349 F.3d 1132
United States Court of Appeals,
Ninth Circuit.

In the Matter of the Application of the UNITED STATES FOR AN ORDER AUTHORIZING THE ROVING INTERCEPTION OF ORAL COMMUNICATIONS,
The Company, Appellant,
v.
United States of America, Appellee.

No. 02–15635. | Argued and Submitted Dec. 2, 2002. | Filed Nov. 18, 2003.

* * *

BERZON, Circuit Judge:

Giving new meaning to the automotive advertising slogans "The Ultimate Driving Machine" and "We've Got You Covered," some luxury cars are now equipped with telecommunication devices that provide a set of innovative services to car owners. These on-board systems assist drivers in activities from the mundane—such as navigating an unfamiliar neighborhood or finding a nearby Chinese restaurant—to the more vital—such as responding to emergencies or obtaining road-side assistance. Such systems operate via a combination of GPS (global positioning system, using satellite technology) and cellular technology. The appellant ("the Company") runs one such service ("the System").

One feature of the System allows the Company to open a cellular connection to a vehicle and listen to oral communications within the car. This feature is part of a stolen vehicle recovery mode that provides assistance to car owners and law enforcement ***1134** authorities in locating and retrieving stolen cars. The same technology that permits the interception of the conversations of thieves absconding with the car also permits eavesdropping on conversations within the vehicle.

The Federal Bureau of Investigation ("FBI"), realizing that the System can be used as a roving "bug" and following the procedures mandated for "bugging" private individuals suspected of criminal activity, sought and obtained a series of court orders requiring the Company to assist in intercepting conversations taking place in a car equipped with the System. The Company challenges the court's authority to order the use of the Company's equipment, facilities, system, and employees. The question for decision is whether the statute governing private parties' obligations to assist the federal government in intercepting communications permits such an order.

I

A. *The System*

* * *

Each System console has three buttons: (1) an emergency button, which routes customers' calls to the Company; (2) an information button, which routes customers' calls to the other company that assists the customer with navigation; and (3) the roadside assistance button, which routes customers' calls to the other company for assistance in getting on-site service for vehicles. The System automatically contacts the Company if an airbag deploys or the vehicle's supplemental restraint system activates.

If a customer's car is stolen and the customer verifies the theft, the customer can ask the Company to put the car into stolen vehicle recovery mode. Once the car is in this mode, the Company sends a signal to the car's System. The signal is sent continuously until the car responds or until the Company deactivates the mode. If the System has cellular reception and the engine is running, the System will automatically call the Company. The call will be directed to the next available operator. The Company maintains that it cannot determine when such a call will be made from the car or direct the call to a specific operator.

Once the call from the System is answered, the operator and anyone else listening ***1135** in can hear sound from inside the vehicle. Occupants of the vehicle will not know of the cellular phone connection and will be unaware of the eavesdropping.[4] The connection remains active until the driver turns off the ignition or loses cellular reception, or the Company disconnects the call. The System returns to normal when the Company deactivates vehicle recovery mode. * * *

When the System is in stolen vehicle recovery mode, the customer cannot use any of the other System services. If a customer presses any of the non-emergency buttons—for example, the roadside assistance or information buttons—nothing will happen. If the customer presses the emergency button or the airbags deploy while the recovery mode is enabled, it appears to the user that the system is attempting to open up a cellular phone connection to the response center but it is not. Instead, an audio tone is sent over the already open connection. The Company is concerned that if no operator is on the line and only the FBI is listening in, there will be no response to the subscriber's emergency signaled by the transmitted tone.

B. *This Case*

Upon request by the FBI, the district court issued several ex parte orders pursuant to 18 U.S.C. § 2518(4), requiring the Company to assist in intercepting oral communications occurring in a certain vehicle equipped with the System. The Company complied with the first thirty-day order but not the next. After the government filed a Motion to Compel and for Contempt, the Company responded and filed motions for reconsideration and to quash or modify the court's order. The district court held an evidentiary hearing, denied the

government's contempt motion, and ordered the Company to comply with the contested order. The Company has since complied with all subsequent court orders. In explaining its order, the district court found that "[The Company] is a 'telecommunications carrier' and 'provider of wire or electronic communication service' within the scope of 18 U.S.C. § 2518(4) and § 2522;" that the FBI request and the court order were not "unreasonably burdensome," that the Company's due process rights had not been violated; and that no "taking" had occurred.[6]

The district court ordered two further, similar ex parte interception orders, and the Company both contested and complied with each order. The district court then held a hearing on the Company's pending motions and denied them all. The Company now appeals from this denial.

II

A. *Mootness*

[The panel briefly notes that the case is not moot, because these sorts of compelled interception orders fall within the "capable of repetition, yet evading review" exception.]

B. *Overview of 18 U.S.C. § 2518*

[The court briefly sketches the wiretapping procedures and protections under section 2518.]

* * *

The statute also has provided, since 1970, that certain enumerated entities and individuals must assist law enforcement in wiretapping or eavesdropping when directed by a court order to do so. *See* ***1137** Pub.L. No. 91–358, § 211(b) (1970); § 2518(4).[8] Presently, § 2518(4) requires:

> that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the [law enforcement] applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted.
>
> 18 U.S.C. § 2518(4).

The question before us is: When may a company, not a common carrier[9] but possessing a unique ability to facilitate the interception of oral communications, be required to assist law enforcement in intercepting such communications?

C. *Application of § 2518(4) to the Company*

[The panel concludes that the FBI sought to intercept "oral communications," and the Company is either a "provider of a wire or electronic communications service" or a "landlord, custodian, or other person" within the meaning of the Wiretap Act. Much of the argumentation on these issues arose only because the Company subcontracted out the underlying cellular service.]

* * *

D. ***Requirement of a Minimum of Interference***

That the Company is both a "provider of wire or electronic communication service" and an "other person" within the meaning of § 2518(4), and may therefore be required to furnish facilities and technical assistance is not, however, the end of the story. The question remains whether the order goes too far in interfering with the service provided by the Company, by preventing the Company from supplying the System's services to its customers when a vehicle is under surveillance. We conclude that it does.

Court orders granted pursuant to the authority of § 2518 must specify that assistance be provided "unobtrusively and with *a minimum of interference* with the services that such service provider, landlord ... or person is according the person whose communications are to be intercepted." § 2518(4) (emphasis added).[23] The "a minimum of interference" language was ***1145** added in 1970 as part of the amendment that added the explicit assistance requirement to title III. Pub.L. No. 91–358, § 211(b) (1970).

Looking at the language of the statute, the "a minimum of interference" requirement certainly allows for *some* level of interference with customers' service in the conducting of surveillance.[24] We need not decide precisely how much intereference is permitted. "A minimum of interference" at least precludes total incapacitation of a service while interception is in progress. Put another way, eavesdropping is not performed with "a minimum of interference" if a service is *completely* shut down as a result of the surveillance.[25]

Our interpretation of the "a minimum of interference" language is bolstered by our reading of title III, which, we believe, does not evince a congressional intent to authorize surveillance in the face of complete disruption of a wire and electronic communication service for a particular customer. As the Supreme Court stated in *United States v. New York Telephone Co.,* "[t]he conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions." 434 U.S. at 175 n. 24, 98 S.Ct. 364. At the same time, the Supreme Court stressed that the order in question in that case (approved under the All Writs Act, not title III) "required minimal effort on the part of the Company and *no disruption to its operations.*" *Id.* at 175, 98 S.Ct. 364 (emphasis added). The obligation of private citizens to assist law enforcement, even if they are compensated for the immediate costs of doing so, has not extended to circumstances in which there is a complete disruption of a service

they offer to a customer as part of their business, and, as we read title III, Congress did not intend that it would.[26]

***1146** In this case, FBI surveillance completely disabled the monitored car's System. The only function that worked in some form was the emergency button or automatic emergency response signal. These emergency features, however, were severely hampered by the surveillance: Pressing the emergency button and activation of the car's airbags, instead of automatically contacting the Company, would simply emit a tone over the already open phone line. No one at the Company was likely to be monitoring the call at such a time, as the call was transferred to the FBI once received. There is no assurance that the FBI would be monitoring the call at the time the tone was transmitted; indeed, the minimization requirements, *see* note 23, *supra,* preclude the FBI from listening in to conversations unrelated to the purpose of the surveillance. Also, the FBI, however well-intentioned, is not in the business of providing emergency road services, and might well have better things to do when listening in than respond with such services to the electronic signal sent over the line. The result was that the Company could no longer supply any of the various services it had promised its customer, including assurance of response in an emergency.

We hold that whatever the precise limits Congress intended with its "a minimum of interference" limitation, the level of interference with the System worked by the FBI's surveillance is not "a minimum of interference with the services" that the Company "accord[s] the person whose communications are to be intercepted." § 2518(4). Because, given the set-up of the System, the surveillance could not be completed with "a minimum of interference," the district court erred in ordering the Company's assistance.[27]

Conclusion

The Company can properly be considered an "other person" for purposes of § 2518(4), and therefore the district court could have ordered the Company to assist the FBI in intercepting oral communications if the other requirements of § 2518(4) had been met. In this instance, however, the Company could not assist the FBI without disabling the System in the monitored car. Therefore, under the "a minimum of interference" requirement of § 2518(4), the order should not have issued. We therefore REVERSE the order of the district court.

TALLMAN, Circuit Judge, dissenting:

I respectfully dissent. I agree that 18 U.S.C. § 2518(4) applies to the Company as a "provider" or "other person" and therefore the district court had the authority to order it to assist the FBI in intercepting conspiratorial conversations held in the car and transmitted electronically via the Company's System. *See* Maj. Op. at 1139–43. I

disagree, however, with the majority's conclusion that the order cannot ***1147** be carried out in conformance with § 2518(4). The FBI established to the district court's satisfaction the existence of probable cause to believe that individuals engaged in a continuing criminal enterprise were using the car as a venue for planning illegal activities. Pursuant to § 2518(4), the district court found the necessity for this type of intercept and authorized federal agents to surreptitiously monitor the individuals' conversations.

The majority opinion nonetheless invalidates the district court's order, despite express statutory language commanding the Company to assist the government in such eavesdropping. The court reaches this result by erroneously concluding that the district court's order cannot be carried out "with 'a minimum of interference.' " Maj. Op. at 1146. This holding cannot be reconciled with the plain text of the statute.

I

* * *

The plain meaning of the phrase "minimum of interference" is clear: an order must be executed in the manner that causes the *least amount of disruption necessary* to intercept the targeted communication. Significantly, § 2518(4) does not require the method of interception to allow the monitored communication service to continue without *any* interruption. Here, the record leaves no doubt that the Company complied with the challenged order in the way least likely to interfere with its subscriber's services and that, in fact, no actual service disruption occurred. The majority opinion ignores the record on how the intercept was implemented and contorts the meaning of "a minimum of interference."

As a threshold matter, there is no evidence that any service disruption actually occurred. The record does not indicate that the subjects of the surveillance tried to use the System while the FBI was listening. One cannot disrupt a service unless and until it is being utilized. Moreover, even accepting *arguendo* the majority's characterization of the emergency call function as "severely hampered" by the surveillance, Maj. Op. at 1146, this characterization by its own terms belies the claim that the Service was "*completely* shut down," *id.* at 1145 (emphasis in original). The record reflects that the emergency call function was still operational, albeit monitored by the FBI rather than a Company operator. In any event, as there is no record that an emergency signal or a call for service was ever transmitted on the System during government surveillance, the majority can only speculate that federal agents would have done nothing had the occupants sought help by pushing a button or if the emergency call function had been automatically activated by the deployment of an airbag.

The majority opinion also makes the fundamental mistake of treating "a minimum of interference" as an absolute threshold instead of a relative standard. As revealed by a

brief review of dictionary definitions, a "minimum" is a concept that depends upon there being *no lesser amount. See, e.g., American Heritage Dictionary of the English Language, New College Edition* 835 (1976) (defining "minimum" in its noun form as "[t]he *least possible* quantity or degree ... [or t]he ***1148** lowest quantity, degree, or number reached or recorded; *the lower limit of variation* ") (emphasis added); *see also Oxford English Dictionary* (*OED*), *available at* http:// www.oed.com/ (defining the noun form of "minimum" as "[t]he smallest portion into which matter is divisible; an atom. Also, the hypothetical *smallest possible* unit of time or space ...") (emphasis added).

These definitions confirm that "a minimum of interference" must mean the *lowest, least,* and *smallest* amount of interference *possible,* whatever that amount might be. The record indicates that the only method of executing the intercept order in this case involved activating the car's microphone and transferring the car's cellular telephone link to the FBI. This conduct might have amounted to a service disruption had the subjects of the surveillance attempted to use the System, but there is no evidence that they did. The majority concludes that "eavesdropping is not performed with 'a minimum of interference' if a service is *completely* shut down as a result of the surveillance." Maj. Op. at 1144–45. However, even the complete shutdown of a service can represent the *minimum* interference, so long as no lesser amount of interference could satisfy the intercept order. It is not an ineluctable conclusion that no compliance is required if nothing less will do the job.

The majority creates—under the guise of limiting the assistance a provider or other person may be required to render—a wide-ranging form of protection for the legitimate targets of government surveillance. But Congress legislated only very limited restrictions on the effect of intercept orders once authorized by Article III judges under § 2518. As it fails to identify any real service disruption, much less explain how the Company could have administered the intercept in a way that would cause *less* interference, the majority's statutory argument is unsupportable.

II

Furthermore, it is important to recognize that giving the phrase "a minimum of interference" its proper reading does not foreclose providers from pursuing other remedies where an order causes them some hardship.[2] Service disruption that is severe enough to result in serious adverse effects on a provider may be prohibited by the doctrine of undue burden. As a general principle, an intercept order may not impose an undue burden on a company enlisted to aid the government. *See United States v. New York Tel. Co.,* 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) ("[T]he power of the federal courts to impose duties upon third parties is not without limits; unreasonable burdens may not be imposed."); *see also United States v. Mountain States Tel. & Telegraph Co.,* 616 F.2d 1122 (9th Cir.1980) (affirming a district court's order

compelling Mountain States to perform a trace of telephone calls by means of electronic facilities within the company's exclusive control because "the obligations imposed ... were reasonable ones.") (citing *New York Tel.,* 434 U.S. at 172, 98 S.Ct. 364). If such an order is determined to be unreasonably burdensome, then relief may be available.[3]

***1149** Here, although the Company argued that compliance with the order might harm its emerging business (because people might not subscribe to its service if they become aware of this potential for court-ordered eavesdropping), the district court properly found the evidence insufficient to establish that the terms of the challenged order were overly or unreasonably burdensome. After listening to the evidence presented at the hearing, the district court concluded that "[the Company] has not shown this Court through its arguments and testimony that it's [sic] compliance with the Court's Order ... is overly or unreasonably burdensome."[4] To disregard this finding, we must declare it "clearly erroneous." *See Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001); *accord Freeman v. Allstate Life Ins. Co.,* 253 F.3d 533, 536 (9th Cir.2001). The record simply will not support the majority's ruling.

III

It is undisputed in this case that the intercept order was administered in the manner that caused the least possible interference with the subscriber's service and that the district court determined that the order was not unduly burdensome. This should end the analysis and lead to the conclusion that the district court properly ordered the provider to comply. Instead, the majority repeats the error of *Application of the United States,* 427 F.2d 639 (9th Cir.1970), the very decision that prompted Congress to amend 18 U.S.C. § 2518(4) to include the language relied upon by the district court to compel the Company's cooperation. *See Mountain States,* 616 F.2d at 1131; Maj. Op. at 1137 n. 8. Because the court's holding that the order violated § 2518(4) is based on a flawed reading of the statute, disregards the factual findings of the district court, and undermines an important investigative tool in a manner that defies common sense, I respectfully dissent.

Footnotes

4 We do not decide, as it is not relevant to our discussion, whether such eavesdropping by the Company is permitted by title III if conducted without a court order. *See* § 2511.

6 Neither the takings nor the due process challenge has been continued on appeal.

8 The Omnibus Crime Control and Safe Streets Act did not originally provide explicitly for the enlisting of assistance for surveillance purposes. *See* Pub.L. No. 90–351 (1968). In 1970, the Ninth Circuit, in *Application of the United States,* 427 F.2d 639, 644 (9th Cir.1970), held that under title III a telephone company could not be ordered to assist law

enforcement in intercepting a wire communication. Soon thereafter, § 2518 was amended to provide: "An order authorizing the interception of a wire or oral communication shall ... direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception ...." Pub.L. No. 91–358, § 211(b) (1970); *see also* H.R.Rep. No. 103–827, at 13 (1994), *reprinted* in 1994 U.S.C.C.A.N. 3489, 3493 (the 1970 amendment was in response to *Application of the United States*); *N.Y. Tel. Co.,* 434 U.S. at 177, 98 S.Ct. 364 (same).

9 "Common carriers" are entities that must provide service to the public without discrimination and are heavily regulated by the FCC. *See* 47 U.S.C. § 153(h); 47 U.S.C. § 201(a); *FCC v. Midwest Video Corp.,* 440 U.S. 689, 701, 99 S.Ct. 1435, 59 L.Ed.2d 692(1979) (defining a common carrier as an entity that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing") (internal quotation marks and citations omitted).

23 We note that the "a minimum of interference" obligation is distinct from the "minimization" requirement contained within § 2518(5). The minimization requirement directs law enforcement to intrude as little as possible into the private communications of the targeted individuals unrelated to the criminal activity under investigation. *See Dalia,* 441 U.S. at 250 n. 11, 99 S.Ct. 1682 (citing 18 U.S.C. § 2518(5)); *United States v. McGuire,* 307 F.3d 1192, 1199–1202 (9th Cir.2002). In other words, when the target of surveillance is talking about unrelated matters, law enforcement should stop listening to the conversation and then periodically monitor the conversation for pertinent communications. *See id.* at 1201–02.

24 It is not clear what purpose Congress had in mind by inserting the language in the statute. The amendment was added without comment, so there is no legislative history to guide our interpretation of the language.

25 The dissent's exegesis on the word "minimum" is unpersuasive. The construction "a minimum of," when followed by a noun such as interference (as opposed to a number), is an idiom that in common parlance means something different from the relational term "minimum" standing alone. For instance, if a customer instructed a carpenter to perform a routine house repair "with a minimum of expense," the carpenter would not be authorized to perform a one million dollar job, even if it were impossible to do it for less.

26 The dissent relies on *New York Telephone* for the proposition that "[s]ervice disruption that is severe enough to result in serious adverse effects on a provider may be prohibited by the doctrine of undue burden." *Post* at 1148. *New York Telephone,* however, was decided under the All Writs Act, not title III. 434 U.S. at 168, 98 S.Ct. 364. It is one thing to read an undue burden limitation into the seemingly unbounded authority to issue orders

that the generally worded All Writs Act appears to provide the federal courts. It is quite another to read limitations into title III that do not appear in it. Title III is an intricately worded statute that contains its own guidelines on the issuance of judicial orders; there is no gap to fill. Instead, Congress captured some of the same concerns addressed by the "undue burden" concept in the "a minimum of interference" limitation.

Similarly, *Mountain States* also was decided under the All Writs Act, and does not interpret the language here at issue. The dissent's apparent reliance on *Mountain States, post* at 1148, is therefore misplaced.

[27] The Company might well be able to design its System in such a way that surveillance could be conducted without disrupting the other System services. The current statute does not, however, require that the Company redesign its System to facilitate surveillance by law enforcement. *Compare* 47 U.S.C. § 1002(requiring telecommunications carriers to design equipment, facilities, and services in ways that facilitate government surveillance and to do so in a manner that allows communications to be intercepted "unobtrusively and with a minimum of interference.").

[2] The district court expressly understood "that the government is required to compensate [the Company] for its reasonable expenses incurred in providing such facilities or assistance." 18 U.S.C. § 2518(4). There is no evidence of record that the Company sought reimbursement for the short time it took for an operator to surreptitiously activate the System's microphone inside the car and transfer the now open cellular telephone link to the FBI.

[3] The majority mistakenly cites *New York Telephone* as supporting the proposition that the "complete disruption" of a customer's service is *per se* more than "a minimum of interference." *See* Maj. Op. at 1145. The Court in *New York Telephone* held that a lower court's order compelling the telephone company to aid the FBI in installing a pen register was "clearly authorized by the All Writs Act [28 U.S.C. § 1651(a)] and was consistent with the intent of Congress." *New York Tel.,* 434 U.S. at 172, 98 S.Ct. 364. In so holding, the Court observed that the challenged order was not unreasonably burdensome because the *company's operations* were not disrupted; it did not consider the challenged order's effect on the *customer's service. See id.* at 175, 98 S.Ct. 364. At any rate, the district court here explicitly found that compliance with the order did not "overly or unreasonably" burden the Company's operations. Thus, to the extent *New York Telephone* applies in this case, it does not support the majority's opinion.

[4] The record shows that the Company's System consists of nothing more complicated than a cellular telephone (with built-in speaker and microphone), a global positioning satellite transmitter, and a control box that determines which of two call centers will be alerted when the customer pushes one of three buttons: emergency, information, and roadside assistance. The equipment is installed before the customer takes delivery of the car. Pursuant to the challenged order, the Company call center operator's only responsibility is

to activate the microphone and transfer the cellular link to the FBI field office conducting the surveillance.