

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

hiQ Labs, Inc.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 17-03301 EMC
	)	
LinkedIn Corporation,	)	
	)	
Defendant.	)	
	)	

---

San Francisco, California  
Thursday, July 27, 2017

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff hiQ Labs, Inc.:

Farella, Braun & Martel LLP  
Russ Building  
235 Montgomery Street, 18th Floor  
San Francisco, California 94104  
(415) 954-4400  
(415) 954-4480 (fax)

**BY: DEEPAK GUPTA  
CARL BRANDON WISOFF**

Laurence H. Tribe  
Carl M. Loeb University Professor and  
Professor of Constitutional Law  
Harvard Law School  
1575 Massachusetts Avenue  
Cambridge, MA 02138  
(617) 495-1767

**BY: LAURENCE H. TRIBE**

Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

1 **APPEARANCES :**

2 For Defendant LinkedIn Corporation:

3                                   Munger Tolles & Olson LLP  
4                                   1155 F Street NW, 7th Floor  
5                                   Washington, DC 20004  
6                                   (202) 220-1101  
7                                   (202) 220-2300 (fax)

8                                   **BY: DONALD B. VERRILLI, JR.**

9                                   Munger, Tolles & Olson, LLP  
10                                   560 Mission Street, 27th Floor  
11                                   San Francisco, CA 94105-2907  
12                                   (415) 512-4009  
13                                   (415) 644-6909 (fax)

14                                   **BY: JONATHAN HUGH BLAVIN**  
15                                   **ROSEMARIE T. RING**

16

17

18

19

20

21

22

23

24

25

1 Thursday - July 27, 2017

1:57 p.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling Case C. 17-3301, hiQ Labs versus  
5 LinkedIn. Counsel, please come to the podium and state your  
6 name for the record.

7 **MR. WISOFF:** Good afternoon, Your Honor.  
8 Brandon Wisoff, Farella Braun & Martell, on behalf of  
9 plaintiff, hiQ Labs.

10 **THE COURT:** All right. Thank you, Mr. Wisoff.

11 **MR. TRIBE:** Good afternoon, Your Honor. I'm  
12 Laurence Tribe, here for hiQ.

13 **THE COURT:** All right. Thank you, Mr. Tribe.

14 **MR. GUPTA:** Good afternoon, Your Honor.  
15 Deepak Gupta, here for hiQ Labs.

16 **THE COURT:** Thank you, Mr. Gupta.

17 **MR. VERRILLI:** Good afternoon, Your Honor. I'm  
18 Don Verrilli, from Munger Tolles Olson, for LinkedIn.

19 **THE COURT:** All right. Thank you, Mr. Verrilli.

20 **MR. BLAVIN:** Good afternoon, Your Honor.  
21 Jonathan Blavin, for LinkedIn, from Munger Tolles, as well.

22 **THE COURT:** All right. Good morning.

23 **MS. RING:** Good afternoon, Your Honor.  
24 Rosemarie Ring, Munger Tolles & Olson, also on behalf of  
25 LinkedIn.

1           **THE COURT:** All right. Welcome, everyone.

2           Okay. We are on, obviously, for hiQ's motion for  
3 preliminary injunction. This case, of course, raises a number  
4 of cutting-edge issues, but we are framed by a basic,  
5 well-known framework here with respect to the standard for  
6 preliminary injunction. And one of the first questions that's  
7 going to guide the analysis on the merits is the balance of  
8 hardships. And so I have to determine which way the balance of  
9 hardships tips; and if so, how sharply or not sharply they tip.

10           Now on the one hand, hiQ contends that it will be  
11 subject to bankruptcy, essentially. And maybe you can  
12 elucidate if there's any more information in that regard if the  
13 injunction does not issue here.

14           **MR. GUPTA:** Your Honor, the injury would be  
15 devastating. The company's been already in a bit of a  
16 tailspin. Before the cease-and-desist letters were sent there  
17 were 24 employees, and we're now down to 15. There was a  
18 resignation earlier this week. The momentum of the company is  
19 suffering over the uncertainty of this case hanging over its  
20 head, and we're living day to day as to whether basic raw  
21 materials of the business are going to be available to them.

22           **THE COURT:** And all of the raw materials are taken  
23 from LinkedIn? There's no other --

24           **MR. GUPTA:** Your Honor, the vast, vast preponderance  
25 of the public material they're using is from LinkedIn, because

1 of LinkedIn's tremendous market power in this area as the host  
2 of 500 million professional profiles for the world's  
3 professionals.

4 **THE COURT:** Well, there was reference to the fact  
5 that other similar companies doing analytics are able to work  
6 without using LinkedIn, but using other sources. What's your  
7 take on that?

8 **MR. GUPTA:** Your Honor, we talked with the client  
9 about that. And these other companies are doing something  
10 different. They're not doing what hiQ does. HiQ is in the  
11 data-science business. And all data-science companies dating  
12 back to Alta Vista and Excite and Google require data; and  
13 public data is what people use. That's the business hiQ is  
14 in.

15 These other companies do things like perform surveys on  
16 employees about their employee satisfaction. And that type of  
17 data -- while some of these companies may choose to make a  
18 business out of it, hiQ never opted to go in that direction.  
19 And I think there are good business reasons why they didn't go  
20 in that direction.

21 **THE COURT:** But aren't there -- who would you say  
22 would present databases about employees that, if one had to,  
23 besides LinkedIn, what other sources are there of data?

24 **MR. GUPTA:** Your Honor, our team has been looking  
25 into that question for -- for months now. And there are no

1 real alternatives to this data.

2 In LinkedIn's papers they suggested that Facebook might be  
3 an alternative source, but that doesn't really pass the  
4 red-face test, because everyone knows Facebook is a  
5 social-networking platform where people connect with their  
6 friends, post photographs, and that sort of thing. It's not a  
7 serious professional platform, where you can get skill  
8 information and the other types of data that hiQ works on.

9 **THE COURT:** You want to comment on that, Mr. Verilli;  
10 just that point?

11 **MR. VERILLI:** So, Your Honor, if you would like us to  
12 address that specific point, I'm going to ask my colleague,  
13 Mr. Blavin, to do so.

14 **THE COURT:** Sure.

15 **MR. VERILLI:** I do have some more general points I  
16 think are of real significance on the balance of --

17 **THE COURT:** Right. I haven't gotten to your side of  
18 the ledger yet.

19 **MR. VERILLI:** But in terms of that, maybe we'll have  
20 Mr. Blavin. Thank you.

21 **THE COURT:** All right. Mr. Blavin.

22 **MR. BLAVIN:** Thank you, Your Honor.

23 As Your Honor correctly identified, there are a number of  
24 other competitors in what's called "the people analytics space"  
25 that operate using alternative data inputs. One of them is the

1 company, Glint, which we highlighted in our papers, which uses  
2 internal surveys to collect data relating to employees. It is  
3 viewed as a direct competitor to the type of services that  
4 hiQ is offering.

5 **THE COURT:** But that's a very different process  
6 than -- I mean, you just said it's internal surveys, which is  
7 quite different than being able to sort of surf the World Wide  
8 Web for posted information.

9 **MR. BLAVIN:** It's different in the sense that it's  
10 getting a different type of data input, but the actual service  
11 it's offering within what's described as "the people analytics  
12 space" is remarkably similar. So if the question is, "Do other  
13 companies exist in this space, and do they offer competitive  
14 offerings, and succeed, without using scraped LinkedIn data,"  
15 the answer to that question is "Yes."

16 Moreover, there are a number of other websites which do  
17 have professional data on them, including skills data, job  
18 descriptions, education, et cetera. We highlight in our  
19 declarations and in our brief a number of those, and one of  
20 them is Facebook.

21 And notwithstanding that hiQ just generally takes the  
22 position, *Well, that's not a professional network*, we've put  
23 forward evidence in the Blavin Declaration and other supporting  
24 declarations which show that Facebook has a substantial amount  
25 of professional data on it.

1 For example, one of the things that we did in our  
2 declaration is we looked at the advertising tools on Facebook  
3 and on LinkedIn, searching for people who describe themselves  
4 as working for a particular company. You can target ads to  
5 those people.

6 And the numbers of people as to various companies,  
7 including hiQ's own clients, who describe themselves as  
8 employees of those companies -- so they're obviously putting  
9 down who their employer is -- the numbers are remarkably close,  
10 between LinkedIn and Facebook.

11 And Facebook has the same fields that LinkedIn does that  
12 they're describing: Job titles, skills, education, job  
13 descriptions, et cetera.

14 Moreover, survey evidence which we put in showed that on  
15 Facebook, 74 percent of users put professional data on it, as  
16 compared to 78 percent of LinkedIn users. So notwithstanding  
17 the conclusory allegation that only LinkedIn has professional  
18 data, the actual evidence in the record demonstrates otherwise.

19 **THE COURT:** Okay. What's your response to that?

20 **MR. GUPTA:** Your Honor, the company has invested  
21 \$14 million in a particular business.

22 What LinkedIn is suggesting -- and the hubris is  
23 astounding -- is that we should take that \$14 million  
24 investment, write it off, and completely reinvent the business  
25 to either do employee internal surveys, or somehow figure out a



1 way to use Facebook to make a viable product.

2 We have client contracts today that are based on the  
3 product that we developed. We won the HR Product of the Year  
4 in 2016 for our Keeper product, because our product is  
5 extremely compelling.

6 They're saying, *Well, forget about that product, guys. Do*  
7 *something completely different.*

8 We're saying, *No. "Public" means "public."* We built a  
9 product on public information.

10 **THE COURT:** Well, what Mr. Blavin is referring to is  
11 not just the model of doing internal surveys -- I understand  
12 it's a completely different process -- but doing the same  
13 thing, running the same kind of analytics, but using a  
14 different database, which they say or he says has the same kind  
15 of information one would likely find in LinkedIn.

16 **MR. GUPTA:** Your Honor, if there were a solution like  
17 that, our client would have figured it out, because they have  
18 no desire to be paying our law firm this kind of money to be  
19 fighting against a powerhouse like Microsoft or LinkedIn.

20 The reality is Facebook may have a field in it where some  
21 people choose to put down the name of the business they work  
22 for. That's utterly worthless for the hiQ product. What  
23 the hiQ products depends on is a robust, complete description  
24 of a person's professional skills, previous employment,  
25 interests, that kind of stuff, and update it on a regular

1 basis, so that it is a very rich resource that they can then  
2 extract these analytics from.

3 Facebook is -- they've looked at it. We've talked about  
4 it. Facebook cannot hold a candle to LinkedIn as a  
5 professional networking site.

6 Your Honor, I think their own product marketing collateral  
7 tells the whole story, which is, *We have 500 million-plus*  
8 *members. We are the world's largest professional networking*  
9 *site.* That's their own words.

10 **THE COURT:** Is there anything in the record that  
11 suggests or describes a difference in the quality and the depth  
12 of the field of information, as a practical matter, that is  
13 available from Facebook vis-à-vis LinkedIn?

14 The fields may be available, but maybe people don't use it  
15 very often, because they maybe consider it more of a social as  
16 opposed to a professional network. The age, the demographics  
17 may be different, such that utilization may be different.  
18 Maybe the amount of attention in terms of updating is  
19 different. I don't know. Is there any data that actually  
20 compares these two, in terms of their richness of the data?

21 **MR. GUPTA:** Your Honor --

22 **THE COURT:** Professional data.

23 **MR. GUPTA:** Your Honor, if we had to piece something  
24 together from the Record, I think if you look at Exhibit E to  
25 their TRO papers, that shows what LinkedIn has. You know. And

1 I don't think they've put in the comparable profile from  
2 Facebook; but a Facebook profile does not have that kind of  
3 information in it.

4 Furthermore, I think if you look at the Mark Weideck  
5 Declaration, who's the CEO of our company, he states quite  
6 clearly that there's no other source. He had his CTO and his  
7 team working around the clock when they got the  
8 cease-and-desist letter, saying, *What do we do? You know,*  
9 *we're fighting for our lives here, guys.*

10 And these -- these engineers were working around the  
11 clock, trying to figure out a way: Well, can we somehow use a  
12 different source of public information? Is there anything out  
13 there? How do we keep this going?

14 It was only after they reached a conclusion that there is  
15 no alternative that they said we need to take this measure.

16 And we did try to talk with them. We did try to explain  
17 this to LinkedIn before we pursued this route. It was  
18 unfruitful. And that's why we ended up -- and that's why we're  
19 here today, where we are.

20 **THE COURT:** All right. Let's focus on the other side  
21 of the equation: Hardship --

22 **MR. BLAVIN:** Okay.

23 **THE COURT:** -- to LinkedIn if the injunction were  
24 granted. And I know part of this that you made a big part of  
25 your case has to do with the preferences in the more granular

1 settings -- display settings or privacy settings -- that have  
2 been opted for by LinkedIn users; namely, for instance, not  
3 broadcasting changes made to their profile, I guess, with the  
4 risk that that might be interpreted by their employer as job  
5 hunting, or something. So why don't you elaborate on that?

6 **MR. VERILLI:** Yes, exactly, Your Honor. Of course,  
7 we're focused on the balance of equities here, and I'm going to  
8 address that directly. To get to the balance of equities,  
9 they've got to show likelihood of success on the cause of  
10 action, or at least a serious question; but putting that to one  
11 side, because we think they're nowhere near that here -- but  
12 with respect to the balance of equities, what we would submit  
13 is the most important equity before this Court now -- the  
14 overriding equity -- are the privacy interest of LinkedIn's  
15 members, and the integrity of LinkedIn's trust relationship  
16 with its members, which is essential to its business.

17 Your Honor identified the Do Not Broadcast feature. And I  
18 think that's of critical importance. The second Rockwell  
19 Declaration, which is attached to our supplemental brief,  
20 details the facts on that. And our brief discussed it, too.  
21 And it's critical. Many millions of LinkedIn member, when they  
22 change their profile settings, have opted not to chose the Do  
23 Not Broadcast feature, which means that that information is  
24 not sent out to their contacts, and not send out to their  
25 employer. And so they've made that decision, as paragraph 4 of

1 the Rockwell Decision [sic] -- the Rockwell Declaration  
2 identifies, because we put that policy in place precisely  
3 because LinkedIn members were worried that when they made a  
4 change to their profile, that their employers might get notice,  
5 and be -- and be suspicious that they were searching for a new  
6 job. And that was an invasion of their privacy. And that's  
7 why we have it.

8 And of those many millions of LinkedIn members --

9 **THE COURT:** It was about 50 million, as I recall,  
10 that have opted in?

11 **MR. VERILLI:** That's correct, Your Honor.

12 **THE COURT:** Is that about 10 percent of the user  
13 base?

14 **MR. VERILLI:** Right, but I think in addition, well  
15 more than 10,000 of our members are employees of the companies  
16 with which hiQ already has contracts, so they're already  
17 under this surveillance, and they're already at risk of being  
18 ratted out to their employers with this system.

19 And so -- and that's a -- that is a very serious intrusion  
20 on their privacy. Basically what's happening here is that they  
21 have chosen -- our members have chosen Do Not Broadcast.  
22 And hiQ is broadcasting the very information to the employer  
23 that we have that our members have chosen not to broadcast.

24 Now even with respect to the other members who haven't  
25 chosen that option, they have made their data visible -- their

1 information visible on LinkedIn, on the basis of an  
2 understanding that we are going to respect the Terms and  
3 Conditions that we have communicated to them.

4 One of the Terms and Conditions we have communicated to  
5 them is that we don't allow scraping and data mining of this  
6 kind, because it is an intrusion on their privacy.

7 And, as Your Honor will see from the second Rockwell  
8 Declaration, we have also received numerous complaints from our  
9 members that they believe that this kind of an intrusion --  
10 this kind of scraping, and data mining, and ratting them out to  
11 their employers, or disclosing this information in other  
12 ways -- is an invasion of their privacy; is incompatible with  
13 what they understood.

14 **THE COURT:** Now let me ask you. I'm trying to  
15 recall. When you say they've been informed that data, quote,  
16 "scraping" -- I'll say quotes, because some people find it is a  
17 loaded term, but I'm not sure what term to use for now. I know  
18 that's term that's used, because one of your arguments is that  
19 hiQ signed on to that, and they're bound by that.

20 But how explicit is it that this is not allowed, not only  
21 by users, but just generally; that LinkedIn takes affirmative  
22 steps to block third-party, quote, "scraping," even if they  
23 haven't signed this Agreement?

24 **MR. VERILLI:** Of course, they have signed --

25 **THE COURT:** Right, but --

1           **MR. VERILLI:** -- but in addition --

2           **THE COURT:** -- I'm talking about notice to the  
3 average user.

4           **MR. VERILLI:** Right. It's in the Privacy Policy,  
5 Your Honor. It's in the Privacy Policy, which is  
6 incorporated among the Terms of Use. And the Privacy  
7 Policy states more generally. It doesn't just state that  
8 if -- by agreeing to this User Agreement, you may not engage in  
9 scraping. The Privacy Policy more generally states that we  
10 have measures in place to protect your privacy in this way.

11           And it's the complaints that we have identified from our  
12 members in the Rockwell Declaration, some of which we've quoted  
13 in our brief, show Your Honor the members take that seriously.  
14 And they believe that their privacy is being violated by this.

15           **THE COURT:** Can you identify --

16           **MR. VERILLI:** And then --

17           **THE COURT:** -- where that Privacy Policy --

18           **MR. VERRILLI:** I don't have it at my fingertips,  
19 Your Honor, but we will find it.

20           And then, of course, in addition to that, you know,  
21 LinkedIn does maintain a vigorous set of technical measures,  
22 which are outlined in the first Rockwell Declaration, which are  
23 there to protect our members from -- and I'm going to use this  
24 term, because it's the term -- "scraping" by automated bots,  
25 which can be done for all kinds of purposes. It can be done

1 for identity theft. It can be done for other scams. It can be  
2 done for spamming.

3 And, as Your Honor is aware from the prior submissions in  
4 this case, those technical measures turn away 95 million  
5 incursions by automated bots every day. We have no way of  
6 knowing in advance which of those automated anonymous bots is  
7 seeking information for one purpose or another.

8 What we know is that all of them are acting in violation  
9 of our Terms of Service. All are acting in violation of our  
10 policies. And we need to protect our members' privacy  
11 interests against all of those kinds of intrusions, including  
12 hiQ's intrusion.

13 Now, that's a very powerful equity here, that -- when you  
14 think about that, yes, they've got a certain number of  
15 employees. Whether their business is at risk or not, I don't  
16 know; but if it's at risk, it's at risk because they have  
17 designed a system that -- and I realize we're moving a little  
18 bit to the merits here, but I will confine myself on that. But  
19 they've designed a system that, in our view, is unlawful.

20 And that -- in our view, they have not identified any  
21 legal basis that would require us to disable our technical  
22 measures so they can get access on the terms that they want  
23 access, which we don't give to the general public, and we don't  
24 give to others who want to scrape data for whatever purpose.

25 **THE COURT:** I think I asked this last time. Is there



1 any kind of a setting that's available to LinkedIn users who  
2 might want to be able to be out there for all purposes,  
3 including being subject to collection by bots, because perhaps  
4 there are some advantages to it? Some might think that there  
5 is. Is there an option to allow that?

6 **MR. VERILLI:** I'm not aware that there is.

7 Mr. Blavin can correct me if I don't have that fact right. I'm  
8 not aware that there is; but I also can't imagine that there  
9 are very many members who are going to think something like  
10 their Keeper product is something they'd want to have  
11 themselves subjected to, which is -- it's essentially corporate  
12 intel. It's an anonymous surveillance of their behavior, to  
13 rat them out to their employers. And I can't imagine that any  
14 member would think that that would be something of benefit to  
15 them.

16 **THE COURT:** Well, I mean, hypothetically that was  
17 something posed initially by hiQ, is that people might be  
18 seen as valuable, as "keepers." They think they are going to  
19 be seen as keepers. And this is their subtle way of letting  
20 their employers know that there's free agency out there, and  
21 they might want to keep them.

22 **MR. VERILLI:** I guess my point in response to that,  
23 Your Honor, would be that that ought to be up to the autonomous  
24 choice of the members. It ought not to be up to hiQ, as a  
25 matter of making a buck.

1           **THE COURT:** Well, that's why I asked. If you wanted,  
2 really, a democratic process --

3           **MR. VERILLI:** Right, right.

4           **THE COURT:** -- one could envision that people could  
5 have that option.

6           **MR. VERILLI:** But I guess, Your Honor, what I would  
7 say is if somebody wants their employer to know that they are  
8 looking for a new job because they think it will give them  
9 leverage, they don't need hiQ to tell them. They have plenty  
10 of ways that they can convey that information.

11           You know, I think this Keeper product is all down side.

12           And then there's another equity here even with respect to  
13 the other product, which they try to portray as just something  
14 that has no negative effects, as an equitable matter, at all --  
15 and that's completely wrong -- their Mapper product.

16           Well, a lot of people make a decision to make their  
17 profile visible, and then at some point in the future make a  
18 decision that they no longer want it to be visible, so they  
19 take it down; but at that point, hiQ's got it. And so it's  
20 not -- you know, so they have lost that control. They've lost  
21 that autonomy to decide what people know about them over time,  
22 because hiQ's taking that information, in violation of these  
23 norms on which we run our business, and they've got it  
24 permanently. And so there's -- that's another way in which  
25 there's a real intrusion on the --

1           **THE COURT:** Are there not other archival-type  
2 websites out there that store this information?

3           **MR. VERILLI:** I'm not aware that that would be  
4 available, Your Honor; but what I do know is that they take  
5 that -- that when members decide that they no longer want their  
6 information visible, that's a choice that hiQ effectively has  
7 overridden. It's overridden their privacy. It's overridden  
8 their autonomy. It's done it in numerous respects. It does it  
9 to hundreds of thousands of people, including tens of thousands  
10 of people who are employed by hiQ's clients.

11           And I think that that is an extremely powerful set of  
12 equities that far outweighs any equitable claim that hiQ has  
13 to try to run this commercial enterprise -- we believe, in  
14 violation of the law; certainly in violation of all of the  
15 policies that we set up to protect our members. And that  
16 doesn't even get -- that's just about the members.

17           You also have to, I think, Your Honor, consider our  
18 business model here. Our business model depends on a trust  
19 relationship between us and our members. We need to have our  
20 members put this information up and put it into the system and  
21 make it available, in order for our business model to work.  
22 And in order for that to happen, they have to trust that we're  
23 going to be able to do what we say we're going to do, in terms  
24 of protecting their privacy and protecting their autonomy.

25           And what hiQ comes in and says, essentially, is, *Doesn't*

1 *matter. Does it matter what you tell your members about how*  
2 *you're going to protect their privacy. We get to take that*  
3 *information, and use it for whatever purpose we want.*

4       And that is deeply damaging to our relationship -- the  
5 fundamental relationship that makes our business work.

6               **THE COURT:** Have there been any kind of surveys,  
7 other than a collection of complaints, whether by your client  
8 or anybody else, that look at what users' privacy expectations  
9 are, whether it be Facebook, LinkedIn, or anything else, when  
10 they choose a public setting?

11       Because one could make the argument that once somebody  
12 goes public -- and they have a range of options, whether it's  
13 Facebook or anything else -- they're taking a calculated risk.  
14 And they do that at their own risk, and perhaps knowing that  
15 there's a risk that -- who knows what kind of data? I mean,  
16 there are all sorts of people out there. Could be creditors,  
17 and all sorts of things. But if you put it out there, that's  
18 the risk, and that's what people expect.

19               **MR. VERILLI:** So a couple of points about that,  
20 Your Honor.

21       First, I think -- while I don't know the answer to the  
22 question whether there have been any kind of surveys with  
23 respect to that particular question, I think, based on this  
24 Record, by far the fairest inference is that LinkedIn's members  
25 put that information out there, when they make it visible, on

1 the understanding that the conditions that LinkedIn has imposed  
2 are going to be respected, and that therefore their privacy and  
3 their integrity is going to be respected.

4 And the second point I'd like to make -- I think this goes  
5 a bit to the merits. I think it's also highly relevant to the  
6 balance-of-hardships analysis that we're talking about here --  
7 is that what I would submit to Your Honor is that, with all due  
8 respect, the dynamic is exactly the opposite. If it were the  
9 case that LinkedIn can't continue to use these technical  
10 measures to block the kind of scraping, and data analytics, and  
11 the ratting-out to the employer that their business model  
12 relies on -- if we can't do that, that's not going to increase  
13 the free flow information to the public.

14 It's going to decrease the free flow of information to the  
15 public because what's going to happen is that many, many more  
16 people are going to be unwilling to make their information  
17 visible, precisely because they're not going to want to take  
18 that risk. For example, that number of people who choose  
19 Do Not Broadcast, I'm sure, is going to go way, way up if  
20 this is permissible activity. And in addition, Your Honor, I'm  
21 sure that many, many fewer people are going to make that  
22 information visible, at all. That just stands to reason.

23 So I think the fact, Your Honor, it's not the case that  
24 people understand that they're taking a risk. They think they  
25 aren't taking this risk. And once they learn that they're

1 taking this kind of risk of being exposed to their employer,  
2 and having data that they no longer want public remain  
3 public -- they're going to make the decision not to make that  
4 data available in the first place.

5 And the only other option we have under their theory of  
6 the way the law is supposed to work: Either we've got to tell  
7 our members this, which is going to lead to that reduction in  
8 the free flow of information, or we have to put up a wall;  
9 something like -- keep the information inside a wall with a  
10 password, which, of course, is going to decrease the free flow  
11 of information, because you won't be able to get it if you're  
12 outside the wall.

13 So I think as an equitable matter as well as a legal  
14 matter, that that runs exactly in the other direction. What  
15 they're asking for damages our members' privacy, damages our  
16 business model, damages the free flow of information. It  
17 benefits them and their 20 employees, but it damages every  
18 everything else I've just listed in a very serious way.

19 And, of course, the problem, Your Honor, is if they can do  
20 it, so can everybody else. This isn't a hiQ-only pass. If  
21 they can do it, everybody can do it. And then I think you're  
22 talking about a very, very serious denigration of important  
23 interests.

24 My colleague, Mr. Blavin's, got the Privacy Policy site  
25 here, Your Honor, for you.

1           **MR. BLAVIN:** Yeah. So two things, Your Honor.

2           First, with respect to the User Agreement, we know that  
3 hiQ accepted and agreed to that. They don't dispute it. It's  
4 important in terms of member expectations, though.

5           The User Agreement says, in Section 1.1, that it applies  
6 to anyone who accesses or uses LinkedIn's services. And, as  
7 Your Honor is aware, in Section 8.2 it says if you're going to  
8 access our site, you have to -- you know, we've quoted this  
9 repeated times -- not use software, devices, scripts, robots,  
10 or any other means or processes to scrape the services.

11           So a member, reading the User Agreement, itself, would  
12 think that anyone who's accessing LinkedIn has to agree to its  
13 terms, which included an explicit anti-automated-scraping  
14 prohibition.

15           **THE COURT:** Does that make it clear that it applies  
16 to nonmembers?

17           **MR. BLAVIN:** Well, it applies to anyone. The  
18 Agreement says, *You agree that by clicking Join Now to join*  
19 *LinkedIn, to sign up, or similar, registering, accessing, or*  
20 *using our services, you are agreeing to enter into a legally*  
21 *binding contract with LinkedIn.* So it applies to those who  
22 simply access the site, as well.

23           **THE COURT:** Is there any statement in that policy  
24 that says, regardless of contract or membership, that we take  
25 steps to preclude scrapers, et cetera?

1           **MR. BLAVIN:** Well, as noted, it says that if you  
2 access the site, you can't scrape.

3           **THE COURT:** Yeah. I understand that, but is there  
4 something more affirmative that says, *We protect you, user,*  
5 *against these third parties who might want to scrape your data?*

6           **MR. BLAVIN:** Section 4.5 of the Privacy Policy,  
7 which is attached as Exhibit C to the first Rockwell  
8 Declaration, states that we have implemented security  
9 safeguards designed to protect the personal information that  
10 you provide, in accordance with industry standards.

11           It further goes on to note that to protect any data you  
12 store on our servers, we also regularly monitor our system for  
13 possible vulnerabilities and attacks. And we use a tier-one  
14 secured-access data center.

15           And the security measures are those that are outlined in  
16 the Rockwell Declaration to prevent the estimated 95 million  
17 automated attempts to access the site on a daily basis.

18           **THE COURT:** This is C?

19           **MR. BLAVIN:** Yeah. Rockwell Declaration.

20           **THE COURT:** Where would you say is the --

21           **MR. BLAVIN:** It's in Section 4.5, which is at the end  
22 of the Privacy Policy to the first Rockwell Declaration, not  
23 the supplemental one.

24           **THE COURT:** Well, this refers to information that is  
25 secure. It's stored. It's stuff that you secure bypass word,



1 and everything. We're taking measures to make sure that that's  
2 not hacked.

3 It doesn't say -- it does not -- I don't see anything here  
4 that suggests that things that you have set for public view is  
5 not going to be subject to aggregation, or some kind of  
6 analytic aggregation.

7 **MR. BLAVIN:** Well, it does say that *to protect any*  
8 *data you store on our servers.*

9 Data that is publicly visible on LinkedIn is data stored  
10 on our servers.

11 **THE COURT:** Yeah. I'm sure you can read it like a  
12 lawyer, but I don't think this says that.

13 And chances are 2 percent of the people reading this  
14 thing -- the 2 percent who do -- I bet you if you took a survey  
15 right now and asked, *Did you understand this to mean that you*  
16 *would not be subject to any kind of aggregative collection,*  
17 *with the exception of authorized search engines like Google,*  
18 *that you --*

19 I don't see that here, frankly.

20 **MR. BLAVIN:** You know, I respectfully push back, to  
21 say that those security measures are the ones that are detailed  
22 in the Rockwell Declaration.

23 **THE COURT:** All right.

24 **MR. BLAVIN:** Moreover, if there were a survey to say  
25 how many people would opt into the type of service that hiQ

1 is offering, given everything that Mr. Verilli stated before  
2 about the measures, the features, that LinkedIn has 50 million  
3 people locked into them, I think it would be a very, very low  
4 percentage that would actually opt into that type of service.

5 **THE COURT:** All right. Let me hear your response to  
6 particularly the concerns that they've raised now repeatedly in  
7 their papers about those who -- I guess something like  
8 50 million, if I recall correctly; a large number of people --  
9 who opt for the Do Not Broadcast.

10 **MR. GUPTA:** Yes. Thank you, Your Honor.

11 We're on the balance-of-hardships prong here. Really  
12 quick, big-picture point: There is no hardship from the  
13 existence of hiQ in real terms to LinkedIn or Microsoft.  
14 Their valuation quadrupled during the lifespan of hiQ.  
15 Microsoft today is trading at an all-time high. Putting hiQ  
16 out of business is not going to boost their market  
17 capitalization over the next period of time before we take this  
18 case to the next level.

19 Now, getting to the points that you asked about, the  
20 premise of hiQ's business is very simple. It's: "Public"  
21 means "public." They built a business around analytics on  
22 public information.

23 The most glaring silence in the papers of opposing counsel  
24 is on the fact that we cited a tremendous number of cases that  
25 say there is no expectation of privacy; that users

1 affirmatively publish on the Internet. And that could be  
2 published expressly with a public designation, which is what  
3 we're talking about in the context of LinkedIn.

4 We've shown you that there's a button. And I have a  
5 better printout if you want one today, but I can tell you what  
6 it says. It's, *Make my public profile visible to everyone.*  
7 "Everyone" is a strong word, Your Honor.

8 And when you hover over the information box for that, what  
9 it says is it will be visible to all LinkedIn members, as well  
10 as others who find you through search engines; e.g., Google,  
11 Bing, or other services. So it's everyone: The public,  
12 members, nonmembers, humans, and, to use their term, "bots."  
13 "Everyone" means everyone.

14 **THE COURT:** What's the record cite?

15 **MR. GUPTA:** That's Exhibit E to the TRO, Your Honor.  
16 I'll hand up a cleaner copy for you.

17 There you go, Mr. Verilli (indicating).

18 (Whereupon a document was tendered to the Court.)

19 **MR. GUPTA:** So, Your Honor, the case law that we  
20 cited actually shows that even when it's not designated public,  
21 and if it's just shared with a few people, you've lost your  
22 expectation of privacy under the law; but that's not what we're  
23 talking about here. We're talking about stuff that people  
24 affirmatively make public. Mr. Verilli is --

25 **THE COURT:** Well, what about those who also

1 affirmatively choose Do Not Broadcast?

2 **MR. GUPTA:** Okay. Let's talk about

3 Do Not Broadcast. We were puzzling over what this is. What  
4 does it mean? We're talking about public profiles.

5 So the first thing I did is I asked my client, *What are*  
6 *they talking about? What is this Do No Broadcast argument that*  
7 *they're making?*

8 And my client's response was, *We don't do that.*

9 What they're accusing us of doing is something that Keeper  
10 doesn't do. Keeper doesn't provide this continuous feed of  
11 updates in to users' employers' HR departments.

12 What they've accused us of doing is: Every single change  
13 members make to their profiles goes to the employer.

14 The way Keeper actually works is a bunch of different  
15 factors are put into an algorithm, and out comes a composite  
16 score.

17 So it could say, you know, John Doe. He's at a -- he gets  
18 a score of 75. That's his score. That could include any  
19 number of factors. It's not actually the content of the  
20 changes. That would might be one factor, is: How frequently  
21 is he updating? But other things are huge contributors to that  
22 composite score.

23 Point is: What they're talking about is completely  
24 irrelevant to what Keeper actually does.

25 So I'm going, *What are they talking about here?* These are

1 some of the world's most accomplished lawyers. What are they  
2 talking about?

3 And I'm Googling it. And what I find is that there's  
4 actually a product they have, called "Update Me," which is  
5 something that's a part of their Recruiter product, which is a  
6 huge cash generator for them. And I'm handing up a true and  
7 correct copy of what I've printed out just yesterday.

8 (Whereupon a document was tendered to the Court.)

9 **MR. GUPTA:** So Recruiter has this Update Me feature.  
10 And the purpose of this feature is to know when to reach out to  
11 prospects.

12 I highlighted the first sentence here, because what they  
13 say is, *Every enhancement we make to our flagship product,*  
14 *LinkedIn Recruiter, is driven by our goal to make lives easier*  
15 *for recruiters like you.*

16 I thought that was sort of troubling, because we've heard  
17 so much in this case already about members first, members  
18 first, members first. Apparently, every decision they're  
19 making about this product has nothing do with members. It has  
20 to do with recruiters.

21 I highlighted the second bullet point, where they say what  
22 the product does. It alerts you when prospects make changes to  
23 their profiles, so that you can use those as signals to reach  
24 out at just the right moment. So they're providing this  
25 continuous feed of updates to their recruiters, who are paying

1 for a license.

2       And when you go to the next page, Your Honor, it gives you  
3 a little more detail on what this product does. And I've  
4 highlighted a sentence about three-quarters of the way down.  
5 So after you activated this feature on a profile by pressing  
6 the star button, what they tell you is from now on, when they  
7 update their profile or celebrate a work anniversary, you'll  
8 receive an update on your Home page. So any time a recruiter  
9 likes a candidate, they can turn on the Update Me feature. And  
10 then every time you visit your LinkedIn profile and make a  
11 change, they're going to have a notification. The recruiters  
12 are watching everything. When we talk about surveillance,  
13 that's surveillance.

14       When we're talking about what we do, we're talking about  
15 analytics on public information. We're taking the soapbox that  
16 the Supreme Court has talked about that the Internet provides,  
17 that -- everyone gets their own soapbox. They get to project  
18 their message to the whole world. We're taking that  
19 information, and making more interesting information out of it.

20       What they're doing is creating a system that allows  
21 them -- their recruiters -- to spy on people.

22       And the last sentence, Your Honor, is the real kicker.  
23 *And don't worry. They don't know you're following them.*

24       **THE COURT:** How do names get to LinkedIn Recruiter?

25       **MR. GUPTA:** Your Honor, the -- you mean how do they

1 find someone they want to --

2 **THE COURT:** Yeah. How does one even get on track?

3 **MR. GUPTA:** So, Your Honor, we have actually looked  
4 up the product collateral for Recruiter, because we've asked  
5 ourselves the same question. And it gets even more  
6 interesting.

7 So the Privacy Policy that they were talking about -- we  
8 quoted a few lines from the Privacy Policy in our reply brief  
9 on the Temporary Restraining Order. So here's a true and  
10 correct copy of the product data sheet for the Recruiter  
11 product.

12 (Whereupon a document was tendered to the Court.)

13 **MR. GUPTA:** And what it says here is pretty  
14 remarkable. So this is the candidate-search tool to find the  
15 perfect hire, even if they're not looking for a career move.  
16 *Zero in on the right person with 20-plus premium search*  
17 *filters.*

18 So they provide search filters. If I want, you know, a  
19 lawyer who knows copyright law, you know, I can -- I can find  
20 them using the search filters.

21 And the second bullet point is, *View full profiles for the*  
22 *entire LinkedIn network.* All 500 million plus members. Full  
23 profiles, Your Honor.

24 So what people are checking here when they're saying, *Give*  
25 *my profile only to my network, or Make it visible to no one --*

1 in this (indicating), that has absolutely no truth relative to  
2 recruiters. Recruiters have full access to the whole thing.

3 Now this gets better, because they've been talking about  
4 Privacy Policy. Right? Well, in our reply brief he cited a  
5 couple of lines from the Privacy Policy. And I'm just going  
6 to pull those up. So page 15 of our TRO reply brief. They've  
7 got -- we quote their privacy pledge. So the privacy pledge  
8 says, *We don't provide any of your nonpublic information, like*  
9 *your e-mail address, to third parties, without your consent.*

10 They're selling all -- they're selling all of your  
11 information to recruiters.

12 And then they say, *We do not rent or sell personal*  
13 *information that you have not posted on our services, except as*  
14 *described in this Privacy Policy.*

15 Hm. Really?

16 So, Your Honor, privacy here is a pretext, plain and  
17 simple. We're talking about public information. Let's not mix  
18 apples and oranges. This isn't about surveillance. We don't  
19 engage in surveillance. What we're talking about is allowing  
20 people to achieve their potential in their careers. LinkedIn  
21 has created what is a fundamentally lopsided situation. What  
22 they're doing is giving recruiters this incredible arsenal to  
23 look inside companies, and recruit them away.

24 All we're doing is saying, *Look. There's a lot of public*  
25 *information out there. There are advantages to employee*



1 *retention. There are going to be stars within your*  
2 *organization you don't want to lose. We've got algorithms that*  
3 *will help you identify those stars, and give you a way to*  
4 *counteract this incredibly destructive process of -- of*  
5 *recruiting people out of companies.*

6 Companies today -- if you talk with them, they're going to  
7 tell you that they have trouble keeping employees for more than  
8 five years. It's really, really hard to run a company. Can  
9 you imagine running a law firm or an organization, if it was  
10 such a revolving door?

11 So, Your Honor, Do Not Broadcast carries really no  
12 weight. And what we found in our research of was extremely  
13 disconcerting.

14 **MR. VERILLI:** So, Your Honor, might I --

15 **THE COURT:** It seems disconcerting to users all  
16 around. What you're saying is notwithstanding all of the  
17 privacy concerns, you're saying that -- sort of unclean hands;  
18 that LinkedIn has already doing all sorts of things that are at  
19 least as problematic as yours, so what's the big deal? Why not  
20 add one more straw to that camel's back?

21 **MR. VERILLI:** Your Honor, might I --

22 **MR. GUPTA:** Yeah. Your Honor, I do want to  
23 address -- Mr. Verilli did say a lot of stuff. So it's going  
24 to just take me a couple minutes.

25 My point is really much simpler than that, Your Honor.

1 I'm not making an unclean-hands argument.

2       What I'm saying is that "public" means "public." We're  
3 working on public information. We're doing stuff that has no  
4 privacy concern associated with it. And they haven't cited a  
5 single case that states anything to the contrary.

6       In fact, you'll see in our supplemental briefing we found  
7 that LinkedIn, itself, has made extensive argumentation of the  
8 same form in their own cases, where they've been accused of  
9 doing things like using people's contacts, and sending  
10 unsolicited e-mails to those contacts, inviting them to  
11 LinkedIn. And their rationale in those cases was, *Well,*  
12 *everyone knows your a member of LinkedIn, because you have a*  
13 *public profile on LinkedIn, so there's no additional privacy*  
14 *violation. That was your own affirmative act of making it*  
15 *public.*

16       So what I'm saying is this is really uncontrovertible  
17 territory that we're talking about here. We're talking about  
18 stuff that actually both companies agree on.

19       I want to talk a bit about the User Agreement. So the  
20 User Agreement doesn't contain any -- any clear waiver. The  
21 User Agreement is a -- is a hornets' nest of contradictory  
22 information. It says -- if you walk through the Don'ts in this  
23 Agreement --

24               **THE COURT:** Which tab is this, again?

25               **MR. GUPTA:** So this is Exhibit B to the

1 Rockwell Declaration.

2           **THE COURT:** Yep.

3           **MR. GUPTA:** Okay. So if you go to the Don'ts, which  
4 is a section near the end of the document --

5           **THE COURT:** Section 8?

6           **MR. GUPTA:** I'm sorry. Did you find --

7           **THE COURT:** Section 8?

8           **MR. GUPTA:** Yes, it's in Section 8.

9           There's a whole series of don'ts here, and these  
10 include -- when you go through them and read them carefully,  
11 they include things like -- so, for example, the fourth from  
12 the top. It says, *You can't scrape or copy profiles and*  
13 *information of others through any means, including crawlers,*  
14 *browser plug-ins and add-ons, and any other technology or*  
15 *manual work.*

16           So you can't copy a profile through manual work. Yet, in  
17 order to use the profiles, you have to access these things, and  
18 you have to make a copy to -- at least to your computer.

19           Furthermore, there's actually a feature on the profile  
20 that allows you to save a copy to your own computer, thereby  
21 creating a manual copy. And then you can print it. There's --  
22 it says you can't share information of others without their  
23 express consent, yet their user interface actually has a Share  
24 button on it. It even says you can't manually access the site,  
25 which is extremely ironic in this context. Everybody's,

1 apparently, in violation of their terms of agreement -- of  
2 their User Agreement, just by using the site.

3 **THE COURT:** Which number are you looking at?

4 **MR. GUPTA:** So that one is --

5 **THE COURT:** Is it 8.2? Don't?

6 **MR. GUPTA:** It's -- it's in the Don'ts. So if you go  
7 to the fifth from the bottom, it says, *You can't use manual or*  
8 *automated software -- manual or automated software, devices,*  
9 *scripts, robots, other means or processes to access, scrape,*  
10 *crawl, or spider the services or any related data or*  
11 *information.*

12 So these are just extremely overbroad. And there's no way  
13 you could not allow your users to manually access the site.

14 But anyway, Your Honor, the point is this User Agreement,  
15 if -- if --

16 First of all, those Don'ts don't even survive termination.  
17 So they terminated hiQ from the Agreement. And if you look  
18 at what expressly survives termination, these Don'ts do not  
19 survive termination. So you're absolutely right.

20 The other thing to keep in mind is that this Agreement has  
21 a dispute-resolution provision in it: Section 6. And  
22 Section 6 says, *You agree that the laws of the State of*  
23 *California, excluding its conflict-of-law rules, shall*  
24 *exclusively govern any dispute relating to this Agreement*  
25 *and/or the services.*

1       So if they're going to introduce the User Agreement into  
2 this dispute, then this dispute relates to the User Agreement.

3       And they've got no CFAA claim anymore, because that's  
4 federal law.

5       And all their preemption arguments are out the door.

6       So this is just -- this is all theatrics. It carries  
7 absolutely no legitimate weight.

8       Your Honor, the *Don't scrape or don't automatically*  
9 *collect information* statements that are in here -- all of these  
10 self-contradictory statements in the User Agreement are clearly  
11 contradicted by what the users actually read and actually click  
12 on, which says, *Make it public to everyone: Visitors, members,*  
13 *humans, and bots.* That's what people are asking for. That's  
14 what they're consenting to.

15               **MR. VERRILLI:** Your Honor, may I respond?

16               **THE COURT:** Yes.

17               **MR. GUPTA:** Your Honor, I did want to just --

18               **THE COURT:** Well, I want to move on.

19       Go ahead briefly, please.

20               **MR. VERRILLI:** Yes. Several points.

21       Let me start where Mr. Gupta finished. If Your Honor  
22 looks at the document he handed up, the very top of it, what it  
23 says is that by -- what you're agreeing to is making the  
24 information visible. Visible. That's what you're agreeing to  
25 here, and that's it.

1           Second, with respect to his points about  
2 Do Not Broadcast, I think, with all due respect, Your Honor,  
3 he did not answer Your Honor's question. He says he points to  
4 their algorithms.

5           Well, of course, their algorithms focus on whether  
6 LinkedIn members change their profiles. That's what drives up  
7 their score.

8           **THE COURT:** Well, when you say "focus on," how do I  
9 know how big a factor it is?

10           **MR. VERILLI:** Why -- well, why don't you ask  
11 Mr. Gupta whether a change in the profile makes a difference,  
12 and how big a factor it is.

13           But then in addition, Your Honor, with respect to this  
14 Recruiter point, now, this wasn't made in the briefs. And I  
15 apologize to Your Honor that I'm not fully able to respond to  
16 it, but with all due respect, it's a bit of an ambush here.  
17 And we will find out. We will find out what information is --  
18 relevant information with respect to this Recruiter product;  
19 but one thing is clear on the face of it is that that's not  
20 information that goes to your employer. So that's not  
21 information that compromises your privacy and your employment  
22 status in the way that their product does.

23           And if I could just ask Mr. Blavin to make a couple of  
24 additional points.

25           **MR. BLAVIN:** Thank you, Your Honor.

1           And our client is here, who just confirmed that LinkedIn's  
2 understanding is that when the member selects  
3 Do Not Broadcast, that the Recruiter product respects that,  
4 and those changes are not notified to the recruiters.

5           Moreover, the Recruiter product is entirely different than  
6 hiQ's product. The Recruiter product is where the recruiters  
7 are reaching out to people about job opportunities. People  
8 would welcome that. There are new opportunities out there.

9           Their product is doing something entirely different.

10           **THE COURT:** What information -- what warning's given?  
11 Because you placed such a premium on protecting the privacy  
12 rights of your users, where are users informed that no matter  
13 what setting they pick, public or not, it appears that  
14 recruiters will have access to that?

15           **MR. BLAVIN:** Well, with respect to recruiters, if you  
16 look on the Privacy Policy, Section 2.12, Talent Recruiting,  
17 Marketing, and Sales Solutions -- I believe that's Exhibit C to  
18 the Rockwell Declaration -- it explicitly states that user data  
19 is made available to recruiters.

20           It goes on to say that you may limit --

21           **THE COURT:** Where are you looking at? What section?

22           **MR. BLAVIN:** 2.12. I just want to make sure that's  
23 the right exhibit.

24           **THE COURT:** It says, *You may limit or prevent such*  
25 *subscribers from exporting your profile information by*

1 *configuring your public profile visibility settings --*

2 **MR. BLAVIN:** Correct.

3 **THE COURT:** -- *restrict access.*

4 **MR. BLAVIN:** And moreover, if you select  
5 Do Not Broadcast, that means those changes -- those  
6 notifications -- are not made to the recruiters on a continuous  
7 basis.

8 **THE COURT:** Well, how does that square, though, with  
9 this alleged collateral here that says that you can view full  
10 profiles of the entire LinkedIn network, not just those who  
11 select public view? Because all 500-plus million --

12 **MR. BLAVIN:** Well, that's -- that's a collateral  
13 material that's made to advertisers.

14 These are the privacy profile settings which are described  
15 to the users.

16 **THE COURT:** Well, when you "just" -- this is coming  
17 from -- if this is an authentic LinkedIn.com website. So  
18 representation is made. You're saying this is not a truthful  
19 representation?

20 **MR. BLAVIN:** No, no, no. All I'm saying is that, as  
21 a general matter, yes, all profile information for members is  
22 visible --

23 **THE COURT:** Well, then how can that be --

24 **MR. BLAVIN:** -- subject to the privacy policies.

25 **THE COURT:** How is that consistent with 2.12?



1 Because it just said you can configure your profile-visibility  
2 settings to restrict those fields.

3 **MR. BLAVIN:** I think it's a general collateral  
4 material describing that member information is available,  
5 obviously, subject to the privacy-policy protections which  
6 LinkedIn is committed to its users to do, which is made  
7 explicitly clear in 2.12. And Your Honor, again, we've just  
8 been thrown this --

9 **THE COURT:** Well, at some point let's step back.  
10 You are placing a lot of your arguments about business  
11 model, protecting the privacy, maintaining the trust and  
12 integrity of your user base, based on, frankly, fine print of  
13 various policies which, assuredly, a very small percentage of  
14 the people of your users would actually read and understand.  
15 What they're likely to look at is when they actually make the  
16 choice that's on the Web page. That doesn't have all of these  
17 qualifiers.

18 So, you know, we can sit here for nine hours, and you go  
19 through every damn piece of paper. And, frankly, I don't find  
20 that convincing.

21 **MR. BLAVIN:** Your Honor, if I could quickly respond  
22 to that.

23 **THE COURT:** You're the one talking about business  
24 model, and putting the privacy rights of your users so high;  
25 but frankly, you're doing that on a legal basis that I don't

1 find, in the real, practical world, very persuasive --

2 **MR. BLAVIN:** Your Honor --

3 **THE COURT:** -- so let's move on to something else.

4 **MR. BLAVIN:** Just very quickly, to respond to: Is it  
5 in real time? When users make changes to their profile, this  
6 is in the supplemental Rockwell Declaration. Right there, with  
7 respect to every change, they have the option of not  
8 broadcasting it. That is not buried in a Privacy Policy.  
9 That is made clear to the user.

10 **THE COURT:** That's your best case.

11 So what's your response to --

12 **MR. GUPTA:** My response to that --

13 **THE COURT:** -- how much effect --

14 I don't know what your algorithm is -- maybe you don't  
15 know exactly -- but how do I know there's not a fairly close  
16 one-to-one correlation between number of changes, and ranking?  
17 That number of 57, or whatever it is.

18 **MR. GUPTA:** Your Honor, what I'm told is that there  
19 are a lot of factors. I don't know how many factors. I don't  
20 know what the weighting is.

21 But I can tell you one thing about this Do Not Broadcast  
22 argument, just to finish it off. This idea that there's this  
23 moment of consent when the user clicks the radio button that  
24 says Do Not Broadcast -- the problem is the law recognizes  
25 consent if it's informed consent.

1           And the document that we handed up to you explained that  
2 the Recruiter product, when it's doing this Update Me  
3 feature -- what we're calling, to use Mr. Verrilli's term,  
4 "surveillance" -- that it says, *Don't worry. They -- the*  
5 *user -- don't know you're following them.* The user doesn't  
6 know that the recruiters are following them.

7           **THE COURT:** We're not on the same -- yeah. You  
8 already said that; but what does that have to do with my point?

9           You're saying they violate expectations, so you can go  
10 ahead and violate?

11           **MR. GUPTA:** No, that's not what I'm saying, Your  
12 Honor.

13           **THE COURT:** It sounds like it. I'm asking you a  
14 question.

15           **MR. GUPTA:** Right.

16           **THE COURT:** And in most -- unbeknownst to most users,  
17 this thing exists. In fact, you apparently just found this  
18 yesterday. Otherwise, you would have included this, I hope, in  
19 your supplemental --

20           **MR. GUPTA:** Oh, absolutely, Your Honor.

21           **THE COURT:** -- rather than springing it on counsel  
22 and the Court the last minute.

23           **MR. GUPTA:** Yeah.

24           **THE COURT:** So the chances of an actual user knowing  
25 of this now acting responsively and informing their decisions

1 are very, very small, when you, lead counsel, didn't even find  
2 this when it's the center of your case.

3       So the question still -- and I guess you've told me now  
4 you can't answer this. To the extent people have opted for --  
5 and I'm going to forget all of this collateral stuff; all of  
6 these fine prints; Exhibit Triple E to some declaration. The  
7 thing that people see says, *Don't Broadcast*.

8       And if that, in fact, results in -- if changes do have a  
9 large influence on whether they become ranked highly on Keeper,  
10 that makes it more problematic. I'm not saying that's  
11 dispositive. That creates a potential problem; but apparently  
12 you can't tell me how much influence. There's this black-box  
13 algorithm, and so we don't know, as we sit here.

14           **MR. GUPTA:** Your Honor, there's -- I don't know. And  
15 the employer doesn't know, either. So it kind of -- it's not a  
16 signal that someone is updating their profile in any meaningful  
17 way, because no one actually knows the trade-secret algorithm.  
18 That's the best I can tell you right now. Your Honor, if you'd  
19 like me to follow up, I'm happy to.

20           **THE COURT:** Well --

21           **MR. WISOFF:** I'd like to make one other point on  
22 that --

23           **THE COURT:** Make it short. We've got to move on.

24           **MR. WISOFF:** -- Your Honor, and that's that this  
25 notion that the broadcast feature is a statement by the user

1 that they don't want anyone to know that they've made changes  
2 to their profile is a pretty big leap of faith.

3 What it says is that every single time you make a change,  
4 it's not --

5 All of your contacts -- the people that you are connected  
6 with within LinkedIn; other LinkedIn members -- are not going  
7 to get an e-mail telling them that you've made that change.

8 **THE COURT:** So you're saying there are other reasons  
9 why --

10 **MR. WISOFF:** Well, certainly --

11 **THE COURT:** -- one would not turn that setting off.

12 **MR. WISOFF:** Absolutely.

13 From my perspective, I don't like it when I get bombarded  
14 with e-mails from all of my contacts about every little thing  
15 they've done. In fact, on a Facebook account I sometimes get  
16 an e-mail telling me when somebody's having dinner at a  
17 particular restaurant in Philadelphia. That's not really very  
18 important to me. And, in fact, it's somewhat annoying to me.

19 So to say that because people have checked this box, that  
20 they somehow want to override the public-visibility setting  
21 that they actually affirmatively agreed to, when all they're  
22 saying is they don't want every change sent by e-mail to their  
23 contacts, is a pretty big leap of faith.

24 The other point I would make is we keep talking about the  
25 consumers' expectation of privacy. And I would submit, Your

1 Honor, we're not writing on a clean slate here. There have  
2 been vast numbers of legal decisions that say as a matter of  
3 law there is no expectation of privacy in information posted on  
4 a public website.

5 And, in fact, there are quite a few cases -- and these  
6 were cited in our supplemental brief, and also in our original  
7 papers -- that say that even where you have selected your  
8 settings to be private, and not to share with the whole world,  
9 you still don't have an expectation of privacy, because once  
10 you've shared with some people, there's no expectation that  
11 those people won't share it with someone else.

12 So I think when we are talking about an expectation of  
13 privacy, we're in an area that's not just embodied in contract;  
14 it's embodied in well-established doctrinal law that says when  
15 you make your profile public, you have made a choice. There  
16 are pros. There are cons.

17 And every time you go out on the World Wide Web, there are  
18 all kinds of programs that are using your personal information  
19 for all kinds of purposes that you don't know about. And maybe  
20 at some point in time, Congress will pass a law that regulates  
21 that and puts restrictions on that; but right now what LinkedIn  
22 is trying to do is to restrict anyone that has any potentially  
23 competitive business from using what has become the world's  
24 largest database -- one of the most valuable databases in the  
25 entire world that has 500 million people in it -- on a scale

1 that is unimaginable.

2 And to say that they can raise these privacy issues, when  
3 they are reserved -- not only reserved to themselves, but are  
4 actually going out and selling the same information to other  
5 people for their own purposes, is the absolute hypocrisy. It  
6 is an absolute pretext.

7 **THE COURT:** Let's get on to the merits. Preview the  
8 merits question. And the front question is the CFAA, because  
9 if the CFAA applies, number one, that preempts all your state  
10 law causes of action.

11 **MR. GUPTA:** We disagree with that, Your Honor. And  
12 we hope to have some time to talk with you about that. We  
13 completely disagree with that.

14 And the perhaps the most emblematic case that refutes that  
15 point is *Nosal I*, where Judge Kozinski wrote very clearly that  
16 the CFAA was enacted interstitially, and that it does not  
17 displace common law, and that does not --

18 **THE COURT:** It doesn't displace. It's not field  
19 preemption; that is, if something that violates is found not to  
20 violate the CFAA, does that mean that that doesn't violate some  
21 state law.

22 But if something does violate, if conduct is deemed  
23 illegal under federal law, a state law can't make it legal.  
24 That's obstruction preemption.

25 **MR. GUPTA:** Your Honor, that's a direct-conflict

1 argument that they have made --

2 **THE COURT:** Yes.

3 **MR. GUPTA:** -- but we disagree with that, because  
4 nothing in the CFAA talks about revoking authorization, and  
5 nothing requires them to revoke authorization.

6 So it is often the case that people will make a choice to  
7 exercise some statutory right; but the choice to exercise a  
8 statutory right needs to be scrutinized under law that's  
9 intrinsic to that statute, itself. It happens all of the time,  
10 Your Honor.

11 So, for example, take another federal property right,  
12 patent law, governed in many cases by equitable estoppel  
13 doctrine. There are cases like *Qualcomm versus Broadcom*, which  
14 have said that even though you own a validly issued federal  
15 property right, you can't exercise it in a way that's  
16 inequitable.

17 And that's exactly what we're saying here, Your Honor, is  
18 that the statute doesn't talk about revocation. It doesn't set  
19 forth conditions for revocation. It doesn't purport to require  
20 revocation. And it certainly doesn't talk about revocation of  
21 access to public material. That was never within the  
22 contemplation of the statute; but the point is that there's  
23 plenty of law that says you cannot exercise these rights as  
24 weapons against other people to carry out unfair competitive  
25 aims.



1 Another example of that is *U.S. versus Microsoft*, another  
2 federal property right, which is the copyright right, where the  
3 D.C. Circuit, when approving the consent judgment against  
4 Microsoft, said that Microsoft made an argument that, *Well, we*  
5 *owned duly issued copyrights on all of our Windows software, so*  
6 *we can go out there and put all of these onerous restrictions*  
7 *on our licensees.*

8 And the D.C. Circuit said that that borders on frivolous.  
9 And it said that that's like saying, *Because I own a baseball*  
10 *bat, I can do whatever I want with it.*

11 **THE COURT:** Well, but has to be frivolous in order  
12 for it to be unenforceable; doesn't it?

13 **MR. GUPTA:** I don't think so, Your Honor. I think  
14 that -- I don't think that was a legal requirement.

15 I think the Judge was a little bit -- bristled at it.

16 The citation for that, Your Honor, is 253 F. 3d. 34 for  
17 the *U.S. versus Microsoft* case.

18 And the *Qualcomm versus Broadcom* case is 548 F. 3d. 1004  
19 Federal Circuit 2008, where equitable estoppel prohibited the  
20 exercise of patent rights against a particular standard --  
21 products that adhere to a particular standard, because Broadcom  
22 had not disclosed its patents to the standards-setting  
23 organization.

24 **THE COURT:** Isn't that a matter ultimately of federal  
25 law incorporating common-law principles? You're saying that's

1 a stand-alone state law that --

2 **MR. GUPTA:** Your Honor, the equitable estoppel  
3 doctrine could be arguably a federal common law doctrine, so I  
4 don't know if it would qualify as a state or federal common  
5 law; but my point is simply that a federal property right, to  
6 the extent it may exist, does not exist bereft of a matrix of  
7 regulations on how you can use those property rights.

8 **THE COURT:** Well, that still ultimately is a question  
9 of federal law, and whether it recognizes a defense that  
10 incorporates certain matters; but to say, for instance, that  
11 the California constitutional right of free speech could  
12 preëempt -- reverse preëempt, I guess -- a federal statutory --  
13 or prevent somebody from exercising statutory rights -- that  
14 seems odd to me. I mean --

15 **MR. GUPTA:** Your Honor, it --

16 **THE COURT:** Assuming it's not a *Noerr-Pennington*  
17 problem.

18 **MR. GUPTA:** Yeah. Your Honor, so on this point, to  
19 me, it strikes me as a very straightforward point, because if  
20 you think about -- they used a metaphor of trespass.  
21 They're -- a lot of their argument is based on the CFAA as a  
22 trespass statute.

23 Well, the case of *Marsh versus Alabama* and the case of  
24 *PruneYard* -- these are all cases that talk about fundamentally  
25 trespass. And what they say is that the physical trespass law

1 needs to cede to free speech principles.

2 And so these property rights always exist within a matrix  
3 of other rights.

4 **THE COURT:** Well, that's a property right that  
5 accedes to a federal constitutional right. There's not a  
6 Supremacy Clause problem there. That's a question of whether  
7 or not, you know, in the hierarchy of things, a constitutional  
8 right prevails. I'm talking about state and federal. Let me  
9 ask --

10 **MR. GUPTA:** Your Honor, Your Honor, I just have one  
11 example. I want to just --

12 **THE COURT:** One more example, and then I want to --

13 **MR. GUPTA:** Let me give you an example, which is if  
14 the CFAA had this sweeping, unbridled power of revoking  
15 authorization to anyone, it would lead to incredibly absurd  
16 results.

17 So let me give you an example. Let's say that I'm a Web  
18 hosting company. And you're hosting your business' services on  
19 my servers. So we have a contract governed by California state  
20 law. In that situation, I owe it to you that I'm going to  
21 continuously provide service to you for three years.

22 Under their interpretation of the CFAA, I could simply  
23 revoke your access to the server. You can never come onto the  
24 server again, which you have a contract with me for. But the  
25 CFAA action that I took would preëempt California law. And, to

1 boot, you know, there's all of these other consequences of the  
2 CFAA that are unspeakable.

3 **THE COURT:** So your argument is, for instance,  
4 whether or not there's a valid withdrawal of authorization  
5 which would be necessary in order to trigger CFAA protection  
6 might be governed by state law? State contract law?

7 **MR. GUPTA:** Yeah. The conditions and motivations and  
8 circumstances under which somebody might choose to revoke  
9 access under the CFAA would need to be governed by overarching  
10 principles of equity, common law, unfair competition. It's not  
11 a weapon.

12 **THE COURT:** All right. What's your response on just  
13 the preemption question?

14 **MR. VERILLI:** Yeah. So Your Honor's quite right that  
15 if the CFAA applies. It preempts all of their causes of  
16 action.

17 I would just note -- and I want to go into preemption in  
18 depth, but I would just note for Your Honor's focus here that  
19 before you get to the question of preemption, they have got to  
20 have a likelihood of success on an affirmative cause of action  
21 that justifies the injunction that they've claimed, preceded by  
22 the intentional interference or unfair competition.

23 **THE COURT:** Well, the preemption would make that  
24 difficult, because you don't even get to those if there's  
25 preemption.

1           **MR. VERILLI:** Right, right.

2           **THE COURT:** That's why I took that first.

3           **MR. VERILLI:** Yes, yes.

4           **THE COURT:** If there is no preemption --

5           **MR. VERILLI:** You're totally right about that, Your  
6 Honor --

7           **THE COURT:** -- then you have to get to their  
8 merits --

9           (Reporter requests clarification.)

10          **MR. VERILLI:** Forgive me.

11          You're totally right about that, Your Honor, but the  
12 reverse is also true, in that if they don't have a viable cause  
13 of action, you don't need to get to the preemption. And that's  
14 what I'm saying. You can resolve it either way. Under either  
15 one --

16          **THE COURT:** I understand.

17          **MR. VERILLI:** Now with respect to preemption, I think  
18 the right thing to do here is to focus on the relevant  
19 statutory materials and the relevant precedent which address  
20 the scope of the CFAA, and which indisputably lead to the  
21 conclusion that their claims are preempted.

22          And I don't think there's any serious dispute here that  
23 we're within the plain meaning of the terms of the CFAA. This  
24 is unauthorized access resulting in obtaining information that  
25 inflicts more than \$5,000 worth of damage, so we're within the

1 plain terms. We have an express private right of action  
2 entitling us to relief under those terms. We're within the  
3 plain terms. And there's no doubt about that.

4 They're making an argument that the plain terms need to be  
5 read more narrowly than they -- than they, on their face,  
6 clearly state; but I would submit, Your Honor, that binding  
7 Ninth Circuit precedent has already definitively rejected the  
8 very argument they're making about the need to narrow the  
9 scope.

10 **THE COURT:** Well, I want to talk about the CFAA in a  
11 moment, but before we get there I just want to hear the  
12 predicate about what the consequences of finding a CFAA  
13 application here. And is there an exception to preemption?

14 One of the arguments Mr. Gupta's making is that, yes, even  
15 if the CFAA were generally applicable, if it is misused in a  
16 way that violates certain state rights like breach of contract  
17 or perhaps breach of the law of unfair competition to  
18 monopolize -- the use of monopoly power -- that there is room  
19 for state-law limits on the employment of that CFAA cause of  
20 action.

21 **MR. VERILLI:** Yes. I don't think there's -- there's  
22 absolutely no authority for that proposition. Your Honor has  
23 zeroed in on exactly the right points with respect to the  
24 *Microsoft* case and the *Qualcomm* case. In those cases, those  
25 were both instances of reconciling two different strands of

1 federal authority, and making them work together.

2       They have not cited a single case -- and I'm not aware of  
3 a single case -- suggesting that a federal statute's squarely  
4 on point, and applies, and creates a particular right or  
5 creates a particular prohibition that -- based on some kind of  
6 equitable notion, that that would be unfair under state law;  
7 that the federal statute doesn't apply. There's no case for  
8 that proposition. It's a direct refutation of the Supremacy  
9 Clause.

10       Now, the -- this is, as Your Honor correctly identified, a  
11 question of conflict preemption here, but in -- but I think  
12 it's worth remembering that what my friends on the other side  
13 are doing here is asserting an affirmative right to get  
14 injunctive relief that would require us to disable our  
15 technical measures so they can get on our website and get on  
16 our servers, in contravention of our policies.

17       And so what we've asserted is our right under the CFAA to  
18 block that unauthorized access. And, having asserted that  
19 right -- and we believe that we're clearly in the right here.  
20 And I do want to talk about them finding Ninth Circuit  
21 precedent on the question of the scope of the CFAA.

22       But having asserted that right, if we are correct that we  
23 have a right --

24       And, as I think we've pointed out in our brief, *Power*  
25 *Ventures* specifically describes the CFAA as a computer trespass

1 statute. Its function is to provide remedies against  
2 unauthorized access that are in the nature of a trespass.

3 And if that is what they are doing, they are violating  
4 the -- they are violating the very thing that federal law  
5 exists to protect. And --

6 **THE COURT:** Well, let me ask. You place emphasis on  
7 sort of the trespass notion. The Ninth Circuit has referred to  
8 the CFAA as kind of a digital trespass statute. What's your  
9 opinion of Professor Orin Kerr's analysis, if you read that?

10 **MR. VERILLI:** Yes, I have. I think --

11 **THE COURT:** And, you know, looking at trespass now  
12 through the lens of norms and silent expectations --

13 And the starting point, as he posits, is that the World  
14 Wide Web is presumptively open. And once you've placed  
15 something on the Web, it's like putting it on the town square.  
16 There are ways of taking it out of that arena, and thereby  
17 invoking protection in the application of that CFAA. That  
18 de-emphasizes use of authentication techniques and what you  
19 calls "bumps in the road," you know, like, you know, certain IP  
20 disablers and other things that may make it difficult.

21 But his view is that there should be a presumption  
22 under -- borrowing from the normal methodology of trespass  
23 evolution law applied in the digital domain to start with a  
24 very powerful premise that anything on the Web should be  
25 presumptively open, and not subject to criminalization, even if



1 you get around these -- what he calls "speed bumps" on the  
2 CFAA.

3 I take it you may not agree with his sense of it.

4 **MR. VERRILLI:** Professor Kerr is a smart law  
5 professor. He's wrong about this.

6 Judge Breyer, in *3Taps*, is right.

7 But I think even more importantly, the Ninth Circuit has  
8 already definitively rejected that very argument. And you can  
9 see it in two cases. The first is in *Power Ventures*.

10 And if the Court looks at page 1067 of 844 F. 3d. in *Power*  
11 *Ventures*, the Ninth Circuit sets out the standard for when the  
12 CFAA applies. And it says that -- acknowledges that a  
13 violation of terms of use of a website, without more, can't  
14 establish liability under the CFAA, but it does say -- and this  
15 goes to a point Mr. Gupta was making earlier, and definitively  
16 refutes that point. It does say that, *and then you can run*  
17 *afoul of the CFAA when a person has no permission to access a*  
18 *computer, or when permission has been revoked explicitly.* So  
19 it's right there. The Ninth Circuit definitively interpreted  
20 the CFAA to cover revocation. *Once permission has been*  
21 *revoked, technological gamesmanship or the enlisting of a third*  
22 *party in gaining access will not excuse liability.*

23 **THE COURT:** But neither Facebook -- Facebook does not  
24 address the situation. There, I mean, arguably, the defendant  
25 was able to kind of get into the website and obtain data on

1 usage and facilities in order to -- I forget whether it was  
2 broadcast e-mails, or send out communications. That was not  
3 just using publicly available data. I mean, so the Court  
4 didn't have to address this question that Professor Kerr --

5 **MR. VERILLI:** So I want to get back --

6 **THE COURT:** It was more traditional trespass. It was  
7 getting into the system; deep into the system.

8 **MR. VERILLI:** I want to get back to *Power Ventures*,  
9 but I do think *Nosal II* -- and that's, of course, a case Your  
10 Honor's very familiar with. But in *Nosal II* -- and I think  
11 this is at pages, if I'm remembering correctly, 1037, 1038 of  
12 *Nosal II*. There was a question about whether the Jury  
13 Instruction in that case was correct as a matter of law. And  
14 the argument was that you couldn't have, under the CFAA -- the  
15 defendant's argument was, *You can't have a violation of the*  
16 *CFAA unless, at a minimum, there is a technological barrier in*  
17 *place that impedes access.*

18 And what the Ninth Circuit held in that case was that  
19 there is no such requirement under the CFAA; that it's not  
20 within -- the plain terms of the statute don't impose that  
21 requirement, and it would make no sense to impose that  
22 requirement. That's what the Ninth Circuit held in the case.

23 And, of course, they're asking you to go a step beyond  
24 *Nosal II*, because in *Nosal II* the argument was, *So you have to*  
25 *show evasion or overcoming of technical barriers.*

1 Well, here we have the evasion or overcoming of technical  
2 barriers.

3 What they want to do is go further and say, *You can only*  
4 *violate the CFAA when you've got a wall up, with password*  
5 *protection.* I just think it's definitively refuted there.

6 And now if I might go back to *Power Ventures*, because I  
7 want to direct Your Honor's attention, if I could, to the next  
8 page after the one I was quoting, because I think this also,  
9 even taking Your Honor's point, definitively refutes the  
10 position of my friends on the other side. So what the Court  
11 said and held in *Power Ventures* was that for Power to continue  
12 its campaign against -- campaign using Facebook's computers, it  
13 needed authorization both from individual Facebook users who  
14 control their data and personal pages, and from Facebook, which  
15 stores the data on its physical servers. Permission from the  
16 users, alone, was not sufficient to constitute authorization  
17 after Facebook issued the cease-and-desist letter.

18 Now, what the Court is saying there -- and I would submit  
19 it's saying in very plain terms -- is that the argument that my  
20 friend on the other side is making that once users make this  
21 information of theirs public or available to be visible, at  
22 least, on the Internet, that at that point, that the entity  
23 that controls the computer or server on which that information  
24 resides loses all authority -- loses all authority to control  
25 the use of bots to scrape that data, or other unauthorized

1 incursions.

2 Well, *Power Ventures* expressly rejected that exact  
3 argument, saying *It's not enough that it's okay*. Because  
4 remember in *Power Ventures* it was okay with the users. They  
5 had agreed to let Power have access to their data. And the  
6 Courts --

7 So that's a step beyond here, where, of course, because of  
8 the issues we were talking about earlier this afternoon, they  
9 don't have that kind of affirmative agreement.

10 **THE COURT:** Well, but I think the focus that you're  
11 focusing on, as well as *Nosal* -- the main focus on *Nosal*, as  
12 evident by the dissent from Judge Reinhardt, was: Who has the  
13 power to grant that consent?

14 And the Ninth Circuit has come down squarely that it has  
15 to be consent of the operator of the site. If there is no --  
16 if there is no authorization in that sense, there is no  
17 authorization.

18 But the Professor Kerr point is a much broader -- it's a  
19 different issue. It's not a question of whom. It's a question  
20 of what. Is there, quote, "unauthorized" access being obtained  
21 to data that is otherwise open to the public in a way that's  
22 different from breaking into Korn Ferry's database, or getting  
23 into Facebook's?

24 And neither of those situations deal with this, I think,  
25 emerging issue, where there hasn't been a lot. And I think

1 Judge Breyer's decision is the one that comes closest to  
2 otherwise publicly available data to which certain speed bumps  
3 have been placed; technological speed bumps.

4 Is that the kind of thing that can be deemed subject to  
5 criminalization, within the meaning of the CFAA?

6 **MR. VERILLI:** I guess what I would say, Your Honor,  
7 in response to that: It's within the plain terms of the  
8 statute. There's simply nothing in the statute that supports  
9 drawing that line.

10 The Ninth Circuit has not drawn that line, and could have.  
11 It drew a line differently to try to deal with the problem that  
12 I think professor Kerr is trying to deal with. And that's why  
13 the Ninth Circuit requires the cease-and-desist letter. It  
14 says that the terms of service, alone, aren't enough, because  
15 it may not be clear enough that you're engaging in an  
16 unauthorized intrusion; but once you get a cease-and-desist  
17 letter -- and particularly when you get a cease-and-desist  
18 letter, and that's in combination with the owner of the  
19 computer or the owner of the server using technical measures to  
20 try to block your access -- when those conditions are present,  
21 then you're in a situation in which there is nothing unfair or  
22 untoward or improper about enforcing the CFAA, and granting the  
23 owner of the computer, the owner of the server, the right to  
24 enforce the terms on which this information will be made  
25 available.

1           **THE COURT:** Well, that's certainly true from the  
2 perspective of procedural due process and notice, because  
3 there, there's no question you've got notice, and so any  
4 deauthorization is well known. It's not a question of, you  
5 know, being surprised.

6           I don't know if it answers the larger question.

7           But I do want to ask you. I mean, I think the most  
8 powerful argument is that the plain language of the statute  
9 talks about accessing a computer without authorization.

10           **MR. GUPTA:** The simplest response to that, Your  
11 Honor, is the plain language of the statute says nothing about  
12 revoking authorization. It does not mention the concept of  
13 revoking authorization. The predicate of not having  
14 authorization under the CFAA is simply not having the rights,  
15 as a matter of user name/password-type credentials, to get into  
16 the system. And so when an employer revokes your  
17 authorization, your user name and password no longer work, and  
18 so you are without authorization.

19           That is the situation that has come up for the  
20 Ninth Circuit. This is a --

21           The idea that they can drive this truck into words that  
22 aren't in the statute -- that "revocation of authorization,"  
23 because in these cases the Court focused and used those  
24 words -- doesn't create enough capacity for the idea that all  
25 public information could have been --

1           **THE COURT:** I guess I don't understand your argument.  
2 You're saying that because the CFAA doesn't contain the words  
3 "revoke," that "without authorization" can only mean without  
4 authorization from the get-go, and not change?

5           **MR. GUPTA:** Your Honor, the point is that the entire  
6 framework of the CFAA was not contemplating a situation where  
7 people were plugging servers into an open Internet, and by  
8 virtue of simply putting the server onto the Internet, people  
9 could grab information from it.

10           That's the beauty of the internet. It's a big, public,  
11 open Internet. There is no initial authorization. It's just a  
12 physical act.

13           And when the CFAA was being enacted, they were thinking of  
14 authorization in the conventional, mainframe type of thing,  
15 which is, *I have an employee. I need to authorize the*  
16 *employee.*

17           **THE COURT:** No. I understand that. And, in fact,  
18 the CFAA started off with, as I recall, criminalization of  
19 hacking into government computers, and it was expanded two  
20 years later to include private computers, all well before the  
21 worldwide Internet became the World Wide Web. And so, you  
22 know, it's not hard to ascertain that Congress didn't have this  
23 in mind at the time. But what does one do?

24           I mean, I understand all of the policy concerns and the  
25 implications. And if suddenly you criminalize anybody who, you

1 know, wants to have access to a business competitor, a  
2 political rival, or anything else, and wants to do research,  
3 and some government agency doesn't want them doing research,  
4 and all the implications, in terms of the marketplace of  
5 ideas -- but what do I do with this plain, seemingly simple  
6 language?

7 "Accessing." Is there something secret about, nuanced  
8 about the term "accessing a computer" -- we know what that  
9 is -- "without authorization"?

10 Well, if you say, *Well, "without authorization" only means*  
11 *without initialing authorization, or you can't deauthorize when*  
12 *it involves the World Wide Web --*

13 **MR. GUPTA:** No, Your Honor. I think that it's -- I  
14 think -- you know. Look. Judge Kozinski already found once  
15 that that phrase, including the "exceeds authorized access," is  
16 ambiguous. We're not asking you to go out on a limb here.

17 Authorization is ambiguous, because even -- even  
18 Mr. Verrilli and I can disagree about whether these IP blocks  
19 constitute a deauthorization. Right?

20 I will point you to *Facebook versus Power Ventures*, where,  
21 in Note 5 what they say is the opposite of what Mr. Verilli is  
22 saying. They say simply bypassing an IP address would not  
23 constitute unauthorized use.

24 We're talking about speed bumps. Right? And  
25 Professor Kerr talks about speed bumps. Do speed bumps count



1 as authorization or deauthorization?

2 Our position is: Absolutely not.

3 Their position is: Absolutely yes.

4 So the language is undeniably ambiguous in the context of  
5 the modern Internet. And all we're saying is let's not fool  
6 ourselves, and say that this language is unambiguous. There is  
7 no authorization that happens, beyond just plugging in that  
8 computer, when somebody sets up public pages.

9 Your Honor, I did -- I actually want to cede the floor,  
10 because obviously a huge part of this argument is the principle  
11 of constitutional avoidance, but I just wanted to make two  
12 quick points. The first is that Mr. Verilli sort of presented  
13 this sky-is-falling scenario of, you know, if the CFAA doesn't  
14 allow them to kick us off, then they lose all authority to  
15 control what's happening on their computers. And obviously,  
16 that's not true. There are plenty of other bodies of law that  
17 give them the ability to regulate malicious hacking and other  
18 types of damaging activity.

19 **THE COURT:** Well, what would you do if you're hit  
20 with 95 million attempts a day, many of which may well be some  
21 attempt at hacking? You don't know for sure. You have to  
22 really just --

23 **MR. GUPTA:** Your Honor, so I think that --

24 **THE COURT:** What are you supposed to do in that  
25 situation?

1           **MR. GUPTA:** So this is a point that Mr. Verilli made  
2 earlier, and I didn't have an opportunity to get to, which is  
3 they get these 95 million attempts each day from people, and  
4 they're trying to block these visits. So these are people who  
5 are trying to protect their user-privacy issues. They  
6 rationalized it in the Rockwell Declaration on three grounds as  
7 to why they're blocking this information.

8           They said there's user-privacy issues.

9           And they said that it's to prevent identity theft and  
10 other fraud.

11          And they said it's to ward off denial-of-services attacks.

12          So protecting user privacy and preventing identity theft  
13 have absolutely no relevance to public pages. Case after case  
14 has held that public pages don't present a privacy concern.

15          The third is this warding off of denial-of-services  
16 attacks. We don't disagree that they have the right and they  
17 have the necessity to fight off these malicious intruders. And  
18 there are entire companies, entire businesses, security  
19 industries, built around that.

20          This is not what we are talking about here today. What we  
21 are talking about is they are trying to block a low-volume user  
22 who is not engaged in a denial-of service attack from accessing  
23 public --

24           **THE COURT:** But your injunction would --

25          I mean, are you acceding or do you acknowledge that they

1 would generally have the right to use bot blockers?

2           **MR. GUPTA:** Your Honor, they would have to use -- any  
3 kind of blocking mechanism would have to be narrowly tailored,  
4 and at a reasonable time, place, manner restriction from a  
5 free-speech point of view, and it can't be anticompetitive.

6           What they're doing here is obviously competitive.

7           **THE COURT:** So they would have to identify the source  
8 of each bot attack to determine whether that's a legitimate --  
9 whether that's a competitor, a potential competitor, versus a  
10 hacker, versus a foreign agent attempt at surveillance, or  
11 something else? I mean --

12           **MR. GUPTA:** Your Honor, my understanding is, if you  
13 look at their papers, they've listed four or five different  
14 types of protections that they use on their system. Most of  
15 them are designed to prevent large-scale intrusions that  
16 would -- that would impair their servers.

17           All we're saying is they cannot block us. They cannot  
18 block hiQ, which is trying to access public pages. They  
19 can't block for motivations --

20           **THE COURT:** So if they knew, for instance, that a  
21 particular user --

22           Let's say if you accede that they could have a general  
23 policy and have a general defense, a technical defense, I take  
24 it your position is that once they are aware through exchange  
25 that you are a user that doesn't fit into one of those threats,

1 that they would then have to "open the door," so to speak?

2           **MR. WISOFF:** I don't even think you have to go that  
3 far, Your Honor. We're asking for preservation of the status  
4 quo. So to the extent they had general blocking mechanisms in  
5 place, you know, we're not asking, as part of a preliminary  
6 injunction, at least, for removal of that.

7           What we're saying is that they --

8           And you raised this issue. Mr. Verilli raised this issue  
9 that we have to win on our affirmative state claims, or show  
10 that we have a likelihood of success on those in order to win  
11 here. I actually don't think that's entirely true.

12           And as we said in our supplemental brief, as a practical  
13 matter, it is only the CFAA Penal Code threat that they have  
14 made that -- and the criminal liability that attaches to that,  
15 that, as a practical matter, keeps us from coming back to the  
16 site, because --

17           **THE COURT:** So would you be satisfied with an  
18 injunction that's essentially a declaratory relief injunction?

19           **MR. WISOFF:** An injunction that they can't give force  
20 and effect to the CFAA Penal Code revocation, until the merits  
21 of whether those statutes apply, and how they apply, have been  
22 decided, because we've been able to gather data under the  
23 status quo with these mechanisms in place. Because these pages  
24 are publicly accessible, we've been able to do that prior to  
25 the lawsuit.

1           We just want to be able --

2           We don't want to be put out of business before the merits  
3 can be determined.

4           And so we're not asking the Court to say they have to take  
5 down all technical measures that generally block unidentified  
6 automated bots coming onto their site; but to the extent that  
7 they've specifically blocked our IP address, and have  
8 specifically -- are trying to criminalize our access to the  
9 website -- I mean, under the CFAA, even individuals can be  
10 criminally liable if they cause their company to access the  
11 site. So --

12           **THE COURT:** All right. Let me go back to the first  
13 question, then. What is your argument in terms of -- in the  
14 face of fairly -- what appears to be, at first glance, plain  
15 language?

16           I guess you're arguing that "authorization" is not plain;  
17 it's ambiguous.

18           Although if you read *Nosal II*, the Court goes to great  
19 lengths to talk about how that's plain language. It goes  
20 through just about every Circuit in the nation to back them up  
21 on that. So I'm not sure.

22           **MR. WISOFF:** Your Honor --

23           **THE COURT:** Maybe your argument is that in this  
24 context, in the context of the World Wide Web and the Internet,  
25 that "authorization" or "without authorization" has a different

1 meaning, not addressed by the Ninth Circuit or any other  
2 Circuit at this point.

3 **MR. WISOFF:** Correct.

4 **MR. GUPTA:** Right, Your Honor.

5 **MR. WISOFF:** That's our argument, because these cases  
6 that you're talking about --

7 You know, Mr. Verilli made a point that you don't have to,  
8 you know, have -- to contradict Professor Kerr's opinion, he  
9 talked about how it's not necessary to have a technical barrier  
10 like a password.

11 So you know, obviously, I can't walk back into your  
12 office, into your chambers, and look at your computer. I don't  
13 have authorization to do that. That information was never  
14 meant to be public.

15 So whether you have a password on your computer or not,  
16 that still falls within the CFAA, because the purpose of this  
17 statute was to protect information that's not generally  
18 available to the public, that only certain people are  
19 authorized to access.

20 But when you put up a website and you program a server to  
21 respond to every request, by definition, there's been  
22 authorization for the entire world.

23 And the idea that you could send a letter to one of  
24 billions of people who visit that website every day and say, *If*  
25 *you ever type our URL address into your computer while you're*

1 *sitting in the privacy of your home to view information that is*  
2 *public for every other person in the world to see; that that's*  
3 *a criminal -- a federal criminal violation, I submit, Your*  
4 *Honor, that you have to duty not to interpret a statute to lead*  
5 *to such an absurd result.*

6           **THE COURT:** So you would say that once you place it  
7 on a public setting for the World Wide Web, that is  
8 authorization? Even if you later attempt to delimit or revoke  
9 that individually on a case-by-case basis for purposes of the  
10 CFAA, that is not unauthorized?

11           **MR. WISOFF:** I can't imagine that Congress intended  
12 to criminalize that activity, or that any interpretation of the  
13 statute that would lead to that result would be a sensible  
14 interpretation, number one.

15           Number two, to the extent you are going to analogize to  
16 trespass law, trespass law has always lived in conjunction with  
17 other laws of general application. And we're not talking about  
18 a private home. And we're not even talking about a mom-and-pop  
19 business, but in the context of a mom-and-pop business, one of  
20 the cases they cite, *Alexis versus McDonald's Restaurants of*  
21 *Massachusetts* -- there is a Massachusetts trespass statute  
22 where somebody came into a restaurant, and the question is;  
23 whether they were properly thrown out or not. And the Court  
24 said that the statute on its face didn't admit of any  
25 exceptions of an owner's ability to exclude, but that the

1 statute has to be read within the body of other laws. And so  
2 it said, absent some invidious, ulterior purpose, then once  
3 proper notice has been given by the owner, the business  
4 licensee remains. He's subject to arrest.

5 So even in the real-property context -- you know, we're  
6 not talking about homeowners, but a business property. When  
7 you open it up to the public, you don't have unfettered rights  
8 to exclude people for any reason, whatsoever.

9 And in fact Judge Posner, in the *Desnick versus American*  
10 *Broadcasting Companies* case -- and this case was not cited by  
11 anybody. I found it by Shepardizing one of their cases; the  
12 *Dietemann versus Time* case. It distinguished that. It's at  
13 44 F. 3d. 1345, Seventh Circuit, 1995.

14 There was a case where ABC News fraudulently gained  
15 inducement into an eye clinic, in order to do an exposé, and  
16 then broadcast information about it.

17 And Judge Posner, under Illinois law, said, you know, in  
18 the context of business property that's been open to the  
19 public, we have to be careful about other policy considerations  
20 on trespass, and that the objectives of trespass law are to  
21 protect breach of peace, invasion of privacy, damage to  
22 property. And none of these things exist, because -- he went  
23 through each of the factors in the case, and said there was no  
24 breach of the peace, no disruption of the business, no damage  
25 to property, no invasion of privacy. And therefore, why would



1 you apply trespass law to -- to access to a business property  
2 that doesn't fulfill any of the purposes that trespass was  
3 enacted to address?

4       So I think to interpret a 500 million-member website open  
5 to billions of people on the World Wide Web -- to say that they  
6 can single out somebody that they don't like, because they're  
7 using information for a commercial purpose, ban them from the  
8 site, from gaining public information that anyone else in the  
9 world can get, and then say that's criminal -- and, by the way,  
10 not just if you're doing it by automated bots, but under their  
11 interpretation, if I got one of those letters, and I typed  
12 their website address in again, I'm a criminal, even if I just  
13 look at it, whether I manually copy it --

14               **THE COURT:** You disagree with Judge Breyer, I take  
15 it, in the *3Taps* case?

16               **MR. WISOFF:** I do disagree with Judge Breyer,  
17 although I do think that this case was different than this  
18 case.

19       And I think that their own privacy policies don't support  
20 their argument. And I think when they choose California law as  
21 the law to govern their dispute under their User Agreement,  
22 that it's a little bit hypocritical to come to court and say  
23 that California's law is preëmpted.

24               **MR. VERILLI:** Your Honor, may I have a few words?

25               **THE COURT:** Yes, you --

1           **MR. VERILLI:** Thank you, Your Honor.

2           **MR. WISOFF:** Your Honor --

3           **MR. VERILLI:** Thank you, Your Honor.

4           **THE COURT:** I've got to move on.

5           **MR. GUPTA:** Okay. Thank you. I just wanted to let  
6 you know that Professor Tribe would also like to speak.

7           **THE COURT:** All right. So we're going to move on.

8           **MR. VERILLI:** A few points.

9           Your Honor's identified Judge Breyer's opinion. And, of  
10 course, Judge Breyer noted the very statute at issue in the  
11 very next subsection draws a distinction between public and  
12 nonpublic computers. It doesn't draw that distinction in the  
13 preceding subsection, the one that's applicable to our case.  
14 So Congress knew how to draw the line; didn't draw it.

15           Second, with respect to the consequences of adopting the  
16 position my friend on the other side is urging, they kind of  
17 spun up a lot of smoke about how there won't be a lot of  
18 adverse consequences, but of course, there would, because their  
19 argument is that unless we've got a wall, and this information  
20 is password protected, that we can't assert a CFAA right  
21 against anyone. So it means not just that we can't assert it  
22 against them. We can't assert it against identity thieves,  
23 scammers, spammers -- you name it -- because it's not behind a  
24 wall. That's their argument.

25           And I think the consequences of adopting a position like

1 that in the absence of any statutory authority -- a  
2 Ninth Circuit authority, interpreting the statute pointing  
3 exact opposite direction would be extraordinary.

4           **THE COURT:** Well, what do you mean: You can't  
5 assert? If a hacker gets in, and breaches, and goes beyond  
6 just whatever the surface is that's visibly visible to the  
7 public, obviously, you have to -- a hacker would have to get in  
8 there and get information that is not public, but private --

9           **MR. VIRELLI:** But Your Honor has made a point  
10 already, though, that --

11           **THE COURT:** -- the CFAA would --

12           **MR. VIRELLI:** These bots are hitting us 95 million  
13 times a day. We don't know what they are in advance. But  
14 under their theory, we can't assert a CFAA against anybody.

15           **THE COURT:** You could use bots. You could employ  
16 self-help measures. That doesn't mean that then you can then  
17 enjoin the force of criminal law for somebody who defeats that  
18 bot, unless they get into the deeper layer.

19           **MR. VERILLI:** But then people who scrape for these  
20 other -- they say, *Well, we're scraping for this beneficial*  
21 *purpose.* Of course, we can test that.

22           But people who just scrape for nefarious purposes -- we  
23 can't use -- we can't invoke the CFAA against them. That's  
24 their position.

25           **THE COURT:** Well, if it's for nefarious purposes, you

1 may have a UCL claim. You may have a tort claim. You may have  
2 other statutes.

3           **MR. VERILLI:** Well, we may or we may not; but  
4 congress gave us this. And it does, by its plain terms, cover.  
5 The Ninth Circuit covers it.

6           If I could, before we move on to the constitutional  
7 issue -- and I know we're taxing Your Honor's patience --  
8 there's one really important point. My friends on the other  
9 side have been saying this over and over and over again. It  
10 just isn't right. They've premised their whole case on this  
11 argument that once the information is visible, that it's  
12 public, and that we have made it available to everyone, without  
13 conditions. And that just isn't right.

14           It's wrong in a number of ways that we've already  
15 discussed. There are multiple conditions that are imposed.  
16 Do Not Broadcast is one condition. The prohibition on  
17 scraping is one condition. The fact that we put these  
18 technical measures in place to block is one condition.

19           And it gets to a point that I think is just of fundamental  
20 importance here, and it's this. Public/nonpublic is not an  
21 on/off switch. That isn't how it works. Routinely information  
22 is made public, but subject to conditions. And I'll try to  
23 give a couple of commonsense analogies that I hope will go  
24 straight to the point.

25           Take a public library. A public library makes the

1 information publicly available. You go and get books and other  
2 information and material from the public library, but the fact  
3 that the information's available to the public in that sense  
4 doesn't mean that you can break into the library with a crowbar  
5 at 2:00 in the morning, because you're seized in with a desire  
6 to read Moby Dick. It doesn't mean that you can take a book  
7 out, when you're supposed to return it in two weeks, and keep  
8 it for a year, because you want that information. It doesn't  
9 mean if your library privileges have been revoked for abusing  
10 the rules, that you can show a fake ID at the door, to get back  
11 in. The information's public, but it's subject to conditions.

12 Same thing with a museum. Works of art are made available  
13 to the public for viewing. That doesn't mean that the museum  
14 can't impose conditions. You can't take flash photographs.  
15 Maybe you can't take photographs, at all. Maybe you've got to  
16 pay for admission. You've got, you know, a whole set of  
17 conditions that are imposed on the public access.

18 **THE COURT:** What if the museum had an outdoor display  
19 in the public square? Took it outside. A sculpture, or  
20 whatever it is. And they said, *Well, you're in a public*  
21 *square. It's a public place. You can see it's open to all,*  
22 *but then said, No photographs.*

23 Now, would that be trespass, if someone came up -- it's on  
24 public land -- and took a photo?

25 **MR. VERILLI:** If there was a reasonable time. It's

1 the government, of course. The First Amendment applies to  
2 them, which isn't us, because we're a private entity, and the  
3 First Amendment doesn't apply to us; but with respect to the  
4 government, the question there would be whether it's a  
5 reasonable time, place, and manner restriction. And it might  
6 be.

7 **THE COURT:** But I'm wondering about trespass law. I  
8 mean, governments can enforce trespass laws, as well.

9 **MR. VERILLI:** Sure.

10 **THE COURT:** Would that be trespass, to take a photo,  
11 even though you're standing in a place that you're otherwise  
12 able to do, but you're doing something --

13 **MR. VERILLI:** Well, I don't know if that would be  
14 trespass, but here's what would I think, Your Honor. If  
15 somebody were taking a photograph, and were told that they  
16 weren't allowed to take a photograph, and they took another  
17 photograph, and they were told that they have to leave the  
18 premises because they're violating the rules, and then they  
19 left the premises, and they came back on, in violation of the  
20 order to leave the premises for violating rules, that would be  
21 trespass.

22 And that would be a case very much like *Virginia against*  
23 *Hicks*, which I know -- I assume we'll get to when we talk about  
24 the First Amendment. But that would be trespass here -- there.  
25 And that is effectively what we have here, Your Honor.

1           We've -- you know, they talk about how we connect up our  
2 servers to the Internet, and that means this information is  
3 available to the public. And that means, they say, that we  
4 can't impose any conditions on the availability of that  
5 information, because it's out there, and it's available to the  
6 public.

7           Well, there's just --

8           **THE COURT:** Well, it's not that you can't impose  
9 conditions. The question is whether you can back up those  
10 conditions with the -- with the force of federal criminal law.

11           You may be able to back it up with state law, maybe some  
12 state trespass law, maybe common law, or just self-help for no  
13 legal remedy on the other side, which is one of the things  
14 we're going to talk about. But the question is whether you can  
15 criminalize violation of those conditions.

16           **MR. VERILLI:** So I'm going to repeat myself, and I  
17 apologize for doing so, but Congress has made the judgment in  
18 plain terms of Section 1030(a)(2), and it's made another  
19 judgment in plain terms later in the statute, that we can get a  
20 private right of action to enforce to enforce our ability to  
21 impose conditions that can control access. And it's just right  
22 there on the plain -- on the face of the statute. It's why  
23 Judge Breyer reached the result he reached.

24           And I would submit to Your Honor that that is actually the  
25 answer that is the speech-promoting answer in this case,

1 because the other options for us -- if my friends on the other  
2 side are right about the CFAA, either we've got to put up a  
3 wall and put everything behind a password, which means the  
4 information is not going to be publicly available anymore,  
5 which reduces the flow of the information to the public, or  
6 we're going to tell our members that they're vulnerable to this  
7 kind of surveillance and disclosure to their employers in a way  
8 that's certainly going to deter people from making that  
9 information available and visible to the public.

10       And so I really think, Your Honor, it's not just -- it's  
11 clear that we do have a clear right under the law. We do have  
12 a clear right, as the Ninth Circuit has interpreted the law.  
13 We are a private entity. These are our computer servers. The  
14 information resides on our servers. We have a right to control  
15 who gets access to it and who doesn't, because we're a private  
16 entity making private judgments. And our view of the law is  
17 the view of the law that is going to maximize the free flow of  
18 information.

19               **THE COURT:** All right.

20               **MR. GUPTA:** Your Honor, I'd like to hand it off to  
21 Professor Tribe, to talk about the constitutional avoidance  
22 issue here.

23               **THE COURT:** All right.

24               **MR. TRIBE:** Thank you, Your Honor.

25               **THE COURT:** Okay.



1           **MR. TRIBE:** Maybe I could begin with that library  
2 analogy before I try to put the case in its First Amendment  
3 setting. If it's a public library, you know, when I was a kid,  
4 the books used to have a little tag inside that would tell you  
5 how often the book was taken out, and when.

6           And I think when the public library lets people take those  
7 books home, if they manually write down, *The most popular books*  
8 *are the ones in the geography section* -- not likely, but  
9 suppose it was -- and I want to make use of that information,  
10 for the government to make it a crime for me to make use of  
11 that information because they want to be the, perhaps,  
12 exclusive distributors of information about what's popular to  
13 read would, of course, be unconstitutional.

14           That's the setting in which I want to put this case.

15           Orin Kerr's article was very convincing to me, partly  
16 because in 1991 I wrote pretty much the same thing in an  
17 article called, "The Constitution in Cyberspace." It is  
18 ridiculous in today's world to use concepts like physical  
19 trespass when you're talking about the public pages of a  
20 website.

21           And it's not only ridiculous. There is authority on the  
22 point. In *Packingham against North Carolina* on the 19th of  
23 June this year the Supreme Court very clearly said that public  
24 websites -- and they used LinkedIn as an example -- are public  
25 fora. They are the current equivalent of the town square, to

1 use Your Honor's analogy.

2 Now, that doesn't mean that for all purposes, social media  
3 are to be treated as public utilities. I mean, all of the  
4 cases that they cited in their brief -- *Quigley, Buza, Langdon,*  
5 *Kinderstart, Howard, Green*; cases about how Yahoo! and Google  
6 and AOL are not simply public utilities; they have a right to  
7 exercise editorial control. Those have nothing do with this  
8 case. We are not arguing that we have some right to convert  
9 LinkedIn's pages to our own purposes. We're not trying to post  
10 things on LinkedIn.

11 We're simply trying to do what the public, as a whole, has  
12 been invited to do; and that is observe, collate the  
13 information, use data science to process it and make it more  
14 useful, both to employers who want to retain those of their  
15 employees who are apparently most desirable to the outside  
16 world, and outside employers who want to give employees greater  
17 opportunity.

18 So *Packingham* holds that for that purpose, social media  
19 are the modern equivalent of the town square. And it also  
20 holds -- and this is really important, I think -- that a  
21 content-neutral restriction --

22 And in part three of the *Packingham* opinion, the Court  
23 said that for purposes of this opinion, we will assume that  
24 it's content neutral when you tell sex predators that they  
25 cannot use any social media.

1           -- that a content-neutral restriction of First Amendment  
2 activity is subject to intermediate scrutiny and a narrow  
3 tailoring requirement.

4           And so, of course, if they do have interests, like not  
5 being overwhelmed by an army of bots that lead them to go --  
6 you know, their servers to crash. If they can show when this  
7 case gets beyond the preliminary stage, before they put us out  
8 of business -- if they can show that they are using the  
9 narrowest-possible alternative to serve that legitimate  
10 interest, then we would have a different case. Perhaps the  
11 First Amendment standard could be met.

12           **THE COURT:** But that would suggest that every  
13 organization that puts themselves out on the Internet, to the  
14 extent they want to limit bots or some other kind of -- you  
15 know, put some technological "speed bumps," as Orin Kerr puts  
16 it, that would be subject to constitutional scrutiny,  
17 intermediate scrutiny, a narrowly tailored view. And wouldn't  
18 be that a pretty profound burden placed on even small websites  
19 or small businesses, that don't have the ability to -- they  
20 just buy off-the-shelf packages, that software anti-hacking  
21 stuff, that may be overly broad in terms of who it filters out,  
22 and the barriers that it imposes? Would they have to go  
23 through a narrowly tailored constitutional review every time  
24 anybody --

25           **MR. TRIBE:** Well, not strict scrutiny. "Narrowly

1 tailored" simply means they have to show that it is not  
2 gratuitously and substantially overbroad. That's not a burden,  
3 after *Ward v. Rock for Racism* [sic]. That's not a burden that  
4 the Court has thought to be too extreme.

5 But look at how extreme their position is, when a website  
6 that has tens of millions, hundreds of millions of people who  
7 put their profiles out there to reach as much of the world as  
8 they can is allowed to say, *You know, your business model is*  
9 *pretty good. We've been visiting your seminars. Now we want*  
10 *to adopt it, and kick you off.*

11 Well, that can't be done, unless you accept their position  
12 that this case has nothing do with the First Amendment, because  
13 we're not talking about protest or dissent. We've got a  
14 serious problem that follows from their position.

15 And in the *Sorrell* case the Court made very clear --  
16 *Sorrell v. IMS Health* -- by a vote of six to three that data  
17 mining of information whose owner has put it out to the world,  
18 as the doctors in Vermont did when they said that *It's okay for*  
19 *you to look at our prescription practices* -- that that kind of  
20 data mining for purposes of marketing to those who could use  
21 the analyzed information to make sounder economic decisions is  
22 fully protected free speech.

23 Now, what make this case particularly dramatic, as Your  
24 Honor noted, is that they're putting in the hands of a private  
25 entity. And they emphasize how private LinkedIn is. It's not

1 the city. It's not the town. True enough. But that just make  
2 this a more extreme First Amendment violation, because they  
3 want to delegate -- they want to read the CFAA as though  
4 Congress, in its wisdom, decided to delegate to any website,  
5 however huge, the unilateral, unrestrained discretion to decide  
6 whom to lock out and deauthorize, for whatever reason, whether  
7 they don't want the competition, or whether they have  
8 objections to the race, or the religion, or the sexual  
9 orientation of the owner.

10 That violates a core principle that's been adopted by the  
11 Supreme Court, even when the power is delegated to a  
12 responsible governmental entity. Think of a case like --

13 **THE COURT:** But that's the question; is it?

14 **MR. TRIBE:** Mm-hm.

15 **THE COURT:** Where is the state action?

16 Because all of the other cases, whether it's *Sorrell*, or  
17 *Packingham*, there are obvious state actions. It's not a  
18 problem.

19 Here are you relying on some delegation?

20 **MR. TRIBE:** Yes.

21 **THE COURT:** Because it's not -- you can't say this is  
22 a case where they're -- like a railroad case, where there's  
23 active encouragement. By regulations, railroads were forced to  
24 engage in your analysis.

25 You don't have -- the CFAA doesn't force them to do that.

1 It gives them --

2           **MR. TRIBE:** No. They're simply handing a blank  
3 check.

4           **THE COURT:** Okay. And those cases where there's  
5 delegation usually involve a delegation of inherently sovereign  
6 power; something that's traditionally within the sovereignty,  
7 within the power of the government.

8           Here, running a business -- I mean, I could understand why  
9 it's like the town square in a functional way, but I don't  
10 understand why it is state action.

11           **MR. TRIBE:** Well, take a case like *Marsh against*  
12 *Alabama*. In *Marsh*, it was a privately owned company town in  
13 Chickasaw. And that company town was given the power under  
14 Alabama law to call the police, and have anybody who comes into  
15 the town to distribute literature that they don't want  
16 distributed, or for any other purpose, to call the police,  
17 arrest them for trespass, prosecute them, and convict them.

18           This is like *Marsh*. Now, *Marsh* held that deciding who can  
19 use the public parts of the town is an inherently governmental  
20 function. And it seems to me that after *Packingham* deciding  
21 who can visit the public site of something like LinkedIn is  
22 exactly like deciding who can use the public parks and streets  
23 of a town. That analogy is not --

24           **THE COURT:** That was barring -- but there, that was  
25 action barring offenders from the entire -- essentially, the

1 entire Internet; not from visiting a particular site.

2           **MR. TRIBE:** Well, the Court did say in the Kennedy  
3 opinion that if you exclude someone from websites like -- and  
4 it used the examples of Twitter, LinkedIn, and Facebook -- that  
5 you're excluding them from the equivalent of the modern town  
6 square.

7           They didn't say you have to exclude from all media; that  
8 is, if there had been a modification of the North Carolina law  
9 in *Packingham*, saying that a certain group of people -- and  
10 it's hard to think of a group less sympathetic and more  
11 dangerous than registered sex offenders -- that they can't  
12 visit a social platform that has on it the profiles and  
13 professional aspirations of a substantial percentage of the  
14 world, the case wouldn't have come out differently. It was not  
15 a quantitative case. It was a case about principle.

16           And when the Court has said in cases like *Lakewood against*  
17 *Plain Dealer*, in 1988, which involved a delegation by law to a  
18 town of the power to decide which news boxes may or may not be  
19 attached to public utility poles, the Court said that even if  
20 the right to attach something to a public property is not  
21 directly protected by the First Amendment, the danger of giving  
22 even a town, let alone a private entity -- a huge, powerful  
23 private entity -- discretion to decide who may and who may not  
24 engage in activity that is related to freedom of speech and  
25 information is constitutionally impermissible.

1           **THE COURT:** That was speech on public property.

2           **MR. TRIBE:** That's correct. And this is --

3           **THE COURT:** Well, you would say *Packingham* makes it  
4 public property -- makes the Internet public property.

5           I'm not quite sure it goes that far.

6           **MR. TRIBE:** Well, it does say it's the modern  
7 equivalent of the town square.

8           The real reason that this is so crucial, Your Honor, is  
9 that the First Amendment has really two branches. There's a  
10 branch that directly deals with government censorship. It says  
11 that if the government, itself, uses forbidden criteria, that's  
12 no good, unless it's overwhelmingly justified.

13           Then there's another branch that says that there must be  
14 enough breathing room for speech; that is, if you could divide  
15 up the world -- either the cyberworld or the physical world --  
16 into privately owned enclaves, where people who want to engage  
17 in information processing or the dissemination of ideas need  
18 the permission of the private owner, then there isn't enough  
19 breathing room. That's where the public forum doctrine was  
20 born.

21           And what the Court said last month was that in today's  
22 world, for there to be enough breathing room, you have to treat  
23 privately owned social media platforms, at least in their  
24 public face, as public forums. And it seems to me that that  
25 First Amendment principle is what's crucial here.



1           In our brief, I cited the *Grendel's Den* case, which  
2 happens to be a favorite of mine because it arose in Cambridge,  
3 and I was involved from the very beginning. It was a case that  
4 served for the same principle. A body as private as a church  
5 cannot be given governmental power over First Amendment  
6 activity by state law. It also can't be given that power by  
7 federal law.

8           Now, Your Honor was certainly right that the federal  
9 statute trumps contrary state law, although I agree with my  
10 colleague that because the federal statute, the CFAA, doesn't  
11 lay out detailed criteria for what constitutes authorization or  
12 revocation, that there's room to absorb -- and there's a  
13 presumption that one should absorb -- the backgrounds body of  
14 state law in which the federal law is immersed; but surely the  
15 federal statute trumps even a state constitutional provision,  
16 which is one of the sources of our affirmative right here in  
17 the *PruneYard* decision; but what trumps the federal statute is  
18 surely the U.S. Constitution.

19           And I submit that even without deciding, especially at  
20 this preliminary stage, that it would clearly violate the First  
21 Amendment to read the CFAA the way my friend Verilli wants to  
22 read it, it surely raises a grave constitutional question that  
23 could be best avoided by deciding that this language about  
24 authorization, which does not look to me unambiguous in today's  
25 world, at least, as applied to the public pages of a website

1 like LinkedIn, reading that word "authorization" gratuitously  
2 to completely wipe out the free-speech use that an organization  
3 like hiQ wishes to make of that website seems to me to be  
4 creating a constitutional problem that Your Honor would want to  
5 avoid; that is, you want to construe the CFAA and the  
6 California Penal Code not to clearly give this owner the  
7 unilateral power, unbridled, to decide whom to admit and whom  
8 not to admit; that is, they were fine with what we were doing,  
9 until it looked like we could make money from it, and then they  
10 thought, *Hey, there's an opportunity for us*, which is why we're  
11 suing under the Unfair Competition Law.

12           **THE COURT:** So is your First Amendment argument that  
13 the First Amendment applies to anyone who participates now in  
14 this newly declared public forum -- i.e., the Internet -- and  
15 that would apply not just to LinkedIn, but any small website.  
16 any business? They would still be subject to scrutiny, in  
17 terms of whether they could disable or disallow/deauthorize  
18 people from accessing the website?

19           Or is it more the fact that the CFAA has delegated  
20 essentially a sovereign power now, and that the deployment of  
21 the CFAA would implicate the First Amendment?

22           **MR. TRIBE:** It's principally the latter, but it's  
23 also in part the former, in the sense that if you look back at  
24 the series of decisions that ultimately led to *PruneYard*, the  
25 Court seemed to draw a quantitative distinction. A large

1 shopping center opened to the general public in California is  
2 subject to the Free Speech Clause of the State Constitution.

3 It doesn't mean that a mom-and-pop grocery store has to  
4 allow people who enter the store to circulate petitions; that  
5 is, there may be a kind of de minimis exception before  
6 something is classified as fitting the model of a social media  
7 platform in the modern age.

8 But surely Your Honor needn't solve all of those problems  
9 at this stage. That is one of the, I think, sound pieces of  
10 advice that Justice Kennedy gave in the *Packingham* case, was  
11 that we should tread carefully before withdrawing First  
12 Amendment protection from anything as important as a social  
13 media platform of great magnitude.

14 Now, my friends turn that around, and say that being  
15 cautious means we should put you out of business, because in  
16 the long run if there are too many guys like you, we might get  
17 overrun.

18 Well, in the long run we're all dead, but I think we can  
19 cross that bridge we when come to it. And I don't think that  
20 they've made case of any kind for suffocating the First  
21 Amendment in this sweeping way at this stage.

22 One thing I want to say that is not directly related to  
23 the First Amendment. I was interested in the argument that we  
24 could always go elsewhere. You know, if we're kicked off of  
25 LinkedIn, we can go somewhere else. And I was thinking of

1 Whac-A-Mole. I mean, if LinkedIn has this power, so does  
2 Facebook; and the entire universe of cyberspace can be gobbled  
3 up by a small number of private owners. That can't be what the  
4 law of an open, democratic society with the First Amendment  
5 means. It can't possibly mean that.

6 And what we suggest is that at least keeping us alive to  
7 fight another day, when we face these difficult issues of *What*  
8 *are the less-restrictive alternatives? What are the more*  
9 *narrowly tailored alternatives*, is the right way to solve the  
10 problem.

11 It's certainly not the case, as my friend Mr. Verilli  
12 suggests, that the Ninth Circuit has already ended this inquiry  
13 in *Nosal II*, and in a number of other --

14 **THE COURT:** *Power Ventures*. Yeah.

15 **MR. TRIBE:** I mean, they -- it -- clearly, this  
16 concern about free speech was not central in those cases.  
17 Those cases involved using false pretenses or inducing people  
18 to let you pass a password.

19 This case is about the public space. "Public" means  
20 "public."

21 And it seems to me that when Mr. Wisoff talked about the  
22 Fourth Amendment law of justifiable expectations of privacy, he  
23 brought the case home in an important way; that is, if you say  
24 *I want my stuff to be public* --

25 And I really liked your question whether they have an

1 option for saying, *I want it to be as public as possible. I*  
2 *want Broadcast.*

3 -- then it seems to me you're not respecting personal  
4 autonomy by creating an automatic ability on the part of the  
5 owner of the website, not the individual, to simply choose, for  
6 whatever reason, however anticompetitive or otherwise  
7 difficult, to knock someone off the website.

8 And I think that no matter how many times they use  
9 adjectives like "scraping" and make it sound like we're  
10 engaging in some kind of predatory behavior, they're really not  
11 making what I would regard as a legal point that answers  
12 *Packingham* and *Sorrell* and the cases about impermissible  
13 delegation of power to criminalize, *Marsh*, *Grendel's Den*, which  
14 involved de-licensing, and not even criminalization, and other  
15 cases that stand for the broad proposition that giving any  
16 powerful entity, public or private, the ability to choke off,  
17 at its discretion, speech and the precursor of speech, the  
18 analysis of information, and the gathering of facts in the  
19 decision of how to make them most useful, is a dangerous path  
20 down which we should not go.

21 **THE COURT:** All right. Thank you, Professor.

22 **MR. TRIBE:** Thank you, Your Honor.

23 **THE COURT:** Let me give Mr. Verilli a chance to  
24 respond.

25 **MR. VERRILLI:** Thank you, Your Honor. I'd like to

1 first talk about the nature of the law being enforced here, and  
2 the nature of the right that we're asserting, and why it  
3 demonstrates there's no First Amendment issue. Then I want to  
4 address the delegation point that Professor Tribe has focused  
5 most of his energies on. And then I want to also talk about  
6 the *Packingham* decision in particular, and this question about  
7 whether constitutional avoidance is probative.

8       So let me start with the nature of the law. As the  
9 Ninth Circuit said in *Power Ventures*, the CFAA is a computer  
10 trespass law. It applies to prohibit or provide a private  
11 cause of action against unauthorized access to private  
12 computers, no matter why the entity wants to gain that  
13 unauthorized access, whether they want to do it to harvest data  
14 that they can subsequently use to support speech activity,  
15 whether they want to do it in order to engage in identity  
16 theft, or in order to do a denial-of service attack. Doesn't  
17 matter why. The law does not turn on the motive of the person  
18 seeking unauthorized access. In that regard, it is a classic  
19 law of general application that is not subject to any First  
20 Amendment scrutiny when it is enforced.

21       That's what *Virginia against Hicks* says, by the Supreme  
22 Court; *Cohen against Cowles Media*. That's a fundamental  
23 principle of Supreme Court First Amendment jurisprudence, that  
24 when a law is a law of general application that applies  
25 irrespective of any connection or lack of connection to speech

1 activity, there is no First Amendment argument to be made.

2 Secondly --

3 **THE COURT:** Well, isn't there a converse implication  
4 that's troubling? Maybe it's not a First Amendment problem,  
5 but what about hiQ's argument that if you arm LinkedIn and  
6 other large websites with a power to deauthorize and debar or  
7 demit large classes of people, even, let's say, on the basis of  
8 race, gender, political beliefs, competition, it seems to me  
9 that you're saying, *Well, the law is a law. And it's like*  
10 *trespass law: You can bar anybody you want for any reason,*  
11 *even if it's the kind of thing that would implicate traditional*  
12 *First Amendment concerns, to exclude people from a particular*  
13 *website, particularly if it's for information gathering.*

14 Isn't that troubling?

15 **MR. VERILLI:** So a few points about that. First, of  
16 course, LinkedIn doesn't do that, and that's not what this case  
17 is about.

18 **THE COURT:** But I have to think about what your  
19 proffered interpretation of the CFAA is.

20 **MR. VERILLI:** Of course.

21 **THE COURT:** Once you withdraw authorization, even  
22 with a simple cease-and-desist letter, without any technology,  
23 that's it. You can't even look at the website -- whoever the  
24 recipient is.

25 **MR. VERILLI:** Yes. There's another important

1 qualification to the applicability of the statute, which is  
2 that the incursion has to inflict a minimum of \$5,000 worth of  
3 damage. And that's going to take out of the equation the vast  
4 majority of the circumstances that are in the parade of  
5 horrors that my friends on the other side have identified.

6 With respect to a class of people defined by race or  
7 religion, for example, there's no way that anybody's going to  
8 be able to go through and say for each and every one of them  
9 their use of the website is inflicting \$5,000 worth of damages  
10 on us. So as a practical matter at a very minimum, those cases  
11 are never going to come up.

12 And, of course, the CFAA has been around a long time. And  
13 those case versus never come up because they don't occur.  
14 People don't do that. And what my friends on the other side  
15 are suggesting is that on the basis of this kind of far-fetched  
16 hypothetical that never comes up in the real world, that the  
17 statute contains a practical -- a practical mechanism to deal  
18 with anyway, that you should interpret the statute so as not to  
19 apply to this kind of situation that doesn't present any of  
20 those concerns, and does present a kind of concern that the  
21 statute exists to address. And, you know --

22 But the second point with respect to going back to basic  
23 First Amendment doctrine that I think is critical here is that  
24 the incursion -- the unauthorized access here -- is not,  
25 itself, speech. It's gathering data to support speech in the



1 future; but it's not, itself, speech.

2 So the statute is not regulating expressive activity. It  
3 isn't doing that. It's regulating nonexpressive conduct. It's  
4 not speech, itself. And it's not conduct that has an inherent  
5 expressive element, like burning a draft card or burning a  
6 flag, in which case --

7 **THE COURT:** Well, the gathering -- I understand your  
8 argument about, *You have to have one of them speak here, or you*  
9 *have the right to receive information.* So I don't think you're  
10 going to have to spend a lot of time on that.

11 **MR. VERILLI:** Yeah.

12 **THE COURT:** But I don't know if I buy the argument  
13 that, well, just gathering information, harvesting information  
14 has no protection under the First Amendment of the  
15 Constitution. Maybe it's not expressive conduct, but it is the  
16 right to receive information, assuming other requisites are  
17 made.

18 **MR. VERILLI:** Right, but Your Honor, the other  
19 requisites are what is critical here. And there is no case  
20 ever that we've found or that our friends on the other side  
21 have cited that suggests that any right to receive information  
22 authorizes trespass, or authorizes a violation of any other  
23 legal norm that would otherwise prohibit the conduct.

24 And that gets back to this idea that it's a law of general  
25 application that prohibits trespass. And I don't know.

1           **THE COURT:** That begs the question. Trespass is  
2 somebody who wants to go into do that marketplace and actually  
3 get the books, or look at the art, or whatever it is. And so,  
4 I mean, it begs the question. The trespass is getting access  
5 to that information. I wonder if there can be trespass if they  
6 don't have a -- it's not trespass -- I mean, they're tied up.

7           **MR. VERILLI:** The problem, Your Honor, is that  
8 they're only tied up if you assume that we're the equivalent of  
9 the government, but we're not. We're a private company. These  
10 are private computers, private servers.

11           **THE COURT:** No. I understand that. And that's why I  
12 asked the questions of Professor Tribe.

13           **MR. VERILLI:** That's why I think that it is trespass.  
14 That's the classic definition of trespass, is unauthorized  
15 invasion of property, of space.

16           And that is what the CFAA protects against, and provides a  
17 remedy for. And that's how the Ninth Circuit described it.  
18 That's a law of general application.

19           So it's just like *Virginia against Hicks*. And there, you  
20 know, the person said -- the person was barred from being in a  
21 public housing project. And the person said, *Well, I need*  
22 *to --* and the person said, *I need to go on that public housing*  
23 *project to engage in a speech*. And that's the particular forum  
24 which is very important: Engaging in speech.

25           And what the Supreme Court held was, well, no. That law

1 on trespass is a law of general application, and bars you,  
2 irrespective of the reason you want to go on the property.

3 And there, unlike here, they wanted to go on the  
4 property and actually engage in speech, which, of course, was  
5 what *PruneYard* was. *PruneYard* was not going into private  
6 property to gather data to use at a subsequent time. It was to  
7 engage in speech, itself, in that forum.

8 And so I think those two points, and then, in addition,  
9 the idea that even if you're going to take this gigantic leap,  
10 and treat us as though we were the government, and subject to a  
11 similar set of rules, this is clearly a reasonable time, place,  
12 and manner restriction, for all of the reasons we identified  
13 before. We have to have the ability to keep these bots out,  
14 and do our best to keep these bots out. And it can't be that  
15 first there's a First Amendment right to overcome that.

16 Now, if I might move on to the second point about the  
17 delegation, there's a dispositive difference between the  
18 situation here -- the sending the cease-and-desist letter --  
19 and every single example that Professor Tribe has identified.  
20 In every single example he's identified, the private actor is  
21 exercising the government power, itself.

22 *Grendel's Den* is a good example. The church got to decide  
23 how the zoning laws were going to apply, and the church had the  
24 last word. There was no subsequent governmental body reviewing  
25 it. The government turned the decision over to the church, and

1 the church made the final decision.

2       *Marsh against Alabama. Marsh against Alabama*, the  
3 government basically turned everything over to the private  
4 company, and they got to make the final decision about how  
5 government power's exercised.

6       We sent a cease-and-desist letter. We are asserting our  
7 rights under the law, but we are not making the final decision.  
8 The final decision is up to a Court.

9       And so that's why there's state action in those cases, and  
10 not in this case.

11       And what I think my friend Professor Tribe is trying to  
12 address with his argument is that, well, yes, but you'll get to  
13 the decide as a private actor against whom you are going to  
14 assert your rights under the CFAA. And that's true, but that  
15 is a feature of trespass law generally. It is always the case  
16 that an entity that owns and controls property gets to decide  
17 who it's going allow access to, and who it isn't. And the  
18 courts routinely enforce trespass claims at civil law and in  
19 appropriate circumstances in criminal law, even though the root  
20 of the judgment about whether the law will be enforced is a  
21 decision of the property owner whether to allow access or  
22 not.

23       **THE COURT:** Well, that's where at least in California  
24 law *PruneYard* comes in, because the trespass law has been  
25 deemed at some point subject to some strictures of --

1           **MR. VERRILLI:** Yes. Certainly --

2           **THE COURT:** -- the right of expression under  
3 California.

4           **MR. VERRILLI:** -- true, but no one's taken the leap  
5 California case that we're aware of, Your Honor, to apply that  
6 to websites.

7           **THE COURT:** Well, the U.S. Supreme Court hasn't gone  
8 much further beyond *Marsh*.

9           **MR. VERILLI:** In fact, it's cut back on *Marsh*  
10 repeatedly --

11           **THE COURT:** I understand that.

12           **MR. VERILLI:** -- since the 1940s, when *Marsh* was  
13 enacted.

14           Now, if I might -- and that's why I think *Grendel's Den*  
15 and *Marsh* -- every case my friends on the other side have  
16 identified -- is a case in which the government has given the  
17 final word to a private party.

18           That's not this case. Right?

19           There's no case, I think, ever in history in which a  
20 cease-and-desist letter has been found to be state action. We  
21 certainly couldn't find one. Friends on the other side haven't  
22 identified one. And it would be an extraordinary thing to say  
23 that it is. It's a private assertion of rights. That's what  
24 it is. It isn't a state action. Can't be a state action.

25           Now with respect to the *Packingham* case and its

1 applicability or nonapplicability here, I want to make several  
2 points, if I could. First I direct Your Honor's attention to  
3 page 8 of the slip opinion. I apologize I don't have a more  
4 updated cite than that, but page 8 of the slip opinion, in  
5 which the case says exactly what Your Honor said it says. And  
6 in at least three places on page 8 what the Court said was that  
7 the fault of this North Carolina law is it's weak in its scope.

8       Even with these assumptions about the scope of the law  
9 that were set in the state's interest, the statute here enacts  
10 a prohibition unprecedented in the scope of the First Amendment  
11 speech it burdens. It bars access to, for many, one of the  
12 principal sources for knowing events, et cetera, et cetera.  
13 And, in sum, to foreclose access to social media altogether is  
14 to prevent the user to engage in a legitimate exercise of First  
15 Amendment rights.

16       There's no doubt that the scope was critical. And, in  
17 fact, the whole point of the case was that the scope was  
18 overbroad in relation to the state's interest in protecting  
19 minors, because it swept in a whole host of websites that  
20 didn't pose any risk of the sex offenders having contact with  
21 minors. So that's point one.

22       Point two. And I think Your Honor's identified this point  
23 exactly correctly, also. This was a state statute that was  
24 being enforced against an individual defendant. Obviously,  
25 there's state action there. And in that situation, you have

1 the state intervening in between an individual who wanted  
2 information, and the information that was out there to get.

3 That's nothing like this case.

4 In order to make *Packingham* like this case, what you'd  
5 have to -- you'd have to changes the facts, so that the sex  
6 offender would be making an argument.

7 So let's say you have a social media website that has --  
8 that children use with great frequency, and that has a policy  
9 that says, *We're not allowing registered sex offenders to have*  
10 *access to this website.*

11 And the sex offender says, *Well, I have a First Amendment*  
12 *right to access to this website despite your denial of*  
13 *authorization, because that's information that is out there in*  
14 *the world, and you don't require a password, and so I can go*  
15 *on.* That would be the parallel to this case.

16 And it's -- and nothing that the Supreme Court said in  
17 *Packingham* comes anywhere near justifying that kind of a  
18 result. Nowhere near. And so with respect to *Packingham*, I  
19 think: Just not applicable.

20 With respect to *Sorrell*, of course, the key difference  
21 there was that the information at issue was already in the  
22 possession of the people who wanted to use it for speech.  
23 There was no trespass. There was no unauthorized access.  
24 There was no breaking of the law to get the information. There  
25 was no going around technological measures. It was already in

1 their possession, A.

2 And, B, what the Court said in that circumstance was  
3 because the information was already in the possession of the  
4 people who want to use it for speech, and the law directly  
5 targets the speech activity and says, *You may not use this law*  
6 *for speech*, based on those two things, the First Amendment  
7 applies.

8 In those two critical respects, this case is the polar  
9 opposite. This is information that's not in their possession.  
10 And it's a law that prohibits unauthorized access, irrespective  
11 of whether the entity seeking the access wants to use the  
12 information for speech, or not. So it really doesn't have  
13 anything to do with the case.

14 **THE COURT:** All right. So we're going to have to  
15 wrap this up. And I'll let Professor Tribe rebut.

16 **MR. TRIBE:** I'll try to be very brief.

17 In *Sorrell* the information is not in the possession of the  
18 data miner, which was IMS; it was in the possession of somebody  
19 else. And the people who gave consent were the doctors who  
20 prescribed.

21 And here, people who give consent are the people who put  
22 their profiles on. The case is on all fours with *Sorrell*,  
23 because *Sorrell* holds that, just as Your Honor said, gathering  
24 information and processing it is not just some ancillary  
25 activity related to speech; it's at the heart of the First



1 Amendment. The first Amendment is not applicable only to  
2 handing out placards and petitions. It's applicable to  
3 processing and gathering information.

4 And as far as *Packingham* is concerned, it is true that the  
5 breadth of the thing was important, but the Court did say --  
6 and this is on page 1737 of 137 S. Court -- that this APPLIES  
7 to social networking websites like Facebook, LinkedIn, and  
8 Twitter.

9 Now, it can't be the law that if you exclude somebody from  
10 one of those at a time, that's okay; and then you do it from  
11 the second, that's fine; and the third, that's fine; but in the  
12 end you've excluded from everyone.

13 And he hasn't really answered -- Mr. Verilli hasn't really  
14 answered the Whac-A-Mole point. If they can say "No" to us, so  
15 can Facebook, so can every other website.

16 And as far as the answer to the delegation point, it  
17 really does -- you know, maybe I can use the word "*chutzpah*" in  
18 court. To say that their cease-and-desist letter is reviewed  
19 by a Court, and that's what makes it different -- that's  
20 nonsense. The cease-and-desist letter is weaponized. In their  
21 view, it is given the automatic effect of excluding anyone they  
22 want to exclude, by virtue of the Computer Fraud and Abuse Act.  
23 So that's not a distinction. It's a distinction without a  
24 difference.

25 And then the final point he makes is, *Let's not worry*

1 *about our ability to exclude people on invidious grounds like*  
2 *race or belief. It's never happened; but that's because this*  
3 *case hasn't come up yet. People haven't yet had the effrontery*  
4 *to say that something that they make open to the entire*  
5 *world -- they have the power, by virtue of some federal law*  
6 *designed to prevent trespass, which is not this -- by virtue of*  
7 *that law, they have the power to send a kind of letter of*  
8 *marque and reprisal, as the Constitution put it, to kind of*  
9 *mark someone as ineligible to gather information. That's a*  
10 *brehtaking claim. If that claim --*

11 **THE COURT:** Probably in part because the response was  
12 that the CFAA has a jurisdictional requirement of certain  
13 amount of damages before it can be brought to bear; and  
14 therefore, that screens out the vast majority of these parade  
15 of horrors.

16 **MR. TRIBE:** If somebody said that no company that is  
17 owned by -- that has a majority/minority ownership can access  
18 this site, that would certainly exceed the \$5,000. We're not  
19 talking about the use of the exclusionary cease-and-desist  
20 power in a bill of tender way, simply to pick on particular  
21 individuals. Maybe that wouldn't meet the threshold. We're  
22 talking about uses that could be employing a forbidden  
23 criterion causing lots of harm, with lots of money at stake.  
24 Seems to me that if you were to allow this, then it would  
25 multiply the number of such cases. And I think that to do that

1 in a preliminary stage would be terrible.

2 **MR. WISOFF:** Your Honor, if I can make --

3 **THE COURT:** Last quick word.

4 **MR. WISOFF:** -- quick comment. So first of all,  
5 Mr. Verilli said that the CFAA didn't turn on the motive of the  
6 person seeking access to the computer. I don't think that's  
7 really what our argument has been.

8 Our argument -- what we've -- to the extent motive feeds  
9 into this, I think what we've said is there's nothing in the  
10 CFAA, just like any trespass law that's enacted at the state  
11 level, to suggest that it was meant to not live in harmony with  
12 other laws of general application. And so maybe the motive of  
13 the person seeking the information may not matter; but at the  
14 end of the day there is room for you to interpret the CFAA in a  
15 way where, even if under where they have a legitimate right to  
16 refuse access, that if they're doing it for an improper  
17 purpose -- a purpose that would violate other law -- that maybe  
18 their right is limited, especially in the context of a public  
19 website. So I think that motive can play into it from that  
20 end.

21 They've also said -- when you asked them, *Well, what if*  
22 *you were trying to exclude people based on race or religion,*  
23 *one of their responses is, Well, we don't do that. We don't*  
24 *discriminate. You don't have to worry about that.* Well, that  
25 very argument was rejected in *Nosal I*, where the Ninth Circuit

1 said -- where the prosecutor said, *Well, we wouldn't bring*  
2 *those kinds of cases.* And the Court said, *No. We have to*  
3 *interpret the statute in a way that is reasonable, and that has*  
4 *limits on it, and not rely on the good faith of prosecutors.*  
5 And if the Ninth Circuit was saying, *You can't rely on the good*  
6 *faith of prosecutors,* you certainly can't rely on the good  
7 faith of a private web owner.

8       And then finally on the \$5,000 damages -- that provision  
9 has been interpreted to be satisfied, which they've done in  
10 this case, to say, *Well, we spent more than \$5,000*  
11 *investigating just to figure out who you were.* That criteria  
12 could be satisfied in each and every case. That is no  
13 practical limit.

14       So if you were to interpret the statute the way they say,  
15 they're sending of a letter, even if you're just manually  
16 accessing, even if you've done nothing, for whatever reason,  
17 even if it's based on race, religion, anticompetitive concerns,  
18 anything, you commit a crime the second you type that website  
19 address back into your browser. That cannot be a reasonable  
20 interpretation of the statute.

21               **MR. VERRILLI:** Your Honor, I apologize.

22               **THE COURT:** One extra minute.

23               **MR. VERILLI:** I'm going to tax your patience here,  
24 but let me be clear. We're not saying that this statute can be  
25 used to authorize these kinds of discrimination. What we're

1 saying is that if it ever is, the Court can decide in that case  
2 whether there's an interpretation of the statute that is  
3 appropriately limited, such that it can't be enforced when its  
4 enforcement would involve the enforcement of something that is  
5 discriminatory on the basis of race or --

6 **THE COURT:** How can you find that in the statute? If  
7 I find "authorization" means whatever --

8 **MR. VERILLI:** Well, I don't think you can find it in  
9 the statute. I think you'd have to decide in that circumstance  
10 whether there might be an as-applied limit under the  
11 Constitution.

12 **THE COURT:** Under the Constitution?

13 **MR. VERILLI:** Yeah. In a different case --

14 **THE COURT:** What were the constitutional arguments?  
15 If it's private, you've argued there's no state action.

16 **MR. VERILLI:** Right. Well, we think it is, but I  
17 think if -- what I'm trying to stress here, Your Honor, is that  
18 that's is a very different case than this one. It doesn't pose  
19 that issue.

20 **THE COURT:** It's a different case, but one has to  
21 look at the consequences of any interpretation; what the  
22 implications are.

23 **MR. VERILLI:** You're definitely correct, Your Honor.  
24 But I guess what I would try to leave Your Honor with is this;  
25 that in a situation in which the interests that the statute

1 exists to protect are directly implicated, and none of these  
2 kinds of concerns are present, the Court can reserve for  
3 another day the question of what to do in a case in which those  
4 concerns are present. And that does not and should not lead  
5 the Court to the conclusion that the statute ought not to be  
6 enforced in a situation in which its fundamental policies are  
7 implicated.

8           **MR. WISOFF:** Well, I think those concerns have been  
9 raised, Your Honor.

10           **THE COURT:** I'm going to take the matter under  
11 submission. My question is: Right now, pending my decision on  
12 this, did the parties have a stipulation to keep the -- I guess  
13 there's kind of a stay in place.

14           **MR. VERILLI:** Yes. There's a standstill agreement in  
15 place.

16           (Reporter requests clarification.)

17           **THE COURT:** Standstill.

18           I appreciate the briefing and the argument. Obviously,  
19 it's been is superb. And it's a very interesting issue. I've  
20 got a feeling it's not going to end here, so I will work on  
21 this as quickly as I can, and get it out.

22           **MR. TRIBE:** Thank you, Your Honor.

23           **MR. VERILLI:** Thank you, Your Honor.

24           (At 4:28 p.m. the proceedings were adjourned.)

25

1 I certify that the foregoing is a correct transcript from the  
2 record of proceedings in the above-entitled matter.

3

4

*Lydia Zinn*

5

July 28, 2017

Signature of Court Reporter/Transcriber      Date

6

Lydia Zinn

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25