

No. 20-16408

IN THE
United States Court of Appeals
for the Ninth Circuit

NSO GROUP TECHNOLOGIES LTD. ET AL.,

Defendants-Appellants,

v.

WHATSAPP INC. ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Northern District of California,
No. 4:19-cv-07123-PJH

**APPELLANTS' RESPONSE TO MOTIONS FOR LEAVE TO
FILE BRIEF AS AMICI CURIAE**

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Dated: January 4, 2021

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INTRODUCTION

In this appeal, twenty amici have filed or sought leave to file five separate briefs in favor of Appellees (“WhatsApp”). When Appellants (“NSO”) first received requests for consent from three groups of amici, NSO consented out of courtesy. Then two additional sets of amici—one led by Access Now and one comprising three law professors—sought consent for a fourth and fifth brief in support of WhatsApp. By that point, it had become clear that WhatsApp’s amici, instead of “fil[ing] a joint brief” as requested by this Court’s rules, were filing separate, duplicative briefs that all repeated arguments made by the other amici and WhatsApp. Cir. R. 29-1, Advisory Comm. N. For that reason, NSO declined to consent to the filing of Access Now’s and the Professors’ proposed briefs.

Access Now and the Professors have now sought this Court’s leave to file their proposed briefs. NSO submits this response to explain its rationale for declining to consent and to provide additional information to inform this Court’s resolution of Access Now’s and the Professors’ motions for leave.

BACKGROUND

A. This appeal arises out of WhatsApp’s lawsuit claiming that, in the Spring of 2019, one piece of software designed by NSO was used to monitor some of WhatsApp’s users in countries other than the United States. As set forth in more detail in NSO’s opening brief to this Court, NSO does not operate its technology in any respect. Instead, it sells its technology exclusively to foreign governments, which then use the technology to investigate and prevent terrorism and serious crime, as they have done in numerous successful operations to apprehend terrorists, child abusers, and drug traffickers. *See* NSO Br. 16-19. WhatsApp seeks to hold NSO liable for this alleged conduct, carried out entirely by or on behalf of foreign sovereign nations.

Because NSO acts entirely on behalf of foreign sovereigns, it moved to dismiss WhatsApp’s complaint on the ground that it is immune from suit as an agent of foreign sovereigns. In support of its motion, NSO submitted evidence establishing (among other things) that it sells its technology exclusively to foreign governments, that those governments operate NSO’s technology, and that NSO’s role is limited to providing “support services . . . entirely at the direction of [its] government

customers.” ER 54-55. WhatsApp did not submit any contrary evidence. The district court thus found it undisputed that NSO is an agent of foreign governments and that WhatsApp is suing NSO for alleged conduct that falls within NSO’s “official capacity” as a foreign agent. ER 11. The district court nonetheless denied NSO immunity on purely legal grounds. ER 11-14; NSO Br. 21-22. NSO appealed that decision.

B. Shortly before WhatsApp filed its brief, would-be amici began reaching out to NSO seeking consent to file amicus briefs in support of WhatsApp. Between December 8 and 15, NSO received requests for consent from Professor David Kaye, the Electronic Frontier Foundation (“EFF”), and a group of seven companies led by Microsoft. NSO consented to all three requests as a matter of courtesy and to spare this Court unnecessary motion practice.

After WhatsApp filed its brief, NSO received an additional request for consent from the Professors, who stated they intended to raise two arguments: “(1) that the [Foreign Sovereign Immunities Act] comprehensively addresses the scope of immunity for corporations and other entities such that alternative potential sources of jurisdictional immunity for such entities are no longer applicable; and (2) that, in any

event, the federal common law of conduct-based immunity applies only to natural persons.” Because those proposed arguments are identical to the arguments in WhatsApp’s brief, NSO declined to consent, explaining that the Professors’ proposed brief “appear[ed] inconsistent with the guidance in Circuit Advisory Committee note to Rule 29-1.”

NSO next received a request for consent from a group of proposed amici led by Access Now. By this point, it had become clear that WhatsApp’s amici were seeking to file numerous duplicative briefs. NSO thus declined to consent, again explaining that the proposed brief “appear[ed] inconsistent with the guidance in Circuit Advisory Committee note to Rule 29-1.”

ARGUMENT

NSO declined to consent to the filing of Access Now’s and the Professors’ proposed briefs because they appear to be inconsistent with this Court’s Advisory Committee Note to Rule 29-1. That Note admonishes that “[t]he filing of multiple amici curiae briefs raising the same points in support of one party is disfavored.” It further cautions that “amici briefs should not repeat arguments or factual statements made by the parties.”

Contrary to this guidance, four of the briefs submitted by WhatsApp’s amici—from Professor Kaye, the EFF, Microsoft, and Access Now—contain duplicative policy arguments that NSO’s business is socially undesirable, based on misrepresentations or misunderstandings about what NSO’s business actually is. The fifth, the Professors’ proposed brief, repeats WhatsApp’s arguments for denying NSO immunity. Instead of filing one “joint brief,” WhatsApp’s amici have filed five separate briefs—totaling more than 30,000 words—“raising the same points.” Cir. R. 29-1, Advisory Comm. N.

NSO consented to the first three of those briefs as a courtesy, but it believes five separate duplicative briefs is excessive. In addition, Access Now’s proposed brief seeks to introduce unsupported and inadmissible assertions of fact that NSO does not have a fair opportunity to contest in this appeal.

I. The Proposed Briefs Duplicate Other Amicus Briefs and WhatsApp’s Brief

This Court reviews amicus briefs “in conjunction with the briefs submitted by the parties.” Cir. R. 29-1, Advisory Comm. N. As a result, amicus briefs are helpful only to the extent they supplement, not duplicate, “arguments or factual statements made by the parties.” *Id.*

Similarly, “[t]he filing of multiple amici curiae briefs raising the same points in support of one party is disfavored.” *Id.* Instead, “[p]rospective amici are encouraged to file a joint brief.” *Id.* Despite this guidance, WhatsApp’s amici have filed five duplicative briefs.

A. Access Now’s Proposed Brief Duplicates Other Amicus Briefs and WhatsApp’s Brief

Access Now’s proposed brief advances policy arguments based on its dislike for NSO and NSO’s sovereign customers. NSO’s technology, the brief asserts, is “an insidious spyware product” that “many of NSO’s customers” use “for insidious ends.” Access Now Br. 1. It asks this Court to deny NSO immunity on policy grounds, contending that “[g]ranting NSO immunity would not just undermine fundamental international legal protections for privacy, free expression, and association, it would seriously undermine civil society.” *Id.* at 1-2. These statements, which NSO disputes, are identical to statements by WhatsApp’s other amici.

Access Now’s criticisms of NSO’s technology as “an insidious spyware product” repeat arguments made by Professor Kaye, the EFF, and Microsoft. Like Access Now, Professor Kaye bemoans the prevalence of “clandestine spyware tools” that “enable invasive and surreptitious surveillance.” Kaye Br. 5-6. The EFF criticizes “modern technology

companies that provide sophisticated surveillance and censorship products and services to foreign governments.” EFF Br. 6. And Microsoft devotes its entire brief to the proposition that “[c]yber-surveillance tools” like NSO’s are “dangerous.” Microsoft Br. 12.

Access Now also repeats other amici’s arguments that technology like NSO’s facilitates human rights abuses. Access Now asserts, for example, that “[d]igital surveillance threatens several human rights enshrined in international law,” in particular “the rights to free expression and privacy.” *Id.* at 26. That is the same argument made by Professor Kaye, who contends that NSO’s technology “has repeatedly interfered with the human rights of activists, journalists, and others and has undermined democratic values globally.” Kaye Br. 3. The EFF likewise argues that “[u]nlawful digital surveillance invades victims’ privacy and chills their freedom of speech and association.” EFF Br. 4. It claims, largely based on Professor Kaye’s public statements, that surveillance technologies “enable spying that stifles dissent, has chilling effects across society, and in many cases allows governments to hunt down those it wishes to silence.” *Id.* at 7. Professor Kaye and the EFF also cite many of the same alleged abuses of NSO’s technology by foreign

states as Access Now. Kaye Br. 8; EFF Br. 10, 26 n.81; Access Now Br. 10-24.

Finally, Access Now duplicates other amici's arguments that granting NSO immunity would leave no "means to hold a corporation responsible" for foreign governments' misconduct. Access Now Br. 31-34. Professor Kaye likewise contends that "[a] viable remedy" for alleged abuses by foreign states "is desperately needed and yet globally unavailable" and that granting NSO immunity "would effectively eliminate any remedy." Kaye Br. 3-4; *see id.* at 18-21. And the EFF argues that "[v]ictims of human rights abuses enabled by powerful technologies must have the ability to seek redress through civil suits in U.S. courts." EFF Br. 5.

Access Now's policy arguments also repeat WhatsApp's own brief. Like Access Now, WhatsApp argues that granting NSO immunity "would create an unacceptable risk of unsanctioned conduct" and "foster[] situations in which human rights are subordinated to goals of efficiency." WhatsApp Br. 48-49 (internal quotation marks omitted). WhatsApp also argues, like Access Now, that "U.S. courts must provide a forum for the

victims harmed by [foreign government] contractors to hold them accountable.” *Id.* at 49.

As this discussion shows, Access Now seeks to raise the same policy arguments as the (already duplicative) briefs filed by Professor Kaye, the EFF, and Microsoft. Access Now similarly duplicates WhatsApp’s policy arguments. That is inconsistent with the Court’s guidance.

B. The Professors’ Proposed Brief Duplicates WhatsApp’s Brief

While Access Now’s proposed brief duplicates other amici’s briefs, the Professors’ proposed brief repeats WhatsApp’s brief.

WhatsApp makes two primary arguments against NSO’s claim of immunity: (1) conduct-based immunity applies only to natural persons, not entities, and (2) the FSIA exhausts immunity for foreign entities. WhatsApp Br. 23-39. The Professors make the same arguments, relying on the same reasoning and authorities. Professors’ Br. 3-18, 20-23. To the limited extent the Professors differ from WhatsApp, they support NSO’s argument that conduct-based immunity protects foreign agents sued in their individual capacity. Professors’ Br. 18-20; NSO Br. 34-40. Therefore, when “review[ing] the amicus curiae brief[s] in conjunction with the briefs submitted by the parties,” this Court will find nothing in

the Professors' proposed brief that is not already in the parties' briefs.

Cir. R. 29-1, Advisory Comm. N.

II. Access Now's Proposed Brief Improperly Seeks to Supplement the Record With Disputed Factual Assertions

As this appeal comes to this Court, the relevant factual record is closed and undisputed. It consists of NSO's unrebutted factual showing in the district court that (among other things) it acts entirely on behalf of foreign governments, it does not operate its technology, and it has no knowledge of or control over its sovereign customers' activities. NSO Br. 30-31 & n.5. WhatsApp did not rebut that evidence below, and it may not do so for the first time on appeal. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Access Now, however, fills its proposed brief with an onslaught of unverified factual assertions about NSO's and its customers' conduct. That is inappropriate. Access Now does not provide a complete or accurate account of the facts, and its account is based on inadmissible and unverified hearsay from its clients or other third-party sources.

NSO, moreover, has no fair opportunity to rebut Access Now's claims. NSO and WhatsApp were able to submit evidence in connection with NSO's motion to dismiss. NSO used that opportunity to respond to

WhatsApp's factual claims, and WhatsApp chose to let NSO's evidence stand un rebutted. That record is now closed. NSO has no ability in this appeal to present evidence in response to Access Now's factual assertions, and the Court should not consider them.

CONCLUSION

NSO declined to consent to Access Now's and the Professors' briefs because, in its view, those briefs are inconsistent with this Court's guidance. When deciding whether to grant leave, this Court should consider whether five duplicative briefs totaling over 30,000 words will aid its resolution of the merits of NSO's appeal.

Respectfully submitted,

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January 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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