLATE PROCEDURE  
10(e), THAT CERTAIN DOCUMENTS ARE PART  
OF THE RECORD ON APPEAL

15 The United States of America, by and through MCGREGOR W. SCOTT, United States Attorney  
16 for the Eastern District of California, KIMBERLY A. SANCHEZ, Assistant United States Attorney, and  
17 JEFFREY S. POLLAK, Attorney in the Criminal Division of the Department of Justice, hereby moves  
18 the Court to confirm, pursuant to Federal Rule of Appellate Procedure 10(e), that certain materials  
19 docketed in other cases were before this Court at the time it issued its February 11, 2019 order denying  
20 the motions to unseal and are part of the record on appeal. If the Court grants this motion, the  
21 Government would be able to transmit the sealed materials at issue to the court of appeals in sealed, *ex*  
22 *parte* Excerpts of Record to be filed with its answering brief.

23 **BACKGROUND**

24 On November 28, 2018, the American Civil Liberties Foundation (“ACLU”) and WP Company  
25 LLC, dba The Washington Post (hereinafter “movants”), filed motions in this Court to seeking to unseal  
26 certain documents relating to separately docketed Title III proceedings in this Court involving the  
27 Government and Facebook. Movants requested specifically that the Court unseal any sealed docket  
28

1 sheets, court orders on sealing requests, any judicial rulings associated with the Title III proceedings that  
2 movants described, and legal analysis presented in government submissions and addressed in judicial  
3 rulings. *See* Doc. 1 (ACLU Mot.) at 2.

4 On February 7, 2019, this Court issued an order on the public docket denying movants’ motions  
5 to unseal. Doc. 26 at 1-5. The Court described the materials that were the subject of the unsealing  
6 motions as a “court ruling pertaining to the U.S. Department of Justice . . . and Facebook,” “motions,  
7 requests, substantive documents in support and opposition, evidentiary hearing, and resulting Court  
8 Order of Decision.” *Id.* at 1. The Court explained that it had “closed and sealed” those materials, “upon  
9 motion and request” based on particular findings made at the time and restated in the February 7 Order.  
10 *Id.* at 1-2. The Court then concluded that neither the First Amendment nor the common law afforded  
11 movants (or the public) a right of access to the materials, that any such right would be outweighed by  
12 compelling government interests in any event, and that “[r]edaction of sensitive information is not a  
13 viable option” in this case, because “sensitive investigatory information is so thoroughly intertwined  
14 with the legal and factual arguments in the record such that redaction would leave little and/or  
15 misleading substantive information.” *Id.* at 2-4.

16 On March 8 and 13, 2019, respectively, movants filed separate notices of appeal. Docs. 27, 29.  
17 The Washington Post’s opening brief is currently due on May 13, 2019, while the ACLU’s opening brief  
18 is due, on extension, on June 12, 2019.

19 On April 15, 2019, the ACLU filed in the court of appeals a motion requesting that court “to  
20 obtain” from this Court what it describes as “Contempt-related Materials” . . . filed in a separate sealed  
21 matter,” and then “include them as part of the appellate record in this case.” The ACLU’s motion—a  
22 copy of which is appended hereto as Attachment A—states that the ACLU is not privy to the docket  
23 numbers “or other identifying information” for the sealed matters in which the materials they seek were  
24 first filed, but asserts that the Government has the necessary information, “as do Facebook, at least one  
25 judge” of this Court, “and likely the district court clerk’s office.” Attach. A, at 3-4. The motion argues  
26 that the court of appeals “could order any of these entities to provide [the case-identifying] information  
27 or obtain and file the Contempt-Related Materials with [the Ninth Circuit] to ensure the [court of  
28 appeals] has access to them as it considers this appeal.” *Id.* at 4.

**DISCUSSION**

1  
2 In light of the ACLU’s motion in the Ninth Circuit, and in an abundance of caution, the  
3 Government moves this Court to confirm, pursuant to Federal Rule of Appellate Procedure 10(e), that  
4 the materials the ACLU seeks to include in the appellate record were before this Court when it issued its  
5 February 11, 2019 Order denying the unsealing motions. This Court has the authority under Rule 10(e)  
6 to clarify that the sealed materials that movants seek to include in the appellate record were in fact  
7 before this Court at the time that it issued its February 11 Order.\* Rule 10(e) “is meant to ensure that the  
8 record reflects what really happened in the district court.” *United States v. Banks*, 405 F.3d 559, 567  
9 (7th Cir. 2005). While the rule cannot be used to supplement the record “with material which was not  
10 before the district court,” *United States v. Walker*, 601 F.2d 1051, 1054 (9th Cir. 1979); *see United*  
11 *States v. Garcia*, 997 F.2d 1273, 1278 (9th Cir. 1993), it can ensure that the appellate record includes  
12 materials that were “relied upon by the district court [ ]or relevant to its decisions” but that may not  
13 appear on its docket. *See Banks*, 405 F.3d at 567.

14 Here, this Court’s February 11 Order makes clear that the categories of sealed materials at issue  
15 were before the Court at the time it ruled. The Court described the materials (“original motions,  
16 requests, substantive documents in support and opposition, evidentiary hearing, and resulting Court  
17 Order of Decision”), Doc. 26 at 1; explained the grounds on which it had previously ordered the  
18 materials “closed and sealed,” *id.* at 1-2; and rejected movants’ request for at least partial unsealing after  
19

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20 \* Rule 10 provides in relevant part:

21 (e) Correction or Modification of the Record.

22 (1) If any difference arises about whether the record truly discloses what occurred in the  
23 district court, the difference must be submitted to and settled by that court and the record  
24 conformed accordingly.

25 (2) If anything material to either party is omitted from or misstated in the record by error  
26 or accident, the omission or misstatement may be corrected and a supplemental record  
27 may be certified and forwarded:

28 (A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

Fed. R. App. P. 10(e).

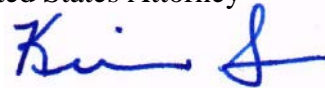
1 concluding that “the requested material is so entangled with investigatory secrets that effective redaction  
2 is not possible,” *id.* at 4. The Court’s Order thus leaves little doubt that, although the sealed materials at  
3 issue may have been docketed only under other case numbers, they were “before” this Court and  
4 considered by it in resolving the unsealing motions that are now on appeal. *See Walker*, 601 F.2d at  
5 1054. Accordingly, the Court should confirm in a written order that the materials at issue were before it  
6 in this case and that, under Rule 10(e), those materials may properly be included in the appellate record.  
7 If the Court enters such an order, the Government will be prepared to provide the sealed materials to the  
8 court of appeals in sealed, *ex parte* Excerpts of Record to be filed with its answering brief.

9 A proposed order accompanies this motion.

10 Dated: April 25, 2019

Respectfully Submitted,

11 McGREGOR W. SCOTT  
12 United States Attorney



13  
14 KIMBERLY A. SANCHEZ  
Assistant United States Attorney



15  
16 JEFFREY S. POLLAK  
17 Criminal Division  
U.S. Department of Justice

# **ATTACHMENT A**

No. 19-15472

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION FOUNDATION,  
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN  
CALIFORNIA, ELECTRONIC FRONTIER  
FOUNDATION, AND RIANA PFEFFERKORN,

*Appellants,*

v.

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

*Appellees,*

On Appeal from the United States District  
Court for the Eastern District of California  
Case No. 1:18-mc-00057-LJO-EPG

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APPELLANTS' MOTION FOR THE COURT TO OBTAIN FROM  
THE DISTRICT COURT, AND INCLUDE AS PART OF THE  
APPELLATE RECORD, MATERIALS FILED IN A SEALED  
MATTER IN THE DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, nongovernmental corporate parties American Civil Liberties Union Foundation, American Civil Liberties Union of Northern California, and Electronic Frontier Foundation, state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

## INTRODUCTION

Appellants American Civil Liberties Union Foundation, American Civil Liberties Union of Northern California, Electronic Frontier Foundation, and Riana Pfefferkorn respectfully move this Court to obtain from the District Court for the Eastern District of California certain materials (“Contempt-Related Materials”) filed in a separate sealed matter (the “Sealed Case”) and include them as part of the appellate record in this case.<sup>1</sup> The Contempt-Related Materials are directly relevant to the issue on appeal in this case: whether the district court should have unsealed (partially or otherwise) certain judicial records relating to a Motion to Compel filed in the Sealed Case (including a judicial opinion and docket sheet). Some or all of the Contempt-Related Materials may already be part of the appellate record in this case, but since much of that record is sealed, Appellants cannot be certain.<sup>2</sup> Through this motion, Appellants seek to ensure that the Contempt-Related Materials be available to this Court as it reviews the district court’s denial of Appellants’ motion, pursuant to the First Amendment and the common law, to unseal certain judicial records in the Sealed Case.

## ARGUMENT

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<sup>1</sup> Because the case is sealed, Appellants have no case name or docket number for the Sealed Case.

<sup>2</sup> Notably, all of the filings and proceedings in the Eastern District of California that took place *in this case* after Appellants filed their motion for public access remain under seal and are not available to Appellants or the public.



This Court should ensure that it has the benefit of a complete factual and documentary record as it considers Appellants' efforts to unseal judicial records. The merits of this appeal are focused on proceedings in the Sealed Case resulting in a sealed opinion denying a U.S. Department of Justice ("DOJ") motion to hold Facebook, Inc. in contempt of court (the "Contempt Opinion"). On November 28, 2018, Appellants moved in the Eastern District of California to unseal the Contempt Opinion and the Sealed Case's docket sheet, among other related judicial records. *See* Motion to Unseal Court Records Concerning U.S. Department of Justice Motion to Compel Facebook, *In Re U.S. Department of Justice*, No. 18-mc-00057-LJO-EPG (E.D. Cal. Nov. 28, 2018), ECF No. 1 ("Motion to Unseal"). On February 11, 2019, the Court denied Appellants' motion. *See* Opinion, *In Re U.S. Department of Justice*, No. 18-mc-00057-LJO-EPG (E.D. Cal. Feb. 11, 2019), ECF No. 26. This appeal ensued.

In adjudicating this appeal, Appellants believe that the appellate record should include, and the court should have access to, the Contempt-Related Materials. These consist of:

- 1) the Sealed Case judicial records Appellants moved to unseal in *In Re U.S. Department of Justice*, No. 18-mc-00057-LJO-EPG, specifically:
  - any sealed docket sheets;
  - any court orders on sealing requests;
  - the Contempt Opinion; and

- legal analysis in government briefing which is incorporated, adopted, or rejected in the Contempt Opinion.
- 2) other materials related to the genesis of the Sealed Case Contempt Opinion, such as the technical assistance order sought by the DOJ, the DOJ's motion to hold Facebook in contempt, and all related Contempt Motion briefing; and
  - 3) any and all transcripts from the August 14, 2018 sealed hearing in the Sealed Case on the Contempt Motion (the "Contempt Transcript").

This Motion does not seek to litigate the merits of the pending appeal; whether the district court should have unsealed the Contempt Opinion, Sealed Case docket sheet, and other identified materials. Rather, this Motion is designed to ensure that the Court has access to Contempt-Related Materials likely to be relevant to the merits of the pending appeal.

Appellants' information about the Sealed Case is limited. Reportedly, the DOJ demanded that Facebook provide certain technical assistance in conducting a wiretap on Facebook's Messenger platform.<sup>3</sup> When Facebook declined to provide the requested assistance, the DOJ filed a motion to hold Facebook in contempt of court. After a hearing on August 14, 2018, the district court ruled in favor of Facebook and issued the Contempt Opinion.

Appellants cannot provide this Court with a docket number, case name, nor

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<sup>3</sup> See Dan Levine & Joseph Menn, *In Test Case, U.S. Fails to Force Facebook Help to Wiretap Messenger*, Reuters, Sept. 28, 2018, <https://reut.rs/2QjKGNo>; Dan Levine & Joseph Menn, *U.S. Government Seeks Facebook Help to Wiretap Messenger*, Reuters, Aug. 17, 2018, <https://reut.rs/2MZGY0>; Ellen Nakashima, *Facebook Wins Court Battle Over Law Enforcement Access to Encrypted Phone Calls*, Wash. Post, Sept. 28, 2018, <https://wapo.st/2FBBeORV>.

other identifying information for the Sealed Case. However, the DOJ has this information, as do Facebook, at least one judge in the Eastern District, and likely the district court clerk's office. This Court could order any of these entities to provide that 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. The Court may have other means of ensuring that the Contempt-Related Materials are available to it, as well.

Therefore, Appellants hereby move this Court to obtain from the district court, and include as part of the appellate record, the Contempt-Related Materials.

Regarding the transcript, Appellants have tried, but so far failed, to obtain it. Appellant ACLU's Legal Assistant Daniela del Rosario Wertheimer contacted the Court Services Supervisor for the Eastern District, as well as lawyers for Facebook, in order to facilitate transmission of the August 18, 2018 Contempt Transcript to the Ninth Circuit. (Decl. ISO Motion ¶¶ 5–9.) Ms. Wertheimer also sent a transcript request order filled out to the best of Appellants' abilities to the Court Services Supervisor and wrote a two-page cover letter explaining the circumstances of the request and detailing, to the best of Appellants' knowledge, the Sealed Case. (*Id.* at ¶ 8; *see* Exhibit B.) Appellants provided the Court Services Supervisor as much information as possible. The Court Services Supervisor informed Appellants that there was no further information she could provide, given that Appellants could not

provide her office with a case name or docket number for the requested Contempt Transcript. (Decl. ISO Motion at ¶ 9; *see* Exhibit C.) Appellants on our own are unable to obtain the transcript for this Court’s review. We hereby move this court to ensure that the Contempt Transcript is included in the record on appeal.

While the circumstances of the Motion to Unseal and this appeal are unconventional, moving the Court to order it have access to any and all necessary materials—even those not automatically included in the record in the district court—is standard procedure. Circuit Rule 27-14, for instance, states that “[i]f a party asserts that review of an exhibit not currently available on the electronic district court docket is necessary to resolution of an issue on appeal, that party shall move the Court for leave to transmit to the Court a copy or replication of the exhibit.” This Motion is different from a C.R. 27-14 motion in that Appellants are not able to transmit the Contempt Opinion or the Contempt-Related Materials ourselves—because the documents are in a sealed matter and because the court reporter cannot provide us with information needed to obtain the Contempt Transcript. But this Court has the same authority to and interest in including relevant materials not currently available on the district court docket as part of the appellate record.

For these reasons, Appellants respectfully move that this Court ensure that Contempt-Related Materials be included in the record on appeal.

Dated: April 15, 2019

Respectfully submitted,  
/s/ Jennifer Stisa Granick  
Jennifer Stisa Granick  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
39 Drumm Street  
San Francisco, CA 94111  
T: 415.343.0758  
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*Attorneys for Appellants*

No. 19-15472

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, AMERICAN CIVIL LIBERTIES  
UNION OF NORTHERN CALIFORNIA, ELECTRONIC  
FRONTIER FOUNDATION, AND RIANA  
PFEFFERKORN,

*Appellants,*

v.

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

*Appellees,*

On Appeal from the United States District  
Court for the Eastern District of California  
Case No. 1:18-mc-00057-LJO-EPG

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DECLARATION OF DANIELA DEL ROSARIO WERTHEIMER IN  
SUPPORT OF APPELLANTS' MOTION FOR THE COURT TO  
OBTAIN FROM THE DISTRICT COURT, AND INCLUDE AS PART  
OF THE APPELLATE RECORD, MATERIALS FILED IN A SEALED  
MATTER IN THE DISTRICT COURT FOR THE EASTERN  
DISTRICT OF CALIFORNIA

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I, Daniela del Rosario Wertheimer, declare as follows:

1. I am a Legal Assistant with the American Civil Liberties Union Foundation's Speech, Privacy and Technology Project. During the weeks from March 17 to March 29, 2019, I sought hearing transcripts from a case under seal in the Eastern District ("Sealed Case") for the appellate record in this matter. I was unsuccessful in my efforts.
2. Appellants seek for the purposes of this appeal any reporter's transcript from a contempt hearing that took place on August 14, 2018 in the Sealed Case ("Contempt Transcript"). News reports confirm that this hearing took place, but the proceedings and the case itself are sealed and currently unavailable to the public.
3. The standard procedure for ordering hearing transcripts in the Eastern District is by submitting an official transcript request form. This request form requires that the requester provide the court reporter receiving the request with a case name and docket number.
4. Because the case is sealed, Appellants have no case name or docket number.
5. In an attempt to learn the case name or docket number, I called Facebook's attorneys at Gibson, Dunn & Crutcher. The Sealed Case pertains to Facebook's refusal to heed a Department of Justice wiretap order. The hearings in this matter are the Contempt Transcripts that Appellants seek. I

felt it was likely, then, that Facebook possessed the case name or number.

6. I spoke briefly with Benjamin Wagner, an attorney for Facebook at Gibson, Dunn & Crutcher. Mr. Wagner informed me that he could not provide me the case name or docket number for the Sealed Case.
7. After I called Mr. Wagner, I made several attempts to obtain a case name or docket number, or to otherwise successfully order the Contempt Transcript, from the District Court itself. I called Ana Rivas, the Court Services Supervisor for the Eastern District. Ms. Rivas informed me that in order to access any transcripts, Appellants would need to provide her office with information from the Sealed Case: the court reporter's name, the case name, and a docket number. Otherwise, she would not be able to provide me with more information nor the Contempt Transcripts.
8. Afterward, I filled out an Eastern District of California transcript order form and sent it, along with a two-page cover letter, directly to Ms. Rivas. The transcript order form is attached as Exhibit A to this Declaration. The cover letter is attached as Exhibit B. In the cover letter I reiterated the reason that Appellants are in search of the Contempt Transcripts in the Sealed Case. I also provided as much information as I was able to so that Ms. Rivas, or a court reporter that she supervises, could find the Sealed Case and Contempt Transcripts more easily. Finally, I emphasized the importance of providing



the transcripts to the Ninth Circuit.

9. Ms. Rivas promptly replied the following day, stating that she had “no information to provide [me.]” Ms. Rivas’s email is attached as Exhibit C.
10. At this point, we have exhausted our options for obtaining the information needed for a transcript order: the case name, docket number, and reporter’s name. Further requests are likely to be equally fruitless.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 15, 2019

Respectfully submitted,

/s/ Daniela del Rosario Wertheimer

Daniela del Rosario Wertheimer  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
T: 212.549.2603  
[dwertheimer@aclu.org](mailto:dwertheimer@aclu.org)

## **EXHIBIT A**

CAED 435  
(Rev. 04/18)

United States District Court, Eastern District of California

**FOR COURT USE ONLY**  
**DUE DATE:**

**TRANSCRIPT ORDER**

PLEASE Read Instruction Page (attached):

1. YOUR NAME <b>Jennifer Stisa Granick</b>		2. EMAIL <b>jgranick@aclu.org</b>		3. PHONE NUMBER <b>415-343-0758</b>		4. DATE <b>3/27/2019</b>	
5. MAILING ADDRESS <b>39 Drumm Street</b>				6. CITY <b>San Francisco</b>		7. STATE <b>CA</b>	8. ZIP CODE <b>94111</b>
9. CASE NUMBER <b>sealed</b>		10. JUDGE <b>sealed</b>		DATES OF PROCEEDINGS			
				11. FROM <b>8/14/2018</b>		12. TO <b>8/14/2019</b>	
13. CASE NAME <b>sealed</b>				LOCATION OF PROCEEDINGS			
				14. CITY <b>Fresno</b>		15. STATE <b>CA</b>	
16. ORDER FOR							
<input checked="" type="checkbox"/> APPEAL No. 19-15472		<input type="checkbox"/> CRIMINAL		<input type="checkbox"/> CRIMINAL JUSTICE ACT		<input type="checkbox"/> BANKRUPTCY	
<input type="checkbox"/> NON-APPEAL		<input type="checkbox"/> CIVIL		<input type="checkbox"/> IN FORMA PAUPERIS		<input type="checkbox"/> OTHER (Specify)	

17. TRANSCRIPT REQUESTED (Specify portion(s) and date(s) of proceeding(s) for which transcript is requested) You must provide the name of the Reporter.

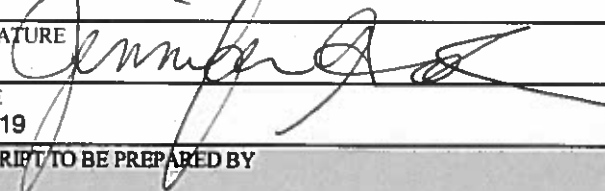
TRIAL	DATE(S)	REPORTER	HEARINGS	DATE(S)	REPORTER
<input type="checkbox"/> ENTIRE TRIAL			<input checked="" type="checkbox"/> OTHER (Specify Below)	8/14/2018	Sealed
<input type="checkbox"/> JURY SELECTION			Oral arguments on contempt motion, or		
<input type="checkbox"/> OPENING STATEMENTS			any other contempt proceedings, in a sealed		
<input type="checkbox"/> CLOSING ARGUMENTS			case. These proceedings may be related to		
<input type="checkbox"/> JURY INSTRUCTIONS			U.S. v. Berrera-Palma et al.,		
			18-cr-00207-LJO-SKO.		
			Please see attached letter for more information.		

**18. ORDER (Grey Area for Court Reporter Use)**

CATEGORY	ORIGINAL (Includes Certified Copy to Clerk for Records of the Court)	FIRST COPY	ADDITIONAL COPIES	NO. OF PAGES ESTIMATE	COSTS
ORDINARY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	NO. OF COPIES		
14-Day	<input type="checkbox"/>	<input type="checkbox"/>	NO. OF COPIES		
EXPEDITED	<input type="checkbox"/>	<input type="checkbox"/>	NO. OF COPIES		
3-Day	<input type="checkbox"/>	<input type="checkbox"/>	NO. OF COPIES		
DAILY	<input type="checkbox"/>	<input type="checkbox"/>	NO. OF COPIES		
HOURLY	<input type="checkbox"/>	<input type="checkbox"/>	NO. OF COPIES		
REALTIME	<input type="checkbox"/>	<input type="checkbox"/>			

CERTIFICATION (19 & 20)  
By signing below, I certify I will pay all charges (deposit plus additional).

ESTIMATE TOTAL

19. SIGNATURE  


PROCESSED BY

20. DATE  
**3/27/2019**

PHONE NUMBER

TRANSCRIPT TO BE PREPARED BY

COURT ADDRESS

ORDER RECEIVED	DATE	BY
DEPOSIT PAID		
TRANSCRIPT ORDERED		
TRANSCRIPT RECEIVED		
ORDERING PARTY NOTIFIED TO PICK UP TRANSCRIPT		
PARTY RECEIVED TRANSCRIPT		

DEPOSIT PAID	
TOTAL CHARGES	
LESS DEPOSIT	
TOTAL REFUNDED	
TOTAL DUE	

## **EXHIBIT B**

March 27, 2019

United States District Court, Eastern District of California  
Court Services  
501 I Street Suite 4-200  
Sacramento, CA 95814



National Office  
125 Broad Street,  
18<sup>th</sup> Floor  
New York, NY 10004  
Tel: (212) 549-2644  
Fax: (212) 549-2644  
aclu.org

Susan N. Herman  
*President*

Anthony D. Romero  
*Executive Director*

Richard Zacks  
*Treasurer*

***Sealed Case: In Re U.S. Department of Justice Motion to Compel Facebook to Provide Technical Assistance in Sealed Case, Opinion and Order Issued In or About September 2018***

***No. 1:18-mc-00057-LJO-EPG – Motion to Unseal Court Records Concerning U.S. Department of Justice Motion to Compel Facebook, on appeal as 19-15472 – ACLU Foundation v. USDOJ, et al.***

***Potential Related Case: U.S. v. Berrera-Palma et al.  
No. 1:18-cr-00207-LJO-SKO***

Dear Ms. Rivas:

We have filed an appeal in the Ninth Circuit, now captioned *ACLU Foundation v. USDOJ, et al.* under case number 19-15472, which was originally brought before the District Court for the Eastern District of California as *Motion to Unseal Court Records Concerning U.S. Department of Justice Motion to Compel Facebook* under case number 18-mc-00057-LJO-EPG. As part of the appeal, the Ninth Circuit needs all relevant and previously designated hearing transcripts before it. However, one of the transcripts is part of a sealed case for which we have no docket number, case name, nor other identifying information. Any hearings would have been transcribed by a court reporter from your office, and should therefore be accessible through a transcript request made to your office. Therefore, we seek your assistance in identifying the relevant transcripts.

We have some details that should assist you in locating the court reporter and identifying the transcripts in the relevant matter. Reporting done by Reuters and the Washington Post reveals that the matter was likely regarding an application for a wiretap order filed in the District Court for the Eastern District of California.<sup>1</sup> At some

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<sup>1</sup> See Dan Levine & Joseph Menn, *In Test Case, U.S. Fails to Force Facebook Help to Wiretap Messenger*, Reuters, Sept. 28, 2018, <https://reut.rs/2QjKGN0>; Dan Levine & Joseph Menn, *U.S. Government Seeks Facebook Help to Wiretap Messenger*, Reuters, Aug. 17, 2018, <https://reut.rs/2MZGYY0>; Ellen

point in that *ex parte* proceeding, the U.S. Department of Justice filed a motion to hold Facebook, Inc. in contempt of court for its refusal to provide technical assistance in wiretapping suspects using Facebook's Messenger communications platform. Facebook opposed the motion, and the judge ruled in favor of Facebook. It is the docket and court opinion from this contempt proceeding that we seek to unseal in our Ninth Circuit appeal. To consider the matter, the appellate court will need to be able to review documents from this contempt proceeding. Reportedly, oral arguments on the contempt motion took place on August 14, 2018. We seek transcripts of those August 14, 2018 hearings, as well as of any other contempt proceedings in this case. Additionally, the wiretap application may be related to *U.S. v. Berrera-Palma et al.*, 18-cr-00207-LJO-SKO.

This is all the information that is publicly available concerning the transcript that we require. We are happy to answer any questions that you may have and we thank you for your assistance in obtaining these transcripts for appellate review. We will follow up on this transcript request no later than early next week.

Sincerely,



Daniela del Rosario Wertheimer  
Legal Assistant  
Speech, Privacy & Technology Project  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

## **EXHIBIT C**

**From:** [ARivas@caed.uscourts.gov](mailto:ARivas@caed.uscourts.gov)  
**To:** [Daniela del Rosario Wertheimer](#)  
**Cc:** [Jennifer Granick](#)  
**Subject:** Re: Transcript Order  
**Date:** Thursday, March 28, 2019 6:39:48 PM  
**Attachments:** [ATT00001.png](#)

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Hi Daniela,

Thank you. We have received your request.

Unfortunately we have no information to provide you at this time.

Sincerely,

Ana Rivas  
Court Services Supervisor  
United States District Court  
Eastern District of California  
916-930-4133

From: Daniela del Rosario Wertheimer <DWertheimer@aclu.org>  
To: "arivas@caed.uscourts.gov" <arivas@caed.uscourts.gov>  
Cc: Jennifer Granick <jgranick@aclu.org>  
Date: 03/27/2019 03:26 PM  
Subject: Transcript Order

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Dear Ms. Rivas,

Please find attached to this email a Transcript Order and cover letter, which explains the circumstances of our request. If you have any questions, please reach out to me or Jennifer Granick, whose information can be found on the order itself.

Sincerely,

**Daniela del Rosario Wertheimer**

Pronouns: She/Her(s)

Legal Administrative Assistant | Speech, Privacy, and Technology Project

American Civil Liberties Union

125 Broad St., New York, NY 10004

| 646 905 8946 | [dwertheimer@aclu.org](mailto:dwertheimer@aclu.org)





BECAUSE FREEDOM CANT PROTECT ITSELF

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[attachment "Cover Letter - ACLU v. USDOJ.pdf" deleted by Ana Rivas/CAED/09/USCOURTS] [attachment "Transcript Order - ACLU v. USDOJ.pdf" deleted by Ana Rivas/CAED/09/USCOURTS]

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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN RE U.S. DEPARTMENT OF JUSTICE  
MOTION TO COMPEL FACEBOOK TO  
PROVIDE TECHNICAL ASSISTANCE IN  
SEALED CASE, OPINION ISSUED IN OR  
ABOUT SEPTEMBER 2018

CASE NO. 1:18-MC-00057-LJO-EPG

[PROPOSED] ORDER ON MOTION TO  
CONFIRM THAT CERTAIN DOCUMENTS ARE  
PART OF THE RECORD ON APPEAL

Currently pending before the Court is the Government's motion to confirm, pursuant to Federal Rule of Appellate Procedure 10(e), that certain documents are part of the appellate record in the above-captioned case. Upon review of the Government's motion and the record in both this matter and related sealed proceedings before the Court, the Court confirms that the Title III materials described in the Court's February 11, 2019 Order—*i.e.*, the original motions, requests, substantive documents in support and in opposition, transcript of evidentiary hearing, resulting Court Order of Decision, and related docket entries, *see* Doc. 26 at 1-2—were before this Court and considered by the Court when it issued the February 11, 2019 Order that is the subject of the appeals in Case Nos. 19-15472 and 19-15473 (9th Cir.).

Accordingly, upon consideration of the Government's motion to confirm that certain documents are part of the appellate record, IT IS HEREBY ORDERED that the Government's motion is GRANTED.

IT IS SO ORDERED.

Dated: April \_\_, 2019

/s/ Lawrence J. O'Neill  
UNITED STATES CHIEF DISTRICT JUDGE