UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA (Eastern Division - Riverside)

CRIMINAL DOCKET FOR CASE #: 5:16-cm-00010-SP All Defendants

		Docket Excerpts on Application and Amici
Date Filed	#	Docket Text
03/02/2016	<u>25</u>	APPLICATION for Leave to File Brief of Amici Curiae Access Now and Wickr Foundation in support of Apple Inc's Motion to Vacate, Filed. (ad) (Entered: 03/02/2016)
03/02/2016	<u>26</u>	APPLICATION of American Civil Liberties Union of Southern California et al to File Brief of Amici Curiae Filed. (ad) (Entered: 03/02/2016)
03/02/2016	<u>27</u>	NOTICE OF MOTION AND MOTION of ACT The App Association For Leave to File an Amicus Curiae Brief in support of Apple Inc's Motion to Vacate Order Compelling Assistance Filed. (ad) (Entered: 03/02/2016)
03/03/2016	<u>28</u>	APPLICATION for Leave to File Motion for Leave to File Amicus Brief. Filed by Plaintiff Apple Inc as to Defendant In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203. (Attachments: # 1 Amicus Curiae Brief Re: 28 U.S.C. s. 1651) (Taub, Richard) (Entered: 03/03/2016)
03/03/2016	<u>29</u>	APPLICATION for Leave to File Brief of Amici Curiae EFF and 46 Technologists, Researcher and Cryptographers Filed. (ad) (Entered: 03/03/2016)
03/03/2016	<u>30</u>	APPLICATION for Leave to File Brief of Amici Curiae Privacy International and Human Rights Watch Filed. (ad) (Entered: 03/03/2016)
03/03/2016	<u>31</u>	EX PARTE APPLICATION of Amici Curiae Federal Law Enforcement Officers Association, Association of Prosecuting Attorneys Inc and National Sheriffs' Association to Participate as Amici Curiae Filed. (ad) (Entered: 03/03/2016)
03/03/2016	<u>32</u>	MOTION for Leave to File Brief as Amici Curiae Airbnb Inc, Atlassian Pty Ltd, Automattic Inc, CloudFlare Inc, eBay Inc, GitHub Inc, Kickstarter PBC, LinkedIn Corporation, Mapbox Inc, A Medium Corporation, Meetup Inc, Reddit Inc, Square Inc, Squarespace Inc, Twilio Inc, Twitter Inc and Wickr Inc Filed. (ad) (Entered: 03/03/2016)
03/03/2016	33	First EX PARTE APPLICATION for Order for Granting Leave to Participate as Amici Curiae Federal Law Enforcement Officers Officers Association, the Association of Prosecuting Attorneys, and the National Sheriffs' Association Filed by Plaintiff USA as to Defendant In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203. (Attachments: # 1 Ex Parte Application of Amici Curiae, # 2 Order re Application of Amici Curiae, # 3 Certificate of Service) (Attorney David Richard LaBahn added to party USA(pty:pla)) (LaBahn, David) (Entered: 03/03/2016)
03/03/2016	<u>34</u>	NOTICE OF MOTION AND MOTION for Leave to Appear as Amicus Curiae AT&T Mobility Filed. (ad) (Entered: 03/03/2016)
03/03/2016	<u>35</u>	APPLICATION of Greg Clayborn, James Godoy, Hal Houser, Tina Meins, Mark Sandefur and Robert Velasco to File an Amicus Curiae Brief Filed. (ad) (Entered: 03/03/2016)
03/03/2016	<u>36</u>	NOTICE OF MOTION AND MOTION of Intel Corporation for Leave to File Brief as Amicus Curiae Filed. (ad) (Entered: 03/03/2016)
03/03/2016	<u>37</u>	APPLICATION for Leave to File Amici Curiae Brief; Statement of Identity and Interests of Amici Curiae; Brief of Amici Curiae and Memorandum of Points and Authorities in support of Amici Curiae Brief Filed by The California State Sheriffs Association, California Police

		Chiefs' Association and the California Peace Officers' Association. (ad) (Entered: 03/03/2016)	
03/03/2016	<u>38</u>	APPLICATION of Amazon.com, Box, Cisco Systems, Dropbox, Evernote, Facebook, Google, Microsoft, Mozilla, Nest, Pinterest, Slack, Snapchat, WhatsApp and Yahoo to Participate as Amici Curiae in support of Apple Inc Filed. (ad) (Entered: 03/03/2016)	
03/03/2016	<u>39</u>	NOTICE OF MOTION AND MOTION of AVG Technologies, The Computer & Communications Industry Association, Data Foundry, Golden Frog, The Internet Association and The Internet Infrastructure Coalition for Leave to File an Amici Curiae Brief in support of Apple Inc's Motion to Vacate Order Compelling Assistance Filed. (artered: 03/03/2016)	
03/03/2016	<u>40</u>	NOTICE OF MOTION AND MOTION of Electronic Privacy Information Center (EPIC) Eight Consumer Privacy Organizations for Leave to File an Amicus Curiae Brief Filed (ad) (Entered: 03/03/2016)	
03/03/2016	<u>41</u>	San Bernardino County District Attorney's APPLICATION to Participate as Amicus Cu Filed. (ad) (Entered: 03/03/2016)	
03/03/2016	<u>42</u>	APPLICATION of BSA The Software Alliance, the Consumer Technology Association Information Technology Industry Council and TechNet to File Brief of Amici Curiae File (ad) (Entered: 03/03/2016)	
03/03/2016	<u>43</u>	Center for Democracy & Technology's NOTICE OF MOTION AND MOTION for Leave File Brief as Amicus Curiae in support of Apple Inc's Motion to Vacate and in Oppositi Government's Motion to Compel Assistance Filed. (ad) (Entered: 03/03/2016)	
03/03/2016	<u>44</u>	NOTICE OF MOTION AND MOTION of the Media Institute for Leave to File an Amicu Curiae Brief in support of Apple Inc Filed. (ad) (Entered: 03/03/2016)	
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03/03/2016	DECLARATION of Jonathan H Blavin in support of MOTION of Airbnb Inc, Atlassian Pt Ltd, Automattic Inc, CloudFlare Inc, eBay Inc, GitHub Inc, Kickstarter PBC, LinkedIn Corporation, Mapbox Inc, A Medium Corporation, Meetup Inc, Reddit Inc, Square Inc, Squarespace Inc, Twilio Inc, Twitter Inc and Wickr Inc for Leave to File Brief as Amici Curiae 32. (ad) (Entered: 03/03/2016)		
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03/03/2016	<u>49</u>	MOTION for Leave to File Brief of Amicus Curiae Lavabit LLC in support of Apple Inc. Motion to Vacate Filed. (ad) (Entered: 03/03/2016)	

Case 5:16-cm-00010-SP Document 25 Filed 03/02/16 Page 1 of 5 Page ID #:560 Marcia Hofmann (Cal. Bar No. 250087) 1 Zeitgeist Law PC 2 2016 MAR -2 PM 1: 37 25 Taylor Street CLERK U.S. DISTRICT COURT CENTRAL DIST. OF CALIF. RIVERSIDE 3 San Francisco, CA 94102 Telephone: (415) 830-6664 4 marcia@zeitgeist.law 5 Attorney for Amici Curiae 6 Access Now and Wickr Foundation 7 8 UNITED STATES DISTRICT COURT 9 FOR THE CENTRAL DISTRICT OF CALIFORNIA 10 **EASTERN DIVISION** 11 12 IN THE MATTER OF THE SEARCH Case No. 5:16-cm-00010-SP-1 13 OF AN APPLE IPHONE SEIZED APPLICATION FOR LEAVE TO DURING THE EXECUTION OF A 14 FILE BRIEF OF AMICI CURIAE SEARCH WARRANT ON A BLACK ACCESS NOW AND WICKR FOUNDATION IN SUPPORT OF 15 LEXUS IS300, CALIFORNIA LICENSE APPLE INC.'S MOTION TO PLATE 35KGD203 16 VACATE 17 Date: March 22, 2016 Time: 1:00 p.m. 18 Place: Courtroom 3 or 4, 3<sup>rd</sup> Floor 19 Judge: Honorable Sheri Pym 20 21 22 23 ORIGINAL 24 25 26 27 28 APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF ACCESS NOW Case No. 5:16-cm-10-SP-1 AND WICKR FOUNDATION

Access Now and Wickr Foundation hereby seek leave to file an amici curiae brief in support of Apple Inc.'s motion to vacate an order compelling Apple to assist government agents in the search of an iPhone. This application is supported by the proposed amici curiae brief and proposed order.

Amici are non-profit civil society organizations dedicated to supporting digital rights and championing private communications throughout the world. Amici's proposed brief seeks to inform the Court about the impact that the intentional weakening of digital security would have on global human rights.

The government claims that this case is about a single iPhone, and that the software solution it wants Apple to create will do nothing to weaken encryption. In reality, this case could set precedent for law enforcement to demand that any technology company deliberately impair the security of its products or services, and has potential to do far-reaching harm.

Technology and connectivity have empowered millions around the world to demand social and political change—but criminals and authoritarian regimes exploit the same technology to identify and persecute protesters, democracy activists, bloggers, and journalists. In some countries, reliable security tools such as encryption can be the difference between life and death. The relief sought by the government endangers people globally who depend on robust digital security for their physical safety and wellbeing.

## Case 5:16-cm-00010-SP Document 25 Filed 03/02/16 Page 3 of 5 Page ID #:562

Pursuant to international law, the United States government has a duty to foster 1 basic human rights such as freedom of expression and privacy. The assistance sought by 2 3 the government not only undermines the commitment of the United States to uphold 4 those fundamental rights in the digital age, but also keeps Apple from fulfilling its own 5 responsibilities to respect the human rights of users. 6 7 Counsel for amici has contacted Apple Inc. and the United States to ask their 8 positions on this proposed amici curiae brief. The parties have both indicated that they 9 do not object to the filing of this brief. 10 11 Respectfully submitted, DATED: March 1, 2016 12

Marcia Hofmann
Zeitgeist Law PC
25 Taylor Street

San Francisco, CA 94102

marcia@zeitgeist.law

Telephone: (415) 830-6664

Attorney for Amici Curiae Access Now and Wickr Foundation

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PROOF OF SERVICE 1 I, the undersigned, declare that I am a citizen of the United States; my business 2 address is 25 Taylor Street, San Francisco, California 94102; I am employed in the City 3 and County of San Francisco; I am over the age of eighteen (18) years and not a party to 4 the within action. 5 On March 1, 2016, I served the foregoing document described as: 6 • Application for Leave to File Brief of Amici Curiae Access Now and Wickr 7 Foundation in Support of Apple Inc.'s Motion to Vacate 8 on the interested party(ies) in this action by placing a true copy thereof enclosed in a 9 sealed envelope addressed as follows: 10 Allen W Chiu Theodore J Boutrous, Jr. 11 AUSA - Office of US Attorney Eric David Vandevelde National Security Section Gibson Dunn and Crutcher LLP 12 312 North Spring Street, Suite 1300 333 South Grand Avenue Los Angeles, CA 90012 13 Los Angeles, CA 90071 213-229-7000 213-894-2435 14 Marc J Zwillinger Tracy L Wilkison 15 Jeffrey G Landis AUSA Office of US Attorney 16 Zwillgen PLLC Chief, Cyber and Intellectual Property Crimes 1900 M Street NW Suite 250 Section 17 Washington, DC 20036 312 North Spring Street, 11th Floor 202-296-3585 Los Angeles, CA 90012-4700 18 213-894-0622 19 Nicola T Hanna Gibson Dunn and Crutcher LLP Counsel for Plaintiff USA 20 3161 Michelson Drive 12th Floor Irvine, CA 92612-4412 21 949-451-3800 22 Theodore B Olson 23 Gibson Dunn and Crutcher LLP 1050 Connecticut Avenue NW 24 Washington, DC 20036-5306 25 202-955-8668 26 Counsel for Respondent Apple Inc. 27 28 APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF ACCESS NOW AND WICKR FOUNDATION Case No. 5:16-cm-10-SP-1

## Case 5:16-cm-00010-SP Document 25 Filed 03/02/16 Page 5 of 5 Page ID #:564

BY MAIL: I caused such envelope(s), fully prepaid, to be placed in the United States mail at San Francisco, California. I am "readily familiar" with this firm's practice for collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service the same day, with postage thereon fully prepaid, at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date on postage meter date is more than one day after date of deposit for mailing in affidavit. I declare that I am employed in the office of a member of the bar of this court at whose direction this service was made. I declare under penalty of perjury under the laws

of the United States of America that the foregoing is true and correct.

DATED: March 1, 2016

Manie Shattuck

Document 26 Filed 03/02/16 , Page 1 of 6 Page ID #:565

Case 5:16-cm-00010-SP

## APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Proposed *amici curiae* the American Civil Liberties Union ("ACLU"), ACLU of Southern California, ACLU of Northern California, and ACLU of San Diego and Imperial Counties, by and through undersigned counsel, hereby move the Court for leave to file the attached Brief of *Amici Curiae* in the abovecaptioned case.

In support of this motion, proposed amici state the following:

The disposition of this case is of critical importance to Americans' privacy and cybersecurity because the government seeks to compel a technology company to create software designed to weaken the security of its own devices—an effort that, if successful, would set precedent implicating the security and privacy of hundreds of millions of Americans. This case raises both statutory and constitutional questions regarding the limits of law enforcement authority to compel private parties to assist in investigations.

Proposed *amici* argue that the request is not authorized by the All Writs Act because the Act does not permit the government to force innocent third parties to turn over information not already in their possession or control, because the assistance the government seeks is unreasonably burdensome and unnecessary, and because Congress has deliberately withheld from the government the authority to require technology companies to circumvent the security protections in their devices. Proposed *amici* also argue that the order the government seeks violates the Fifth Amendment, and that principles of constitutional avoidance counsel against granting the government's request.

Proposed *amici* frequently appear as direct counsel or *amicus curiae* in cases raising similar legal issues to those here.

Proposed *amicus* the American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members

dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before the Supreme Court and other federal courts, both as direct counsel and as *amicus curiae*, in numerous cases implicating Americans' right to privacy. The ACLU and its members have long been concerned about the impact of new technologies on constitutional rights. The ACLU is particularly concerned with protecting the lawful use of strong encryption technologies, which are essential to preserving the constitutional guarantees of privacy, free expression, and anonymity in the digital age. The ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties are the geographic affiliates in California of the ACLU.

Counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Wherefore, proposed *amici* respectfully request leave to file the attached Brief of *Amici Curiae*, to aid this Court in its consideration and resolution of the issues in this case.

March 2, 2016

Respectfully Submitted,

Peter Bibring

**ACLU OF SOUTHERN** 

**CALIFORNIA** 

pbibring@aclusocal.org 1313 West Eighth Street Los Angeles, CA 90017

Telephone: (213) 977-9500

1 Alex Abdo Esha Bhandari 2 Eliza Sweren-Becker\* 3 Brett Max Kaufman aabdo@aclu.org 4 **AMERICAN CIVIL LIBERTIES** 5 UNION FOUNDATION 125 Broad Street, 18th Floor 6 New York, NY 10004 7 Telephone: (212) 549-2500 8 Linda Lye (SBN 215584) 9 llye@aclunc.org **ACLU OF NORTHERN** 10 **CALIFORNIA** 11 39 Drumm Street, 2nd Floor San Francisco, CA 94111 12 Telephone: (415) 621-2493 13 David Loy (SBN 229235) 14 davidloy@aclusandiego.org 15 ACLU OF SAN DIEGO AND **IMPERIAL COUNTIES** 16 San Diego, CA 92138 17 Telephone: (619) 232-2121 18 \*Application for admission to the bar 19 pending 20 Attorneys for amici curiae 21 22 23 24 25 26 27

#### PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is ACLU of Southern California, 1313 West 8th Street, Los Angeles, CA 90017.

On March 2, 2016, I caused to be served through mail (USPS) and e-mail the foregoing document described as:

## APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA ET AL. TO FILE BRIEF OF AMICI CURIAE; PROPOSED BRIEF

on each person on the attached Service List.

Executed on March 2, 2016, in Los Angeles, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Diana Gonzalez

Print Name

Signature

## **Service List**

Service Type	Counsel Served	Party
Mail & E-mail	Theodore J. Boutrous, Jr. Nicola T. Hanna Eric D. Vandevelde Gibson, Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 Telephone: (213) 229-7000 Facsimile: (213) 229-7520	Apple, Inc.

## Case 5:16-cm-00010-SP Document 26 Filed 03/02/16 Page 6 of 6 Page ID #:570

	Email: tboutrous@gibsondunn.com		
	nhanna@gibsondunn.com		
	evandevelde@gibsondunn.com		
Mail & E-mail			
	Gibson, Dunn & Crutcher LLP	Apple, Inc.	
	1050 Connecticut Avenue, N.W.		
	Washington, DC, 20036-5306		
	Telephone: (202) 955-8500		
	Facsimile: (202) 467-0539		
	Email: tolson@gibsondunn.com		
Mail & E-mail	Marc J. Zwillinger	A 1 T	
	Jefffrey G. Landis	Apple, Inc.	
	Zwillgen PLLC		
	1900 M Street N.W., Suite 250		
	Washington, D.C. 20036		
	Telephone: (202) 706-5202		
	Facsimile: (202) 706-5298		
	Email: marc@zwillgen.com		
	jeff@zwillgen.com		
Mail & E-mail	Eileen M. Decker	United State	
	Patricia A. Donahue	of America	
	Tracy L. Wilkison	Of 7 tillerica	
	Allen W. Chiu		
	1500 United States Courthouse		
	7312 North Spring Street		
	Los Angeles, California 90012		
	Telephone: (213) 894-0622/2435		
	Facsimile: (213) 894-8601		
	Email: Tracy. Wilkison@usdoj.gov		
	Allen.Chiu@usdoj.gov		

1 2 3 4 5 6 7 8 9	Facsimile: +1 213 896-6600	
11	Attorneys for Amicus Curiae ACT   The Ap	op Association
12 135 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	EASTERN D  INTHE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA LICENSE PLATE 35KGD203	OF CALIFORNIA

#### TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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PLEASE TAKE NOTICE THAT ACT | The App Association ("ACT") respectfully requests leave to participate in this action as *amicus curiae* supporting Apple Inc.'s ("Apple") Motion to Vacate the Order Compelling Apple to Assist Agents in Search, and Opposition to the Government's Motion to Compel Assistance (filed Feb. 25, 2016) [ECF Docket Entry 16]. *Amicus* requests leave to help explain the extraordinary burdens that the Government's position would impose, and to discuss the disruption it threatens for a significant sector of the economy.

#### I. STANDARD FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

"[A] district court has broad discretion to appoint amici curiae." Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982). "There are no strict prerequisites that must be established prior to qualifying for amicus status although an individual or organization seeking to participate as amicus curiae must make a showing that his participation is useful to or otherwise desirable to the court." Congregation Etz Chaim v. City of Los Angeles, No. CV 97-5042 CAS(EX), 2009 WL 1293257, at \*5 n.4 (C.D. Cal. May 5, 2009) (quoting Infineon Techs. N. Am. Corp. v. Mosaid Techs., Inc., No. C 02-5772 JF(RS), 2006 WL 3050849, at \*3 (N.D. Cal. Oct. 23, 2006)). "An amicus brief should normally be allowed" when, among other considerations, "the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." Cmty. Ass'n for Restoration of the Env't (CARE) v. DeRuyter Bros. Dairy, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citation omitted). "District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved[.]" Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc., 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003).

As explained below and in ACT's brief, the ramifications of the order to compel assistance obtained by the Government extend far beyond the parties directly involved and the issue of encryption. The Government's position and the order's

sweep should concern any company that uses proprietary methods to protect data privacy and security, and ACT counts numerous such companies among its members.

## II. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

ACT (formerly known as the Association for Competitive Technology) is an international grassroots advocacy and education organization representing more than 5,000 small and mid-size app developers and information technology firms. It is the only organization focused on the needs of small business innovators from around the world. ACT advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating. To this end, ACT has been closely monitoring recent developments in this case and others like it because of the significant implications for the interests of its members. In light of the critical role that technological innovation plays in enhancing competition and improving the welfare of consumers, ACT has a special interest in ensuring that federal law is properly applied to dynamic industries and innovative technologies.

ACT has participated as *amicus curiae* in a number of cases involving technological innovation. *See*, *e.g.*, *United States v. Apple, Inc.*, No. 15-565 (U.S.) (pending, ACT's brief filed Dec. 2, 2015); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

### III. AMICUS CURIAE'S EXPERTISE WILL BENEFIT THE COURT

Based on its strong interest in fostering innovation and protecting the interests of app developers and information technology firms, ACT believes that its perspective will aid this Court in evaluating the motions filed by the Government and Apple. The Government has premised its All Writs Act arguments on the proposition that "compan[ies] that write[] software code as part of [their] regular business" can be compelled to "modify[] an operating system" or "writ[e] software code." *Ex Parte* Application for Order Compelling Apple Inc. to Assist Agents at 15 (C.D. Cal. Feb.

16, 2016). ACT has substantial knowledge and a unique perspective regarding those issues, and submits that its participation as an *amicus* would assist the Court in assessing the "potential ramifications beyond the parties directly involved," *Sonoma Falls Developers*, 272 F. Supp. 2d at 925, and in particular would highlight the potentially devastating impact that the Government's order may have for software developers and across a number of critical industries.

#### IV. CONCLUSION

Accordingly, ACT respectfully requests that the Court grant this Motion for Leave to Participate as *amicus curiae*, and to file the accompanying Brief in Support of Apple's Motion to Vacate the Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to the Government's Motion to Compel Assistance.

ACT brings this motion after conferring with the parties' counsel. Counsel for Apple and the United States indicated that they have no opposition to ACT | The App Association's motion for leave to file its *amicus curiae* brief in support of Apple.

Dated: March 2, 2016

SIDLEY AUSTIN LLP Mark E. Haddad Eamon P. Joyce

Nicholas M. McLean

Mark E. Haddad

Attorneys for *Amicus Curiae* ACT | The App Association

RICHARD F. TAUB, SBN 273865

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rtaub@taublawyers.com TAUB & TAUB. P.C.

 $_{3}$ 

15260 Ventura Blvd., Ste. 840

4

Sherman Oaks, CA 91403 Tel.: 818.259.5300

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Fax: 818.259.5307

6

**Amicus Curiae** 

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

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IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300. CALIFORNIA LICENSE PLATE 35KGD203 ED No. CM 16-00010 (SP)

## RICHARD F. TAUB'S MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Richard F. Taub (hereinafter "Undersigned Counsel") respectfully moves this Court for leave to file a brief as *amicus curiae* as to the authority and scope of Title 28 U.S.C. § 1651, the All Writs Act in the context of this case as to whether it can authorize the relief sought by the Government for Apple's assistance in this matter.

## I. FEDERAL DISTRICT COURTS HAVE INHERENT AUTHORITY TO ACCEPT AMICUS BRIEFS

Though the Federal Rules of Civil Procedure do not provide for the filing of amicus briefs at the federal district court level, courts have inherent authority to appoint "friends of the court" to assist in their proceedings. *In* 

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re Bayshore Ford Truck Sales, Inc., 471 F.3d 1233, 1249 n. 34 (11<sup>th</sup> Cir. 2006). The district court retains the inherent authority to appoint amicus curiae to assist it in a proceeding. Alliance of Auto. Mfrs. v. Gwadowsky, 297 F.Supp. 2d. 305, 306 (D. Me. 2003).

# II. THE PROPOSED AMICUS BRIEF PROVIDES SUPPLEMENTAL ANALYSIS OF TITLE 28 U.S.C. § 1651, THE ALL WRITS ACT AS IT APPLIES TO THE INSTANT CASE THAT WAS NOT BRIEFED COMPLETELY BY THE PARTIES

The instant *amicus* brief is meant to focus completely on the All Writs Act's reach in the context of the Government's request for Apple to create code to defeat its security features for an item it sells and markets to the general public. In no case reflecting appellate-level *stare decisis* has the Government ever sought this degree of relief from a court to compel a third party to provide work product to the Government for its purposes to discover electronic information. The Government's original application tends to assume that the All Writs Act provides the authority for it to obtain its sizeable relief. Apple's opposition and request for vacatur of the Court's order compelling it to act as the Government requested necessarily covers constitutional and other issues in its limited 35-page brief and, so, fails to provide greater depth regarding the All Writs Act's reach in this case. For these reasons, the Court should grant leave to officially file the accompanying brief.

WHEREFORE, the Undersigned Counsel respectfully requests that

this Honorable Court grant its Motion for Leave to File Amicus Brief and deem the accompanying brief filed for all purposes.. Respectfully submitted, this 3<sup>rd</sup> day of March, 2016. Taub & Taub, P.C. /s/ Richard F. Taub By: Richard F. Taub **Amicus Curiae** 

RICHARD F. TAUB, SBN 273865
rtaub@taublawyers.com
TAUB & TAUB, P.C.
15260 Ventura Blvd., Ste. 840
Sherman Oaks, CA 91403
Tel.: 818.259.5300
Fax: 818.259.5307
Amicus Curiae

## UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA EASTERN DIVISION

IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300. CALIFORNIA LICENSE PLATE 35KGD203 ED No. CM 16-00010 (SP)

AMICUS CURIAE BRIEF RE: 28 U.S.C. § 1651

Amicus Curiae Richard F. Taub, Esq. (hereinafter "Undersigned Counsel"), hereby files this Amicus Curiae Brief to assist the Court in its analysis of certain issues to be considered in this case regarding the Government's Motion to Compel Assistance and Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance.

i

## AMICUS CURIAE BRIEF RE: 28 U.S.C. § 1651

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## **PRELIMINARY STATEMENT**

This Amicus Curiae Brief has been authored solely by the Undersigned Counsel. Neither the Undersigned Counsel nor the points and authorities contained herein have any connection whatsoever to the parties to this action. The purpose of this Brief is to aid the Court primarily in its decision in this matter by expounding upon the relevant scope of Title 28 U.S.C. § 1651 to determine whether it may authorize the type of remedy sought by the Government beyond the arguments and authorities set forth in the parties' applications and motions.

## **POINTS AND AUTHORITIES**

- I. The Scope of 28 U.S. C. § 1651 (the "All Writs Act")
  - A. Brief History of the All Writs Act and Requirement of Underlying Statutory Authority for Proposed Actions

Title 28 U.S.C. § 1651, the present All Writs Act originally was codified in section 14 of the Judiciary Act of 1789. *Pennsylvania Bureau of Correction v. United States Marshals Service* (1985) 474 U.S. 34, 40. The All Writs Act in its original form provided in pertinent part as follows:

all the... courts of the United States, shall have power to issue writs of *scire facias, habeas corpus*, and all other writs **not specifically provided for by statute**, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

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[t]he writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews.

*Id.* In this instance, the absence of an underlying statute providing for the type of review sought was fatal to an attempt to invoke the All Writs Act to accomplish that goal.

The *United States Marshals Service* case analyzed the authority of the federal district court to order the Marshals Service to transport state prisoners for federal *habeas* hearings. The United States Supreme Court in the *Marshals Service* case held, most significantly to the case at bar, that the All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. *Id.* at 43. It further reasoned that "[a]lthough that Act empowers federal courts to fashion extraordinary remedies when

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B. The All Writs Act's Use with Third Parties to Effect the Purpose of Specific Statutory Authority and the Present State of Legislation to Allow Law Enforcement to Defeat Private Encryption

In its present form, the All Writs Act provides in pertinent part that "[t]he Supreme Court and all courts established by Act of Congress may use all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). Regardless of the missing language regarding "express statutory authority", under *Alkali*, an underlying statutory authority must still be present. *See Alkali* at *Id*. However, statutory authority specifically addressing the particular issue at hand controls over the All Writs Act. *See United States Marshals Service* at 34. As set forth in *United States Marshals Service*,

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Constitutional and other limitations aside, the degree to which a statute authorizes the type of action at issue or even specifically addresses third party assistance should provide insight into the degree upon which the Court may expect to compel third party assistance. Title 18 § 2518(4) and (5) of the wire interception statute provides a perfect example of the degree that a Court may involve third parties in the context of a substantive statute enabling the type of relief sought generally with the aid of the All Writs Act to provide a specific vehicle to do so. Most importantly, section 4(e) of that provision specifically provides for an order directing the assistance of a telecommunications provider with protections against unreasonable interference and to compensate such providers. See 18 U.S.C. § 2518(4)(e). It stands to reason that an Order co-opting a third party under the wire interception statute could carefully follow Section 4(e) with complete impunity short of constitutional limitations. In contrast, it stands to reason that an order directing the assistance of a third party in the absence of such specific legislative direction regarding third party involvement would have to be more circumscribed under an order whose only legal basis for third party involvement is the All Writs Act.

In this case, Federal Rule of Criminal Procedure 41 provides the only underlying legal basis for the Government's action. Rule 41 is itself completely silent as to third party assistance to accomplish its goals.

However, this case presents more than the question of the All Writs Act's scope over third party assistance in the absence of legislation containing third party assistance provisions. This case presents the question of what power the All Writs Act confers on a District Court when Congress has decided specifically not to act. The District Court in *In re* 

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Order Requiring Apple, Inc., 2015 U.S. Dist. Lexis 138755 (E.D.N.Y. 2015) addressed precisely that issue. It analyzed, inter alia, the legislative history of the Comprehensive Counter-Terrorism Act of 1991 ("CALEA"), a 2012 note by Senator Leahy, a co-sponsor of CALEA that the Obama Administration had not proposed specific amending legislation on the issue of the law failing to keep up with the type of technology at issue in this case, the proposed introduction of Bills from 2015 to preclude the government from forcing a private entity such as Apple to compromise the kind of data security at issue in this case. See generally In re Order Requiring Apple, Inc. The District Court in In re Order noted that Congress is plainly aware of the lack of statutory authority, but has thus far failed to either create or reject the type of relief the Government seeks here. *Id.* at 10. That Court indicated that, under these circumstances makes it much less obvious that the relief sought herein would be available under the All Writs Act, id., and concluded that this analysis "strongly suggests that granting the instant motion would be inconsistent with the purpose of the All Writs Act as interpreted in the aforementioned cases." *Id.* [emphases added] The Court then granted a due process hearing for Apple before that Court made a final decision. Similar to our case, the present state of the law is that debate rages on regarding the issue of whether to give the Government the awesome power of defeating privacy interests that the public has in their data in favor of a criminal investigation. Congress is aware of the issues, but has not acted, which continues to suggest that a far reaching decision to compel a manufacturer to create code to defeat its own encryption, upon which members of the public have relied in their purchase decision and use of Apple's product, is not authorized by the All Writs Act standing alone.

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## C. Reasonableness of Burden Upon Third Party Apple

Also to be considered by this Court is the reasonableness of the Government's request of third party manufacturers not merely to implement existing tools or process, but to create one at considerable effort and expense. The power of federal courts to impose duties upon third parties is not without limits; unreasonable burdens may not be imposed. *United* States v. New York Telephone Co., 434 U.S. 159 (1977). At issue in the New York Telephone Co. case was whether a highly regulated public telephone service utility with a duty to serve the public had a substantial interest in not providing "meager" assistance needed by the FBI in its investigation to determine whether the utility's facilities were being used by a criminal enterprise. See Id. at 174. Underscoring the Court's decision that New York Telephone Co. could be compelled to assist in the installation and operation of pen registers was the pre-existing mandate from Congress under then-existing 18 U.S.C. § 2518(4) for a "communication common carrier to furnish [law enforcement] all information, facilities, and technical assistance necessary to accomplish" wire interception unobtrusively. Thus, the New York Telephone Co. case rather clearly stands for the proposition that, in the presence of a statute specifically providing for the assistance of third parties necessary to avoid frustration of a Court's lawful order, and one that requires only "meager" assistance at that, it is more likely the All Writs Act will allow the district court to fashion a remedy to compel that assistance.

In this case, there is no such statutory provision that evinces congressional intent to empower the district court to specifically require third party Apple to act in the extraordinary fashion requested by the Government. In *New York Telephone Co.* the express statutory authority

found under 18 U.S.C. § 2518(4) specifically contemplated and set forth a procedure for the assistance by a telecommunications provider in the case of wire interception orders. In fact, section 4 of that Act provides for parameters and protections for third party service providers. Here, there are no statutory provisions or other sources of law requiring the manufacturer of a smartphone to dismantle its data security methods, whether by providing encryption keys or to undermine its security to allow entry to a passcode-protected phone. In the absence of any legislative authorization, procedures or limitations on the assistance of a third party manufacturer under these circumstances, the Court's inherent reach to compel the assistance of that third party in aid of execution of a search warrant should be quite limited and not reach as far as to force the third party manufacturer into involuntary servitude to substantially modify its operating system to undermine its security features. Most importantly, however, this case presents much more than the "meager" assistance required under the wire interception act and of the third party telecommunications provider in *New York Telephone Co.* Private third party manufacturer Apple has a substantial interest in resisting the forced labor sought by the Government under circumstances where it is not a public utility and is not requested to provide "meager" assistance. It is, in fact, asked to become involved in a considerable amount of research and development. The Government's request here stretches the holding in the

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<sup>&</sup>lt;sup>1</sup> The Undersigned Counsel freely concedes that, there may be a different result if this case had involved the mere requirement that Apple turn over to the Government a pre-existing "back door" passcode to unlock all iPhones. While that circumstance would be just as dangerous to the data security of the public, it would not necessarily be prohibited by the All Writs Act, even if it may be prohibited by other provisions of law.

New York Telephone Co. case beyond its breaking point.

The Court would, likewise, come to the same conclusion that the requests of the Government here even if it were to apply the Ninth Circuit's analysis associated with third party telecommunications providers under compulsion to assist the Government.

Even if the Court utilized a similar analysis to that set forth for telecommunications providers for which their assistance is sought, the same conclusion against compelling Apple to act as requested would result. The Ninth Circuit set forth a procedure for due process to be accorded third parties beset by an All Writs order to assist the government and a set of factors for the federal district court to determine the reasonableness of the burden of compliance of the All Writs order. In the case of *In re Application of United States for an Order etc.* (1980) 616 F.2d 1122, the Ninth Circuit exercised its authority to supervise the administration of criminal justice within the circuit to determine that a company whose cooperation in electronic surveillance is sought should be afforded reasonable notice and an opportunity to be heard *prior* to the entry of any order compelling its assistance. *Id.* at 1132-3.

<sup>&</sup>lt;sup>2</sup> The Court should consider that these factors were imposed in the Ninth Circuit for such a determination in the context of third party public utilities mandated to serve the public as set forth in the *New York Telephone Co.* case and not for other private for-profit third parties, publicly traded or not. In other words, under *New York Telephone Co.*, it may be appropriate for the Court to include in a remoteness analysis of third party, Apple Inc. from the device at issue as its manufacturer and not its owner, and cooperation sought that Apple Inc. is not similarly situated to a public utility as to the utility's independent obligations to serve the public in this manner and, thus, its Government. If it were, the Court would logically have to consider Apple's contention to be serving the public by using its resources to oppose the creation of a "back door" to its encryption and to undermine the privacy of millions of iPhone owners as collateral damage to Apple's compelled assistance at the Government's behest.

<sup>&</sup>lt;sup>3</sup> It makes little sense to suggest that the procedure set forth in that case should be read to be limited to electronic surveillance cases when the process created was clearly meant to provide due process and a burdensomeness determination as to third party direction by court order in the All Writs Act context. The fact that electronic surveillance may be more common than the encryption issues in this case is irrelevant.

The Ninth Circuit imposed upon federal district courts within its supervisory authority, a series of non-exhaustive factors to be utilized at this due process hearing that includes the following: (1) the likelihood that the surveillance will develop information useful in a criminal prosecution; (2) the availability of alternative means for obtaining the information; (3) the extent of the burdens which the requested surveillance would place upon the telephone company; (4) the extent to which the restrictions upon the scope of the surveillance can minimize interference with company operations; and (5) the likelihood that the company can be fully compensated for the services provided (collectively, "Reasonableness Factors"). Significantly, the Ninth Circuit specifically determined its procedure would safeguard the interests of communications carriers, will not interfere with the government's pursuit of appropriate investigative tools, and would provide the district courts with a sound basis for the wise exercise of their discretion. *Id.* at 1133.

In the context of the case at bar, those Reasonableness Factors that appear, *prima facie*, to apply in electronic surveillance matters can easily be slightly more generalized to read as follows: (1) the likelihood that the requested assistance of the third party will develop information useful in a criminal prosecution, (3) the extent of the burdens which the compelled assistance would place upon the third party, (4) the extent to which the scope of compelled assistance will minimize interference with company operations; and (5) the likelihood that the company can be fully compensated for the services provided. Since the Ninth Circuit specifically indicated that these factors were non-exhaustive, other non-enumerated factors should be considered by the Court in this case. For instance, the Court should consider, under these facts, (6) whether the public interest in

the adverse impact upon United States citizens' privacy interests in the compromised security of ubiquitous smartphones used to maintain confidential data outweighs the Government's interest in securing data from a single iPhone, (7) whether the compelled assistance of third party, Apple Inc. ("Apple") requires mere assistance or longer term employment, and, perhaps, (8) whether the assistance at issue requires the creation of a product and not the mere use of pre-existing tools ordinarily used by the third party in the scope of its business.

In the context of this case, the analysis weighs rather heavily in a finding of unreasonable burden upon third party Apple. The Government rather freely admits that it has no idea what, if anything, is on the cellphone. The principal criminal shooters are dead. The prosecution of a third party for his involvement *collateral* to the cellphone suggests no such useful evidence present on the cellphone at issue. The Government's theory of its user's contact with ISIS suggests it unlikely that even complete access to the cellphone will yield anything useful for a criminal prosecution. As has been suggested by Apple, the Government may have alternative means in seeking Apple's assistance merely to access the iPhone at issue for its data, rather than requiring Apple to actually create code to disable the auto erase and delay safeguards. Apple has also articulated substantial burdens placed upon it to enlist staff, time and effort to create code to defeat its original security measures, and its burden of having to defeat its original security plan in the presence of a rejected legislative plan to prevent unbreakable encryption systems. However, the Government's

position on that matter is, at present, scant on the subject.<sup>4</sup> Interference with Apple's operations is also articulated as part of its attached declarations relating to the efforts in creating the code desired by the Government. Nevertheless, it does appear likely that Apple can be fully compensated by the Government for the employment of its personnel to accomplish the Government's goal. The application of the facts to these factors vitiate in favor of granting Apple's requested relief in vacating the existing Order.

The impact on the risks regarding the invasion of privacy to iPhone users, however, weighs heavily against a finding that the burden would be reasonable. The entire purpose, in the modern world, of a high level of encryption (permitted by Congress) to exist in safeguarding data is to recognize the strong interest in privacy in that very data. The data is encrypted in a manner that even the manufacturer cannot invade without creating a tool of the type sought by the Government in this case, which Apple has (to this point and prior to the events giving rise to the order compelling Apple to act) voluntarily refused to do. This issue should be considered by the Court to, perhaps, be the weightiest factor to be considered under the facts of this case because of its global impact. Indeed, the impact to third party Apple could be equally catastrophic in deterring users from purchasing electronic products that are unsecure for the protection of their data. Even if putative consumers of Apple products erroneously believe that the release of code that undermines the iPhone

<sup>&</sup>lt;sup>4</sup> In fairness to the Government, its Reply Brief is not due until after the deadline for the filing of this Amicus Brief. Consequently, if the Government can undermine Apple's burdensomeness claims, that may change the weight of this particular factor.

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security encryption measures could be sufficient to turn users away from purchasing what are perceived to be unsecured Apple products. As articulated by Apple, the cooperation sought appears to be longer and more involved than the employment of traditional forms of All Writs third party assistance (though the Government may yet set forth facts in support of its position that the assistance is meager). These factors tend to weigh heavily in vacatur of the Court's order compelling third party Apple to cooperate as requested by Apple.

Lastly, the requirement that Apple have to create code or any other product to assist the Government, whether otherwise necessary to defeat something Apple itself put in place or to defeat the protections sought by others is, perhaps, the most reprehensible of effects of the Government's request. This requirement that any third party have to go to any real or considerable effort to create something under punishment of contempt for failing to do so smacks so repugnantly of involuntary servitude, regardless of the actual inapplicability of the Thirteenth Amendment to the United States Constitution to this case. The stretching of what it means under the All Writs Act to render assistance under threat of punishment to the point of creation of code or any other product easily takes the concept of assistance to the point of "snapping" and, it is shocking to think of an Article III Court enforcing it in the absence of a specific underlying statutory authority authorizing it. In sum, consideration of the Reasonableness Factors with a few additional non-enumerated factors relating to glaring issues presented in this case inexorably lead to the conclusion that the existing ex parte Order should be vacated and the Government's motion to compel denied.

## **CONCLUSION**

Title 28 U.S.C. 1651(a), the All Writs Act is not, itself a substantive

1 grant of powers to the district courts to act with the issuance of ad hoc 2 3 4 5 6 7 8 10 11 12 13 14 15 16 17 18 19 20

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writs. It merely provides the issuance of all writs necessary to the completion of the Court's jurisdiction where created by another source of law. Where Congress acts to provide for the specific cooperation of third parties to a degree not limited by the Constitution, the district courts may issue orders pursuant to that authority. In the absence of congressional authority, and especially when Congress has chosen not to act when it is aware of the desire of law enforcement to overcome third party private encryption (which is guite telling), the district court's ability to complete its jurisdiction by compelling the aid of third parties is guite limited. In this case, the legislative refusal to act inexorably leads to the conclusion that the Court may not use the All Writs Act to compel Apple to act as the Government requests. Alternatively, the Ninth Circuit's due process hearing and factors used for compelling the assistance of third party telecommunication providers for electronic surveillance, if applied to the situation at bar, suggests rather clearly that the burden upon Apple is too unreasonable so as to violate Apple's rights under the All Writs Act (and perhaps, the Constitution as well). Accordingly, the Order compelling Apple to provide assistance to the Government in the manner requested by the Government should be vacated forthwith.

Taub & Taub, P.C.

By: /s/ Richard F. Taub Richard F. Taub **Amicus Curiae** 

RICHARD F. TAUB, SBN 273865
rtaub@taublawyers.com
TAUB & TAUB, P.C.
15260 Ventura Blvd., Ste. 840
Sherman Oaks, CA 91403
Tel.: 818.259.5300
Fax: 818.259.5307
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# UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA EASTERN DIVISION

IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300. CALIFORNIA LICENSE PLATE 35KGD203 ED No. CM 16-00010 (SP)

AMICUS CURIAE BRIEF RE: 28 U.S.C. § 1651

Amicus Curiae Richard F. Taub, Esq. (hereinafter "Undersigned Counsel"), hereby files this Amicus Curiae Brief to assist the Court in its analysis of certain issues to be considered in this case regarding the Government's Motion to Compel Assistance and Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance.

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#### AMICUS CURIAE BRIEF RE: 28 U.S.C. § 1651

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Order Requiring Apple, Inc., 2015 U.S. Dist. Lexis 138755 (E.D.N.Y. 2015) addressed precisely that issue. It analyzed, inter alia, the legislative history of the Comprehensive Counter-Terrorism Act of 1991 ("CALEA"), a 2012 note by Senator Leahy, a co-sponsor of CALEA that the Obama Administration had not proposed specific amending legislation on the issue of the law failing to keep up with the type of technology at issue in this case, the proposed introduction of Bills from 2015 to preclude the government from forcing a private entity such as Apple to compromise the kind of data security at issue in this case. See generally In re Order Requiring Apple, Inc. The District Court in In re Order noted that Congress is plainly aware of the lack of statutory authority, but has thus far failed to either create or reject the type of relief the Government seeks here. *Id.* at 10. That Court indicated that, under these circumstances makes it much less obvious that the relief sought herein would be available under the All Writs Act, id., and concluded that this analysis "strongly suggests that granting the instant motion would be inconsistent with the purpose of the All Writs Act as interpreted in the aforementioned cases." *Id.* [emphases added] The Court then granted a due process hearing for Apple before that Court made a final decision. Similar to our case, the present state of the law is that debate rages on regarding the issue of whether to give the Government the awesome power of defeating privacy interests that the public has in their data in favor of a criminal investigation. Congress is aware of the issues, but has not acted, which continues to suggest that a far reaching decision to compel a manufacturer to create code to defeat its own encryption, upon which members of the public have relied in their purchase decision and use of Apple's product, is not authorized by the All Writs Act standing alone.

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#### C. Reasonableness of Burden Upon Third Party Apple

Also to be considered by this Court is the reasonableness of the Government's request of third party manufacturers not merely to implement existing tools or process, but to create one at considerable effort and expense. The power of federal courts to impose duties upon third parties is not without limits; unreasonable burdens may not be imposed. *United* States v. New York Telephone Co., 434 U.S. 159 (1977). At issue in the New York Telephone Co. case was whether a highly regulated public telephone service utility with a duty to serve the public had a substantial interest in not providing "meager" assistance needed by the FBI in its investigation to determine whether the utility's facilities were being used by a criminal enterprise. See Id. at 174. Underscoring the Court's decision that New York Telephone Co. could be compelled to assist in the installation and operation of pen registers was the pre-existing mandate from Congress under then-existing 18 U.S.C. § 2518(4) for a "communication common carrier to furnish [law enforcement] all information, facilities, and technical assistance necessary to accomplish" wire interception unobtrusively. Thus, the New York Telephone Co. case rather clearly stands for the proposition that, in the presence of a statute specifically providing for the assistance of third parties necessary to avoid frustration of a Court's lawful order, and one that requires only "meager" assistance at that, it is more likely the All Writs Act will allow the district court to fashion a remedy to compel that assistance.

In this case, there is no such statutory provision that evinces congressional intent to empower the district court to specifically require third party Apple to act in the extraordinary fashion requested by the Government. In *New York Telephone Co.* the express statutory authority

found under 18 U.S.C. § 2518(4) specifically contemplated and set forth a procedure for the assistance by a telecommunications provider in the case of wire interception orders. In fact, section 4 of that Act provides for parameters and protections for third party service providers. Here, there are no statutory provisions or other sources of law requiring the manufacturer of a smartphone to dismantle its data security methods, whether by providing encryption keys or to undermine its security to allow entry to a passcode-protected phone. In the absence of any legislative authorization, procedures or limitations on the assistance of a third party manufacturer under these circumstances, the Court's inherent reach to compel the assistance of that third party in aid of execution of a search warrant should be quite limited and not reach as far as to force the third party manufacturer into involuntary servitude to substantially modify its operating system to undermine its security features. Most importantly, however, this case presents much more than the "meager" assistance required under the wire interception act and of the third party telecommunications provider in New York Telephone Co. Private third party manufacturer Apple has a substantial interest in resisting the forced labor sought by the Government under circumstances where it is not a public utility and is not requested to provide "meager" assistance. It is, in fact, asked to become involved in a considerable amount of research and development. The Government's request here stretches the holding in the

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<sup>&</sup>lt;sup>1</sup> The Undersigned Counsel freely concedes that, there may be a different result if this case had involved the mere requirement that Apple turn over to the Government a pre-existing "back door" passcode to unlock all iPhones. While that circumstance would be just as dangerous to the data security of the public, it would not necessarily be prohibited by the All Writs Act, even if it may be prohibited by other provisions of law.

New York Telephone Co. case beyond its breaking point.

The Court would, likewise, come to the same conclusion that the requests of the Government here even if it were to apply the Ninth Circuit's analysis associated with third party telecommunications providers under compulsion to assist the Government.

Even if the Court utilized a similar analysis to that set forth for telecommunications providers for which their assistance is sought, the same conclusion against compelling Apple to act as requested would result. The Ninth Circuit set forth a procedure for due process to be accorded third parties beset by an All Writs order to assist the government and a set of factors for the federal district court to determine the reasonableness of the burden of compliance of the All Writs order. In the case of *In re Application of United States for an Order etc.* (1980) 616 F.2d 1122, the Ninth Circuit exercised its authority to supervise the administration of criminal justice within the circuit to determine that a company whose cooperation in electronic surveillance is sought should be afforded reasonable notice and an opportunity to be heard *prior* to the entry of any order compelling its assistance. *Id.* at 1132-3.

<sup>&</sup>lt;sup>2</sup> The Court should consider that these factors were imposed in the Ninth Circuit for such a determination in the context of third party public utilities mandated to serve the public as set forth in the *New York Telephone Co.* case and not for other private for-profit third parties, publicly traded or not. In other words, under *New York Telephone Co.*, it may be appropriate for the Court to include in a remoteness analysis of third party, Apple Inc. from the device at issue as its manufacturer and not its owner, and cooperation sought that Apple Inc. is not similarly situated to a public utility as to the utility's independent obligations to serve the public in this manner and, thus, its Government. If it were, the Court would logically have to consider Apple's contention to be serving the public by using its resources to oppose the creation of a "back door" to its encryption and to undermine the privacy of millions of iPhone owners as collateral damage to Apple's compelled assistance at the Government's behest.

<sup>&</sup>lt;sup>3</sup> It makes little sense to suggest that the procedure set forth in that case should be read to be limited to electronic surveillance cases when the process created was clearly meant to provide due process and a burdensomeness determination as to third party direction by court order in the All Writs Act context. The fact that electronic surveillance may be more common than the encryption issues in this case is irrelevant.

The Ninth Circuit imposed upon federal district courts within its supervisory authority, a series of non-exhaustive factors to be utilized at this due process hearing that includes the following: (1) the likelihood that the surveillance will develop information useful in a criminal prosecution; (2) the availability of alternative means for obtaining the information; (3) the extent of the burdens which the requested surveillance would place upon the telephone company; (4) the extent to which the restrictions upon the scope of the surveillance can minimize interference with company operations; and (5) the likelihood that the company can be fully compensated for the services provided (collectively, "Reasonableness Factors"). Significantly, the Ninth Circuit specifically determined its procedure would safeguard the interests of communications carriers, will not interfere with the government's pursuit of appropriate investigative tools, and would provide the district courts with a sound basis for the wise exercise of their discretion. *Id.* at 1133.

In the context of the case at bar, those Reasonableness Factors that appear, *prima facie*, to apply in electronic surveillance matters can easily be slightly more generalized to read as follows: (1) the likelihood that the requested assistance of the third party will develop information useful in a criminal prosecution, (3) the extent of the burdens which the compelled assistance would place upon the third party, (4) the extent to which the scope of compelled assistance will minimize interference with company operations; and (5) the likelihood that the company can be fully compensated for the services provided. Since the Ninth Circuit specifically indicated that these factors were non-exhaustive, other non-enumerated factors should be considered by the Court in this case. For instance, the Court should consider, under these facts, (6) whether the public interest in

the adverse impact upon United States citizens' privacy interests in the compromised security of ubiquitous smartphones used to maintain confidential data outweighs the Government's interest in securing data from a single iPhone, (7) whether the compelled assistance of third party, Apple Inc. ("Apple") requires mere assistance or longer term employment, and, perhaps, (8) whether the assistance at issue requires the creation of a product and not the mere use of pre-existing tools ordinarily used by the third party in the scope of its business.

In the context of this case, the analysis weighs rather heavily in a finding of unreasonable burden upon third party Apple. The Government rather freely admits that it has no idea what, if anything, is on the cellphone. The principal criminal shooters are dead. The prosecution of a third party for his involvement *collateral* to the cellphone suggests no such useful evidence present on the cellphone at issue. The Government's theory of its user's contact with ISIS suggests it unlikely that even complete access to the cellphone will yield anything useful for a criminal prosecution. As has been suggested by Apple, the Government may have alternative means in seeking Apple's assistance merely to access the iPhone at issue for its data, rather than requiring Apple to actually create code to disable the auto erase and delay safeguards. Apple has also articulated substantial burdens placed upon it to enlist staff, time and effort to create code to defeat its original security measures, and its burden of having to defeat its original security plan in the presence of a rejected legislative plan to prevent unbreakable encryption systems. However, the Government's

position on that matter is, at present, scant on the subject.<sup>4</sup> Interference with Apple's operations is also articulated as part of its attached declarations relating to the efforts in creating the code desired by the Government. Nevertheless, it does appear likely that Apple can be fully compensated by the Government for the employment of its personnel to accomplish the Government's goal. The application of the facts to these factors vitiate in favor of granting Apple's requested relief in vacating the existing Order.

The impact on the risks regarding the invasion of privacy to iPhone users, however, weighs heavily against a finding that the burden would be reasonable. The entire purpose, in the modern world, of a high level of encryption (permitted by Congress) to exist in safeguarding data is to recognize the strong interest in privacy in that very data. The data is encrypted in a manner that even the manufacturer cannot invade without creating a tool of the type sought by the Government in this case, which Apple has (to this point and prior to the events giving rise to the order compelling Apple to act) voluntarily refused to do. This issue should be considered by the Court to, perhaps, be the weightiest factor to be considered under the facts of this case because of its global impact. Indeed, the impact to third party Apple could be equally catastrophic in deterring users from purchasing electronic products that are unsecure for the protection of their data. Even if putative consumers of Apple products erroneously believe that the release of code that undermines the iPhone

<sup>&</sup>lt;sup>4</sup> In fairness to the Government, its Reply Brief is not due until after the deadline for the filing of this Amicus Brief. Consequently, if the Government can undermine Apple's burdensomeness claims, that may change the weight of this particular factor.

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security encryption measures could be sufficient to turn users away from purchasing what are perceived to be unsecured Apple products. As articulated by Apple, the cooperation sought appears to be longer and more involved than the employment of traditional forms of All Writs third party assistance (though the Government may yet set forth facts in support of its position that the assistance is meager). These factors tend to weigh heavily in vacatur of the Court's order compelling third party Apple to cooperate as requested by Apple.

Lastly, the requirement that Apple have to create code or any other product to assist the Government, whether otherwise necessary to defeat something Apple itself put in place or to defeat the protections sought by others is, perhaps, the most reprehensible of effects of the Government's request. This requirement that any third party have to go to any real or considerable effort to create something under punishment of contempt for failing to do so smacks so repugnantly of involuntary servitude, regardless of the actual inapplicability of the Thirteenth Amendment to the United States Constitution to this case. The stretching of what it means under the All Writs Act to render assistance under threat of punishment to the point of creation of code or any other product easily takes the concept of assistance to the point of "snapping" and, it is shocking to think of an Article III Court enforcing it in the absence of a specific underlying statutory authority authorizing it. In sum, consideration of the Reasonableness Factors with a few additional non-enumerated factors relating to glaring issues presented in this case inexorably lead to the conclusion that the existing ex parte Order should be vacated and the Government's motion to compel denied.

### **CONCLUSION**

Title 28 U.S.C. 1651(a), the All Writs Act is not, itself a substantive

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grant of powers to the district courts to act with the issuance of ad hoc writs. It merely provides the issuance of all writs necessary to the completion of the Court's jurisdiction where created by another source of law. Where Congress acts to provide for the specific cooperation of third parties to a degree not limited by the Constitution, the district courts may issue orders pursuant to that authority. In the absence of congressional authority, and especially when Congress has chosen not to act when it is aware of the desire of law enforcement to overcome third party private encryption (which is guite telling), the district court's ability to complete its jurisdiction by compelling the aid of third parties is guite limited. In this case, the legislative refusal to act inexorably leads to the conclusion that the Court may not use the All Writs Act to compel Apple to act as the Government requests. Alternatively, the Ninth Circuit's due process hearing and factors used for compelling the assistance of third party telecommunication providers for electronic surveillance, if applied to the situation at bar, suggests rather clearly that the burden upon Apple is too unreasonable so as to violate Apple's rights under the All Writs Act (and perhaps, the Constitution as well). Accordingly, the Order compelling Apple to provide assistance to the Government in the manner requested by the Government should be vacated forthwith.

Taub & Taub, P.C.

By: /s/ Richard F. Taub Richard F. Taub Amicus Curiae

cm-00010-SP

#### TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

The Electronic Frontier Foundation ("EFF") and 46 Technologists,
Researchers, and Cryptographers hereby move for leave to file the attached *amicus*curiae brief supporting Respondent Apple, Inc. Counsel for Apple has consented
and the government has no objection to the filing of the attached brief.

#### I. STATEMENT OF INTEREST

Individual *amici* are technologists, researchers, and cryptographers, including pioneers in digital signature technology, who develop secure technologies and systems or rely on them to create many of the digital services at the center of modern life. The ability to securely shop, bank, communicate, and engage in countless other activities online are made possible by the technologies and systems conceived, built, and tested by *amici*.<sup>1</sup>

Encryption and cryptography-based systems like digital signatures are the linchpin of the security of digital devices and the software that runs on them. *Amici* have a vested interest in ensuring that these systems remain both uncompromised and ubiquitous so that everyone can trust that their activities using those devices are secure. Individual *amici* thus oppose government efforts to compel anyone to develop code that undermines, bypasses or otherwise limits the security that

Brief biographies of the amici are found in Appendix A of the attached brief.

encryption provides and jeopardizes the trust encryption enables.

For 25 years, *amicus* EFF has represented the interests of these and many other technology creators as they seek to build the secure infrastructure that all of us can trust. EFF also represents the interests of users of digital devices who need security, privacy, and protection from hackers, malware, and overbroad government surveillance.

Amici have a special interest in helping this Court appreciate that its Order places a significant burden on the free speech rights of Apple and its programmers by compelling them to write code and then to use their digital signature to endorse that code to the FBI, their customers, and the world.

#### II. AMICI ARE NOT AFFILIATED WITH ANY PARTY

No party or party's counsel participated in the writing of the brief in whole or in part. No party, party's counsel, or other person contributed money to fund the preparation or submission of the brief. *Amici* are neither sponsored by, nor in any way affiliated with, any of the parties to this case. *Amici* file this brief to further their independent interests in ensuring that encryption and cryptography-based systems remain uncompromised.

### III. AMICI'S BRIEF OFFERS A UNIQUE PERSPECTIVE AND DOES NOT DUPLICATE APPLE'S BRIEF

Finally, *Amici's* brief does not duplicate Apple's brief. Rather, it provides the Court with a unique and important perspective on the burden the Court's

order—which compels Apple and its programmers to write code and then use their 1 2 digital signature to endorse that code—places on Apple's First Amendment rights. 3 **CONCLUSION** IV. 4 Amici respectfully request that the Court grant leave to file the attached brief 5 6 in support of Apple. 7 Respectfully submitted, Dated: March 2, 2016 8 9 10 CINDY A. COHN LEE TIEN 11 **KURT OPSAHL** 12 NATE CARDOZO SOPHIA COPE 13 ANDREW CROCKER 14 JAMIE WILLIAMS ELECTRONIC FRONTIER 15 **FOUNDATION** 16 815 Eddy Street San Francisco, CA 94109 17 Telephone: (415) 436-9333 18 Facsimile: (415) 436-9993 19 Counsel for Amici Curiae 46 Technologists, 20 Researchers, and Cryptopgraphers 21 22 23 24 25 26 27 28 Case No: 16-APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

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Proof of Service

I am a citizen of the United States and employed in San Francisco, 1 2 California. I am over the age of eighteen years and not a party to the within-3 entitled action. My business address is 815 Eddy Street, San Francisco, CA 94109. 4 On this date, I served the following: 5 6 APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE EFF AND 46 TECHNOLOGISTS, RESEARCHERS, AND 7 **CRYPTOGRAPHERS** 8 and caused to be served by U.S. Mail, postage thereon fully prepaid, true and 9 correct copies of the foregoing on: 10 Theodore B Olson 11 Gibson Dunn and Crutcher LLP 12 1050 Connecticut Avenue NW Washington, DC 20036-5306 13 202-955-8668 14 Fax: 202-530-9575 Email: tolson@gibsondunn.com 15 16 Theodore J Boutrous, Jr Eric David Vandevelde 17 Gibson Dunn and Crutcher LLP 18 333 South Grand Avenue Los Angeles, CA 90071-3197 19 213-229-7000 20 Fax: 213-229-7520 Email: tboutrous@gibsondunn.com 21 Email: evandevelde@gibsondunn.com 22 Nicola T Hanna 23 Gibson Dunn and Crutcher LLP 24 3161 Michelson Drive 12th Floor Irvine, CA 92612-4412 25 949-451-3800 26 Fax: 949-451-4220 Email: nhanna@gibsondunn.com 27 28 Case No: 16-Proof of Service cm-00010-SP

1	Marc J Zwillinger			
	Jeffrey G Landis			
2	Zwillgen PLLC 1900 M Street NW Suite 250			
3	Washington, DC 20036			
4	202-296-3585			
5	Fax: 202-706-5298			
	Email: marc@zwillgen.com			
6	Email: jeff@zwillgen.com			
7	Counsel for Respondent			
8				
9	Allen W Chiu			
10	AUSA - Office of US Attorney National Security Section			
	312 North Spring Street Suite 1300			
11	Los Angeles, CA 90012			
12	213-894-2435			
13	Fax: 213-894-6436			
14	Email: allen.chiu@usdoj.gov			
I	Tracy L Wilkison			
15	AUSA Office of US Attorney			
16	Chief, Cyber and Intellectual Property			
17	Crimes Section 312 North Spring Street 11th Floor			
18	Los Angeles, CA 90012-4700			
l	213-894-0622			
19	Fax: 213-894-0141			
20	Email: tracy.wilkison@usdoj.gov			
21	Counsel for Plaintiff			
22	I declare under penalty of perjury under the laws of the United States that			
23				
24	the foregoing is true and correct.			
	D. A. 1.1: M. A. 2. 2016 in Gr. Francisco Galifornia			
25	Executed this March 3, 2016 in San Francisco, California			
26	Cythie Dongung			
27	Cynthia Dominguez			
28	2			
	Case No: 16- Proof of Service			
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FILED Joseph Joseph 1 CAROLINE WILSON PALOW (SBN 241031) caroline@privacyinternational.org 2016 MAR - 3 PM 1: 49 2 SCARLET KIM CLERK U.S. DISTRICT COURT 3 CENTRAL DIST. OF CALIF. scarlet@privacyinternational.org PRIVACY INTERNATIONAL 62 Britton Street London EC1M 5UY 6 United Kingdom Telephone: +44.20.3422.4321 7 8 Attorneys for Proposed Amici Curiae PRIVACY INTERNATIONAL 10 **HUMAN RIGHTS WATCH** 11 12 UNITED STATES DISTRICT COURT 13 CENTRAL DISTRICT OF CALIFORNIA 14 **EASTERN DIVISION** 15 IN THE MATTER OF THE SEARCH ) ED No. CM 16-10 (SP) 16 OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A APPLICATION FOR LEAVE TO 17 SEARCH WARRANT ON A BLACK FILE BRIEF OF AMICI CURIAE 18 LEXUS IS300, CALIFORNIA PRIVACY INTERNATIONAL AND 19 LICENSE PLATE 35KGD203 **HUMAN RIGHTS WATCH** 20 Hearing: 21 Date: March 22, 2016 Time: 1:00 p.m. 22 Place: Courtroom 3 or 4 23 Judge: Hon. Sheri Pym 24 25 26 27 28

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#### APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Proposed *amici curiae* Privacy International and Human Rights Watch ("HRW") respectfully request leave to file the attached Brief of *Amici Curiae* in the above-captioned matter. Counsel for *amici curiae* have contacted Apple Inc. and the government; the parties have indicated that they do not oppose this application.

#### I. Standard for Leave to File Amicus Curiae Brief

District courts have "broad discretion to appoint amici curiae." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). Indeed, "[d]istrict courts frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal citations and quotation marks omitted). In determining whether to accept an amicus brief, "[t]he touchstone is whether the amicus is 'helpful'." *California v. U.S. Dep't of Labor*, 2014 U.S. Dist. LEXIS 5439, at \*3 (E.D. Cal. Jan. 14, 2014) (quoting *Hoptowit*, 682 F.2d at 1260). There exists "no rule . . . that amici must be totally disinterested." *Hoptowit*, 682 F.2d at 1260.

#### II. Interests of Amici Curiae

Privacy International is a nonprofit, non-governmental organization based in London dedicated to defending the right to privacy around the world. Established in 1990, Privacy International undertakes research and investigations into state and corporate surveillance with a focus on the technologies that enable these practices. It has litigated or intervened in cases implicating the right to privacy in the courts of the United States, the United Kingdom ("UK") and Europe, including the European Court of Human Rights. To ensure universal respect for the right to privacy, Privacy International advocates for strong national, regional and

international laws that protect privacy. It also strengthens the capacity of partner organizations in developing countries to do the same.

HRW has been reporting on abuses connected to the practice of state surveillance since its inception more than three decades ago as Helsinki Watch, with particular focus on mass surveillance practices since 2013. HRW's reports detail abuses of rights connected to surveillance around the globe (for example, in Ethiopia, China, Saudi Arabia, and the US), and its advocacy involves legal analysis and submissions on the various legal authorities (actual or proposed) for surveillance practices to the relevant bodies of the United Nations ("UN"), the U.S., the UK, the UN High Commissioner for Human Rights, the Special Rapporteur for Freedom of Expression, as well as comment and analysis on the laws of many other countries in respect of these issues.

Privacy International and HRW's brief brings a unique comparative and global perspective to this case, focusing on its potential international legal ramifications. The majority of digital communications travel the world over in a matter of seconds and new technologies proliferate rapidly in diverse societies. A full understanding of privacy issues in the digital age therefore requires a global perspective, which Privacy International and HRW are uniquely suited to provide in this case. This perspective is informed by Privacy International and HRW's research, advocacy, and capacity-building on the ground across many countries in every region of the world. This work feeds into Privacy International and HRW's regular representations to governments, regional bodies like the European Union, and the UN on the global state of privacy.

This case will have far-reaching implications for the security of communications of millions of individuals around the world and particularly for certain vulnerable groups. Communications security tools, especially encryption, protect privacy in addition to other fundamental rights enshrined in the US Constitution and international instruments, such as freedom of speech. While these

protections are important for everyone, they are especially critical to protect journalists, human rights defenders, political activists, and others whose communications are particularly sensitive. Governments in many other countries – both democratic and authoritarian – may seek to compel Apple and other technology companies to assist their law enforcement and intelligence agencies by weakening those protections. The outcome of this case could make it easier for them to do so.

In the brief, Privacy International and HRW draw on their comparative and global expertise to unpack the international implications of this case. In particular, the brief describes how other governments seek the power to compel companies to undermine the security of their products and services, including through hacking and weakening encryption. It also illustrates the civil and human rights abuses that can – and have – occurred when governments are permitted to exercise such powers.

Counsel for *amici curiae* state that no counsel for a party in this matter authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

III. Conclusion

For the foregoing reasons, proposed *amici curiae* Privacy International and HRW respectfully request that this Court grant their application to file the attached Brief of *Amici Curiae*.

Dated: March 3, 2016

Respectfully submitted,

Caroline Wilson Palow (SBN 241031)

Scarlet Kim

PRIVACY INTERNATIONAL

62 Britton Street London EC1M 5UY United Kingdom

Telephone: +44.20.3422.4321 caroline@privacyinternational.org

Attorneys for Proposed *Amici Curiae* Privacy International and Human Rights Watch

#### PROOF OF SERVICE

I am a citizen of the United States of America and employed in London, the United Kingdom. I am over the age of 18 and not a party to the within action. My business address is Privacy International, 62 Britton Street, London EC1M 5UY, United Kingdom.

On March 3, 2016, I caused to be served through mail (FedEx) and/or e-mail on each person on the attached Service List the foregoing document described as:

## APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE PRIVACY INTERNATIONAL AND HUMAN RIGHTS WATCH

#### Service List

Service List				
Service Type	Counsel Served	Party		
E-mail*	Theodore J. Boutrous, Jr.	Apple, Inc.		
	Nicola T. Hanna	<del></del>		
	Eric D. Vandevelde			
	Gibson, Dunn & Crutcher LLP			
	333 South Grand Avenue			
	Los Angeles, CA 90071-3197			
	Telephone: (213) 229-7000			
	Facsimile: (213) 229-7520			
	Email: tboutrous@gibsondunn.com			
	nhanna@gibsondunn.com			
	evandevelde@gibsondunn.com			
E-mail*	Theodore B. Olson	Apple, Inc.		
	Gibson, Dunn & Crutcher LLP			
	1050 Connecticut Avenue, N.W.			
	Washington, D.C. 20036-5306			
	Telephone: (202) 955-8500			
	Facsimile: (202) 467-0539			
	Email: tolson@gibsondunn.com			
E-mail*	Marc J. Zwillinger	Apple, Inc.		
	Jeffrey G. Landis			
	Zwillgen PLLC			

	1900 M Street N.W., Suite 250	
Washington, D.C. 20036		
Telephone: (202) 706-5202		
	Facsimile: (202) 706-5298	
	Email: marc@zwillgen.com	
	jeff@zwillgen.com	
Mail & E-mail	Eileen M. Decker	United States of
	Patricia A. Donahue	America
	Tracy L. Wilkison	
	Allen W. Chui	
	1500 United States Courthouse	
	7312 North Spring Street	
	Los Angeles, California 90012	
	Telephone: (213) 894-0622/2435	
	Facsimile: (213) 894-8601-7520	
	Email: Tracy.Wilkison@usdoj.gov	
	Allen.Chiu@usdoj.gov	

\*Apple, Inc. has consented in writing to service by electronic means in accordance with Federal Rule of Civil Procedure 5(b)(E), Local Civil Rule 5-3.1.1, and Local Criminal Rule 49-1.3.2(b).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I have made service at the direction of a member of the bar of this Court.

Executed on March 3, 2016 in London, United Kingdom

Sara Nelson

APPLICATION OF AMICI CURIAE FLEOA, APA, AND NSA

ED No. CM 16-10-SP

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The Federal Law Enforcement Officers Association ("FLEOA"), the Association of Prosecuting Attorneys, Inc. ("APA"), and the National Sheriffs' Association ("NSA") (together, the "Amici"), hereby submit this Ex Parte Application for an order granting them leave to participate as amici curiae in this matter and to file a Brief in Support of the Government's Motion to Compel Apple Inc. To Comply With Court's February 16, 2016 Order Compelling Apple to Assist Agents In Its Search (the "Government's Motion to Compel"). In support thereof, Amici respectfully submit the following:

- 1. On February 16, 2016, this Court issued an Order directing Apple, Inc. ("Apple") to assist in enabling the government's search of an iPhone 5c used by Syed Rizwan Farook, who was one of the individuals responsible for the December 2, 2015 terrorist attack at the Inland Regional Center in San Bernardino, California.
- 2. On February 19, 2016, the government filed its Motion to Compel Apple to comply with the Order ("Government's Motion to Compel"), alleging, *inter alia*, that the Court's All Writs Act Order is lawful and binding, and Congress has not limited this Court's authority in that regard.
- 3. On February 25, 2016, Apple filed an opposition to that motion and a motion to vacate the Order ("Apple's Opposition") alleging, among other things, that the All Writs Act does not grant this Court the authority to issue its February 16, 2016 Order and that the Order would violate the First and Fifth Amendments of the Constitution.
- 4. Members of the *Amici* are law enforcement officers on the ground police, investigators, prosecutors, and others for whom the ability to extract data and evidence, from whatever sources are available, is a critical to solving crimes and upholding their obligations to protect the public. As such, *Amici* have a very strong interest in the outcome of this case.

- 5. Federal district courts have the authority to permit non-parties to participate in a case as *amici curiae*, and have broad discretion to determine whether or not to permit such participation. *See*, *e.g.*, *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *In re Roxford Foods Litigation*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) ("generally courts have exercised great liberality in permitting an amici curiae to file a brief in a pending case") (internal quotations omitted).
- 6. As a general matter, courts typically permit amicus participation in the information offered is considered "timely and useful." *Ellsworth Assocs., Inc.* v. *United States*, 917 F. Supp. 841, 846 (D.D.C. 1996). *Amici*'s Application meets both of these requirements.
- 7. First, *Amici*'s Application is timely. This Court has specifically made provision for the filing of amicus briefs in its Scheduling Order dated February 19, 2016: "Any amicus brief shall be filed by not later than March 3, 2016, along with an appropriate request seeking leave of the Court to file such a brief." Amici here have submitted the required documents within the Court's March 3 deadline.
- 8. Second, courts have deemed *amicus* participation useful when a party has a special interest in or is particularly familiar with the issues in a case. *See, e.g.*, *Ellsworth Assocs.*, 917 F. Supp. at 846; *NGV Gaming, Ltd. V. Upstream Point Malate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) ("District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide) (internal quotations and citations omitted). *Amici*'s brief provides information regarding the importance of the data in question to law enforcement officers, who utilize exactly this type of cell phone extracted data on a daily basis to apprehend and prosecute criminals. Moreover,

	II .				
1	JEROME C. ROTH (State Bar No. 1594)	83) BY CLER 5			
2	jerome.roth@mto.com ROSEMARIE T. RING (State Bar No. 22				
3	rose.ring@mto.com JONATHAN H. BLAVIN (State Bar No.	, June 1			
4	Ionathan.blavin(a)mto.com				
5	josh.patashnik@mto.com MUNGER, TOLLES & OLSON LLP 560 Mission Street	95120)  REGISTER 5			
6	Twenty-Seventh Floor	280			
7	San Francisco, California 94105-2907 Telephone: (415) 512-4000 Facsimile: (415) 512-4077	Z C			
8		2			
9	ARIEL C. GREEN (State Bar No. 30478) ariel.green@mto.com	0)			
10	MUNGER, TOLLES & OLSON LLP    355 South Grand Avenue				
11	Thirty-Fifth Floor Los Angeles, California 90071-1560				
12	Los Ángeles, California 90071-1560 Telephone: (213) 683-9100 Facsimile: (213) 687-7302				
13	Attorneys for <i>Amici Curiae</i>				
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15	UNITED STATES DISTRICT COURT				
16	CENTRAL DISTRICT OF CALIFORNIA				
1.7	EASTERN	DIVISION			
18	,				
19	IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED	Case No. ED CM 16-10-SP			
20	DURING THE EXECUTION OF A	MOTION OF AIRBNB, INC.; ATLASSIAN PTY. LTD.;			
21	SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA	<b>AUTOMATTIC INC.</b> ;			
22	LICENSE PLATE 35KGD203	CLOUDFLARE, INC.; EBAY INC.; GITHUB, INC.; KICKSTARTER,			
23		PBC; LINKEDIN CORPORATION; MAPBOX INC.; A MEDIUM			
24		CORPORATION; MEETUP, INC.; REDDIT, INC.; SQUARE, INC.;			
25		SQUARESPACE, INC.; TWILIO INC.; TWITTER, INC.; AND			
26		WICKR INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE			
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28		Judge: Hon. Sheri Pym			

I.

#### INTRODUCTION

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Airbnb, Inc., Atlassian Pty. Ltd., Automattic Inc., CloudFlare, Inc., eBay Inc.; GitHub, Inc.; Kickstarter, PBC, LinkedIn Corporation, Mapbox Inc., A Medium Corporation, Meetup, Inc., Reddit, Inc., Square, Inc., Squarespace, Inc., Twilio Inc., Twitter, Inc., and Wickr Inc. respectfully request leave to file the brief submitted currently herewith as Amici Curiae in connection with Respondent Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, which is scheduled for hearing on March 22, 2016. Amici curiae have provided notice to both Apple Inc. ("Apple") and the government of this motion and the filing of the attached brief. Decl. of Jonathan H. Blavin, ¶ 2. Neither Apple nor the government oppose the filing of *Amici*'s brief. *Id.* ¶¶ 3-4.

#### II. **DISCUSSION**

Amici are providers of platforms and tools for communicating, publishing, connecting, transacting, and securing traffic over the Internet. The number of users of their platforms and tools is in excess of one billion.

As providers of several of the most popular communication, networking, ecommerce, publishing, and commercial transaction platforms on the Internet accessed via websites and/or applications on mobile devices, Amici have a strong interest in this case, the continued security and privacy of their users' data, and in transparency to users regarding how that data is protected. Several Amici also regularly assist in investigations by federal and state law enforcement agencies and have a strong interest in ensuring that government requests for user data are made within the bounds of applicable laws, including those that balance the interests of privacy, security, and transparency with law enforcement needs.

Accordingly, Amici have a manifest interest in the extent to which the All Writs Act may be used to compel assistance from Internet and technology companies in law enforcement investigations outside of existing statutory frameworks. The issues presented in this case and the unique perspective of Amici—as providers of

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27 28 networking platforms and tools that serve over one billion users—justify granting this motion.

This Court invited the filing of amicus briefs in its February 19, 2016 Scheduling Order. Such an invitation is not uncommon. "District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting Cobell v. Norton, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)). Amici's brief offers such assistance.

Amici's brief aids the Court by demonstrating that the government's request to force a company to undermine security measures adopted to protect user data is not only legally unprecedented and unfounded but also erodes the core principles of privacy, security, and transparency that underlie the fabric of the Internet. Specifically, Amici's brief further elucidates the policies and principles guiding the decisions of Internet and technology companies to adopt transparent policies giving users choice and control over how their data is used and shared, and security measures that protect user data from the increasing threats posed by hackers, identity thieves, and other wrongdoers. It details how the government's request not only undermines those efforts in the present case but also sets a dangerous precedent that could give the government unbridled authority to access user data in a manner not contemplated by lawmakers. Finally, it demonstrates why the All Writs Act may not be used to compel the requested assistance in light of existing statutory schemes and legal precedent.

#### III. **CONCLUSION**

For the foregoing reasons, Amici respectfully request that the Court grant their motion for leave to file the accompanying brief.

1	DATED: March 2, 2016	
1	DATED: March 3, 2016	Respectfully submitted,
2		MUNGER, TOLLES & OLSON LLP
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5		By: Jack J. Mari
6 7		JONATHAN H. BLAVIN
8	•	Attorneys for Amici Curiae
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	MOTION FOR LEA	VE TO FILE BRIEF OF AMICI CURIAE

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1 2 3	ASSOC 1615 L S Washing Phone:	aBahn (State Bar No. 128930) IATION OF PROSECUTING A Street NW, Suite 1100 ston, D.C. 20036 (202) 861-2481 david.labahn@apainc.com	ATTORNEYS,	INC.
4	Joseph V	V. DeMarco		
5	Urvashi	Sen E & DEMARCO LLP		
6	99 Park .	Avenue, Suite 1100 rk, New York 10016		
7	Phone:	(212) 922-9499		
8	Email:	(212) 922-1799 jvd@devoredemarco.com usen@devoredemarco.com		
9	Attorney	s for Amicus Curiae		
10	Federal Prosecut	Law Enforcement Officers Associ ing Attorneys, Inc., and the Natio	iation, the Assoc onal Sheriffs' Ass	iation of sociation
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21			COMPLY WI	TH THIS COURT'S 6, 2016 ORDER
22			COMPELLIN SEARCH	G ASSISTANCE IN
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24			Hearing Time: Courtroom:	1:00 p.m. 3 or 4
25			Judge:	Hon. Sheri Pym
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BRIEF OF AMICI CURIAE FLEOA, APA, AND NSA

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#### STATEMENT OF INTEREST OF AMICI CURIAE

The Federal Law Enforcement Officers Association ("FLEOA"), a volunteer organization founded in 1977, is the largest nonpartisan, nonprofit professional association exclusively representing federal law enforcement officers. FLEOA represents more than 26,000 uniformed and non-uniformed federal law enforcement officers from over 65 different agencies. FLEOA is a charter member of the Department of Homeland Security Federal Law Enforcement Advisory Board; holds two seats on the Congressional Badge of Bravery Federal Board; and serves on the Executive Board of the National Law Enforcement Officers Memorial Fund and the National Law Enforcement Steering Committee. FLEOA provides a legislative voice for the federal law enforcement community and monitors legislative and other legal issues that may impact federal law enforcement officers.

The Association of Prosecuting Attorneys, Inc. ("APA") is a national notfor-profit organization headquartered in Washington, D.C. and made up of elected and appointed prosecuting attorneys from throughout the nation. The APA provides valuable resources such as training and technical assistance to prosecutors in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and help make our communities safer. The APA also acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with all criminal justice partners, providing timely and effective technical assistance as well as access to technology for the enhancement of the prosecutorial function. The APA serves as an advocate for prosecutors on emerging issues related to the administration of justice and development of partnerships.

Chartered in 1940, the National Sheriffs' Association ("NSA") is a professional association headquartered in Alexandria, Virginia, and dedicated to serving the Office of Sheriff and its affiliates through police education, police

training, and general law enforcement information resources. The NSA represents thousands of sheriffs, deputies and other law enforcement and public safety professionals, as well as concerned citizens nationwide. The NSA has provided programs for sheriffs, their deputies, chiefs of police, and others in the field of criminal justice in order to enable them to perform their jobs in the best possible manner and to better serve the people of their cities, counties, or other jurisdictions. The NSA has worked to forge cooperative relationships with local, state, and federal criminal justice professionals across the nation to network and share information about homeland security programs and projects.

Amici members are called upon on a daily basis to protect and serve the public by investigating criminal activity and wrongdoing and ensuring that the individuals responsible for it pay the penalty for their crimes. In order to fulfill their duties, Amici members must have access to all reasonable means of procuring relevant evidence. In this digital age, data stored on mobile devices has proven time and again to be critical in assisting law enforcement officers to do their jobs. Amici and their members thus have a strong interest in ensuring that the Court's February 16, 2016, Order is upheld and enforced.

#### FACTS AND SUMMARY OF THE ARGUMENT

This is a case in which this Court issued a February 16, 2016, Order (the "Order") directing Apple Inc. ("Apple") to assist in enabling the government's search of the government-owned iPhone 5c used by Syed Rizwan Farook ("the Terrorist") by providing "reasonable technical assistance to assist law enforcement agents in obtaining access to the data" on that device. Apple has refused to comply with the Order.

On February 19, 2016, the government filed a motion to compel Apple to comply ("Government's Motion to Compel")<sup>2</sup>, and, on February 25, 2016, Apple filed an opposition to that motion and a motion to vacate the Order ("Apple's Opposition"). <sup>3</sup> Amici respectfully submit this brief in support of the Government's Motion to Compel.

Amici believe that the position Apple has taken is a dangerous one. First, Apple's refusal to provide assistance has far-reaching public safety ramifications by making it difficult, and in some cases impossible, for law enforcement to fulfill

Order Compelling Apple, Inc. To Assist Agents in Search, *In the Matter of Search of an Apple iPhone Seized During Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203*, No. ED 15-0451M, 2016 WL 618401, at \*1-2 (C.D. Cal. Feb. 16, 2016).

<sup>&</sup>lt;sup>2</sup> Motion to Compel Apple Inc. To Comply With Court's February 16, 2016 Order Compelling Apple to Assist Agents In Its Search, *In the Matter of Search of an Apple iPhone Seized During Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203*, ED No. CM 16-10 (SP), Dkt. 1 (C.D. Cal. Feb. 19, 2016).

<sup>&</sup>lt;sup>3</sup> Apple Inc's Motion To Vacate Order Compelling Apple Inc. To Assist Agents in Search, And Opposition To Government's Motion To Compel Assistance, *In the Matter of Search of an Apple iPhone Seized During Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203*, ED No. CM 16-10 (SP), Dkt. 16 (C.D. Cal. Feb. 25, 2016).

its obligation to investigate crimes, protect the public by bringing criminals to justice, and enforce the law. *Second*, if Apple were to prevail, the public at large may itself think twice about cooperating with law enforcement when called upon to do so.

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#### **ARGUMENT**

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# I. APPLE'S REFUSAL TO PROVIDE REASONABLE ASSISTANCE TO THE GOVERNMENT HINDERS EVERYDAY LAW ENFORCEMENT AND ENDANGERS PUBLIC SAFETY

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The Parties have extensively briefed the utility and necessity of searching the cell phone used by the Terrorist on the day of the attacks in San Bernardino. Yet beyond the facts of that heinous crime, a ruling which validates Apple's position in this litigation can only serve to hamper the ability of *Amici* to bring criminals to justice and justice to victims. To be clear: if Apple can refuse lawful court orders to reasonably assist law enforcement, public safety will suffer. Crimes will go unsolved and criminals will go free. Apple's iPhones and iPads are ubiquitous. They are powerful. They are used by criminals, as well as crime victims. And, until recently, Apple was willing to assist law enforcement in executing court orders to search these devices. But Apple has changed course. As this case illustrates, it has redesigned its iOS operating system to make its products far harder to search pursuant to a warrant, and in this case decided not to do what it can to help investigate the Terrorist and his murderous crimes. These decisions -- decisions made in Apple's boardroom -- are already impeding and damaging investigations in law enforcement offices around the country. As law enforcement officials who are sworn to ensure public safety, and to solve crimes, Amici are the first responders, the investigators, the law enforcers and the prosecutors who, day-in and day-out, must live with Apple's decisions. To Amici,

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this is not a theoretical debate. It is as real as a killer gone free, as real as a pedophile planning for his next prey.

The importance of access to evidence found on iPhones, iPads, and similar devices is emphasized by actual, real world examples undisputed by Apple. For example, in one big-city district attorney's office approximately 50% of the mobile devices currently recovered during investigations are inaccessible to law enforcement due to the fact that they are running iOS 8.4 That percentage will, of course, only grow as time goes on and newer devices replace older ones. As the DA in that county put it:

In some cases, we can't move at all. We can't establish liability or responsibility because we can't access the phone. In others, it's affecting our ability to gather all the evidence that's needed to make sure that we are making the right judgments. And I think it's very important for people to understand that a prosecutor's job is to investigate, get all the information and then make the right judgment as to whether or not we can go forward. It's also our responsibility to make sure that we are prosecuting the right people. And when we don't have access to digital devices, we don't have all the information that we need to make the best judgment as to how the case should be handled.5

Other district attorneys throughout the country have had alarmingly similar experiences with iPhones running the current operating system. For example, last year the Harris County (Texas) District Attorney's Office was unable to search

<sup>&</sup>lt;sup>4</sup> See The Encryption Tightrope: Balancing Americans' Security and Privacy: Hearing Before the H. Judiciary Comm., 114th Cong. 6 (2016) (written testimony of Cyrus R. Vance, Jr., N.Y. County Dist. Attorney) ("Vance Hearing Testimony"), at 6.

<sup>&</sup>lt;sup>5</sup> NPR, It's Not Just The iPhone Law Enforcement Wants To Unlock, Feb. 21, 2016, http://www.npr.org/2016/02/21/467547180/it-s-not-just-the-iphone-lawenforcement-wants-to-unlock (last visited Feb. 25, 2016).

more than 100 encrypted (and therefore inaccessible) Apple devices from cases to date, including human trafficking, violent street crimes, and sexual assaults. In 2016, the number of inaccessible Apple devices for that office already numbers eight to ten per month. Similarly, in January and February of this year, the Cook County (Chicago) State Attorney's office has received 30 encrypted devices it could not access, and the Connecticut Division of Scientific Services has encountered 46 encrypted Apple devices in criminal cases, including those involving child pornography.<sup>6</sup>

Actual, real-world cases provide a window into the types of cases at stake for *Amici*:

- Homicide (conviction of guilty): People v. Hayes<sup>7</sup>: The victim was filming a video using his iPhone when he was shot and killed by the defendant. Because the iPhone was not passcode-locked, the video, which captured the shooting, was recovered and admitted into evidence at trial. The defendant was convicted of murder and sentenced to 35 years to life.<sup>8</sup>
- Homicide (exoneration of innocent): People v. Rosario<sup>9</sup>: A detective obtained a search warrant and an unlock order for certain iPhones found at the scene of a homicide. He sent the phones to

<sup>&</sup>lt;sup>6</sup> See Vance Hearing Testimony at 6-7.

<sup>&</sup>lt;sup>7</sup> Indictment Number 4451/12.

<sup>&</sup>lt;sup>8</sup> New York County District Attorney's Office, Report of the Manhattan District Attorney's Office on Smartphone Encryption and Public Safety 9 (Nov. 18, 2015),

http://manhattanda.org/sites/default/files/11.18.15%20 Report%20 on %20 Smartphone%20 Encryption%20 and %20 Public%20 Safety.pdf (the "NY DA's Report").

<sup>&</sup>lt;sup>9</sup> Indictment Number 1859/10.

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Apple, which assisted in extracting data from them. The phone data demonstrated inaccuracies in what investigators initially thought to be the timeline of events, and demonstrated that a particular suspect was not, in fact, involved in the murder. A phone number stored in one of the iPhones was eventually linked to another individual, who later confessed and pled guilty to the killing. He is currently serving a sentence of 17 1/2 years' imprisonment. 10

- **Child Pornography:** *People v. Hirji*<sup>11</sup>: The defendant was arrested after telling a taxi driver about his interest in having sex with children and showing the driver a child pornography image. Upon searching the defendant's iPhone pursuant to a search warrant, investigators discovered a large number of child pornography images. The defendant was convicted of Promoting a Sexual Performance by a Child.12
- Sex Trafficking: People v. Brown<sup>13</sup>: The defendant directed a sex trafficking operation involving at least four women, using physical violence, threats of force, and psychological manipulation to coerce the women to engage in prostitution. Evidence recovered from defendant's electronic devices contained (a) photographs showing him posing his victims for online prostitution advertisements and showing that he had "branded" multiple women with his nickname;

<sup>&</sup>lt;sup>10</sup> NY DA's Report at 11.

<sup>&</sup>lt;sup>11</sup> Supreme Court Information Number 3650/15.

<sup>&</sup>lt;sup>12</sup> NY DA's Report at 9-10.

<sup>&</sup>lt;sup>13</sup> Indictment Numbers 865/12, 3908/12, and 3338/13.

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and (b) text messages between him and several victims confirming that he had engaged in acts of violence against the testifying witness and others. The defendant was convicted of multiple counts of sex trafficking and promoting prostitution and was sentenced to 10-20 years in prison.<sup>14</sup>

Cybercrime and Identity Theft: People v. Jacas et al. 15 and People v. Brahms et al. 16: An iPhone was recovered from a waiter who was arrested for stealing more than 20 customers' credit card numbers by surreptitiously swiping the credit cards through a card reader that stored the credit card number and other data. When the phone was searched pursuant to a warrant, law enforcement officials discovered text messages between the waiter and other members of the group regarding the ring's crimes. Based in large part on information obtained from the phone, investigators were able to obtain an eavesdropping warrant, and ultimately arrested a 29-member identity theft ring, including employees of high-end restaurants who stole credit card numbers, shoppers who made purchases using counterfeit credit cards containing the stolen credit card numbers, and managers who oversaw the operation. The group stole 100 American Express credit card numbers and property worth over \$1,000,000. All of the defendants pled guilty, and more than \$1,000,000 in cash and

<sup>&</sup>lt;sup>14</sup> NY DA's Report at 9.

<sup>&</sup>lt;sup>15</sup> Indictment Number 42/12.

<sup>&</sup>lt;sup>16</sup> Indictment Number 5151/11.

merchandise was seized and forfeited.<sup>17</sup>

Unlawful Surveillance: People v. Lema<sup>18</sup>: The defendant was arrested for unlawful surveillance after a police officer observed the defendant using his phone to film up women's skirts (*i.e.*, "upskirting"). The defendant consented to a search of his phone, but the passcode he provided did not work. Investigators obtained a search warrant and unlock order for the phone. The phone was sent to Apple, Apple extracted data from the phone, and the phone and data were returned to the prosecutor. Two "upskirting" videos were found on the phone, both filmed on the date of the defendant's arrest. Following the trial, at which both videos were entered into evidence, the defendant was convicted as charged, of two counts of unlawful surveillance.<sup>19</sup>

And in one current investigation in Louisiana, a locked iPhone's text messages and other information on the device may hold the only clues to the murder of a pregnant woman gunned down at the front door of her home.<sup>20</sup> These examples, and many more, prove just how essential evidence recovered from iPhones can be.<sup>21</sup>

<sup>&</sup>lt;sup>17</sup> NY DA's Report at 10-11.

<sup>&</sup>lt;sup>18</sup> Indictment Number 4117/13.

<sup>&</sup>lt;sup>19</sup> NY DA's Report at 11.

<sup>&</sup>lt;sup>20</sup> See Peter Holley, A Locked iPhone May Be the Only Thing Standing Between Police and This Woman's Killer, Wash. Post, Feb. 26, 2016, available at https://www.washingtonpost.com/news/post-nation/wp/2016/02/26/a-locked-iphone-may-be-the-only-thing-standing-between-police-and-this-womans-killer/.

<sup>&</sup>lt;sup>21</sup> Amici have additional specific, law-enforcement sensitive examples which it

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does not wish to place in the public domain. Should the Court, however, desire this information, Amici will make it available.

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<sup>22</sup> Lori Hinnant & Karl Ritter, Discarded Cell Phone Led to Paris Attacks Ringleader, Associated Press, Nov. 19, 2015, available at http://bigstory.ap.org/article/47e613d2ad184fe4802fd76de903d4bb/french-leaderextremists-may-strike-chemical-bio-arms.

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<sup>23</sup> NY DA's Report at 12 (emphasis added).

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<sup>24</sup> Apple's website states, "On devices running iOS 8 and later versions, your personal data is placed under the protection of your passcode. For all devices

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To be sure, Apple has greatly assisted law enforcement in the past, helping officers to unlock the very phones it is now stating it would offend privacy to help search. This assistance has been critical in a number of law enforcement cases, both to prosecute criminals and to exonerate the innocent. In this case, law enforcement has no alternate means of obtaining the information they are seeking<sup>25</sup> and the iPhone used by the Terrorist may well be as critical to the resolution of this case as the devices were in the cases described above.

In sum, it is crystal clear that Apple's refusal to provide reasonable assistance to law enforcement has real world, on-the-ground implications for federal and state law enforcement officers as they do their daily jobs as well as for the public they are sworn to protect. In many instances, this assistance is critical to whether or not law enforcement can bring justice and closure to victims' families and, in cases such as this one, thwart everyday crime and violence as well as the ever-growing threat of terrorism across the globe.

running iOS 8 and later versions, Apple will not perform iOS data extractions in response to government search warrants because the files to be extracted are protected by an encryption key that is tied to the user's passcode, which Apple does not possess." Apple Inc., Privacy – Government Information Requests – Apple, http://www.apple.com/privacy/government-information-requests/ (last visited Feb. 29, 2016).

<sup>25</sup> Government's Motion to Compel at 6. It bears noting that although critics of the Government's position here state that law enforcement should simply rely on data that can be obtained on iCloud, as one DA has stated, even when criminals choose to back-up their data on the cloud (and in most cases they do not), data on an iPhone will not be backed up unless the iPhone is connected to Wifi. *See* Vance Hearing Testimony at 4. In this particular case, there are indications that the iCloud account had not been backed up since October 19, 2015. Moreover, Apple itself has stated that it cannot provide data that has been deleted from an iCloud account. *Id.* 

## II. A RULING IN FAVOR OF APPLE HERE WILL HAVE A CHILLING EFFECT ON PUBLIC ASSISTANCE TO LAW ENFORCEMENT

3 Justice Cardozo, in a 1928 decision while he was still a state court judge, stated: "[A]s in the days of Edward I, the citizenry may be called upon to enforce 4 the justice of the state, not faintly and with lagging steps, but honestly and bravely 5 and with whatever implements and facilities are convenient and at hand." 6 7 Babington v. Yellow Taxi Corp., 164 N.E. 726, 727 (N.Y. 1928). Almost 50 years later, Justice White echoed Cardozo's words in the Supreme Court's landmark 8 decision, United States v. New York Telephone Co., recognizing that "citizens 9 have a *duty* to assist in enforcement of the laws." 434 U.S. 159, 175 n.24 (1977) 10 (emphasis added); see also Roviaro v. United States, 353 U.S. 53, 59 (1957) 11 (recognizing the historic obligation of citizens to assist law enforcement and to 12 13 communicate their knowledge of criminal activity to law enforcement officials); In re Quarles and Butler, 158 U.S. 532, 535 (1895) (recognizing the duty of 14 citizens "to assist in prosecuting, and securing the punishment of, any breach of 15

The basic concept that every citizen can be compelled to assist in the pursuit or apprehension of suspected criminals has ancient Saxon origins, predating the Norman Conquest . . . . As the responsibility for keeping the peace shifted, over the centuries, to sheriffs, constables, and eventually to trained professional police departments, the power of those law enforcement officials to command the assistance of citizens was recognized both in statutes and in the common law.

the peace of the United States"). Indeed, as one state supreme court recognized:

State v. Floyd, 584 A.2d 1157, 1166 (Conn. 1991) (upholding state statute requiring citizens to provide reasonable assistance to law enforcement) (internal citations omitted) (footnotes omitted).<sup>26</sup>

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<sup>&</sup>lt;sup>26</sup> See also Cal. Penal Code § 150 (making it an offense to "neglect[] or refuse[] to join the posse comitatus or power of the county, by neglecting or refusing to aid

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The reasons supporting this venerable principle continue to be true today. Especially in this digital age, it is now critical for public safety that technology companies -- and the citizens that manage them -- cooperate with law enforcement. As the cases above recognize, this is not the first, nor will it be the last, time that law enforcement enlists the assistance of citizen-managers of corporations to help them ensure that the law, the bedrock of our society, is followed and that our officers have the tools and information necessary to enforce that law, prevent crime and protect the citizenry.

In New York Telephone Co., the Supreme Court used the authority of the All Writs Act, 28 U.S.C. § 1651(a), to order the phone company to do what it was plainly able to do to assist the FBI in using its facilities and equipment to apprehend a group suspected of illegal gambling. See 434 U.S. at 172, 174. 27

and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required" to do so by a law enforcement officer or a judge).

<sup>27</sup> It bears noting that the request here is even less intrusive than was the case in New York Telephone Co. Here, the data at issue is "at rest" -- static data that exists on a phone whose owner is aware and supportive of law enforcement's efforts to retrieve this data. In New York Telephone Co., the data that was to be accessed was wiretap data belonging to a group of illegal gamblers who were unaware that the most private details of their phone conversations were being intercepted in real time by law enforcement.

Moreover, even if it were true (which it is not, see Government's Motion to Compel, *supra* note 2) that this particular request implicates the Fourth Amendment, it is an integral part of our justice system that law enforcement, with appropriate authority in the form of a search warrant or court order and under court supervision, may intrude upon people's privacy. For example, with courtauthorized search warrants, law enforcement officers are able to enter people's

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Today, this Court has used this same statute to order Apple to do what it is plainly able to do to assist law enforcement in unlocking a cell phone used by the Terrorist where permission to unlock the phone has already been granted by the phone's owner (the San Bernardino County Department of Health, the Terrorist's employer).<sup>28</sup>

In short, law enforcement's request, and this Court's order, is neither new nor novel. What is new is Apple's refusal to comply with this reasonable, courtordered request for assistance from law enforcement officials. Amici are concerned that were Apple to prevail in this case, the public at large may question why they should be called upon to cooperate with law enforcement. In countless ways, knowable and unknowable, this will hamper Amici's ability to detect, deter, and punish crime.

#### **CONCLUSION**

Amici agree with the Parties that this is an important case. It implicates privacy. It implicates security. For many years, Apple has provided crucial and commendable assistance to law enforcement. It has been a valuable partner to Amici in case after case. Apple has changed course in a single -- but a crucial -way. It has created technical impediments and has refused to provide assistance which it plainly can to *Amici's* execution of a court-ordered search. That it has done so in a case involving ISIS-inspired domestic terrorism is disheartening. If

bedrooms to search for contraband; collect health records from medical offices; and even, under some circumstances, search a criminal suspect's attorney's office. All implicate privacy and it is hardly self-evident as to why a search of an iPhone is somehow "special," as Apple seems to contend.

<sup>28</sup> Apple has categorically stated that this Court is "a forum ill-suited to address" the issues in this case, and that the government should instead be seeking to amend existing legislation. See Apple's Opposition at 2. This is not the law. See Government's Motion to Compel at 21-25.

#### Case 5:16-cm-00010-SP Document 33 Filed 03/03/16 Page 18 of 18 Page ID #:633

upheld by the Court, however, the effects of its refusal will, for countless Americans, be truly devastating. DATED: March 2, 2016 ASSOCIATION OF PROSECUTING ATTORNEYS, INC. David LaBahn DEVORE & DEMARCO LLP Joseph V. DeMarco Urvashi Sen Attorneys for Amici Curiae Federal Law Enforcement Officers Association, the Association of Prosecuting Attorneys, Inc. and the National Sheriffs' Association 



The Federal Law Enforcement Officers Association ("FLEOA"), the

- 1. On February 16, 2016, this Court issued an Order directing Apple, Inc. ("Apple") to assist in enabling the government's search of an iPhone 5c used by Syed Rizwan Farook, who was one of the individuals responsible for the December 2, 2015 terrorist attack at the Inland Regional Center in San Bernardino, California.
- 2. On February 19, 2016, the government filed its Motion to Compel Apple to comply with the Order ("Government's Motion to Compel"), alleging, *inter alia*, that the Court's All Writs Act Order is lawful and binding, and Congress has not limited this Court's authority in that regard.
- 3. On February 25, 2016, Apple filed an opposition to that motion and a motion to vacate the Order ("Apple's Opposition") alleging, among other things, that the All Writs Act does not grant this Court the authority to issue its February 16, 2016 Order and that the Order would violate the First and Fifth Amendments of the Constitution.
- 4. Members of the *Amici* are law enforcement officers on the ground police, investigators, prosecutors, and others for whom the ability to extract data and evidence, from whatever sources are available, is a critical to solving crimes and upholding their obligations to protect the public. As such, *Amici* have a very strong interest in the outcome of this case.

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- 5. Federal district courts have the authority to permit non-parties to participate in a case as *amici curiae*, and have broad discretion to determine whether or not to permit such participation. See, e.g., Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995); In re Roxford Foods Litigation, 790 F. Supp. 987, 997 (E.D. Cal. 1991) ("generally courts have exercised great liberality in permitting an amici curiae to file a brief in a pending case") (internal quotations omitted).
- As a general matter, courts typically permit amicus participation in 6. the information offered is considered "timely and useful." Ellsworth Assocs., Inc. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996). Amici's Application meets both of these requirements.
- 7. First, *Amici*'s Application is timely. This Court has specifically made provision for the filing of amicus briefs in its Scheduling Order dated February 19, 2016: "Any amicus brief shall be filed by not later than March 3, 2016, along with an appropriate request seeking leave of the Court to file such a brief." Amici here have submitted the required documents within the Court's March 3 deadline.
- 8. Second, courts have deemed *amicus* participation useful when a party has a special interest in or is particularly familiar with the issues in a case. See. e,g., Ellsworth Assocs., 917 F. Supp. at 846; NGV Gaming, Ltd. V. Upstream Point Malate, LLC, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) ("District courts" frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide) (internal quotations and citations omitted). Amici's brief provides information regarding the importance of the data in question to law enforcement officers, who utilize exactly this type of cell phone extracted data on a daily basis to apprehend and prosecute criminals. Moreover,

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1	as officers on the ground, member	rs of Amici are particularly familiar with how	
2	this data has been used in the past and provide a unique perspective on the		
3	difficulties encountered by officers when faced with the inability to retrieve this		
4	vital information.		
5	9. Pursuant to Central D	District of California's Local Civil Rules L.R. 7-	
6	19 and 7-19.1, <i>Amici</i> have contact	ed both the parties in this case, the Government	
7	and Apple, Inc., in order to notify the parties of <i>Amici</i> 's intention to file this Ex		
8	Parte Application and in order to obtain the parties' stipulated consent to Amici's		
9	participation as <i>amici curiae</i> . Bot	h parties have given their consent.	
10	Wherefore, Amici request the	nat the Court grant its Ex Parte Application (for	
11	which <i>Amici</i> respectfully attach a	Proposed Order) and allow them to participate	
12	as <i>amici curiae</i> by submitting a Br	rief in Support of the Government's Motion to	
13	Compel.		
14			
15	DATED: March 2, 2016	ASSOCIATION OF PROSECUTING	
16		ATTORNEYS, INC.	
17		D	
18		By: David LaBahn	
19		DeVore & DeMarco LLP	
20		Joseph V. DeMarco Urvashi Sen	
21		Attorneys for <i>Amici Curiae</i>	
22		Federal Law Enforcement Officers Association the Association of	
23		Federal Law Enforcement Officers Association, the Association of Prosecuting Attorneys, Inc., and National Sheriffs' Association	
24		Sherijjs Association	
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1 David LaBahn (State Bar No. 128930) 2 ASSOCIATION OF PROSECUTING ATTORNEYS, INC. 1615 L Street NW, Suite 1100 Washington, D.C. 20036 Phone: (202) 861-2481 3 4 Email: david.labahn@apainc.com 5 Joseph V. DeMarco Urvashi Sen 6 **DEVORE & DEMARCO LLP** 99 Park Avenue, Suite 1100 New York, New York 10016 Phone: (212) 922-9499 Fax: (212) 922-1799 7 8 Email: ivd@devoredemarco.com 9 usen@devoredemarco.com 10 Attorneys for *Amici Curiae* Federal Law Enforcement Officers Association, the Association of Prosecuting Attorneys, Inc., and National Sheriffs' Association 11 12 UNITED STATES DISTRICT COURT 13 CENTRAL DISTRICT OF CALIFORNIA 14 EASTERN DIVISION 15 ED No. CM 16-10-SP 16 IN THE MATTER OF THE SEARCH 17 OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A ORDER RE APPLICATION OF AMICI CURIAE FEDERAL LAW 18 ENFORCEMENT OFFICERS ASSOCIATION, ASSOCIATION OF SEARCH WARRANT ON A BLACK LEXIS IS300, CALIFORNIA LICENSE 19 PROSECUTING ATTORNEYS PLATE 35KGD203 INC., AND NATIONAL SHERIFFS' ASSOCIATION TO PARTICIPATE 20 AS AMICI CURIAE 21 Hearing Date: March 22, 2016 22 Hearing Time: 1:00 p.m. Courtroom: 3 or 4 23 Hon. Sheri Pym Judge: 24 25 26 27 28

APPLICATION OF AMICI CURIAE FLEOA, APA, AND NSA

ED No. CM 16-10-SP

### Case 5:16-cm-00010-SP Document 33-2 Filed 03/03/16 Page 2 of 2 Page ID #:639

1	IT IS HEREBY ORDERED th	nat the Application of the Federal Law
2	Enforcement Officers Association, the	Association of Prosecuting Attorneys, Inc.,
3	and the National Sheriffs' Association	to participate in this case as amici curiae is
4	GRANTED and the proposed Brief su	bmitted with the Application is deemed
5	filed.	
6		
7	DATED: March, 2016	Judge Sheri Pym
8		United States District Judge
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1	I, David LaBahn, attorney for the Association of Prosecuting Attorneys,
2	Inc., certify that on March 3, 2016, I caused the mailing through Federal Express
3	a true and correct copy of (1) the Ex Parte Application of Amici Curiae Federal
4	Law Enforcement Association, the Association of Prosecuting Attorneys, Inc., and
5	the National Sheriffs' Association to Participate As Amici Curiae; (2) the
6	Proposed Order Regarding this Application; and (3) the Brief of Amici Curiae
7	Federal Law Enforcement Association, the Association of Prosecuting Attorneys,
8	Inc., and the National Sheriffs' Association in Support of the Government's
9	Motion to Compel Apple, Inc. to Comply With This Court's February 16, 2016
10	Order Compelling Assistance in Search, to the following counsel:
11	Eileen M. Decker
12	Patricia A. Donahue Tracy L. Wilkinson
13	Allen W. Chiu
14	1500 United States Courthouse
15	312 North Spring Street Los Angeles, CA 90012
16	Attorneys for the United States of America
17	Theodore J. Boutrous, Jr.
18	Nicola T. Hanna
19	Eric D. Vandevelde GIBSON, DUNN, & CRUTCHER LLP
20	333 South Grand Avenue
21	Los Angeles, CA 90071-3197 Attorneys for Apple, Inc.
22	
23	Mr. Theodore B. Olson GIBSON, DUNN, & CRUTCHER LLP
24	1050 Connecticut Avenue, N.W.
25	Washington, D.C. 20036-5306 Attorney for Apple, Inc.
26	Tatione, for rippie, me.
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AT&T Mobility LLC ("AT&T") respectfully seeks leave to appear as an *amicus curiae* before this Court and to file the attached Brief of *Amicus Curiae* AT&T Mobility LLC in Support of Apple Inc., which is attached as Exhibit A to this motion. Apple Inc. consents to this motion. Counsel for the United States has stated that it has no objection to this motion.

This Court has "broad discretion to permit participation as *amicus curiae*" based on a "showing that . . . participation is useful to or otherwise desirable to the court." *Congregation Etz Chaim v. City of Los Angeles*, No. CV 97-5042 CAS (Ex), 2009 WL 1293257, at \*5 n.4 (C.D. Cal. May 5, 2009). As set forth in Exhibit A, AT&T's participation will be useful to the Court. AT&T has extensive experience with the privacy and public safety interests implicated by demands from government officials for assistance in securing customer information. AT&T is thus well-positioned to be useful to the Court in explaining the need for a clear, uniform legal framework to determine when private companies of all types may be compelled to provide assistance to law enforcement.

A proposed Order granting this Motion is attached as Exhibit B.

		*
1	DATED: March 3, 2016	Respectfully submitted,
2	•	
3		1 A
4		CROWELL & MORING LLP
5		JASON C. MURRAY (CSB No. 169806)
6		jmurray@crowell.com
7		515 South Flower Street, 40th Floor Los Angeles, CA 90071
		Telephone: (213) 622-4750
8		Facsimile: (213) 622-2690
9		KELLOGG, HUBER, HANSEN,
10		TODD, EVANS & FIGEL, P.L.L.C.
11		SEAN A. LEV (pro hac vice forthcoming)
12		slev@khhte.com
13		1615 M Street, NW, Suite 400 Washington, D.C. 20036
14		Telephone: (202) 326-7900
		Facsimile: (202) 326-7999
15		Attorneys for <i>Amicus Curiae</i>
16		AT&T Mobility LLC
17		
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#### FILED Stephen G. Larson (SBN: 145225) 1 starson@larsonobrienlaw.com 2016 MAR -3 PM 12: 44 Jerry A. Behnke (SBN: 180462) 2 jbehnke@larsonobrienlaw.com Steven A. Haskins (SBN: 238865) CLERK U.S. DISTRICT COURT CENTRAL DIST. OF CALIF. RIVERSIDE shsaskins@larsonobrienlaw.com Melissa A. Meister (SBN: 296744) 4 mmeister@larsonobrienlaw.com LARSON O'BRIEN LLP 555 S. Flower Street, Suite 4400 Los Angeles, CA 90071 6 Telephone: (213) 436-4888 Facsimile: (213) 623-2000 7 Attorneys for AMICUS CURIAE 8 GREG CLAYBORN, JAMES GODOY, HAL HOUSER, TINA MEINS, MARK SANDEFUR, ROBERT VELASCO UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA 12 13 IN THE MATTER OF THE SEARCH Case No. 5:16-CM-00010 (SP) OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A APPLICATION OF GREG SEARCH WARRANT ON A BLACK CLAYBORN, JAMES GODOY, 15 LEXUS IS300, CALIFORNIA LICENSE PLATE 35KGD203 HAL HOUSER, TINA MEINS, MARK SANDÉFUR, AND 16 ROBERT VELASCÓ TO FILE AN AMICUS CURIAE BRIEF 17 Assigned to: The Hon. Sheri Pym 18 19 20 21 22 23 24 25 26 27 28

#### TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that non-parties Greg Clayborn, James Godoy, Hal Houser, Tina Meins, Mark Sandefur, and Robert Velasco will and hereby do move for leave to file a brief as *amici curiae* in the above-captioned case. A copy of the proposed *amicus* brief is appended as Exhibit A to this motion.

District courts have broad discretion to permit third parties to participate in an action as amicus curiae. See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. 09-CV-8011-PCT-PGR, 2010 WL 1452863, at \*2 (D. Ariz. Apr. 12, 2010) ("A district court has broad discretion to permit individuals or entities in a case as amici curiae.") (citing Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982)). The role of amicus curiae is to "provide assistance in a case of general interest, supplement the efforts of counsel in the case, and draw the court's attention to legal arguments that have escaped consideration." Id. Amicus curiae briefs are particularly appropriate when the legal issues in a case "have potential ramifications beyond the parties directly involved." Sonoma Falls Devs., LLC v. Nev. Gold & Casinos, Inc., 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003). This Court has invited parties to seek leave to submit amicus briefs in this action. (Dkt. No. 10.) Likewise, 18 U.S.C.A. § 3771(a) provides crime victims with the right to "reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime" and "not to be excluded from any such public court proceeding." See also Does v. United States, 817 F. Supp. 2d 1337, 1342 (S. D. Fla. 2011) (holding that rights granted by the federal Crime Victims Rights Act attach even "before a complaint or indictment formally charges the defendant with a crime").

These *amici*, though non-parties in this action, have a unique perspective on the Court's decision in this matter. They are loved ones of victims of the tragic mass shooting in San Bernardino, California on December 2, 2015.

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- Gregory Clayborn lost his daughter, Sierra Clayborn.
- James Godoy lost his wife, Aurora Godoy.
- Tina Meins lost her father, Damian Meins.
- Mark Sandefur lost his son, Larry Daniel Eugene Kaufman.
- Robert Velasco lost his daughter, Yvette Velasco.
- Hal Houser's wife, Beth Houser, attended the party and personally witnessed the horrors of the December 2 tragedy but, thankfully, survived.

As family members of the victims of this act of terrorism, *amici* are afforded the rights enumerated in the Crime Victims' Rights Act. *See* 18 U.S.C.A. § 3771(e)(2)(B) ("In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter[.]")

Amici's perspectives are at the crossroads of those offered by the United States and Apple. They are individuals who own and use smartphones and other mobile technology on a daily basis. They are also victims of this terrible tragedy and have a unique interest in the United States' investigation of the iPhone in its custody. As such, amici have a unique perspective on the law and policy implications of this Court's decision. Whereas much of the public and legal debate has focused on the potentially global ramifications of the Court's order, amici respectfully seek to remind all parties of the terrible crime—an act of terrorism—the United States must investigate to its fullest. Ultimately, this is a situation where no stone can be left unturned.

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1	For the foregoing reasons, ami	ci respec	tfully seek leave to file the attached
2	\$I		•
3	Dated: March 3, 2016		LARSON O'BRIEN LLP
4	-		
5		By:	Starion
6			Stephen G. Larson
7			Attorneys for <i>Amicus Curiae</i> Greg Clayborn, James Godoy, Hal
8			Houser, Tina Meins, Mark Sandefur,
9			and Robert Velasco
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1	Daniel F. Katz*
2	dkatz@wc.com Kannon K. Shanmugam*
3	kshanmugam@wc.com Richmond T. Moore*
4	rtmoore@wc.com
5	David M. Krinsky* dkrinsky@wc.com
6	WILLIAMS & CONNOLLY LLP 725 Twelfth Street, N.W.
7	Washington, DC 20005
8	Telephone: (202) 434-5000 Facsimile: (202) 434-5029
9	William Faulkner (SBN 83385)
10	wfaulkner@mcmanislaw.com MCMANIS FAULKNER
11	One California Plaza
12	300 So. Grand Avenue, 37th Floor Los Angeles, CA 90071
13	Telephone: (408) 279-8700 Facsimile: (408) 279-3244
14	#D ## ## 11:

Darren B. Bernhard\*
darren.b.bernhard@intel.com
Vice President
Director of Antitrust &
Commercial Litigation
INTEL CORPORATION
1155 F Street, N.W.
Washington, DC 20004
Telephone: (202) 626 4380

Tanya L. Hunter (SBN 197761); tanya.hunter@intel.com
Associate General Counsel
Antitrust & Commercial Litigation
INTEL CORPORATION
2200 Mission College Boulevard
Santa Clara, CA 95054
Telephone: (408) 765-2318
Facsimile: (408) 765-5157

\*Pro Hac Vice Admission Pending

Attorneys for Intel Corporation

#### UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA EASTERN DIVISION

IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA LICENSE PLATE 35KGD203 ED No. CM 16-10-SP

NOTICE OF MOTION AND MOTION OF INTEL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

#### **Hearing:**

Date:

March 22, 2016

Time:

1:00 PM

Place:

Courtroom 3 or 4

Judge:

Hon. Sheri Pym

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#### TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Intel Corporation moves for leave of Court to file the attached brief as amicus curiae in support of the motion to vacate filed by Apple Inc. For nearly four decades, Intel has been a world leader in the development of computing technology. In that role, Intel has gained a deep understanding of the vital part that strong encryption plays in protecting both privacy and security. Intel's considerable expertise in security technology, in both hardware and software, makes it well-suited to assist the Court in addressing the momentous issues raised by Apple's motion. See Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc., 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (explaining that amicus status may be granted if the amicus has "unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide") (internal quotation marks omitted).

Intel submits this amicus brief because an order compelling Apple to provide assistance to the government would have global ramifications far beyond this case. If this Court allows the government to compel Apple to undermine the security of its products, that precedent could be followed in the United States and in other countries. The proposed brief provides Intel's unique perspective on the question whether the government should be allowed to force a company affirmatively to develop technology for the purpose of circumventing a product's security features. As explained more fully in its proposed brief, Intel opposes any attempt to require a company to reduce the security of its products. Such efforts would chill innovation and ultimately decrease security.

Accordingly, Intel respectfully requests leave to file the attached amicus brief. Counsel for Intel discussed the filing of the proposed brief with counsel for Apple and counsel for the government. Apple has consented to, and the government does not oppose, the filing of this brief.

1	Dated: March 3, 2016		Respectfully submitted,
2		By:	Saniel F. fot
3			Daniel F. Katz* V
4			Kannon K. Shanmugam* Richmond T. Moore*
5			David M. Krinsky*
			WILLIAMS & CONNOLLY LLP
6			725 Twelfth Street, N.W.
7			Washington, DC 20005 Telephone: (202) 434-5000
8			Facsimile: (202) 434-5029
9			William Faulkner (SBN 83385)
10			MCMANIS FAULKNER
11			One California Plaza
12			300 So. Grand Avenue, 37th Floor
			Los Angeles, CA 90071 Telephone: (408) 279-8700
13			Facsimile: (408) 279-3244
14			Darren B. Bernhard*
15			Vice President and Director of
16			Antitrust & Commercial Litigation
17			INTEL CORPORATION
18			1155 F Street, N.W. Washington, DC 20004
			Telephone: (202) 626-4380
19			
20			Tanya L. Hunter (SBN 197761)
21			INTEL CORPORATION 2200 Mission College Blvd.
22			Santa Clara, CA 95054
23			Telephone: (408) 765-2318
			Facsimile: (408) 765-5157
24			*Pro Hac Vice Admission Pending
25			_
26			Attorneys for Intel Corporation
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**JONES & MAYER** Martin J. Mayer, Esq., SBN 73890 mjm@jones-mayer.com James R. Touchstone, Esq. SBN 184584 jrt@jones-mayer.com Tarquin Preziosi, Esq., SBN 198014 tp@jones-mayer.com 3777 North Harbor Boulevard 5 Fullerton, California 92835 (714) 446-1400; Fax (714) 446-1448 Attorneys for Amici Applicants 7 UNITED STATES DISTRICT COURT 8 CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION 9 Case No: 5:16-cm-00010-SP IN THE MATTER OF THE 10 SEARCH OF AN APPLIE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH 11 APPLICATION FOR LEAVE TO WARRANT ON A BLACK LEXUS FILE AMICI CURIAE BRIEF: 12 IS300; CALIFORNIA LICENSE STATEMENT OF IDENTITY AND PLATE 35KGD203 13 INTERESTS OF AMICI CURIAE; BRIEF OF AMICI CURIAE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 14 AMICI CURIAE BRIEF 15 Date: March 22, 2016 16 Time: 1:00 p.m. Location: Courtroom of Hon. 17 Sheri Pym 18 19 TO THE HONORABLE SHERI PYM, MAGISTRATE JUDGE OF THE U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA: 20 APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF 21 The California State Sheriffs' Association, California Police Chiefs' 22 Association and the California Peace Officers' Association (collectively, 23 "California Law Enforcement") respectfully request leave to file the attached brief 24 of Amici Curiae in support of Applicant United States of America ("United 25 States") in order to assist this Court in resolving the important issue of law 26 presented in this matter. 27 28

1 The interests of Amici are as stated in the attached brief, Part I. Applicants endeavor to provide this Court with the perspective of similarly situated law 2 enforcement agencies throughout the State regarding the important legal issue 3 raised in this matter, specifically whether: 4 Apple Inc. ("Apple") can be compelled to assist the United States in 5 unlocking an iPhone owned by the government that was used to facilitate the 6 December 2, 2015 massacre in San Bernardino, California. 7 The issue in this case is of paramount importance to the parties, Amici, to 8 law enforcement generally, and to all of the People of the State of California. 9 Amici believe that they can provide additional perspective to this Court that 10 will be helpful in its decision. 11 Therefore, based upon all of the foregoing, applicants respectfully request 12 leave from the Presiding Judge to file the attached brief of Amici Curiae 13 addressing the above issues, in order to aid this Court in its consideration and 14 determination of the critical issues before it in this matter. 15 There is good cause for permitting the filing of the brief, as stated above, 16 and this Court may grant the filing of the brief pursuant to FRAP 29. 17 18 Dated: March 3, 2016 Respectfully submitted, 19 JONES & MAYER 20 21 By: /s/ Martin J. Mayer 22 Martin J. Mayer James R. Touchstone 23 Tarquin Preziosi Attorneys for Amici Applicants 24 25 26 27 28

#### STATEMENT OF IDENTITY AND INTERESTS OF AMICI CURIAE

Amici Curiae are the following associations: the California State Sheriffs' Association ("CSSA"), the California Police Chiefs' Association ("CPCA"), and the California Peace Officers' Association ("CPOA"). Each of their memberships and interests are discussed below.

The California State Sheriffs' Association ("CSSA") is a non-profit professional organization that represents each of the 58 California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to allow for the general improvement of law enforcement throughout the State of California.

The California Police Chiefs' Association ("CPCA") represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

The California Peace Officers' Association ("CPOA") represents more than 2,000 peace officers, of all ranks, throughout the State of California. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

#### FRAP 29(a) STATEMENT

Pursuant to Rule 29(a) of Federal Rules of Appellate Procedure, Apple, Inc. has informed Amici Curiae that they consent to the filing of this brief. The United States has stated that it takes no position as to whether or not Amici should file this brief.

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#### FRAP 29(c)(5) STATEMENT

Pursuant to Rule 29(c)(5), Amici Curiae state that (A) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (C) no person other than Amici Curiae and their counsel contributed money to fund the preparation or submission of this brief.

#### **ARGUMENT**

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Amici have identified this matter as one of statewide significance in which their expertise may be of assistance to the Court. The attached brief offers a broad perspective of Amici as to the issues before the court, namely the impact of the Court's decision on local law enforcement agencies throughout the State by enabling the United States to compel Apple to assist in unlocking the iPhone that was used to facilitate the December 2, 2015 massacre in San Bernardino, California.

In particular, if the Court were to grant the motion to vacate the order as requested by the Apple, law enforcement investigations into acts of terror – and the ability to prevent the same - will be greatly jeopardized by prohibiting access to crucial information relevant to investigations which is obtained through the judicial process.

The undersigned have been given specific authority to make this Application on behalf of Amici.

Dated: March 3, 2016 Respectfully submitted,

JONES & MAYER

By: /s/ Martin J. Mayer

Martin J. Mayer

Tarquin Preziosi

James R. Touchstone

Attorneys for Amici Applicants

2	Michael M. Maddigan (Bar No. 163450) HOGAN LOVELLS US LLP 1999 Avenue of the Stars, Suite 1400 Los Angeles, California, 90067			
3 4	Telephone: (310) 785-4600 Facsimile: (310) 785-4601 michael.maddigan@hoganlovells.com	2016 CLER CCEN BY		
5	Neal Kumar Katyal ( <i>pro hac vice</i> applica	ation RACS		
6	forthcoming) HOGAN LOVELLS US LLP			
7	555 Thirteenth Street, N.W. Washington, D.C. 20004	PM 3:		
8	Telephone: (202) 637-5600 Facsimile: (202) 637-5910 neal.katyal@hoganlovells.com			
9   10	Attorneys for Amici Curiae  UNITED STATES DISTRICT COURT  CENTRAL DISTRICT OF CALIFORNIA			
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13	EASTERN DIVISION			
14		BY FAX		
15	IN THE MATTER OF THE SEARCH	ED No. CM 16-10 (SP)		
16	OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A	APPLICATION OF		
17	SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA	AMAZON.COM, BOX, CISCO SYSTEMS, DROPBOX,		
18	LICENSE PLÁTE 35KGD20	EVERNOTE, FACEBOOK, GOOGLE, MICROSOFT,		
19		MOZILLA, NEST, PINTEREST, SLACK, SNAPCHAT, WHATSAPP, AND YAHOO TO PARTICIPATE		
20		AND YAHOO TO PARTICIPATE AS AMICI CURIAE IN SUPPORT OF APPLE, INC.		
21				
22		Date: March 22, 2016 Time: 1:00 p.m. Place: Courtroom 3 or 4		
23		Judge: Honorable Sheri Pym		
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HOGAN LOVELLS US LLP ATTORNEYS AT LAW				
LOS ANGELES	A)	PPLICATION TO PARTICIPATE AS AMICI CURIAE		

HOGAN LOVELLS US LLP ATTORNEYS AT LAW LOS ANGELES Amazon.com, Box, Cisco Systems, Dropbox, Evernote, Facebook, Google, Microsoft, Mozilla, Nest, Pinterest, Slack, Snapchat, WhatsApp, and Yahoo apply for leave to participate as *amici curiae* in support of Apple, Inc. in this matter. In support, applicants state:

- 1. The government has moved under the All Writs Act to compel Apple to create software that will bypass the security features of an iPhone recovered by the government. The government's application raises important legal questions regarding whether the All Writs Act authorizes the government's request and the relationship between the All Writs Act and security features on electronic devices more generally.
- 2. District courts have the inherent authority to permit non-parties to participate as *amici curiae* in a case, and have broad discretion in deciding whether to permit *amicus* briefs. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). Generally speaking, "courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case." *In re Roxford Foods Litigation*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)). A brief will typically be accepted if it is "timely and useful." *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996). Applicants' brief is both.
- 3. First, applicants' brief is timely because it is being filed on March 3, 2016, the date set for *amicus* submissions in the Court's February 19, 2016 scheduling order. Dkt. No. 10.
- 4. Second, applicants' brief is useful. Applicants are leading technology companies, and their brief discusses why the government's request is unsupported by the case law, unduly burdensome to technology companies like applicants, and practically harmful for American consumers. The Court will benefit from the unique perspective offered by applicants' brief.

LLP ATTORNEYS AT LAW

Los Angeres

5. We have conferred with counsel for Apple and the government regarding this application. Both have consented to applicants' participation as *amici curiae*.

For the foregoing reasons, the application should be granted.

Dated: March 3, 2016

Respectfully submitted,

HOGAN LOVELLS US LLP

Michael M. Maddigan Attorney for Amici Curiae

Case No. ED 5:16-cm-00010-SP

LEAVE TO FILE BRIEF OF AMICI CURIAE

FENWICK & WEST LLP

# FINWICK & WEST LLP ATTORNEYS AT LAW SAN FRANCISCO

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#### TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 22, 2016, at 1:00 p.m., before the Honorable Sheri Pym, AVG Technologies, Computer & Communications Industry Association (CCIA), Data Foundry, Golden Frog, the Internet Association, and the Internet Infrastructure Coalition ("i2Coalition") (hereinafter "Amici") move the Court for leave to file the accompanying brief as amici curiae in support of Apple's Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition To Government's Motion to Compel Assistance.

The motion is based on this Notice of Motion and Motion, and the accompanying brief.

Dated: March 3, 2016

FENWICK & WEST LLP

Tyler G. New

Andrew P. Bridges David L. Hayes Tyler G. Newby Ciara N. Mittan

FENWICK & WEST LLP

555 California Street, 12th Floor

San Francisco, CA 94104

Telephone: 415.875.2300 Facsimile: 415.281.1350

abridges@fenwick.com

dhayes@fenwick.com

tnewby@fenwick.com

cmittan@fenwick.com

Attorneys for Amici Curiae

AVG Technologies, the Computer & Communications Industry Association (CCIA), Data Foundry, Golden Frog, the Internet Association, and the Internet Infrastructure Coalition ("i2Coalition") ("Amici") move this Court for leave to appear as amici curiae and to file the accompanying brief in support of Apple's Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition To Government's Motion to Compel Assistance. Dkt. 16.

Counsel for the *Amici* has contacted Apple Inc. and the United States to provide notice of the filing of this motion and accompanying brief. The parties have indicated that they do not object to the filing of this brief.

#### I. STANDARD FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The court has inherent authority to permit a non-party to participate as amicus curiae in a case, and it has broad discretion in deciding whether to permit participation. See, e.g., Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995); Ellsworth Assocs., Inc. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996); In re Roxford Foods Litig., 790 F. Supp. 987, 997 (E.D. Cal 1991); Gerritsen v. De La Madrid Hurtado, 819 F.2d 1511, 1514 n. 3 (1987). "Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case. . ." In re Roxford Foods Litig., 790 F. Supp. at 997 (quoting United States v. Louisiana, 751 F. Supp. 608, 620 (E.D. La. 1990)). Courts typically permit amicus participation if the information offered is "timely and useful." Ellsworth Assocs., 917 F. Supp. at 846; Avellino v. Herron, 991 F. Supp. 730, 732 (E.D. Pa. 1998); Hoptowit, 682 F.2d at 1260 (9th Cir.1982).

The proposed brief is timely. *Amici* submit the proposed brief in accordance with the Court's scheduling order, which required that "[a]ny amicus brief shall be filed by not later than March 3, 2016, along with an appropriate request seeking leave of the Court to file such brief." Dkt. 10. The Court will hear Apple's and the government's motions on March 22, and submission of this brief does not affect the

hearing date or the briefing schedule set by the Court.

## II. INTERESTS OF AMICI CURIAE AND HOW THEIR EXPERTISE WILL BENEFIT THE COURT

The proposed brief provides information that is both useful and critical to the Court in considering the issues relating to Apple's motion. Courts have deemed *amicus* participation useful when the *amicus* has a special interest in the issues in a case, is particularly familiar with the issues, or has relevant expertise. *Amicus* briefs concerning legal issues that have potential ramifications beyond parties directly involved are permitted. *NGV Gaming v. Upstream Point Molate*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005).

The government's interpretation of the scope of the Court's authority to issue the order here under the All Writs Act has potential ramifications beyond this case and beyond Apple. If adopted, the government's theory could empower it compel other technology companies, including Internet companies, to develop and implement software that weakens security features those companies have built into their products. *Amici* either are technology companies or represent or support technology companies. None received any compensation for participating in this brief. The sole interest of *Amici* in this case is advocating a principled interpretation of the All Writs Act that protects the ability of technology companies to develop and maintain secure products and services.

#### III. STATEMENT OF IDENTITY OF AMICI CURIAE

AVG is the leading provider of software services to secure devices, data and people. AVG's award-winning consumer portfolio includes internet security, performance optimization, location services, data controls and insights, and privacy and identity protection, for mobile devices and desktops.

The Computer & Communications Industry Association ("CCIA") represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software,

electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than \$465 billion in annual revenues. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition.

Founded in 1994, Data Foundry is one of the first 50 ISPs in the United States. During its nineteen year history, its data centers have supported thousands of enterprise companies in every industry, including high performance computing, energy, financial services, healthcare and technology.

Golden Frog was founded in response to Room 641a, an infamous room in San Francisco where the NSA was conducting surveillance on AT&T's networks. Golden Frog builds tools that help preserve an open and secure Internet experience while respecting user privacy.

The Internet Association, the unified voice of the Internet economy, represents the interests of 35 leading Internet companies and their global community of users. It is dedicated to advancing public policy solutions that strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

The Internet Infrastructure Coalition ("i2Coalition") is the non-profit voice of companies from the Internet infrastructure industry. i2Coalition members are primarily small to medium sized businesses with global businesses in web hosting, data centers and Cloud infrastructure, as well as companies who provide services to those industries. The security of the Internet's infrastructure is vitally important to the economy, and the millions of citizens who rely upon being able to keep their personal data, financial, medical and legal records, secure. Requiring workarounds that weaken security standards has the potential to have broad ramifications and the potential to jeopardize the security and safety of all users.

#### IV. CONCLUSION

The questions at issue in this action are vitally important to both the public

and Amici. Amici respectfully request that the Court grant them leave to appear and 1 file the accompanying brief. 3 4 FENWICK & WEST LLP Dated: March 3, 2016 5 6 By: 7 8 Andrew P. Bridges David L. Hayes 9 Tyler G. Newby 10 Ciara N. Mittan FENWICK & WEST LLP 11 555 California Street, 12th Floor 12 San Francisco, CA 94104 Telephone: 415.875.2300 13 Facsimile: 415.281.1350 14 abridges@fenwick.com dhayes@fenwick.com 15 tnewby@fenwick.com 16 cmittan@fenwick.com 17 Attorneys for Amici Curiae 18 19 20 21 22 23 24 25 26 27 28

FENWICK & WEST LLP Attorneys at Law San Francisco 5

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#### **CERTIFICATE OF SERVICE**

The undersigned declares as follows:

I am a citizen of the United States and employed in the San Francisco County, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Fenwick & West LLP, 555 California Street, 12<sup>th</sup> Floor, San Francisco, CA 94104. On the date set forth below, I served a copy of the following documents:

NOTICE OF MOTION AND MOTION OF AVG TECHNOLOGIES, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, DATA FOUNDRY, GOLDEN FROG, THE INTERNET ASSOCIATION, AND THE INTERNET INFRASTRUCTURE COALITION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF APPLE, INC.'S MOTION TO VACATE ORDER COMPELLING ASSISTANCE; PROPOSED BRIEF;

BRIEF OF AMICI CURIAE, AVG TECHNOLOGIES, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, DATA FOUNDRY, GOLDEN FROG,, THE INTERNET ASSOCIATION, AND THE INTERNET INFRASTRUCTURE COALITION IN SUPPORT OF APPLE INC.'S MOTION TO VACATE ORDER COMPELLING APPLE INC. TO ASSIST AGENTS IN SEARCH, AND OPPOSITION TO GOVERNMENT'S MOTION TO COMPEL ASSISTANCE

[PROPOSED] ORDER GRANTING MOTION OF AVG
TECHNOLOGIES, THE COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION DATA FOUNDRY, GOLDEN FROG, THE
INTERNET ASSOCIATION, AND THE INTERNET INFRASTRUCTURE
COALITION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN
SUPPORT OF APPLE INC.'S MOTION TO VACATE ORDER
COMPELLING APPLE INC. TO ASSIST AGENTS IN SEARCH, AND
OPPOSITION TO GOVERNMENT'S MOTION TO COMPEL
ASSISTANCE

on the interested parties in the subject action by transmitting a true copy thereof as indicated below, addressed as follows:

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* 

I declare under penalty of perjury under the laws of the State of California and the United States that the above is true and correct. Dated: March 3, 2016 FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO 

## ORIGINAL

ALAN J. BUTLER, SBN 281291
butler@epic.org
MARC ROTENBERG
AIMEE THOMSON
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue NW, Suite 200
Washington, DC 20009
Telephone: 202.483.1140
Facsimile: 202.483.1248



Attorneys for the Electronic Privacy Information Center *Amicus Curiae* 

#### UNITED STATES DISTRICT COURT

#### CENTRAL DISTRICT OF CALIFORNIA

#### EASTERN DIVISION

IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA LICENSE PLATE 35KGD203 ED No. CM 16-10 (SP)
NOTICE OF MOTION AND
MOTION OF ELECTRONIC
PRIVACY INFORMATION
CENTER (EPIC) AND EIGHT
CONSUMER PRIVACY
ORGANIZATIONS FOR LEAVE
TO FILE AN AMICUS CURIAE
BRIEF.

#### Hearing:

Date: March 22, 2016 Time: 1:00 p.m.

Place:

Courtroom 3 or 4

Judge:

Hon. Sheri Pym

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Motion of EPIC to File *Amicus* Brief Case No. CM 16-10 (SP)

The Electronic Privacy Information Center ("EPIC"), by and through undersigned counsel, hereby files this Motion for Leave to File a Brief *Amicus Curiae*. In support thereof, EPIC submits the following:

- 1. On February 16, 2016, this Court issued an Order compelling Apple, Inc. to provide extraordinary assistance to the Federal Bureau of Investigation by providing a software file or other technical means to accomplish three specific functions: (1) to "bypass or disable the auto-erase function whether or not it is enabled," (2) to "enable the FBI to submit passcodes" electronically, and (3) to ensure that "software running on the device will not purposefully introduce any additional delay between passcode attempts beyond what is incurred by Apple hardware." On February 25, 2016, Apple filed a Motion to Vacate the Order.
- 2. This Order implicates substantial consumer privacy interests, closely tied to the problems of data breach, financial fraud, and identity theft.
- 3. EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC was specifically established to advocate for the use of strong encryption technology and for the development of related Privacy Enhancing Technologies. EPIC led the effort in the United States in the 1990s to support strong encryption tools and played a key role in the development of the international framework for cryptography policy that favored the deployment of strong security measures to safeguard personal information. EPIC also published the first comparative studies of international

About EPIC, https://epic.org/epic/about.html.

<sup>2</sup> Motion of EPIC to File *Amicus* Brief Case No. CM 16-10 (SP)

encryption policy. See EPIC, Cryptography and Liberty 1998: An International Survey of Encryption Policy (1998).

- 4. The Center for Digital Democracy ("CDD") is one of the leading consumer protection and privacy organizations in the United States. Since its founding in 2001, CDD has been at the forefront of research, public education, and advocacy protecting consumers in the digital age.<sup>2</sup>
- 5. Constitutional Alliance is privately funded nonpartisan non-profit organization whose stated mission is "preserve state and national sovereignty, and the unalienable rights to life, liberty, and the pursuit of happiness as pronounced in the Declaration of Independence and protected under the Bill of Rights of the United States of America."
- 6. Consumer Action empowers underrepresented consumers nationwide to assert their rights in the marketplace and financially prosper through multilingual financial education materials, community outreach, and issue-focused advocacy.<sup>3</sup>
- 7. Consumer Watchdog is a nonprofit organization dedicated to educating and advocating on behalf of consumers for over 25 years. Its mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance rates, energy policy, protecting privacy rights, protecting legal rights, corporate reform, and political accountability.<sup>4</sup>
- 8. Patient Privacy Rights ("PPR") works to empower individuals and prevent widespread discrimination based on health information using a grassroots, community

<sup>&</sup>lt;sup>2</sup> Center for Digital Democracy, https://www.democraticmedia.org/.

Consumer Action, http://www.consumer-action.org/.

<sup>&</sup>lt;sup>4</sup> Consumer Watchdog, http://www.consumerwatchdog.org/.

<sup>3</sup> Motion of EPIC to File Amicus Brief Case No. CM 16-10 (SP)

organizing approach. PPR educates consumers, champions smart policies, and exposes and holds industry and the government accountable.<sup>5</sup>

- 9. The Privacy Rights Clearinghouse ("PRC") is a nonprofit consumer education and advocacy organization based in San Diego, California. Established in 1992, the PRC focuses on consumers' rights and interests relating to informational privacy, answers individual consumer inquiries, and maintains a robust website of practical privacy protection tips.<sup>6</sup>
- 10. Privacy Times provides accurate reporting, objective analysis and thoughtful insight into the events that shape the ongoing debate over privacy and Freedom of Information.<sup>7</sup>
- 11. This case concerns the security and reliability of the Apple iPhone, a device used by millions of consumers in the United States (and worldwide). Consumers rely on the iPhone's security features to protect their most sensitive personal data, including private communications, photographs, bank account records, medical records, and log-in credentials. One of the single greatest threats facing iPhone users today is that criminals will gain access to the personal information stored on their devices. If Apple were to create software that disables or circumvents these security features, it would undermine the security of all iPhone users, and put at risk the personal information stored on nearly 100 million iPhones in the United States.
- 12. Federal courts have previously granted EPIC leave to file *amicus* briefs in many other consumer privacy cases. *See, e.g., In re Nickelodeon Consumer Privacy*

<sup>&</sup>lt;sup>5</sup> Patient Privacy Rights, https://patientprivacyrights.org/.

<sup>&</sup>lt;sup>6</sup> Privacy Rights Clearinghouse, https://www.privacyrights.org/.

Privacy Times, http://www.privacytimes.com/.

<sup>4</sup> Motion of EPIC to File *Amicus* Brief Case No. CM 16-10 (SP)

Litig., No. 15-1441 (3d Cir. filed May 4, 2015) (addressing the definition of personally identifiable information as applied to Internet addresses and other unique persistent identifiers); Gordon v. Softech Int'l, 726 F.3d 42 (2d Cir. 2012) (arguing that resellers of driver records should be strictly liable for downstream misuses); Joffe v. Google, Inc., 729 F.3d 1262 (9th Cir. 2013) (arguing that wi-fi communications are protected by the Wiretap Act), amended and superseded on reh'g, 746 F.3d 920 (9th Cir. 2013); In re Google Inc. St. View Elec. Commc'ns Litig., 794 F. Supp. 2d 1067 (N.D. Cal. 2011) (same), aff'd sub nom. Joffe v. Google, Inc., 729 F.3d 1262 (9th Cir. 2013). EPIC has also filed amicus briefs in other federal cases, including cases before the United States Supreme Court, concerning consumer privacy and data protection. See, e.g., Spokeo v. Robins, 135 S. Ct. 1892 (2015) (arguing that the violation of a consumer's privacy rights under the Fair Credit Reporting Act constitutes an injury-in-fact sufficient to confer Article III standing); Smith v. LexisNexis Screening Solutions, Inc., Nos. 15-2329 & 15-2330 (6th Cir. filed Feb. 29, 2016) (arguing that data brokers should be liable when they mismatch records in employment background check reports); ACA Int'l v. FCC, No. 15-1211 (D.C. Cir. filed Jan. 22, 2016) (defending an order interpreting the Telephone Consumer Protection Act by arguing that the widespread adoption of cell phones has magnified the harm of unwanted communications); FTC v. Wyndham Hotels & Resorts, LLC, 799 F.3d 236 (3d Cir. 2015) (arguing that regulation of data security practices is necessary to protect consumers from identity theft and fraud).

13. Federal district courts have inherent authority to permit a non-party to participate as an *amicus curiae* in a case, and have broad discretion in deciding

5 Motion of EPIC to File *Amicus* Brief Case No. CM 16-10 (SP)

whether to permit such participation. *E.g. Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982), *abrogated on other grounds*, *Sandin v. Conner*, 515 U.S. 472 (1995); *Missouri v. Harris*, No. 2:14-CV-00341, 2014 WL 2987284, at \*2 & n.1 (E.D. Cal. July 1, 2014); *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 303 F.R.D. 266, 269 (D. Md. 2014); *Inst. of Med. Educ., Inc. v. W. Ass'n of Sch. & Colleges*, No. 11-CV-05755, 2013 WL 6672443, at \*3 (N.D. Cal. Dec. 18, 2013); *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996). Courts typically permit *amicus* filings where the information provided is "timely and useful." *Ellsworth*, 917 F. Supp. at 846. The attached Brief of *Amicus Curiae* EPIC and Eight Consumer Privacy Organizations satisfies both of these elements.

- 14. First, the EPIC *Amicus* Brief has been timely filed. On February 19, 2016, the Court issued a Scheduling Order in this matter, specifying that "any amicus brief shall be filed not later than March 3, 2016, along with any appropriate request seeking leave of the Court to file such brief."
- 15. Second, the EPIC *Amicus* Brief provides information that is useful to the Court's consideration of Apple's Motion to Vacate. This case implicates the security of a computing device that is used by millions of consumers to store and protect personal information and to gain access to other secure systems. The EPIC *Amicus* Brief makes clear the substantial risk to consumers if these techniques are altered or diminished as the FBI has urged.
- 16. Pursuant to the Central District of California's Local Civil Rules L.R. 7-19 and 7-19.1, EPIC has contacted both parties regarding this motion, and neither objects to EPIC's participation as *amicus curiae*.

6 Motion of EPIC to File *Amicus* Brief Case No. CM 16-10 (SP)

Wherefore, EPIC requests that the Court grant this Motion and allow EPIC to participate as amicus curiae by submitting the attached Brief of Amicus Curiae. Dated: March 3, 2016 Respectfully submitted, By: /s/ Alan J. Butler ALAN J. BUTLER Marc Rotenberg Aimee Thomson **Electronic Privacy Information Center** 1718 Connecticut Avenue, N.W. Washington, D.C. 20009 (202) 483-1140 (telephone) (202) 483-1248 (facsimile) Attorneys for Amicus Curiae 

matter to file a brief in support of the *United States of America's Ex Parte Order* 

To Compel Apple, Inc. To Assist Agents In Search. A copy of the District

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Attorney's proposed brief is attached to this motion. In support thereof, the People of the State of California, through their attorney, the District Attorney of the County of San Bernardino submit the following:

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#### CONSENT TO FILE AMICUS CURIAE BRIEF

The San Bernardino County District Attorney, on behalf of his client, The People of the State of California, have requested and acquired the consent of the United States Government and Apple, Inc. to participate as <u>Amicus Curiae</u> and to file the attached brief in this matter.

П

# INTEREST OF THE DISTRICT ATTORNEY AND THE PEOPLE OF THE STATE OF CALIFORNIA AS <u>AMICUS</u> CURIAE

The San Bernardino County District Attorney and his client, The People of the State of California, have a compelling governmental interest in acquiring any evidence of criminal conduct, additional perpetrators, potential damage to the infrastructure of San Bernardino County, and in protecting the California Constitutionally guaranteed due process rights of the victims, deceased and living, arising from state crimes committed on December 2, 2015 within his jurisdiction and contained solely on the seized iPhone before the court. The People of the State of California, through its attorney, the District Attorney of San Bernardino County assert that he is best prepared explain and demonstrate to the Court that these interests outweigh any alleged interests that Apple, Inc. asserts.

#### A. THE ACQUISITION OF EVIDENCE OF CRIMINAL ACTIVITY

The District Attorney is the public prosecutor who is charged with attending the courts and within his discretion initiating and conducting on behalf

of the People of the State of California all prosecutions for public offenses. Cal. Govt. Code § 26500 (Lexis 2016). Every person who commits a public offense in the State of California is liable for punishment in this state. The jurisdiction for prosecution of public offenses is in the jurisdictional territory in which it is committed Cal. Penal Code § 777 (Lexis 2016).

The San Bernardino County District Attorney has a specific, unique and compelling interest in acquiring the evidence of criminal activity that may be contained on the Apple iPhone before the Court seized pursuant to a lawful search warrant from the Lexus vehicle.<sup>1</sup> The telephone is owned by the County of San Bernardino and was issued to one its employees, Sayed Farook to conduct county business

On December 2, 2015 Mr. Farook and at least one accomplice committed 14 counts of willful deliberate premeditated murder a violation of Cal. Penal Code §§ 187(a), 189 (Lexis 2016), with the special circumstances of multiple murder Cal. Penal Code § 190.2(3) (Lexis 2016) specifying a penalty of death or life imprisonment without the possibility of parole, and the commission of 22 counts of attempted murder in violation of Cal. Penal Code § 664/187 (Lexis 2016), The murders were committed in furtherance of a conspiracy Cal. Penal Code § 182 (Lexis 2016).

At the time that the murders were being perpetrated at least two 911 calls to the San Bernardino Police Dispatch<sup>2</sup> center reported the involvement of three perpetrators. Although the reports of three individuals were not corroborated, and may ultimately be incorrect, the fact remains, that the information contained solely on the seized iPhone could provide evidence to identify as of yet unknown

<sup>26</sup> Li should be noted

<sup>&</sup>lt;sup>1</sup> It should be noted that the California License Plate for the vehicle is incorrectly noted in the court caption. The correct license plate number, contained in the search warrant, is 5KGD203.

<sup>&</sup>lt;sup>2</sup> A copy of the computerized dispatch center calls is attached as Exhibit A

co-conspirators who would be prosecuted for murder and attempted murder in San Bernardino County by the District Attorney.

The iPhone is a county owned telephone that may have connected to the San Bernardino County computer network. The seized IPhone may contain evidence that can only be found on the seized phone that it was used as a weapon to introduce a lying dormant cyber pathogen that endangers San Bernardino County's infrastructure, a violation of Cal. Penal Code §502 (Lexis 2016) and poses a continuing threat to the citizens of San Bernardino County.

## B. PROTECTION AND ENFORCEMENT OF THE DUE PROCESS RIGHTS OF CALIFORNIA VICTIMS.

On behalf of his client, the People of the State of California, the District Attorney has a unique interest and is best qualified to demonstrate to the Court that Apple, Inc. is infringing on the due process rights guaranteed to victims of crime by the California Constitution and is impeding the enforcement of those rights.

The California Constitution guarantees victims of crimes committed in California a Victim's Bill of Rights Cal. Const. Art. I, §28. Included in that Bill of Rights is the expectation that those who commit felonies that injure victims will be thoroughly investigated and speedily be brought before the courts and tried in a timely manner. It also requires the good faith efforts and actions of elected and appointed officials to accomplish these goals. Cal. Const. Art. I, §28(a)(4). The victim's Bill of Rights also provides the right to "truth in evidence and that "all relevant evidence" be admissible in a criminal proceeding. Cal. Const. Art. I, §28(f)(2).

The People of the State of California, if permitted to file the attached <u>amicus curiae</u> brief, will assert that Apple, Inc. has created a repository of information that can be found only on the seized device before the Court. It will also assert that a search warrant has established that there is probable cause to

believe that the device contains relevant evidence. It will also assert that Apple has created in the device of their design a repository of possible relevant evidence which cannot be penetrated or accessed without their assistance. It will further assert that by failing to assist in the acquisition of this information, Apple is infringing on the victim's rights as provided by the California Constitution and that Apple is impeding the District Attorney's Constitutional obligation to investigate and prosecute crimes committed against these victims.

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#### **ARGUMENT**

The Federal District Court has "broad discretion" to allow the filing of amicus curie briefs and it will only be overturned if there is an abuse of discretion. Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982), abrogated on other grounds, Thomas v. Ponder, 611 F.3d 1144, 1154 (9th Cir. 2010). "Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case.... There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable to the court". In re Roxford Foods Litigation., 790 F. Supp. 987, 997 (E.D. Cal. 1991), citing United States\_v. Louisiana, 751 F.Supp. 608, 620 (E.D. La. 1990).

In addition to whatever interest the United States has in this Court's decision in whether Apple should be required to assist in the unlocking of the seized San Bernardino County iPhone the Court's decision will have a very real impact on San Bernardino County, and the victims of crimes committed in San Bernardino County. The District Attorney and our client, The People of the State of California believe that we can provide this prospective and our view of how Apple's activity and position impacts us. We believe that we can offer our

perspective to the court as to why the government's interest is compelling and 1 outweighs any arguments of interests that Apple can or will advance in support of 2 its position. 3 4 5 **CONCLUSION** For the above mentioned reasons, the San Bernardino County District 6 Attorney, and our client, the People of the State of California, respectfully request 7 8 that the Court grant the San Bernardino County District Attorney's Ex Parte Application, and allow him to participate as Amicus Curiae in support of the United States' application to compel Apple to assist in unlocking the seized 10 iPhone before this Court. A proposed order is attached. 11 DATED: March 3, 2016 12 13 Respectfully Submitted, 14 15 MICHAEL A RAMOS DISTRICT ATTORNEY 16 SAN BERNARDINO COUNTY 17 18 Gary R. 19 Chief Deputy District Attorney 20 San Bernardino County 21 22 23 24 25 26 27 28

	UNIGHNAL					
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	MAYER BROWN LLP JOHN NADOLENCO (SBN 181128) jnadolenco@mayerbrown.com RUTH ZADIKANY (SBN 260288) rzadikany@mayerbrown.com 350 South Grand Avenue, 25th Floor Los Angeles, California 90071-1503 Telephone: (213) 229-9500 Facsimile: (213) 625-0248  ANDREW J. PINCUS (pro hac vice application of the company of	offication forthcoming)  offware Alliance, the Information Net  S DISTRICT COURT CCT OF CALIFORNIA N DIVISION  Case No. 5:16-cm-00010-SP  Application of BSA The Software Alliance, the Consumer Technology Association, the Information				
17 18 19 20	CENTRAL DISTRICTION CENTRAL DISTRICTION OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK	CCT OF CALIFORNIA  N DIVISION  Case No. 5:16-cm-00010-SP  Application of BSA The Software Alliance, the Consumer Technology				
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#### APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Proposed *amici curiae* BSA | The Software Alliance, the Consumer Technology Association, the Information Technology Council, and TechNet, by and through undersigned counsel, hereby move the Court for leave to file the attached Brief of *Amici Curiae* in the above-captioned case.

Amici are associations whose members comprise all of the companies that are leaders in the global technology industry. Because the Court's decision in this case could have significant effects on the security of the products created by amici's members, and on the development of new hardware and software products, amici have a substantial interest in this proceeding. Amici regularly file amicus curiae briefs in cases involving technology and data security issues.

BSA | The Software Alliance is an association of the world's leading software and hardware technology companies. BSA promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies.

The Consumer Technology Association (CTA), formerly Consumer Electronics Association (CEA), is a trade association representing the \$287 billion U.S. consumer electronics industry. CTA also owns and produces CES—the world's gathering place for all who thrive on the business of consumer technology.

The Information Technology Industry Council (ITI) is the global voice of the technology sector. As an advocacy and policy organization for the world's leading innovation companies, ITI navigates the relationships between policymakers, companies, and non-governmental organizations, providing creative solutions that advance the development and use of technology around the world.

TechNet is an association of chief executive officers and senior executives of the Nation's leading technology companies across the country. TechNet's objective is to promote the growth of the technology industry and to advance America's global leadership in innovation. Its members are in the fields of

information technology, biotechnology, clean technology, venture capital, e-commerce, and finance, and represent more than two million employees.

The dispute between Apple and the United States implicates vitally important policy interests: law enforcement and the protection of Americans against terrorism; individuals' right to keep secure against hackers and other bad actors their most personal information and communications; the scope of the government's power to force a private party to act as an agent of the government; and the extent to which the government may, and should, prescribe product design requirements for technology products.

Proposed *amici* argue that the All Writs Act does not give this Court the authority to reconcile these fundamental policy issues. When Congress enacted the statute in 1789 it neither anticipated nor broadly authorized government conscription of private parties that might be able to assist a government investigation. Moreover, the government's interpretation of the Act effectively limits this Court's inquiry to law enforcement needs and dollars-and-cents economic burden, and leaves no room for consideration of other important interests at stake—such as maintaining security of individuals' most important personal information, risk to a third party's business and reputation, and potential barriers to the development of new encryption technology.

Proposed *amici* also argue that controlling circuit precedent confirms that a company cannot be compelled to develop a new product, especially when it will create security risks for all users of the company's products. The government's argument lacks a limiting principle: any third party could be conscripted to produce new software that would allow the government to breach security measures. Congress did not intend this when it enacted the All Writs Act in 1789—indeed, when Congress has authorized such conscription, it has spoken clearly. Finally, *amici* argue that the predictable result of the government's argument is de facto design specifications for technology products and services. *Amici* believe that

a decision of such magnitude should be made by the People acting through the 1 political branches. 2 Counsel for amici curiae states that no counsel for a party authored this brief 3 in whole or in part, and no person other than *amici curiae*, their members, and their 4 counsel made a monetary contribution to its preparation or submission. 5 Counsel for amici curiae further states that they file this motion after 6 contacting the parties' counsel. Counsel for Apple consents to the filing of this 7 brief, and counsel for the United States does not oppose the filing of this brief. 8 Wherefore, proposed amici respectfully request leave to file the attached 9 Brief of Amici Curiae to aid this Court in its consideration and resolution of the 10 issues in this case. 11 12 Dated: March 3, 2016 MAYER BROWN LLP 13 14 ANDREW J. PINCUS TRAVIS CRUM 15 16 By: Lohn Nadolenco/pz 17 John Nadolenco Attorneys for Amici Curiae BSA|The 18 Software Alliance, the Consumer 19 Technology Association, the Information Technology Industry Council, and TechNet 20 21 22 23 24 25 26 27 28

**PROOF OF SERVICE** 1 2 I, Janice Austgen, declare: I am employed in Los Angeles County, California. I am over the age of 3 eighteen years and not a party to the within-entitled action. My business address is 4 Mayer Brown LLP, 350 South Grand Avenue, 25th Floor, Los Angeles, California 5 90071-1503. On March 3, 2016, I served a copy of the within document(s): 6 7 APPLICATION OF BSA|THE SOFTWARE ALLIANCE, THE CONSUMER TECHNOLOGY ASSOCIATION, THE 8 INFORMATION TECHNOLOGY COUNCIL, AND TECHNET TO 9 FILE A BRIEF OF AMICI CURIAE 10 by placing the document(s) listed above in a sealed UPS envelope and X affixing a pre-paid air bill, and causing the envelope to be delivered to a 11 UPS agent for delivery. 12 SEE ATTACHED SERVICE LIST 13 I declare under penalty of perjury under the laws of the United States of 14 15 America that the above is true and correct. 16 Executed on March 3, 2016, at Los Angeles, California. 17 Janice Janice 18 19 20 21 22 23 24 25 26 27 28

1 Eric David Vandevelde, Esq. Theodore J. Boutrous, Jr., Esq. 2 Gibson Dunn and Crutcher LLP 3 333 South Grand Avenue Los Angeles, CA 90071 4 5 Jeffrey G. Landis, Esq. Marc J Zwillinger, Esq. 6 Zwillgen PLLC 1900 M Street NW Suite 250 7 Washington, DC 20036 8 Nicola T. Hanna, Esq. 9 Gibson Dunn and Crutcher LLP 10 3161 Michelson Drive 12th Floor Irvine, CA 92612-4412 11 12 Theodore B. Olson, Esq. Gibson Dunn and Crutcher LLP 13 1050 Connecticut Avenue NW 14 Washington, DC 20036-5306 15 Allen W. Chiu, Esq. Assistant United States Attorney 16 Office of U.S. Attorney 17 National Security Section 312 North Spring Street Suite 1300 18 Los Angeles, CA 90012 19 Tracy L. Wilkison, Esq. 20 Assistant United States Attorney 21 Office of U.S. Attorney Chief, Cyber and Intellectual Property Crimes Section 22 312 North Spring Street 11th Floor Los Angeles, CA 90012-4700 23 24 25 26 27 28

FILE BRIEF AS AMICUS CURIAE

Case \$:16-cm-00010-SP Document 43 Filed 03/03/16 Page 1 of 4 Page ID #:687

# TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the Center for Democracy & Technology respectfully requests leave to file the accompanying brief as *amicus curiae* in support of Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance. Both Apple Inc. ("Apple") and the government have consented to the filing of this motion.

"District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved." NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005); see generally Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995)). This case has attracted extraordinary attention because the government's position has broad implications far beyond the particular device at issue here. Indeed, this Court invited amici to submit briefs, "along with an appropriate request seeking leave of the Court to file such brief." Scheduling Order of February 18, 2016, Dkt. 9.

The Center for Democracy & Technology ("CDT") seeks to file an *amicus curiae* brief in this case to urge the Court to confine the All Writs Act to the limited purpose for which it was intended and to make clear the government does not have the power to use the courts to conscript technology companies into the unauthorized service of law enforcement. A ruling allowing law enforcement to use the All Writs Act to force a private company to write new software for the purpose of overriding key security features of the company's own technology cannot be limited to Apple, the iPhone, or the particular circumstances of this case. Such a ruling will upend the relationship between consumers and device manufacturers and undermine the privacy interests and security protocols that underpin a safe and free Internet. Those concerns occasion CDT's *amicus curiae* brief.

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CDT is a nonprofit advocacy organization that works to ensure that the human rights we enjoy in the physical world are realized online and that technology continues to serve as an empowering force for people worldwide. Integral to this work is CDT's representation of the public interest in the creation of an open, innovative, and decentralized Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

CDT was formed in 1994 as part of civil society's efforts to push back against the backdoors mandated by the Communications Assistance for Law Enforcement Act ("CALEA"), a statute directly relevant to this case. More than 20 years later, the public conversation on these important issues continues, as technology rapidly expands into every portion of our lives. CDT is keenly aware of the consequences of allowing the government to force private companies to break the very security features they designed. CDT advocates for strong online privacy protections, which are essential to building the trust necessary for individuals to adopt new technologies and access the multitude of benefits of an increasingly interconnected world, while also maintaining privacy in their most personal communications, associations, interests, and activities.

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As explained in the accompanying *amicus curiae* brief, this case squarely implicates these concerns. In demanding that Apple write a new version of its operating system so that the government can defeat its security measures, the government is seeking to apply the All Writs Act in a dangerous new way. If approved, the order at issue will create precedent that may be used to compel a wide range of technology providers to break their own products. Undermining trust in the products people use and the companies who make them will make a whole range of technologies less secure. CDT submits this brief to urge the Court to make clear that the government does not have the power to conscript technology companies into the service of law enforcement in the manner contemplated here.

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CDT therefore asks the Court to give it leave to file the accompanying brief as amicus curiae in support of Apple's motion to vacate this Court's order compelling it to assist the government opposition to the government's motion to compel. Dated: March 3, 2016 WILSON SONSINI GOODRICH & ROSATI **Professional Corporation** Attorneys for *Amicus Curiae* Center for Democracy & Technology 

CENTER FOR DEMOCRACY & TECHNOLOGY'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

ED No. CM 16-10 (SP)

# ORIGINAL

# By Fax CRC 2.303

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DANIEL SHALLMAN (Bar No. 180782)

Email: dshallman@cov.com

COVINGTON & BURLING LLP

2029 Century Park East, Suite 3100

Los Angeles, California 90067-3044

Telephone: + 1 (424) 332-4752 Facsimile: + 1 (202) 662-6291

**KURT WIMMER\*** 

Email: kwimmer@cov.com

LAUREN WILLARD\*

Email: lwillard@cov.com

COVINGTON & BURLING LLP

850 Tenth Street, N.W.

Washington, D.C. 20001-4956

Telephone: +1 (202) 662-5337

Facsimile: + 1 (202) 662-6291

\*Pro Hac Vice Motion Forthcoming

Attorneys for [Proposed] Amicus Curiae The Media Institute

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# UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

#### EASTERN DIVISION

IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA LICENSE PLATE 35KGD203 5:16-cm-00010 (SP)

NOTICE OF MOTION AND MOTION OF THE MEDIA INSTITUTE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLE INC.

Hearing Date: March 22, 2016

Hearing Time: 1:00 p.m. Location: Courtroom 3 or 4

Judge: Hon. Sheri Pym

#### NOTICE OF MOTION TO FILE AMICUS BRIEF

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT The Media Institute, by and through counsel, respectfully requests leave to participate in this action as *amicus curiae* in support of Apple, Inc., and permission to file an *amicus curiae* brief.

Counsel for The Media Institute have contacted counsel for Plaintiff the United States and Respondent Apple, Inc. Both parties have consented to The Media Institute's filing of an *amicus curiae* brief.

#### I. STANDARD FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

"[A] district court has broad discretion to appoint *amici curiae*." *Hoptowit* v. Ray, 682 F.2d 1237, 1260 (9th Cir. 192). See also Funbus Sys., Inc. v. State of California Pub. Util. Comm'n, 801 F.2d 1120, 1125 (9th Cir. 1986). "There are no strict prerequisites that must be established prior to qualifying for amicus status although an individual or organization seeking to participate as amicus curiae must make a showing that his participation is useful to or otherwise desirable to the court." Congregation Etz Chaim v. City of Los Angeles, No. CV 97-5042 CAS (EX), 2009 WL 1293257, at \*5, n.4 (C.D. Cal. May 5, 2009) (citation omitted); accord NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F.Supp. 2d 1061, 1067 (N.D. Cal. 2005) ("District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.").

## II. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae The Media Institute is a nonprofit research foundation specializing in communications policy issues, with a particular emphasis on freedom of speech, a competitive media and communications industry, and excellence in journalism. Founded in 1979, The Media Institute publishes books, prepares regulatory filings and court briefs, and convenes conferences and programs for journalists and communications

executives. The Media Institute is one of the leading think tanks focusing on the First Amendment and communications policy. The Media Institute believes that this proposed *amicus* brief, annexed as Exhibit A to the Declaration of Daniel Shallman, will meaningfully assist the Court's consideration of the important issues presented in this matter.

#### III. AMICUS CURIAE'S PERSPECTIVE WILL BENEFIT THE COURT

The matter currently before the Court concerns the obligations of a technology company to engage in protected expression (writing of software code) when law enforcement compels their assistance in disabling security features. As a nonprofit institution representing members of the news media and organizations, The Media Institute has extensive experience with First Amendment issues including in the context of requests for assistance in law enforcement investigations. Members of the news and media industry are invested in the outcome of this case and have a strong interest in guaranteeing that courts apply the appropriate constitutional analysis to government orders compelling speech, including in the context of criminal investigations. Reporters also rely on secure communications technologies to protect the identities of confidential sources and secure sensitive work product and documentary materials—essential features of constitutionally protected newsgathering. This Order impedes journalists' ability to use these mechanisms in modern newsgathering because ostensibly secure apps and updates can longer be trusted.

The proposed *amicus* brief addresses a discrete issue in this case—the First Amendment question—and provides the Court with the unique perspective of news and media organizations on the consequences of failing to apply rigorous First Amendment scrutiny to the FBI's proposed conduct.

#### IV. CONCLUSION

For the foregoing reasons, The Media Institute respectfully requests that the Court grant this Motion for Leave to Participate as *amici curiae* and order that The Media Institute's attached proposed *amicus* brief be deemed filed. The Media Institute brings

this motion after conferring with the parties' counsel. Counsel for Apple and the United 1 States indicated that they have no opposition to The Media Institute's motion for leave to 2 file its amicus curiae brief in support of Apple. 3 4 Respectfully submitted, 5 Dated: March 3, 2016 6 Dan Shallman 7 DANIEL SHALLMAN (Bar No. 180782) 8 Email: dshallman@cov.com **COVINGTON & BURLING LLP** 9 2029 Century Park East, Suite 3100 10 Los Angeles, California 90067-3044 Telephone: +1 (424) 332-4752 11 Facsimile: +1 (202) 662-6291 12 **KURT WIMMER\*** 13 Email: kwimmer@cov.com 14 LAUREN WILLARD\* Email: lwillard@cov.com 15 COVINGTON & BURLING LLP 16 850 Tenth Street, N.W. Washington, D.C. 20001-4956 17 Telephone: +1 (202) 662-5278 18 Facsimile: +1 (202) 662-6291 \*Pro Hac Vice Admission Pending 19 20 Attorneys for Amicus Curiae The Media Institute 21 22 23 24 25 26 27 28

# **DECLARATION OF DANIEL SHALLMAN** IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE AND FILE A BRIEF IN SUPPORT OF APPLE, INC.

I, DANIEL N. SHALLMAN, do hereby declare as follows:

- I am an attorney duly admitted to practice before this Court, and a partner in 1. the law firm of Covington & Burling LLP, counsel for amicus curiae The Media Institute in this matter.
- 2. I have contacted counsel for Plaintiff and Respondent regarding this Motion for Leave to File an amicus brief. Both Plaintiff and Respondent's counsel have informed me that they will not oppose The Media Institute's request to file an amicus brief.
- 4. In accordance with the Court's order of February 19, 2016, I submit this declaration in support of The Media Institute's motion for leave to appear as and file a brief as *amicus curiae* in support of Apple, Inc.
- Attached hereto as Exhibit A is a true and correct copy of The Media 5. Institute's proposed amicus brief.

Executed in Los Angeles, California, on March 3, 2016. I declare that the foregoing is true and correct, in accordance with 28 U.S.C. § 1746.

Dan Shallmon

Daniel Shallman

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# ORIGINAL

# PROOF OF SERVICE

I, Monika Kapuscinska, declare as follows:

I am employed with the law firm of COVINGTON & BURLING LLP, whose address is 9191 Towne Centre Drive, Suite 600, California 92122. I am over the age of eighteen years and not a party to this action.

On March 3, 2016, I served the foregoing documents described as:

- NOTICE OF MOTION AND MOTION OF THE MEDIA INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPLE INC.;
- [PROPOSED] BRIEF AMICUS CURIAE OF THE MEDIA INSTITUTE IN SUPPORT OF APPLE INC.; and
  - [PROPOSED] ORDER

on the interested party(ies) in this action via U.S. mail by placing a true and correct copy of thereof enclosed in a sealed envelope addressed as follows:

# Theodore J. Boutrous, Jr. Eric David Vandevelde Gibson Dunn and Crutcher LLP

333 South Grand Avenue Los Angeles, CA 90071-3197

# Nicola T. Hanna Gibson Dunn and Crutcher LLP 3161 Michelson Drive 12th Floor Irvine, CA 92612-4412

# Theodore B. Olson Gibson Dunn and Crutcher LLP 1050 Connecticut Avenue NW Washington, DC 20036-5306

#### Allen W. Chiu

AUSA - Office of US Attorney National Security Section 312 North Spring Street Suite 1300 Los Angeles, CA 90012

# Tracy L. Wilkison

AUSA Office of US Attorney Chief, Cyber and Intellectual Property Crimes Section 312 North Spring Street 11th Floor Los Angeles, CA 90012-4700

Counsel for Plaintiff USA

Jeffrey G. Landis Marc J Zwillinger Zwillgen PLLC 1900 M Street NW Suite 250 Washington, DC 20036 Counsel for Respondent Apple Inc. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at San Diego, California on March 3, 2016. Ilanika Dapuscinshe Monika Kapuscinska 

PROPOSED AMICUS CURIAE BRIEF / CASE NO. CM 10-16-SP

#### TO THE COURT AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

Pursuant to this Court's Scheduling Order (ECF No. 10), a group of nonparty Law Professors respectfully moves for leave to file the accompanying *amicus curiae* brief in the above-captioned case in support of Apple. The Law Professors are not associated with Apple and neither party is sponsoring The Law Professors' proposed amicus brief. The list of signatory Law Professors is attached to the Declaration of Michael A. Feldman ("Feldman Decl.") as Exhibit A and also appears on the signature page of the proposed brief itself. Apple consents to the Law Professors filing the proposed *amicus curiae* brief. Feldman Decl. ¶ 3. The government does not oppose the Law Professors filing the proposed *amicus curiae* brief. *Id.* ¶ 4.

It is within the Court's discretion whether to permit non-parties to file briefs as *amici curiae*, and the Supreme Court has long counseled that courts should grant permission liberally. *See N. Sec. Co. v. United States*, 191 U.S. 555, 555–56 (1903). A ruling in this case can, and is likely to affect rulings in many other cases the DOJ has filed under the All Writs Act seeking similar relief. *See In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by This Court*, No. 1:15-mc-01902-JO (E.D.N.Y. Feb. 29, 2016), ECF No. 29 at 28 (Orenstein, J.) (noting that there are about a dozen additional cases pending in which the government seeks to compel Apple to province assistance bypassing the security on Apple devices).

In this case, the Court should grant the Law Professors' motion to file an *amicus curiae* brief because this case presents novel issues that involve particularly complex analysis of information security, technology law, criminal law, constitutional law, and statutory laws governing the bounds of the government's power to conscript third parties' assistance in criminal investigations—areas in which the Law Professors are experts. The Law Professors' brief is not duplicative of either party's brief. Many of the signatory Law Professors have published extensively regarding the All Writs Act ("AWA"), CALEA ("Communications Assistance for Law Enforcement Act"), and ECPA ("Electronic

Communications Privacy Act"), each of which is critical to analysis of this case. Feldman Decl. ¶ 5. The Law Professors are therefore able to provide the Court a greater depth of history and perspective on the AWA, CALEA, and ECPA than may be available in the parties' briefs.

Many of the signatory Law Professors have also published and taught Fourth Amendment issues, criminal law, and other legal frameworks relevant to this case. *Id.*  $\P$  6. Therefore, the Law Professors may provide a broader context for the legal backdrop on which the government proceeds, and may raise and explain issues that the parties have not raised for practical or strategic purposes.

The Law Professors have a professional interest in matters of constitutional importance, concern for privacy interests globally, and the security of technical infrastructure that many in this country depend on as well as encouraging creativity and innovation, and to support the public interest in the exercise of sound policy.

For these reasons, The Law Professors respectfully asks the Court to grant leave to file the accompanying brief of *amicus curiae* in support of Apple.

Dated: March 2, 2016 DURIE TANGRI, LLP

By:

MICHAEL A. FELDMAN

Attorneys for *Amicus Curiae* 

## **PROOF OF SERVICE**

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 3, 2016, I served the following documents in the manner described below:

# MOTION OF NONPARTY LAW PROFESSORS FOR LEAVE TO FILE PROPOSED AMICUS CURIAE BRIEF

- □ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
   □ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
   □ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
   □ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
   □ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from mfeldman@durietangri.com to the email addresses set forth below.
   □ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.
  - On the following part(ies) in this action:

Eric David Vandevelde Gibson Dunn and Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071 Fax: 2132296186 Theodore J Boutrous, Jr. Gibson Dunn and Crutcher LLP 333 South Grand Avenue Los Angeles, CA 900713197 Fax: 2132297520

MOTION OF NONPARTY LAW PROFESSORS FOR LEAVE TO FILE PROPOSED AMICUS CURIAE BRIEF / CASE NO. CM 10-16-SP

# Case 5:16-cm-00010-SP Document 45 Filed 03/03/16 Page 5 of 5 Page ID #:702

1	Email: evandevelde@gibsondunn.com	Email: thoutrous@aibsondunn.com
2	evandeverde(wgrosondum.com	Email: tboutrous@gibsondunn.com
3	Attorneys for Respondent Apple Inc.	Attorneys for Respondent Apple Inc.
4	Jeffrey G Landis Zwillgen PLLC 1900 M Street NW Suite 250	Theodore B Olson Gibson Dunn and Crutcher LLP 1050 Connecticut Avenue NW
5	Washington, DC 20036 2022963585	Washington, DC 200365306 2029558668
6	Fax: 2027065298 Email: jeff@zwillgen.com	Fax: 2025309575 Email: tolson@gibsondunn.com
7	Eman. jen@zwingen.com	Email: toison@giosondumi.com
8	Attorneys for Respondent Apple Inc.	Attorneys for Respondent Apple Inc.
9	Nicola T Hanna Gibson Dunn and Crutcher LLP 3161 Michelson Drive 12th Floor	Marc J Zwillinger Zwillgen PLLC 1900 M Street NW Suite 250
10	Irvine, CA 926124412 9494513800	Washington, DC 20036 2022963585
11	Fax: 9494514220 Email: nhanna@gibsondunn.com	Fax: 2027065298 Email: marc@zwillgen.com
12		<u> </u>
13	Attorneys for Respondent Apple Inc.	Attorneys for Respondent Apple Inc.
	Allen W Chiu	Tracy L Wilkison AUSA Office of US Attorney
14	AUSA Office of US Attorney	Chief, Cyber and Intellectual Property
15	National Security Section 312 North Spring Street Suite 1300	Crimes Section 312 North Spring Street 11th Floor
16	Los Angeles, CA 90012 2138942435	Los Angeles, CA 900124700 2138940622
17	Fax: 2138946436	Fax: 2138940141
18	Email: allen.chiu@usdoj.gov	Email: tracy.wilkison@usdoj.gov
19	Attorneys for USA	Attorneys for USA
		1 C41 - II'4 - J C4-4
20	I declare under penalty of perjury under the	ne laws of the United States of America
21	that the foregoing is true and correct. Executed	on March 3 2016 at San Francisco.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 3, 2016, at San Francisco, California.

MICHAEL A. FELDMAN

- 1	i e e e e e e e e e e e e e e e e e e e			
1 2	DURIE TANGRI LLP MARK A. LEMLEY (SBN 155830) mlemley@durietangri.com			
3 4 5	MARK A. LEMLEY (SBN 155830) mlemley@durietangri.com MICHAEL A. FELDMAN (SBN 295780) mfeldman@durietangri.com 217 Leidesdorff Street San Francisco, CA 94111 Telephone: 415-362-6666 Facsimile: 415-236-6300	2016 MAR -3 PM CLERK U.S. DESTRICE REVERSED OF THE PROPERTY OF		
6 7 8 9	all328@drexel.edu			
10	Attorneys for Amicus Curiae Law Professors			
11	Law Professors			
12	IN THE UNITED STATES DISTRICT COURT			
13	FOR THE CENTRAL DISTRICT OF CALIFORNIA			
14	EASTERN DIVISION			
15	IN THE MATTER OF THE SEARCH OF AN APPLE IPHONE SEIZED DURING	Case No. CM 10-16-SP		
16	THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300,	DECLARATION OF MICHAEL A. FELDMAN IN SUPPORT OF MOTION		
17	CALIFORNIA LICENSE PLATE 35KGD203.	OF NONPARTY LAW PROFESSORS FOR LEAVE TO FILE PROPOSED		
18		AMICUS CURIAE BRIEF		
19		Date: March 22, 2016 Time: 1:00 p.m. Ctrm: 3 or 4 - 3rd Floor		
20		Ctrm: 3 or 4 - 3rd Floor Judge: Honorable Sheri Pym		
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	FELDMAN DECL. IN SUPP. OF MOTION OF NONPARTY FOR LEAVE TO FILE PROP. AMICUS CURIAE BRIEF/CASE NO. CM 10-16-SP			

## I, Michael A. Feldman, declare as follows:

- 1. I am an attorney with the law firm of Durie Tangri LLP, and I am one of the attorneys representing nonparty Law Professors. I have personal knowledge of the facts set forth herein, and if called upon to testify, I could and would testify competently and completely to the statements made herein.
- 2. I submit this declaration in support of Nonparty Law Professors for Leave To File Proposed *amicus curiae* Brief. A list of signatory Law Professors is attached as **Exhibit A** and also appears on the signature page of the proposed *amicus curiae* brief itself.
  - 3. Apple consents to the Law Professors filing the proposed *amicus curiae* brief.
- 4. The government does not oppose the Law Professors filing the proposed *amicus curiae* brief.
- 5. Many of the signatory Law Professors have published extensively regarding the All Writs Act ("AWA"), CALEA ("Communications Assistance for Law Enforcement Act"), and ECPA ("Electronic Communications Privacy Act").
- 6. Many of the signatory Law Professors have also published and taught Fourth Amendment issues, criminal law, and other legal frameworks relevant to this case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 2nd day of March, 2016, at San Francisco, California.

MICHAEL A. FELDMAN

**PROOF OF SERVICE** 

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 3, 2016, I served the following documents in the manner described below:

DECLARATION OF MICHAEL A. FELDMAN IN SUPPORT OF MOTION OF NONPARTY LAW PROFESSORS FOR LEAVE TO FILE PROPOSED AMICUS CURIAE BRIEF

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
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   (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
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   BY ELECTRONIC SERVICE: By electronically mailing a true and correct
  - BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from mfeldman@durietangri.com to the email addresses set forth below.
  - (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Eric David Vandevelde Gibson Dunn and Crutcher LLP 333 South Grand Avenue Los Angeles, CA 90071  Theodore J Boutrous, Jr. Gibson Dunn and Crutcher LLP 333 South Grand Avenue Los Angeles, CA 900713197 

FELDMAN DECL. IN SUPP. OF MOTION OF NONPARTY FOR LEAVE TO FILE PROP. AMICUS CURIAE BRIEF/CASE NO. CM 10-16-SP

# Case 5:16-cm-00010-SP Document 46 Filed 03/03/16 Page 4 of 9 Page ID #:706

1	Fax: 2132296186	Fax: 2132297520
	Email:	
2	evandevelde@gibsondunn.com	Email: tboutrous@gibsondunn.com
3	Attorneys for Respondent Apple Inc.	Attorneys for Respondent Apple Inc.
4	Jeffrey G Landis Zwillgen PLLC	Theodore B Olson Gibson Dunn and Crutcher LLP
5	1900 M Street NW Suite 250	1050 Connecticut Avenue NW Washington, DC 200365306
6	Washington, DC 20036 2022963585	2029558668
7	Fax: 2027065298	Fax: 2025309575
7	Email: jeff@zwillgen.com	Email: tolson@gibsondunn.com
8	Attorneys for Respondent Apple Inc.	Attorneys for Respondent Apple Inc.
9	Nicola T Hanna Gibson Dunn and Crutcher LLP	Marc J Zwillinger Zwillgen PLLC
10	3161 Michelson Drive 12th Floor	1900 M Street NW Suite 250
11	Irvine, CA 926124412 9494513800	Washington, DC 20036 2022963585
11	Fax: 9494514220	Fax: 2027065298
12	Email: nhanna@gibsondunn.com	Email: marc@zwillgen.com
13	Attorneys for Respondent Apple Inc.	Attorneys for Respondent Apple Inc.
14	Allen W Chiu AUSA Office	Tracy L Wilkison AUSA Office of US Attorney
15	of US Attorney National Security Section 312 North Spring Street Suite 1300 Los Angeles, CA 90012	Chief, Cyber and Intellectual Property Crimes Section
16	312 North Spring Street Suite 1300	312 North Spring Street 11th Floor Los Angeles, CA 900124700
17	Los Angeles, CA 90012 2138942435	Los Angeles, CA 900124700 2138940622
1 /	Fax: 2138946436	Fax: 2138940141
18	Email: allen.chiu@usdoj.gov	Email: tracy.wilkison@usdoj.gov
19	Attorneys for USA	Attorneys for USA
20		
	I declare under penalty of perjury under th	ne laws of the United States of America
21		

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 3, 2016, at San Francisco, California.



#### **Janet Ainsworth**

John D. Eshelman Professor of Law Seattle University

#### Jordan (Jody) M. Blanke

Ernest L. Baskin, Jr. Distinguished Professor of Computer Information Systems and Law Stetson School of Business & Economics Mercer University

# **Annemarie Bridy**

Professor, University of Idaho College of Law

#### Dan L. Burk

Chancellor's Professor of Law University of California, Irvine

#### **Adam Candeub**

Professor of Law, Director, IP, Information, and Communications Law Program Michigan State University College of Law

#### Michael A. Carrier

Distinguished Professor Rutgers Law School

## Megan M. Carpenter

Professor of Law
Co-Director, Center for Law and Intellectual Property (CLIP)
Faculty Director, IP and Technology Law Clinic
Faculty Director, Entrepreneurship Law Clinic
Texas A&M University School of Law

# Anupam Chander

Professor University of California, Davis, School of Law

#### **Andrew Chin**

Associate Professor University of North Carolina School of Law

#### A. Michael Froomkin

Laurie Silvers & Mitchell Rubenstein Distinguished Professor of Law University of Miami

#### **David Gray**

University of Maryland Francis King Carey School of Law

#### **Woodrow Hartzog**

Associate Professor Samford University's Cumberland School of Law

# Stephen E. Henderson

Judge Haskell A. Holloman Professor of Law The University of Oklahoma

# Margot E. Kaminski

Assistant Professor The Ohio State University Moritz College of Law Affiliated Fellow, Information Society Project at Yale Law School

## Raymond Ku

Professor of Law Case Western Reserve University School of Law

## Mark A. Lemley

William H. Neukom Professor, Stanford Law School Director, Stanford Program in Law, Science, and Technology Senior Fellow, Stanford Institute for Economic Policy Research partner, Durie Tangri LLP co-founder, Lex Machina Inc.

#### Richard A. Leo, Ph.D., J.D.

Hamill Family Professor of Law and Psychology University of San Francisco

#### David S. Levine

Visiting Research Collaborator, Center for Information Technology Policy, Princeton University; Associate Professor and Chair, Faculty Development, Elon University School of Law; Affiliate Scholar, Center for Internet and Society, Stanford Law School

# Yvette Joy Liebesman

Associate Professor of Law Saint Louis University School of Law

# Deirdre K. Mulligan

Associate Professor of Law School of Information University of California at Berkeley

#### Ira Steven Nathenson

Professor of Law St. Thomas University School of Law

#### Blake E. Reid

Assistant Clinical Professor Colorado Law

#### **Neil Richards**

Professor of Law Washington University

# Jorge R. Roig

Associate Professor of Law Charleston School of Law

#### Ira Rubinstein

Senior Fellow and Adjunct Professor Information Law Institute New York University School of Law

#### Victoria Schwartz

Associate Professor Pepperdine University School of Law

#### Robert H. Sloan

Professor and Department Head University of Illinois at Chicago Dept. of Computer Science

# Stephen F. Smith

Professor of Law University of Notre Dame

#### Daniel J. Solove

John Marshall Harlan Research Professor of Law George Washington University Law School

# **Gerry Stegmaier**

George Mason University School of Law

# Daniel J. Weitzner

Principal Research Scientist, MIT Computer Science and Artificial Intelligence Lab, Director, MIT Internet Policy Research Initiative

#### Michael Zimmer, PhD

Associate Professor and PhD Program Director, School of Information Studies Director, Center for Information Policy Research University of Wisconsin-Milwaukee

JEROME C. ROTH (State Bar No. 159483) jerome.roth@mto.com 2 | ROSEMARIE T. RING (State Bar No. 220769) rose.ring@mto.com 3 | JONATHAN H. BLAVIN (State Bar No. 230269) jonathan.blavin@mto.com JOSHUA PATASHNIK (State Bar No. 295120) josh.patashnik@mto.com MUNGER, TOLLES & OLSON LLP 560 Mission Street Twenty-Seventh Floor San Francisco, California 94105-2907 Telephone: (415) 512-4000 Facsimile: (415) 512-4077 8 ARIEL C. GREEN (State Bar No. 304780) ariel.green@mto.com MUNGER, TOLLES & OLSON LLP 355 South Grand Avenue Thirty-Fifth Floor Los Angeles, California 90071-1560 12 Telephone: (213) 683-9100 Facsimile: (213) 687-7302 13: Attorneys for Amici Curiae UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA 17 **EASTERN DIVISION** IN THE MATTER OF THE SEARCH OF AN Case No. ED CM 16-10-SP APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT DECLARATION OF JONATHAN H. ON A BLACK LEXUS IS300, CALIFORNIA BLAVIN IN SUPPORT OF MOTION OF LICENSE PLATE 35KGD203 AIRBNB, INC.; ATLASSIAN PTY. LTD.: AUTOMATTIC INC.; CLOUDFLARE, 21 INC.; EBAY INC.; GITHUB, INC.; KICKSTARTER, PBC; LINKEDIN 22 CORPORATION; MAPBOX INC.; A MEDIUM CORPORATION; MEETUP. 23 INC.; REDDIT, INC.; SQUARE, INC.; SQUARESPACE, INC.; TWILIO INC.; 24 TWITTER, INC.; AND WICKR INC. FOR 25 LEAVE TO FILE BRIEF AS AMICI **CURIAE** 26 Judge: Hon. Sheri Pym 27 28

# **DECLARATION OF JONATHAN H. BLAVIN**

I, Jonathan H. Blavin, hereby declare:

- 1. I am admitted to practice before this Court. I am an attorney at the law firm of Munger, Tolles & Olson LLP and am counsel of record for Airbnb, Inc., Atlassian Pty. Ltd., Automattic Inc., CloudFlare, Inc., eBay Inc., GitHub, Inc., Kickstarter, PBC, LinkedIn Corporation, Mapbox Inc., A Medium Corporation, Meetup, Inc., Reddit, Inc., Square, Inc., Squarespace, Inc., Twilio Inc., Twitter, Inc., and Wickr Inc. (collectively, "Amici") in the above-captioned matter. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, I could and would testify competently to the matters set forth herein.
- 2. On March 2, 2016, I contacted counsel for both Apple Inc. ("Apple") and the United States via email, informing them that *Amici* intended to file a brief in support of Apple in the above-captioned matter.
  - 3. Counsel for Apple informed me that Apple consented to the filing of Amici's brief.
- 4. Counsel for the United States informed me that the government does not oppose the filing of *Amici*'s brief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 3, 2016, at San Francisco, California.

Jonathan H. Blavin

1 JENNIFER STISA GRANICK (SBN 168423) jennifer@law.stanford.edu 2 RIANA PFEFFERKORN (SBN 266817) 3 riana@law.stanford.edu STANFORD LAW SCHOOL 4 CENTER FOR INTERNET AND SOCIETY 5 559 Nathan Abbott Way Stanford, California 94305-8610 6 Telephone: (650) 736-8675 7 Facsimile: (650) 725-4086 8 Attorneys for [Proposed] Amici Curiae 9 iPhone Security and Applied Cryptography **Experts** 10 11 UNITED STATES DISTRICT COURT 12 CENTRAL DISTRICT OF CALIFORNIA 13 **EASTERN DIVISION** 14 15 IN THE MATTER OF THE SEARCH OF ED No. CM 16-10 (SP) AN APPLE IPHONE SEIZED DURING 16 THE EXECUTION OF A SEARCH APPLICATION OF [PROPOSED] WARRANT ON A BLACK LEXUS 17 AMICI CURIAE IPHONE IS300, CALIFORNIA LICENSE PLATE 18 SECURITY AND APPLIED 35KGD203 CRYPTOGRAPHY EXPERTS FOR 19 LEAVE TO FILE BRIEF IN 20 SUPPORT OF MOVANT APPLE INC. 21 22 Hearing: 23 March 22, 2016 Date: Time: 1:00 p.m. 24 Place: Courtroom 3 or 4 25 Hon. Sheri Pym Judge: 26 27

Pursuant to the Court's Scheduling Order dated February 19, 2016 (D.I. 9), iPhone Security and Applied Cryptography Experts Dino Dai Zovi et al. (collectively, "amici") respectfully apply to the Court for permission to submit the accompanying amici curiae brief in support of movant Apple, Inc.'s ("Apple's") Motion to Vacate the Court's February 16, 2016 Order Compelling Apple, Inc. to Assist Agents in Search (the "Order"). Counsel for amici has advised Apple attorney Jeffrey Landis and government attorney Tracy L. Wilkison of amici's intent to file this Application. Counsel for both parties have stated that they do not oppose amici's filing of the proposed brief, which is attached to this Application.

#### MEMORANDUM OF POINTS AND AUTHORITIES

This Court's Order seeks to address law enforcement's legitimate interest in conducting investigations. However, in commanding Apple to create forensic software that would bypass iPhone security features, *amici* assert that the Order would endanger public safety. *Amici* are independent experts in iPhone and iOS security and applied cryptography who work to analyze, understand, and encourage the security of Apple products. (For a full list of *amici* and their credentials, please see the attached brief at page 1.) *Amici* are concerned that the Court's Order would ultimately compromise the protections that Apple has provided to iPhone users for the wealth of sensitive and personal data they store on their devices. Those protections are vital against hackers, identity thieves, corporate espionage, and abusive governments. For this reason, *amici* strongly support Apple's Motion to Vacate.

To assist the Court in deciding whether or not to grant Apple's Motion to Vacate, *amici* seek leave to file the attached brief explaining the public-security risks more fully. This Court has broad inherent discretion to accept briefs from *amici curiae*. See Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995); In re Roxford Foods Litig., 790 F. Supp. 987, 997 (E.D. Cal. 1991). "District courts frequently welcome

amicus briefs from non-parties ... if the amicus has unique information or 1 perspective that can help the court beyond the help that the lawyers from the 2 3 parties are able to provide." Sonoma Falls Developers, L.L.C. v. Nev. Gold & 4 Casinos, Inc., 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (citation omitted). 5 This proposed brief fulfills that purpose. The brief is informed by amici's 6 deep expertise in iPhone and cryptographic security research. It provides useful 7 information to the Court about the security features at issue in this case, the 8 broader iPhone security ecosystem, and the public-security ramifications at stake beyond the scope of the instant matter. Permitting amici's participation is 9 appropriate since the Court has specifically contemplated the submission of amicus 10 curiae briefs, Scheduling Order at 2, ¶ 4.ii, and indicated an interest in hearing 11 more about the technical aspects of the case during a February 18 telephonic 12 conference. See Dan Levine and Sue Horton, In FBI vs. Apple, Judge Asks for 13 2016), (Feb. 24, 14 *Technological* Details. Reuters http://www.reuters.com/article/apple-encryption-judge-idUSL2N16403K. 15 16 For the foregoing reasons, amici curiae respectfully request that the Court 17 allow the filing of the accompanying amici curiae brief. 18 Respectfully submitted, 19 20 21 Dated: March 2, 2016 TISA GRANICK (SBN 168423) 22 RIANA PFEFFERKØRN (SBN 266817) 23 TER FOR INTERNET AND SOCIETY 24 25 Attorneys for [Proposed] *Amici Curiae* iPhone Security and Applied Cryptography 26 **Experts** 27

William Cody Grammer
121 Breeze Ave
Venice, CA 90291
(252) 646-3063
williamcgrammer@gmail.com

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Jesse Binnall (pro hac vice motion pending) Harvey & Binnall, PLLC 717 King Street, Suite 300 Alexandria, VA 22314 Telephone: (703) 888-1943 Facsimile: (703) 888-1930

Attorney for Amici Curiae Lavabit LLC

jbinnall@harveybinnall.com

#### UNITED STATES DISTRICT COURT

#### CENTRAL DISTRICT OF CALIFORNIA

#### EASTERN DIVISION

IN THE MATTER OF THE SEARCH OF) AN APPLE IPHONE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ON A BLACK LEXUS IS300, CALIFORNIA LICENSE PLATE 35KGD203

Case No.: 5:16-cm-00010-SP-1 MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAVABIT, LLC IN SUPPORT OF APPLIE INC.'S MOTION TO VACATE

Date: March 22, 2016

Time: 1:00 p.m.

Place: Courtroom 3 or 4, 3rd Floor Judge: Honorable Sheri Pym



Lavabit, LLC hereby requests leave to participate in this action as *amicus curiae* by filing a brief in support of Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search and Opposition to the Government's Motion to Compel Assistance (filed Feb. 25, 2016) [ECF Docket Entry 16]. *Amicus* requests leave to explain that the Government's request for extraordinary assistance is unwarranted by statute, unconstitutional, and jeopardizes American businesses and the security of American consumers.

Lavabit LLC is a former provider of secured e-mail services. In 2013, the Government sought extraordinary assistance from Lavabit in the form of access to encrypted e-mails stored on Lavabit's servers. The FBI requested access to the private encryption key that Lavabit used to maintain the security of the data sent between the server and the user's e-mail client, or web browser. With this encryption key, the FBI would be able to intercept, decrypt, inspect, and even modify all e-mails sent through the servers. After a lengthy legal battle, and a potential contempt charge, Lavabit surrendered the private encryption key. Lavabit then chose to cease operation of the e-mail service.

Similarly, in this case, the Government is seeking extraordinary assistance from Apple in the form of a new product to access the data stored on an individual's iPhone. Lavabit's proposed brief, which is attached, argues that the Government is seeking extraordinary assistance that far exceeds the scope of the All Writs Act and violates the rights guaranteed to Apple under the First and Thirteenth Amendments to the United States Constitution. The brief discusses important points that Lavabit believes have not otherwise been briefed in this matter.

Third party Apple does not oppose the filing of this brief. The United States did not respond to Lavabit's request for their position on the filing of the brief.

1 Dated: March 3, 2016 Lavabit LLC 2 By Counsel 3 William Cody Grammer 4 8 b 0 5 6 (\$BN 290184) 121 Breeze Ave 7 Venice, CA 90291 8 (252) 646-3063 williamcgrammer@gmail.com 10 11 HARVEY & BUYNALL, PLLC 12 13 Jesse Binnall (pro hac vice motion pending) 717 King Street, Suite 300 14 Alexandria, VA 22314 15 Telephone: (703) 888-1943 16 Facsimile: (703) 888-1930 17 jbinnall@harveybinnall.com 18 19 Counsel for Amicus Curiae Lavabit LLC 20 21 22 23 24 25 26 27 28