

Matheu D. Nunn and NJSBA Successful in New Jersey Supreme Court Opinion in *Facebook, Inc. v. State*

On June 29, 2023, the New Jersey Supreme Court issued an opinion in *Facebook, Inc. v. State*, ___ N.J. ___ (2023), which reversed the Appellate Division decision in *Facebook, Inc. v. State*, 471 N.J. Super. 430 (App. Div. 2022). [Matheu D. Nunn, Esq.](#), and his colleagues from the New Jersey State Bar Association, successfully argued in support of Facebook's position that law enforcement personnel need something more than a communications data warrant to obtain private Facebook messages between Facebook users on a near real-time basis. Specifically, they argued that due to the type of communications sought, law enforcement should have been required to obtain an order with protections akin to a wiretap. Facebook's position (and that of NJSBA) was also joined by Microsoft and Google, as well as several other *Amici Curiae*. The case is a huge win for privacy rights of Facebook users in New Jersey.

The Supreme Court summarized the issue as follows:

The Court considers whether Facebook can be compelled to provide the contents of two users' accounts every 15 minutes for 30 days into the future based only on probable cause, the ordinary standard for a search warrant, or whether the State must instead satisfy certain requirements and apply for a wiretap order, which requires an enhanced showing — one beyond probable cause — because gaining access to private communications in real time is considerably more intrusive than a typical search. The 15-minute delay is because of technical limitations; it is as fast as Facebook can provide the information. Even though it seeks extensive information from private user accounts that does not yet exist, in as close to real time as possible, the State argues that, in light of the 15-minute delay, it is obtaining "stored communications," which do not require a wiretap order. Nowhere else in the nation has law enforcement sought prospective communications from Facebook users' accounts without presenting a wiretap order.

The Court concluded that due to the nearly contemporaneous acquisition of electronic communications sought by law enforcement, which is the functional equivalent of wiretap surveillance, Facebook users' communications were entitled to greater constitutional protection. The Court further held that New Jersey's wiretap act applies in this case to safeguard individual privacy rights under the relevant statutes and the State Constitution.

The New Jersey Supreme Court decision is available here: https://www.njcourts.gov/system/files/court-opinions/2023/a_61_21_a_7_22.pdf.