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8 Amicus Curiae

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 EASTERN DIVISION

12 IN THE MATTER OF THE  
13 SEARCH OF AN APPLE IPHONE  
14 SEIZED DURING THE  
15 EXECUTION OF A SEARCH  
16 WARRANT ON A BLACK LEXUS  
17 IS300. CALIFORNIA LICENSE  
18 PLATE 35KGD203

ED No. CM 16-00010 (SP)

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

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

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

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

1 *re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n. 34 (11<sup>th</sup> Cir.  
2 2006). The district court retains the inherent authority to appoint *amicus*  
3 *curiae* to assist it in a proceeding. *Alliance of Auto. Mfrs. v. Gwadowsky*,  
4 297 F.Supp. 2d. 305, 306 (D. Me. 2003).

5  
6 **II. THE PROPOSED AMICUS BRIEF PROVIDES SUPPLEMENTAL**  
7 **ANALYSIS OF TITLE 28 U.S.C. § 1651, THE ALL WRITS ACT**  
8 **AS IT APPLIES TO THE INSTANT CASE THAT WAS NOT**  
9 **BRIEFED COMPLETELY BY THE PARTIES**

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

24 WHEREFORE, the Undersigned Counsel respectfully requests that

25 ///

26 ///

27 ///

1 this Honorable Court grant its Motion for Leave to File Amicus Brief and  
2 deem the accompanying brief filed for all purposes..

3 Respectfully submitted, this 3<sup>rd</sup> day of March, 2016.

4 Taub & Taub, P.C.

5  
6 /s/ Richard F. Taub

7 By: Richard F. Taub  
8 Amicus Curiae

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

19 *Amicus Curiae* Richard F. Taub, Esq. (hereinafter “Undersigned  
20 Counsel”), hereby files this *Amicus Curiae* Brief to assist the Court in its  
21 analysis of certain issues to be considered in this case regarding the  
22 Government’s Motion to Compel Assistance and Apple Inc.’s Motion to  
23 Vacate Order Compelling Apple Inc. to Assist Agents in Search, and  
24 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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1 (1813), 7 Cranch 504). The original phrase “not specifically provided  
2 for by statute” remained explicitly in the All Writs provision until 1948.  
3 *United States Marshals Service* at 41. The legislative history of the  
4 amendment to the All Writs Act stated that the new section was  
5 “expressive of the construction recently placed upon that law by the  
6 Supreme Court in the case of *U.S. v. Alkali Export Assn. v. United*  
7 *States*, 325 U.S. 196 (1945).” *United States Marshals Service* at *Id.*  
8 In *Alkali*, the Court rejected use of the All Writs Act to enable the  
9 Court to review a lower court’s determination where jurisdiction did  
10 not lie under an express statutory provision, even though that express  
11 language about the underlying statutory provision was no longer  
12 found in the amended statute. *Id.* The *Alkali* Court held that

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

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

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



1 the need arises, it does not authorize them to issue *ad hoc* writs whenever  
2 compliance with statutory procedures appears inconvenient or less  
3 appropriate.” *Id.* The Court concluded that the District Court has no  
4 authority under the All Writs Act *alone* to order the Marshals Service to  
5 transport state prisoners to federal courts in the absence of specific  
6 statutory authority. So, first there must be an enabling statute permitting  
7 the underlying action for which the All Writs Act *may* provide a vehicle to  
8 complete its purpose.

9  
10 **B. The All Writs Act’s Use with Third Parties to Effect the**  
11 **Purpose of Specific Statutory Authority and the Present**  
12 **State of Legislation to Allow Law Enforcement to Defeat**  
13 **Private Encryption**

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

22 Although the Act empowers federal courts to fashion  
23 extraordinary remedies when the need arises, it does not  
24 authorize them to issues *ad hoc* writs whenever compliance  
25 with statutory procedures appears inconvenient or less  
26 appropriate.

27 So, in the event of a statute specifically addressing third party compliance  
28 in a particular context, it obviously controls over the All Writs Act in

1 specifying a remedy and procedure for implementation.

2 Constitutional and other limitations aside, the degree to which a  
3 statute authorizes the type of action at issue or even specifically addresses  
4 third party assistance should provide insight into the degree upon which the  
5 Court may expect to compel third party assistance. Title 18 § 2518(4) and  
6 (5) of the wire interception statute provides a perfect example of the degree  
7 that a Court may involve third parties in the context of a substantive statute  
8 enabling the type of relief sought generally with the aid of the All Writs Act  
9 to provide a specific vehicle to do so. Most importantly, section 4(e) of that  
10 provision specifically provides for an order directing the assistance of a  
11 telecommunications provider with protections against unreasonable  
12 interference and to compensate such providers. See 18 U.S.C. §  
13 2518(4)(e). It stands to reason that an Order co-opting a third party under  
14 the wire interception statute could carefully follow Section 4(e) with  
15 complete impunity short of constitutional limitations. In contrast, it stands to  
16 reason that an order directing the assistance of a third party in the absence  
17 of such *specific* legislative direction regarding third party involvement would  
18 have to be more circumscribed under an order whose only legal basis for  
19 third party involvement is the All Writs Act.  
20

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

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

1 *Order Requiring Apple, Inc.*, 2015 U.S. Dist. Lexis 138755 (E.D.N.Y. 2015)  
2 addressed precisely that issue. It analyzed, *inter alia*, the legislative history  
3 of the Comprehensive Counter-Terrorism Act of 1991 (“CALEA”), a 2012  
4 note by Senator Leahy, a co-sponsor of CALEA that the Obama  
5 Administration had not proposed specific amending legislation on the issue  
6 of the law failing to keep up with the type of technology at issue in this  
7 case, the proposed introduction of Bills from 2015 to preclude the  
8 government from forcing a private entity such as Apple to compromise the  
9 kind of data security at issue in this case. *See generally In re Order*  
10 *Requiring Apple, Inc.* The District Court in *In re Order* noted that Congress  
11 is plainly aware of the lack of statutory authority, but has thus far failed to  
12 either create or reject the type of relief the Government seeks here. *Id.* at  
13 10. That Court indicated that, under these circumstances makes it much  
14 less obvious that the relief sought herein would be available under the All  
15 Writs Act, *id.*, and concluded that this analysis “strongly suggests that  
16 granting the instant motion **would be inconsistent** with the purpose of the  
17 All Writs Act as interpreted in the aforementioned cases.” *Id.* [emphases  
18 added] The Court then granted a due process hearing for Apple before  
19 that Court made a final decision. Similar to our case, the present state of  
20 the law is that debate rages on regarding the issue of whether to give the  
21 Government the awesome power of defeating privacy interests that the  
22 public has in their data in favor of a criminal investigation. Congress is  
23 aware of the issues, but has not acted, which continues to suggest that a  
24 far reaching decision to compel a manufacturer to create code to defeat its  
25 own encryption, upon which members of the public have relied in their  
26 purchase decision and use of Apple’s product, is not authorized by the All  
27 Writs Act standing alone.  
28

### 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

1 found under 18 U.S.C. § 2518(4) specifically contemplated and set forth a  
2 procedure for the assistance by a telecommunications provider in the case  
3 of wire interception orders. In fact, section 4 of that Act provides for  
4 parameters and protections for third party service providers. Here, there  
5 are no statutory provisions or other sources of law requiring the  
6 manufacturer of a smartphone to dismantle its data security methods,  
7 whether by providing encryption keys or to undermine its security to allow  
8 entry to a passcode-protected phone. In the absence of any legislative  
9 authorization, procedures or limitations on the assistance of a third party  
10 manufacturer under these circumstances, the Court's inherent reach to  
11 compel the assistance of that third party in aid of execution of a search  
12 warrant should be quite limited and not reach as far as to force the third  
13 party manufacturer into involuntary servitude to substantially modify its  
14 operating system to undermine its security features.<sup>1</sup> Most importantly,  
15 however, this case presents much more than the "meager" assistance  
16 required under the wire interception act and of the third party  
17 telecommunications provider in *New York Telephone Co.* Private third  
18 party manufacturer Apple has a substantial interest in resisting the forced  
19 labor sought by the Government under circumstances where it is not a  
20 public utility and is not requested to provide "meager" assistance. It is, in  
21 fact, asked to become involved in a considerable amount of research and  
22 development. The Government's request here stretches the holding in the  
23

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26 <sup>1</sup> The Undersigned Counsel freely concedes that, there may be a different result if this case had involved  
27 the mere requirement that Apple turn over to the Government a pre-existing "back door" passcode to  
28 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.

1 *New York Telephone Co.* case beyond its breaking point.

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

6 Even if the Court utilized a similar analysis to that set forth for  
7 telecommunications providers for which their assistance is sought, the  
8 same conclusion against compelling Apple to act as requested would  
9 result. The Ninth Circuit set forth a procedure for due process to be  
10 accorded third parties beset by an All Writs order to assist the government  
11 and a set of factors for the federal district court to determine the  
12 reasonableness of the burden of compliance of the All Writs order.<sup>2</sup> In the  
13 case of *In re Application of United States for an Order etc.* (1980) 616 F.2d  
14 1122, the Ninth Circuit exercised its authority to supervise the  
15 administration of criminal justice within the circuit to determine that a  
16 company whose cooperation in electronic surveillance<sup>3</sup> is sought should be  
17 afforded reasonable notice and an opportunity to be heard *prior* to the entry  
18 of any order compelling its assistance. *Id.* at 1132-3.

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21  
22 <sup>2</sup> The Court should consider that these factors were imposed in the Ninth Circuit for such a determination  
23 in the context of third party public utilities mandated to serve the public as set forth in the *New York*  
24 *Telephone Co.* case and not for other private for-profit third parties, publicly traded or not. In other words,  
25 under *New York Telephone Co.*, it may be appropriate for the Court to include in a remoteness analysis of  
26 third party, Apple Inc. from the device at issue as its manufacturer and not its owner, and cooperation  
27 sought that Apple Inc. is not similarly situated to a public utility as to the utility's independent obligations to  
28 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>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.

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

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

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

9  
10 In the context of this case, the analysis weighs rather heavily in a  
11 finding of unreasonable burden upon third party Apple. The Government  
12 rather freely admits that it has no idea what, if anything, is on the cellphone.  
13 The principal criminal shooters are dead. The prosecution of a third party  
14 for his involvement *collateral* to the cellphone suggests no such useful  
15 evidence present on the cellphone at issue. The Government's theory of  
16 its user's contact with ISIS suggests it unlikely that even complete access  
17 to the cellphone will yield anything useful for a criminal prosecution. As has  
18 been suggested by Apple, the Government may have alternative means in  
19 seeking Apple's assistance merely to access the iPhone at issue for its  
20 data, rather than requiring Apple to actually create code to disable the auto  
21 erase and delay safeguards. Apple has also articulated substantial  
22 burdens placed upon it to enlist staff, time and effort to create code to  
23 defeat its original security measures, and its burden of having to defeat its  
24 original security plan in the presence of a rejected legislative plan to  
25 prevent unbreakable encryption systems. However, the Government's  
26  
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28



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

9  
10 The impact on the risks regarding the invasion of privacy to iPhone  
11 users, however, weighs heavily against a finding that the burden would be  
12 reasonable. The entire purpose, in the modern world, of a high level of  
13 encryption (permitted by Congress) to exist in safeguarding data is to  
14 recognize the strong interest in privacy in that very data. The data is  
15 encrypted in a manner that even the manufacturer cannot invade without  
16 creating a tool of the type sought by the Government in this case, which  
17 Apple has (to this point and prior to the events giving rise to the order  
18 compelling Apple to act) voluntarily refused to do. This issue should be  
19 considered by the Court to, perhaps, be the weightiest factor to be  
20 considered under the facts of this case because of its global impact.  
21 Indeed, the impact to third party Apple could be equally catastrophic in  
22 deterring users from purchasing electronic products that are unsecure for  
23 the protection of their data. Even if putative consumers of Apple products  
24 erroneously believe that the release of code that undermines the iPhone  
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28 <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.

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

9  
10 Lastly, the requirement that Apple have to create code or any other  
11 product to assist the Government, whether otherwise necessary to defeat  
12 something Apple itself put in place or to defeat the protections sought by  
13 others is, perhaps, the most reprehensible of effects of the Government's  
14 request. This requirement that any third party have to go to any real or  
15 considerable effort to create something under punishment of contempt for  
16 failing to do so smacks so repugantly of involuntary servitude, regardless  
17 of the actual inapplicability of the Thirteenth Amendment to the United  
18 States Constitution to this case. The stretching of what it means under the  
19 All Writs Act to render assistance under threat of punishment to the point of  
20 creation of code or any other product easily takes the concept of assistance  
21 to the point of "snapping" and, it is shocking to think of an Article III Court  
22 enforcing it in the absence of a specific underlying statutory authority  
23 authorizing it. In sum, consideration of the Reasonableness Factors with a  
24 few additional non-enumerated factors relating to glaring issues presented  
25 in this case inexorably lead to the conclusion that the existing *ex parte*  
26 Order should be vacated and the Government's motion to compel denied.

### 27 **CONCLUSION**

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

22 Taub & Taub, P.C.

24 By: /s/ Richard F. Taub  
25 Richard F. Taub  
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9 UNITED STATES DISTRICT COURT  
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U.S.C. § 1651**

19 *Amicus Curiae* Richard F. Taub, Esq. (hereinafter “Undersigned  
20 Counsel”), hereby files this *Amicus Curiae* Brief to assist the Court in its  
21 analysis of certain issues to be considered in this case regarding the  
22 Government’s Motion to Compel Assistance and Apple Inc.’s Motion to  
23 Vacate Order Compelling Apple Inc. to Assist Agents in Search, and  
24 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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1 (1813), 7 Cranch 504). The original phrase “not specifically provided  
2 for by statute” remained explicitly in the All Writs provision until 1948.  
3 *United States Marshals Service* at 41. The legislative history of the  
4 amendment to the All Writs Act stated that the new section was  
5 “expressive of the construction recently placed upon that law by the  
6 Supreme Court in the case of *U.S. v. Alkali Export Assn. v. United*  
7 *States*, 325 U.S. 196 (1945).” *United States Marshals Service* at *Id.*  
8 In *Alkali*, the Court rejected use of the All Writs Act to enable the  
9 Court to review a lower court’s determination where jurisdiction did  
10 not lie under an express statutory provision, even though that express  
11 language about the underlying statutory provision was no longer  
12 found in the amended statute. *Id.* The *Alkali* Court held that

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

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

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



1 the need arises, it does not authorize them to issue *ad hoc* writs whenever  
2 compliance with statutory procedures appears inconvenient or less  
3 appropriate.” *Id.* The Court concluded that the District Court has no  
4 authority under the All Writs Act *alone* to order the Marshals Service to  
5 transport state prisoners to federal courts in the absence of specific  
6 statutory authority. So, first there must be an enabling statute permitting  
7 the underlying action for which the All Writs Act *may* provide a vehicle to  
8 complete its purpose.

9  
10 **B. The All Writs Act’s Use with Third Parties to Effect the**  
11 **Purpose of Specific Statutory Authority and the Present**  
12 **State of Legislation to Allow Law Enforcement to Defeat**  
13 **Private Encryption**

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

22 Although the Act empowers federal courts to fashion  
23 extraordinary remedies when the need arises, it does not  
24 authorize them to issues *ad hoc* writs whenever compliance  
25 with statutory procedures appears inconvenient or less  
26 appropriate.

27 So, in the event of a statute specifically addressing third party compliance  
28 in a particular context, it obviously controls over the All Writs Act in

1 specifying a remedy and procedure for implementation.

2 Constitutional and other limitations aside, the degree to which a  
3 statute authorizes the type of action at issue or even specifically addresses  
4 third party assistance should provide insight into the degree upon which the  
5 Court may expect to compel third party assistance. Title 18 § 2518(4) and  
6 (5) of the wire interception statute provides a perfect example of the degree  
7 that a Court may involve third parties in the context of a substantive statute  
8 enabling the type of relief sought generally with the aid of the All Writs Act  
9 to provide a specific vehicle to do so. Most importantly, section 4(e) of that  
10 provision specifically provides for an order directing the assistance of a  
11 telecommunications provider with protections against unreasonable  
12 interference and to compensate such providers. See 18 U.S.C. §  
13 2518(4)(e). It stands to reason that an Order co-opting a third party under  
14 the wire interception statute could carefully follow Section 4(e) with  
15 complete impunity short of constitutional limitations. In contrast, it stands to  
16 reason that an order directing the assistance of a third party in the absence  
17 of such *specific* legislative direction regarding third party involvement would  
18 have to be more circumscribed under an order whose only legal basis for  
19 third party involvement is the All Writs Act.  
20

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

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

1 *Order Requiring Apple, Inc.*, 2015 U.S. Dist. Lexis 138755 (E.D.N.Y. 2015)  
2 addressed precisely that issue. It analyzed, *inter alia*, the legislative history  
3 of the Comprehensive Counter-Terrorism Act of 1991 (“CALEA”), a 2012  
4 note by Senator Leahy, a co-sponsor of CALEA that the Obama  
5 Administration had not proposed specific amending legislation on the issue  
6 of the law failing to keep up with the type of technology at issue in this  
7 case, the proposed introduction of Bills from 2015 to preclude the  
8 government from forcing a private entity such as Apple to compromise the  
9 kind of data security at issue in this case. *See generally In re Order*  
10 *Requiring Apple, Inc.* The District Court in *In re Order* noted that Congress  
11 is plainly aware of the lack of statutory authority, but has thus far failed to  
12 either create or reject the type of relief the Government seeks here. *Id.* at  
13 10. That Court indicated that, under these circumstances makes it much  
14 less obvious that the relief sought herein would be available under the All  
15 Writs Act, *id.*, and concluded that this analysis “strongly suggests that  
16 granting the instant motion **would be inconsistent** with the purpose of the  
17 All Writs Act as interpreted in the aforementioned cases.” *Id.* [emphases  
18 added] The Court then granted a due process hearing for Apple before  
19 that Court made a final decision. Similar to our case, the present state of  
20 the law is that debate rages on regarding the issue of whether to give the  
21 Government the awesome power of defeating privacy interests that the  
22 public has in their data in favor of a criminal investigation. Congress is  
23 aware of the issues, but has not acted, which continues to suggest that a  
24 far reaching decision to compel a manufacturer to create code to defeat its  
25 own encryption, upon which members of the public have relied in their  
26 purchase decision and use of Apple’s product, is not authorized by the All  
27 Writs Act standing alone.  
28

1                   **C. Reasonableness of Burden Upon Third Party Apple**

2           Also to be considered by this Court is the reasonableness of the  
3 Government’s request of third party manufacturers not merely to implement  
4 existing tools or process, but to create one at considerable effort and  
5 expense. The power of federal courts to impose duties upon third parties is  
6 not without limits; unreasonable burdens may not be imposed. *United*  
7 *States v. New York Telephone Co.*, 434 U.S. 159 (1977). At issue in the  
8 *New York Telephone Co.* case was whether a highly regulated public  
9 telephone service utility with a duty to serve the public had a substantial  
10 interest in not providing “meager” assistance needed by the FBI in its  
11 investigation to determine whether the utility’s facilities were being used by  
12 a criminal enterprise. *See Id.* at 174. Underscoring the Court’s decision  
13 that New York Telephone Co. could be compelled to assist in the  
14 installation and operation of pen registers was the pre-existing mandate  
15 from Congress under then-existing 18 U.S.C. § 2518(4) for a  
16 “communication common carrier to furnish [law enforcement] all  
17 information, facilities, and technical assistance necessary to accomplish”  
18 wire interception unobtrusively. Thus, the *New York Telephone Co.* case  
19 rather clearly stands for the proposition that, in the presence of a statute  
20 specifically providing for the assistance of third parties necessary to avoid  
21 frustration of a Court’s lawful order, and one that requires only “meager”  
22 assistance at that, it is more likely the All Writs Act will allow the district  
23 court to fashion a remedy to compel that assistance.  
24

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

1 found under 18 U.S.C. § 2518(4) specifically contemplated and set forth a  
2 procedure for the assistance by a telecommunications provider in the case  
3 of wire interception orders. In fact, section 4 of that Act provides for  
4 parameters and protections for third party service providers. Here, there  
5 are no statutory provisions or other sources of law requiring the  
6 manufacturer of a smartphone to dismantle its data security methods,  
7 whether by providing encryption keys or to undermine its security to allow  
8 entry to a passcode-protected phone. In the absence of any legislative  
9 authorization, procedures or limitations on the assistance of a third party  
10 manufacturer under these circumstances, the Court's inherent reach to  
11 compel the assistance of that third party in aid of execution of a search  
12 warrant should be quite limited and not reach as far as to force the third  
13 party manufacturer into involuntary servitude to substantially modify its  
14 operating system to undermine its security features.<sup>1</sup> Most importantly,  
15 however, this case presents much more than the "meager" assistance  
16 required under the wire interception act and of the third party  
17 telecommunications provider in *New York Telephone Co.* Private third  
18 party manufacturer Apple has a substantial interest in resisting the forced  
19 labor sought by the Government under circumstances where it is not a  
20 public utility and is not requested to provide "meager" assistance. It is, in  
21 fact, asked to become involved in a considerable amount of research and  
22 development. The Government's request here stretches the holding in the  
23

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25  
26 <sup>1</sup> The Undersigned Counsel freely concedes that, there may be a different result if this case had involved  
27 the mere requirement that Apple turn over to the Government a pre-existing "back door" passcode to  
28 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.

1 *New York Telephone Co.* case beyond its breaking point.

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

6 Even if the Court utilized a similar analysis to that set forth for  
7 telecommunications providers for which their assistance is sought, the  
8 same conclusion against compelling Apple to act as requested would  
9 result. The Ninth Circuit set forth a procedure for due process to be  
10 accorded third parties beset by an All Writs order to assist the government  
11 and a set of factors for the federal district court to determine the  
12 reasonableness of the burden of compliance of the All Writs order.<sup>2</sup> In the  
13 case of *In re Application of United States for an Order etc.* (1980) 616 F.2d  
14 1122, the Ninth Circuit exercised its authority to supervise the  
15 administration of criminal justice within the circuit to determine that a  
16 company whose cooperation in electronic surveillance<sup>3</sup> is sought should be  
17 afforded reasonable notice and an opportunity to be heard *prior* to the entry  
18 of any order compelling its assistance. *Id.* at 1132-3.

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21  
22 <sup>2</sup> The Court should consider that these factors were imposed in the Ninth Circuit for such a determination  
23 in the context of third party public utilities mandated to serve the public as set forth in the *New York*  
24 *Telephone Co.* case and not for other private for-profit third parties, publicly traded or not. In other words,  
25 under *New York Telephone Co.*, it may be appropriate for the Court to include in a remoteness analysis of  
26 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.

27 <sup>3</sup> It makes little sense to suggest that the procedure set forth in that case should be read to be limited to  
28 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.

1           The Ninth Circuit imposed upon federal district courts within its  
2 supervisory authority, a series of non-exhaustive factors to be utilized at  
3 this due process hearing that includes the following: (1) the likelihood that  
4 the surveillance will develop information useful in a criminal prosecution; (2)  
5 the availability of alternative means for obtaining the information; (3) the  
6 extent of the burdens which the requested surveillance would place upon  
7 the telephone company; (4) the extent to which the restrictions upon the  
8 scope of the surveillance can minimize interference with company  
9 operations; and (5) the likelihood that the company can be fully  
10 compensated for the services provided (collectively, “Reasonableness  
11 Factors”). Significantly, the Ninth Circuit specifically determined its  
12 procedure would safeguard the interests of communications carriers, will  
13 not interfere with the government’s pursuit of appropriate investigative  
14 tools, and would provide the district courts with a sound basis for the wise  
15 exercise of their discretion. *Id.* at 1133.  
16

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

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

9  
10 In the context of this case, the analysis weighs rather heavily in a  
11 finding of unreasonable burden upon third party Apple. The Government  
12 rather freely admits that it has no idea what, if anything, is on the cellphone.  
13 The principal criminal shooters are dead. The prosecution of a third party  
14 for his involvement *collateral* to the cellphone suggests no such useful  
15 evidence present on the cellphone at issue. The Government's theory of  
16 its user's contact with ISIS suggests it unlikely that even complete access  
17 to the cellphone will yield anything useful for a criminal prosecution. As has  
18 been suggested by Apple, the Government may have alternative means in  
19 seeking Apple's assistance merely to access the iPhone at issue for its  
20 data, rather than requiring Apple to actually create code to disable the auto  
21 erase and delay safeguards. Apple has also articulated substantial  
22 burdens placed upon it to enlist staff, time and effort to create code to  
23 defeat its original security measures, and its burden of having to defeat its  
24 original security plan in the presence of a rejected legislative plan to  
25 prevent unbreakable encryption systems. However, the Government's  
26  
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28



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

9  
10 The impact on the risks regarding the invasion of privacy to iPhone  
11 users, however, weighs heavily against a finding that the burden would be  
12 reasonable. The entire purpose, in the modern world, of a high level of  
13 encryption (permitted by Congress) to exist in safeguarding data is to  
14 recognize the strong interest in privacy in that very data. The data is  
15 encrypted in a manner that even the manufacturer cannot invade without  
16 creating a tool of the type sought by the Government in this case, which  
17 Apple has (to this point and prior to the events giving rise to the order  
18 compelling Apple to act) voluntarily refused to do. This issue should be  
19 considered by the Court to, perhaps, be the weightiest factor to be  
20 considered under the facts of this case because of its global impact.  
21 Indeed, the impact to third party Apple could be equally catastrophic in  
22 deterring users from purchasing electronic products that are unsecure for  
23 the protection of their data. Even if putative consumers of Apple products  
24 erroneously believe that the release of code that undermines the iPhone  
25

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27  
28 <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.

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

9  
10 Lastly, the requirement that Apple have to create code or any other  
11 product to assist the Government, whether otherwise necessary to defeat  
12 something Apple itself put in place or to defeat the protections sought by  
13 others is, perhaps, the most reprehensible of effects of the Government's  
14 request. This requirement that any third party have to go to any real or  
15 considerable effort to create something under punishment of contempt for  
16 failing to do so smacks so repugnantly of involuntary servitude, regardless  
17 of the actual inapplicability of the Thirteenth Amendment to the United  
18 States Constitution to this case. The stretching of what it means under the  
19 All Writs Act to render assistance under threat of punishment to the point of  
20 creation of code or any other product easily takes the concept of assistance  
21 to the point of "snapping" and, it is shocking to think of an Article III Court  
22 enforcing it in the absence of a specific underlying statutory authority  
23 authorizing it. In sum, consideration of the Reasonableness Factors with a  
24 few additional non-enumerated factors relating to glaring issues presented  
25 in this case inexorably lead to the conclusion that the existing *ex parte*  
26 Order should be vacated and the Government's motion to compel denied.

### 27 **CONCLUSION**

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

22 Taub & Taub, P.C.

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

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 20 *Cryptographers*

21 **UNITED STATES DISTRICT COURT**  
 22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
 23 **EASTERN DIVISION**

24 IN THE MATTER OF THE SEARCH )  
 25 OF AN APPLE IPHONE SEIZED )  
 26 DURING THE EXECUTION OF A )  
 27 SEARCH WARRANT ON A BLACK )  
 28 LEXUS IS300, CALIFORNIA LICENSE )  
 PLATE 3KGD203 )

Case No: 16-cm-00010-SP

**APPLICATION FOR LEAVE  
 TO FILE BRIEF OF AMICI  
 CURIAE EFF AND 46  
 TECHNOLOGISTS,  
 RESEARCHERS, AND  
 CRYPTOGRAPHERS**

Date: March 22, 2016  
 Time: 1:00 pm  
 Courtroom: 4 or 5  
 Judge: Hon. Sheri Pym

FILED  
 2016 MAR -3 AM 10:56  
 CLERK U.S. DISTRICT COURT  
 CENTRAL DIST. OF CALIF.  
 RIVERSIDE  
 BY \_\_\_\_\_  
 (signed)  
 logged (proposed) order

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2           The Electronic Frontier Foundation (“EFF”) and 46 Technologists,  
3  
4 Researchers, and Cryptographers hereby move for leave to file the attached *amicus*  
5 *curiae* brief supporting Respondent Apple, Inc. Counsel for Apple has consented  
6 and the government has no objection to the filing of the attached brief.  
7

8 **I. STATEMENT OF INTEREST**

9           Individual *amici* are technologists, researchers, and cryptographers,  
10 including pioneers in digital signature technology, who develop secure  
11 technologies and systems or rely on them to create many of the digital services at  
12 the center of modern life. The ability to securely shop, bank, communicate, and  
13 engage in countless other activities online are made possible by the technologies  
14 and systems conceived, built, and tested by *amici*.<sup>1</sup>  
15  
16

17           Encryption and cryptography-based systems like digital signatures are the  
18 linchpin of the security of digital devices and the software that runs on them. *Amici*  
19 have a vested interest in ensuring that these systems remain both uncompromised  
20 and ubiquitous so that everyone can trust that their activities using those devices  
21 are secure. Individual *amici* thus oppose government efforts to compel anyone to  
22 develop code that undermines, bypasses or otherwise limits the security that  
23  
24  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Brief biographies of the *amici* are found in Appendix A of the attached brief.  
28

1 encryption provides and jeopardizes the trust encryption enables.

2 For 25 years, *amicus* EFF has represented the interests of these and many  
3 other technology creators as they seek to build the secure infrastructure that all of  
4 us can trust. EFF also represents the interests of users of digital devices who need  
5 security, privacy, and protection from hackers, malware, and overbroad  
6 government surveillance.  
7

8  
9 *Amici* have a special interest in helping this Court appreciate that its Order  
10 places a significant burden on the free speech rights of Apple and its programmers  
11 by compelling them to write code and then to use their digital signature to endorse  
12 that code to the FBI, their customers, and the world.  
13

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

15 No party or party's counsel participated in the writing of the brief in whole  
16 or in part. No party, party's counsel, or other person contributed money to fund the  
17 preparation or submission of the brief. *Amici* are neither sponsored by, nor in any  
18 way affiliated with, any of the parties to this case. *Amici* file this brief to further  
19 their independent interests in ensuring that encryption and cryptography-based  
20 systems remain uncompromised.  
21

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

23  
24 Finally, *Amici's* brief does not duplicate Apple's brief. Rather, it provides  
25 the Court with a unique and important perspective on the burden the Court's  
26  
27

1 order—which compels Apple and its programmers to write code and then use their  
2 digital signature to endorse that code—places on Apple’s First Amendment rights.

3 **IV. CONCLUSION**

4  
5 *Amici* respectfully request that the Court grant leave to file the attached brief  
6 in support of Apple.

7 Dated: March 2, 2016

Respectfully submitted,

8 

9 DAVID GREENE  
10 CINDY A. COHN  
11 LEE TIEN  
12 KURT OPSAHL  
13 NATE CARDOZO  
14 SOPHIA COPE  
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 13 *Technologists, Researchers, and*  
 14 *Cryptographers*

15 **UNITED STATES DISTRICT COURT**  
 16 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
 17 **EASTERN DIVISION**

18 IN THE MATTER OF THE SEARCH ) Case No: 16-cm-00010-SP  
 OF AN APPLE IPHONE SEIZED )  
 19 DURING THE EXECUTION OF A ) **PROOF OF SERVICE**  
 SEARCH WARRANT ON A BLACK )  
 20 LEXUS IS300, CALIFORNIA LICENSE )  
 21 PLATE 35KGD203 )  
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1 I am a citizen of the United States and employed in San Francisco,  
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

5 On this date, I served the following:

6 **APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE***  
7 **EFF AND 46 TECHNOLOGISTS, RESEARCHERS, AND**  
8 **CRYPTOGRAPHERS**

9 and caused to be served by U.S. Mail, postage thereon fully prepaid, true and  
10 correct copies of the foregoing on:

11 Theodore B Olson  
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*Counsel for Plaintiff*

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

Executed this March 3, 2016 in San Francisco, California

  
Cynthia Dominguez

ORIGINAL

FILED

*Lodged Proposed Order*

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CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

BY 

Attorneys for  
Proposed *Amici Curiae*  
PRIVACY INTERNATIONAL  
HUMAN RIGHTS WATCH

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

IN THE MATTER OF THE SEARCH ) ED No. CM 16-10 (SP)  
OF AN APPLE IPHONE SEIZED )  
DURING THE EXECUTION OF A ) **APPLICATION FOR LEAVE TO**  
SEARCH WARRANT ON A BLACK ) **FILE BRIEF OF *AMICI CURIAE***  
LEXUS IS300, CALIFORNIA ) **PRIVACY INTERNATIONAL AND**  
LICENSE PLATE 35KGD203 ) **HUMAN RIGHTS WATCH**  
)  
) **Hearing:**  
) Date: March 22, 2016  
) Time: 1:00 p.m.  
) Place: Courtroom 3 or 4  
) Judge: Hon. Sheri Pym

**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

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

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

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

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

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

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

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

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

5  
6  
7  
8  
9 Dated: March 3, 2016

Respectfully submitted,

10 By   
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21 Human Rights Watch  
22  
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**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 Type	Counsel Served	Party
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Mail & E-mail	<b>Eileen M. Decker</b> <b>Patricia A. Donahue</b> <b>Tracy L. Wilkison</b> <b>Allen W. Chui</b> 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.Chui@usdoj.gov	United States of America

\*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

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16 Attorneys for *Amici Curiae*  
17 *Federal Law Enforcement Officers Association, the Association of*  
18 *Prosecuting Attorneys, Inc., and National Sheriffs' Association*

19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**  
21 **EASTERN DIVISION**

22 ED No. CM 16-10-SP

23 IN THE MATTER OF THE SEARCH  
24 OF AN APPLE IPHONE SEIZED  
25 DURING THE EXECUTION OF A  
26 SEARCH WARRANT ON A BLACK  
27 LEXIS IS300, CALIFORNIA LICENSE  
28 PLATE 35KGD203

**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**

Hearing Date: March 22, 2016  
Hearing Time: 1:00 p.m.  
Courtroom: 3 or 4  
Judge: Hon. Sheri Pym

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**ORIGINAL**

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

9           1.       On February 16, 2016, this Court issued an Order directing Apple,  
10 Inc. (“Apple”) to assist in enabling the government’s search of an iPhone 5c used  
11 by Syed Rizwan Farook, who was one of the individuals responsible for the  
12 December 2, 2015 terrorist attack at the Inland Regional Center in San  
13 Bernardino, California.

14           2.       On February 19, 2016, the government filed its Motion to Compel  
15 Apple to comply with the Order (“Government’s Motion to Compel”), alleging,  
16 *inter alia*, that the Court’s All Writs Act Order is lawful and binding, and  
17 Congress has not limited this Court’s authority in that regard.

18           3.       On February 25, 2016, Apple filed an opposition to that motion and a  
19 motion to vacate the Order (“Apple’s Opposition”) alleging, among other things,  
20 that the All Writs Act does not grant this Court the authority to issue its February  
21 16, 2016 Order and that the Order would violate the First and Fifth Amendments  
22 of the Constitution.

23           4.       Members of the *Amici* are law enforcement officers on the ground –  
24 police, investigators, prosecutors, and others – for whom the ability to extract data  
25 and evidence, from whatever sources are available, is a critical to solving crimes  
26 and upholding their obligations to protect the public. As such, *Amici* have a very  
27 strong interest in the outcome of this case.

28

1           5.       Federal district courts have the authority to permit non-parties to  
2 participate in a case as *amici curiae*, and have broad discretion to determine  
3 whether or not to permit such participation. *See, e.g., Hoptowit v. Ray*, 682 F.2d  
4 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515  
5 U.S. 472 (1995); *In re Roxford Foods Litigation*, 790 F. Supp. 987, 997 (E.D. Cal.  
6 1991) (“generally courts have exercised great liberality in permitting an amici  
7 curiae to file a brief in a pending case”) (internal quotations omitted).

8           6.       As a general matter, courts typically permit amicus participation in  
9 the information offered is considered “timely and useful.” *Ellsworth Assocs., Inc.*  
10 *v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996). *Amici’s Application*  
11 meets both of these requirements.

12           7.       First, *Amici’s Application* is timely. This Court has specifically  
13 made provision for the filing of amicus briefs in its Scheduling Order dated  
14 February 19, 2016: “Any amicus brief shall be filed by not later than March 3,  
15 2016, along with an appropriate request seeking leave of the Court to file such a  
16 brief.” *Amici* here have submitted the required documents within the Court’s  
17 March 3 deadline.

18           8.       Second, courts have deemed *amicus* participation useful when a party  
19 has a special interest in or is particularly familiar with the issues in a case. *See,*  
20 *e.g., Ellsworth Assocs.*, 917 F. Supp. at 846; *NGV Gaming, Ltd. V. Upstream*  
21 *Point Malate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) (“District courts  
22 frequently welcome amicus briefs from non-parties concerning legal issues that  
23 have potential ramifications beyond the parties directly involved or if the amicus  
24 has unique information or perspective that can help the court beyond the help that  
25 the lawyers for the parties are able to provide) (internal quotations and citations  
26 omitted). *Amici’s* brief provides information regarding the importance of the data  
27 in question to law enforcement officers, who utilize exactly this type of cell phone  
28 extracted data on a daily basis to apprehend and prosecute criminals. Moreover,


1 as officers on the ground, members 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 District of California’s Local Civil Rules L.R. 7-  
6 19 and 7-19.1, *Amici* have contacted both the parties in this case, the Government  
7 and Apple, Inc., in order to notify the parties of *Amici*’s intention to file this Ex  
8 Parte Application and in order to obtain the parties’ stipulated consent to *Amici*’s  
9 participation as *amici curiae*. Both parties have given their consent.

10 Wherefore, *Amici* request that the Court grant its Ex Parte Application (for  
11 which *Amici* respectfully attach a Proposed Order) and allow them to participate  
12 as *amici curiae* by submitting a Brief in Support of the Government’s Motion to  
13 Compel.

14  
15 DATED: March 2, 2016

ASSOCIATION OF PROSECUTING  
ATTORNEYS, INC.

16  
17   
18 By: \_\_\_\_\_  
David LaBahn

19  
20 DEVORE & DEMARCO LLP  
Joseph V. DeMarco  
Urvashi Sen

21  
22 *Attorneys for Amici Curiae*  
*Federal Law Enforcement*  
*Officers Association, the Association of*  
23 *Prosecuting Attorneys, Inc., and National*  
24 *Sheriffs’ Association*

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14  
 15 UNITED STATES DISTRICT COURT  
 16 CENTRAL DISTRICT OF CALIFORNIA  
 17 EASTERN DIVISION  
 18

19 IN THE MATTER OF THE SEARCH  
 OF AN APPLE IPHONE SEIZED  
 20 DURING THE EXECUTION OF A  
 SEARCH WARRANT ON A BLACK  
 21 LEXUS IS300, CALIFORNIA  
 LICENSE PLATE 35KGD203  
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Case No. ED CM 16-10-SP  
**MOTION OF 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. FOR LEAVE TO**  
**FILE BRIEF AS AMICI CURIAE**

Judge: Hon. Sheri Pym

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 2016 MAR -3 AM 11:54  
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 RIVERSIDE  
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 order

1 **I. INTRODUCTION**

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

12 **II. DISCUSSION**

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

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

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

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

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

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

### 25 **III. CONCLUSION**

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

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DATED: March 3, 2016

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By:   
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19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**  
21 **EASTERN DIVISION**

22 ED No. CM 16-10-SP

23 IN THE MATTER OF THE SEARCH  
24 OF AN APPLE IPHONE SEIZED  
25 DURING THE EXECUTION OF A  
26 SEARCH WARRANT ON A BLACK  
27 LEXIS IS300, CALIFORNIA LICENSE  
28 PLATE 35KGD203

**BRIEF OF *AMICI CURIAE***  
**FEDERAL LAW ENFORCEMENT**  
**OFFICERS ASSOCIATION,**  
**ASSOCIATION OF**  
**PROSECUTING ATTORNEYS,**  
**INC., AND NATIONAL SHERIFFS'**  
**ASSOCIATION IN SUPPORT OF**  
**THE GOVERNMENT'S MOTION**  
**TO COMPEL APPLE, INC. TO**  
**COMPLY WITH THIS COURT'S**  
**FEBRUARY 16, 2016 ORDER**  
**COMPELLING ASSISTANCE IN**  
**SEARCH**

Hearing Date: March 22, 2016  
Hearing Time: 1:00 p.m.  
Courtroom: 3 or 4  
Judge: Hon. Sheri Pym

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

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

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**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.<sup>1</sup> 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

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<sup>1</sup> 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>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>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).

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

5  
6 **ARGUMENT**

7 **I. APPLE’S REFUSAL TO PROVIDE REASONABLE**  
8 **ASSISTANCE TO THE GOVERNMENT HINDERS**  
9 **EVERYDAY LAW ENFORCEMENT AND ENDANGERS**  
**PUBLIC SAFETY**

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



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

3 The importance of access to evidence found on iPhones, iPads, and similar  
4 devices is emphasized by actual, real world examples undisputed by Apple. For  
5 example, in one big-city district attorney's office *approximately 50%* of the  
6 mobile devices currently recovered during investigations are inaccessible to law  
7 enforcement due to the fact that they are running iOS 8.<sup>4</sup> That percentage will, of  
8 course, only grow as time goes on and newer devices replace older ones. As the  
9 DA in that county put it:

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

21 Other district attorneys throughout the country have had alarmingly similar  
22 experiences with iPhones running the current operating system. For example, last  
23 year the Harris County (Texas) District Attorney's Office was unable to search  
24

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25 <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.

26 <sup>5</sup> NPR, *It's Not Just The iPhone Law Enforcement Wants To Unlock*, Feb. 21,  
27 2016, <http://www.npr.org/2016/02/21/467547180/it-s-not-just-the-iphone-law-enforcement-wants-to-unlock> (last visited Feb. 25, 2016).

1 more than 100 encrypted (and therefore inaccessible) Apple devices from cases to  
 2 date, including human trafficking, violent street crimes, and sexual assaults. In  
 3 2016, the number of inaccessible Apple devices for that office already numbers  
 4 eight to ten per month. Similarly, in January and February of this year, the Cook  
 5 County (Chicago) State Attorney's office has received 30 encrypted devices it  
 6 could not access, and the Connecticut Division of Scientific Services has  
 7 encountered 46 encrypted Apple devices in criminal cases, including those  
 8 involving child pornography.<sup>6</sup>

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

- 11 • **Homicide (conviction of guilty)**: *People v. Hayes*<sup>7</sup>: The victim was  
 12 filming a video using his iPhone when he was shot and killed by the  
 13 defendant. Because the iPhone was not passcode-locked, the video,  
 14 which captured the shooting, was recovered and admitted into  
 15 evidence at trial. The defendant was convicted of murder and  
 16 sentenced to 35 years to life.<sup>8</sup>
- 17 • **Homicide (exoneration of innocent)**: *People v. Rosario*<sup>9</sup>: A  
 18 detective obtained a search warrant and an unlock order for certain  
 19 iPhones found at the scene of a homicide. He sent the phones to  
 20

21 <sup>6</sup> See Vance Hearing Testimony at 6-7.

22 <sup>7</sup> Indictment Number 4451/12.

23 <sup>8</sup> NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, REPORT OF THE MANHATTAN  
 24 DISTRICT ATTORNEY'S OFFICE ON SMARTPHONE ENCRYPTION AND PUBLIC SAFETY  
 25 9 (Nov. 18, 2015),  
 26 <http://manhattanda.org/sites/default/files/11.18.15%20Report%20on%20Smartphone%20Encryption%20and%20Public%20Safety.pdf> (the "NY DA's Report").

27 <sup>9</sup> Indictment Number 1859/10.  
 28

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

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

22  
23 <sup>10</sup> NY DA's Report at 11.

24 <sup>11</sup> Supreme Court Information Number 3650/15.

25 <sup>12</sup> NY DA's Report at 9-10.

26 <sup>13</sup> Indictment Numbers 865/12, 3908/12, and 3338/13.

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

- 6 • **Cybercrime and Identity Theft:** *People v. Jacas et al.*<sup>15</sup> and *People*  
7 *v. Brahms et al.*<sup>16</sup>: An iPhone was recovered from a waiter who was  
8 arrested for stealing more than 20 customers' credit card numbers by  
9 surreptitiously swiping the credit cards through a card reader that  
10 stored the credit card number and other data. When the phone was  
11 searched pursuant to a warrant, law enforcement officials discovered  
12 text messages between the waiter and other members of the group  
13 regarding the ring's crimes. Based in large part on information  
14 obtained from the phone, investigators were able to obtain an  
15 eavesdropping warrant, and ultimately arrested a 29-member identity  
16 theft ring, including employees of high-end restaurants who stole  
17 credit card numbers, shoppers who made purchases using counterfeit  
18 credit cards containing the stolen credit card numbers, and managers  
19 who oversaw the operation. The group stole 100 American Express  
20 credit card numbers and property worth over \$1,000,000. All of the  
21 defendants pled guilty, and more than \$1,000,000 in cash and  
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24 <sup>14</sup> NY DA's Report at 9.

25 <sup>15</sup> Indictment Number 42/12.

26 <sup>16</sup> Indictment Number 5151/11.

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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>

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<sup>17</sup> NY DA’s Report at 10-11.

<sup>18</sup> Indictment Number 4117/13.

<sup>19</sup> NY DA’s Report at 11.

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

1 Of course, Apple's decisions also hamper crime *prevention*. Data  
2 successfully retrieved from a cell phone after the November 2015 Paris terrorist  
3 attacks on the Bataclan concert hall, where 89 people were killed, reportedly  
4 allowed French law enforcement officials to track down the alleged ringleader,  
5 who later died in a police raid.<sup>22</sup> This individual was in the process of planning  
6 yet another attack in Europe. And lest there be any doubt about the "value-add"  
7 for criminals by Apple's recent engineering decisions and present litigation  
8 posture, *Amici* are even aware of jailhouse statements by criminals about how the  
9 new iOS encryption is a helpful "feature" for planning and committing crimes.  
10 For example, in 2015, the New York Department of Corrections intercepted a  
11 phone call between an inmate and a friend about Apple's new, impregnable  
12 operating system, during which the inmate stated: "*If our phone is running on the*  
13 *iOS 8 software, they can't open my phone. That might be another gift from*  
14 *God.*"<sup>23</sup> In fact, *Amici* are aware of numerous instances in which criminals who  
15 previously used one time, so-called "throwaway" or "burner" phones, have now  
16 switched to the new iPhones as the "device-of-choice" for their criminal  
17 wrongdoing. Troublingly, Apple *even advertises and promotes* its alleged  
18 inability to help law enforcement search these devices.<sup>24</sup>

19  
20 does not wish to place in the public domain. Should the Court, however, desire  
21 this information, *Amici* will make it available.

22 <sup>22</sup> Lori Hinnant & Karl Ritter, *Discarded Cell Phone Led to Paris Attacks*  
23 *Ringleader*, Associated Press, Nov. 19, 2015, *available at*  
24 [http://bigstory.ap.org/article/47e613d2ad184fe4802fd76de903d4bb/french-leader-](http://bigstory.ap.org/article/47e613d2ad184fe4802fd76de903d4bb/french-leader-extremists-may-strike-chemical-bio-arms)  
25 [extremists-may-strike-chemical-bio-arms](http://bigstory.ap.org/article/47e613d2ad184fe4802fd76de903d4bb/french-leader-extremists-may-strike-chemical-bio-arms).

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

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

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

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

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

22 <sup>25</sup> Government's Motion to Compel at 6. It bears noting that although critics of  
23 the Government's position here state that law enforcement should simply rely on  
24 data that can be obtained on iCloud, as one DA has stated, even when criminals  
25 choose to back-up their data on the cloud (and in most cases they do not), data on  
26 an iPhone will not be backed up unless the iPhone is connected to Wifi. *See*  
27 Vance Hearing Testimony at 4. In this particular case, there are indications that  
28 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.*

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

3           Justice Cardozo, in a 1928 decision while he was still a state court judge,  
 4           stated: “[A]s in the days of Edward I, the citizenry may be called upon to enforce  
 5           the justice of the state, not faintly and with lagging steps, but honestly and bravely  
 6           and with whatever implements and facilities are convenient and at hand.”

7           *Babington v. Yellow Taxi Corp.*, 164 N.E. 726, 727 (N.Y. 1928). Almost 50 years  
 8           later, Justice White echoed Cardozo’s words in the Supreme Court’s landmark  
 9           decision, *United States v. New York Telephone Co.*, recognizing that “citizens  
 10          have a *duty* to assist in enforcement of the laws.” 434 U.S. 159, 175 n.24 (1977)  
 11          (emphasis added); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957)  
 12          (recognizing the historic obligation of citizens to assist law enforcement and to  
 13          communicate their knowledge of criminal activity to law enforcement officials);  
 14          *In re Quarles and Butler*, 158 U.S. 532, 535 (1895) (recognizing the duty of  
 15          citizens “to assist in prosecuting, and securing the punishment of, any breach of  
 16          the peace of the United States”). Indeed, as one state supreme court recognized:

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

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

26 \_\_\_\_\_  
 27          <sup>26</sup> *See also* Cal. Penal Code § 150 (making it an offense to “neglect[] or refuse[] to  
 28          join the posse comitatus or power of the county, by neglecting or refusing to aid



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

9 In *New York Telephone Co.*, the Supreme Court used the authority of the  
10 All Writs Act, 28 U.S.C. § 1651(a), to order the phone company to do what it was  
11 plainly able to do to assist the FBI in using its facilities and equipment to  
12 apprehend a group suspected of illegal gambling. *See* 434 U.S. at 172, 174.<sup>27</sup>  
13

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

19 <sup>27</sup> It bears noting that the request here is even less intrusive than was the case in  
20 *New York Telephone Co.* Here, the data at issue is “at rest” -- static data that  
21 exists on a phone whose owner is aware and supportive of law enforcement’s  
22 efforts to retrieve this data. In *New York Telephone Co.*, the data that was to be  
23 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.

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

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

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

### 13 CONCLUSION

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


21  
22 bedrooms to search for contraband; collect health records from medical offices;  
23 and even, under some circumstances, search a criminal suspect's attorney's office.  
24 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.

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

1 upheld by the Court, however, the effects of its refusal will, for countless  
2 Americans, be truly devastating.

3  
4 DATED: March 2, 2016

ASSOCIATION OF PROSECUTING  
ATTORNEYS, INC.

5  
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7 By:   
8 David LaBahn

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Joseph V. DeMarco  
Urvashi Sen

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12 *Federal Law Enforcement*  
13 *Officers Association, the Association of*  
14 *Prosecuting Attorneys, Inc. and the*  
15 *National Sheriffs' Association*

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18 *Prosecuting Attorneys, Inc., and National Sheriffs' Association*

19  
20  
21 **UNITED STATES DISTRICT COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA**  
23 **EASTERN DIVISION**

24 ED No. CM 16-10-SP

25 IN THE MATTER OF THE SEARCH  
26 OF AN APPLE IPHONE SEIZED  
27 DURING THE EXECUTION OF A  
28 SEARCH WARRANT ON A BLACK  
LEXIS IS300, CALIFORNIA LICENSE  
PLATE 35KGD203

**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**

Hearing Date: March 22, 2016  
Hearing Time: 1:00 p.m.  
Courtroom: 3 or 4  
Judge: Hon. Sheri Pym

FILED  
2016 MAR -3 AM 11:59  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

**COPY**

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

9 1. On February 16, 2016, this Court issued an Order directing Apple,  
10 Inc. (“Apple”) to assist in enabling the government’s search of an iPhone 5c used  
11 by Syed Rizwan Farook, who was one of the individuals responsible for the  
12 December 2, 2015 terrorist attack at the Inland Regional Center in San  
13 Bernardino, California.

14 2. On February 19, 2016, the government filed its Motion to Compel  
15 Apple to comply with the Order (“Government’s Motion to Compel”), alleging,  
16 *inter alia*, that the Court’s All Writs Act Order is lawful and binding, and  
17 Congress has not limited this Court’s authority in that regard.

18 3. On February 25, 2016, Apple filed an opposition to that motion and a  
19 motion to vacate the Order (“Apple’s Opposition”) alleging, among other things,  
20 that the All Writs Act does not grant this Court the authority to issue its February  
21 16, 2016 Order and that the Order would violate the First and Fifth Amendments  
22 of the Constitution.

23 4. Members of the *Amici* are law enforcement officers on the ground –  
24 police, investigators, prosecutors, and others – for whom the ability to extract data  
25 and evidence, from whatever sources are available, is a critical to solving crimes  
26 and upholding their obligations to protect the public. As such, *Amici* have a very  
27 strong interest in the outcome of this case.

28

1           5. Federal district courts have the authority to permit non-parties to  
2 participate in a case as *amici curiae*, and have broad discretion to determine  
3 whether or not to permit such participation. *See, e.g., Hoptowit v. Ray*, 682 F.2d  
4 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515  
5 U.S. 472 (1995); *In re Roxford Foods Litigation*, 790 F. Supp. 987, 997 (E.D. Cal.  
6 1991) (“generally courts have exercised great liberality in permitting an amici  
7 curiae to file a brief in a pending case”) (internal quotations omitted).

8           6. As a general matter, courts typically permit amicus participation in  
9 the information offered is considered “timely and useful.” *Ellsworth Assocs., Inc.*  
10 *v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996). *Amici’s* Application  
11 meets both of these requirements.

12           7. First, *Amici’s* Application is timely. This Court has specifically  
13 made provision for the filing of amicus briefs in its Scheduling Order dated  
14 February 19, 2016: “Any amicus brief shall be filed by not later than March 3,  
15 2016, along with an appropriate request seeking leave of the Court to file such a  
16 brief.” *Amici* here have submitted the required documents within the Court’s  
17 March 3 deadline.

18           8. Second, courts have deemed *amicus* participation useful when a party  
19 has a special interest in or is particularly familiar with the issues in a case. *See,*  
20 *e.g., Ellsworth Assocs.*, 917 F. Supp. at 846; *NGV Gaming, Ltd. V. Upstream*  
21 *Point Malate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) (“District courts  
22 frequently welcome amicus briefs from non-parties concerning legal issues that  
23 have potential ramifications beyond the parties directly involved or if the amicus  
24 has unique information or perspective that can help the court beyond the help that  
25 the lawyers for the parties are able to provide) (internal quotations and citations  
26 omitted). *Amici’s* brief provides information regarding the importance of the data  
27 in question to law enforcement officers, who utilize exactly this type of cell phone  
28 extracted data on a daily basis to apprehend and prosecute criminals. Moreover,


1 as officers on the ground, members 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 District of California’s Local Civil Rules L.R. 7-  
6 19 and 7-19.1, *Amici* have contacted both the parties in this case, the Government  
7 and Apple, Inc., in order to notify the parties of *Amici*’s intention to file this Ex  
8 Parte Application and in order to obtain the parties’ stipulated consent to *Amici*’s  
9 participation as *amici curiae*. Both parties have given their consent.

10 Wherefore, *Amici* request that the Court grant its Ex Parte Application (for  
11 which *Amici* respectfully attach a Proposed Order) and allow them to participate  
12 as *amici curiae* by submitting a Brief in Support of the Government’s Motion to  
13 Compel.

14  
15 DATED: March 2, 2016

ASSOCIATION OF PROSECUTING  
ATTORNEYS, INC.

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18 By:   
David LaBahn

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20 DEVORE & DEMARCO LLP  
Joseph V. DeMarco  
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22 Attorneys for *Amici Curiae*  
Federal Law Enforcement  
23 Officers Association, the Association of  
Prosecuting Attorneys, Inc., and National  
24 Sheriffs’ Association

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

ED No. CM 16-10-SP

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

**ORDER RE APPLICATION OF  
AMICI CURIAE FEDERAL LAW  
ENFORCEMENT OFFICERS  
ASSOCIATION, ASSOCIATION OF  
PROSECUTING ATTORNEYS,  
INC., AND NATIONAL SHERIFFS'  
ASSOCIATION TO PARTICIPATE  
AS AMICI CURIAE**

Hearing Date: March 22, 2016  
Hearing Time: 1:00 p.m.  
Courtroom: 3 or 4  
Judge: Hon. Sheri Pym

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2016 MAR -3 AM 11:58  
U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

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1           **IT IS HEREBY ORDERED** that 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 submitted with the Application is deemed  
5 filed.

6  
7 DATED: March \_\_, 2016

\_\_\_\_\_  
8 Judge Sheri Pym  
9 United States District Judge  
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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION**

ED No. CM 16-10-SP

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

**CERTIFICATE OF SERVICE**

1 I, David LaBahn, attorney for the Association of Prosecuting Attorneys,  
2 Inc., certify that on March 2, 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:

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16 Attorneys for *Amicus Curiae*  
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18 UNITED STATES DISTRICT COURT  
19 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
20 EASTERN DIVISION

21 IN THE MATTER OF THE  
22 SEARCH OF AN APPLE IPHONE  
23 SEIZED DURING THE  
24 EXECUTION OF A SEARCH  
25 WARRANT ON A BLACK  
26 LEXUS IS300, CALIFORNIA  
27 LICENSE PLATE 35KGD203

ED No. CM 16-10 (SP)

28 NOTICE OF MOTION AND  
MOTION FOR LEAVE TO  
APPEAR AS *AMICUS CURIAE*;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION

Date: March 22, 2016  
Time: 1:00 p.m.  
Location: Courtroom 3 or 4

2016 MAR -3 AM 10:16  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

BY \_\_\_\_\_

CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

2016 MAR -3 AM 10:17  
*lodged (proposed) and*

FILED

1 AT&T Mobility LLC (“AT&T”) respectfully seeks leave to appear as an  
2 *amicus curiae* before this Court and to file the attached Brief of *Amicus Curiae*  
3 AT&T Mobility LLC in Support of Apple Inc., which is attached as Exhibit A to  
4 this motion. Apple Inc. consents to this motion. Counsel for the United States has  
5 stated that it has no objection to this motion.

6 This Court has “broad discretion to permit participation as *amicus curiae*”  
7 based on a “showing that . . . participation is useful to or otherwise desirable to the  
8 court.” *Congregation Etz Chaim v. City of Los Angeles*, No. CV 97-5042 CAS (Ex),  
9 2009 WL 1293257, at \*5 n.4 (C.D. Cal. May 5, 2009). As set forth in Exhibit A,  
10 AT&T’s participation will be useful to the Court. AT&T has extensive experience  
11 with the privacy and public safety interests implicated by demands from government  
12 officials for assistance in securing customer information. AT&T is thus well-  
13 positioned to be useful to the Court in explaining the need for a clear, uniform legal  
14 framework to determine when private companies of all types may be compelled to  
15 provide assistance to law enforcement.

16 A proposed Order granting this Motion is attached as Exhibit B.  
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1 DATED: March 3, 2016

Respectfully submitted,

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ORIGINAL

FILED

2016 MAR -3 PM 12:44  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
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HAL HOUSER, TINA MEINS, MARK  
SANDEFUR, ROBERT VELASCO

FILED  
2016 MAR -3 PM 12:44

CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

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

Case No. 5:16-CM-00010 (SP)  
**APPLICATION OF GREG  
CLAYBORN, JAMES GODOY,  
HAL HOUSER, TINA MEINS,  
MARK SANDEFUR, AND  
ROBERT VELASCO TO FILE AN  
AMICUS CURIAE BRIEF**

Assigned to: The Hon. Sheri Pym

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1           **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

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

6           District courts have broad discretion to permit third parties to participate in  
7 an action as *amicus curiae*. See *Ctr. for Biological Diversity v. U.S. Bureau of*  
8 *Land Mgmt.*, No. 09-CV-8011-PCT-PGR, 2010 WL 1452863, at \*2 (D. Ariz. Apr.  
9 12, 2010) (“A district court has broad discretion to permit individuals or entities in  
10 a case as *amici curiae*.”) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.  
11 1982)). The role of *amicus curiae* is to “provide assistance in a case of general  
12 interest, supplement the efforts of counsel in the case, and draw the court’s  
13 attention to legal arguments that have escaped consideration.” *Id.* *Amicus curiae*  
14 briefs are particularly appropriate when the legal issues in a case “have potential  
15 ramifications beyond the parties directly involved.” *Sonoma Falls Devs., LLC v.*  
16 *Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003). This Court  
17 has invited parties to seek leave to submit *amicus* briefs in this action. (Dkt. No.  
18 10.) Likewise, 18 U.S.C.A. § 3771(a) provides crime victims with the right to  
19 “reasonable, accurate, and timely notice of any public court proceeding . . .  
20 involving the crime” and “not to be excluded from any such public court  
21 proceeding.” See also *Does v. United States*, 817 F. Supp. 2d 1337, 1342 (S. D.  
22 Fla. 2011) (holding that rights granted by the federal Crime Victims Rights Act  
23 attach even “before a complaint or indictment formally charges the defendant with  
24 a crime”).

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

28



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

9           As family members of the victims of this act of terrorism, *amici* are afforded  
10 the rights enumerated in the Crime Victims’ Rights Act. *See* 18 U.S.C.A. §  
11 3771(e)(2)(B) (“In the case of a crime victim who is under 18 years of age,  
12 incompetent, incapacitated, or deceased, the legal guardians of the crime victim or  
13 the representatives of the crime victim's estate, family members, or any other  
14 persons appointed as suitable by the court, may assume the crime victim's rights  
15 under this chapter[.]”)

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

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For the foregoing reasons, *amici* respectfully seek leave to file the attached *amicus* brief with the Court.

Dated: March 3, 2016

LARSON O'BRIEN LLP

By: 

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Attorneys for *Amicus Curiae*  
Greg Clayborn, James Godoy, Hal  
Houser, Tina Meins, Mark Sandefur,  
and Robert Velasco

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*\*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

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CENTRAL DISTRICT OF CALIFORNIA  
FILED BY FAX

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

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

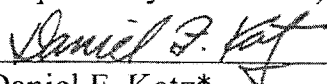
2 PLEASE TAKE NOTICE THAT Intel Corporation moves for leave of Court to  
3 file the attached brief as amicus curiae in support of the motion to vacate filed by  
4 Apple Inc. For nearly four decades, Intel has been a world leader in the development  
5 of computing technology. In that role, Intel has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

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

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

1 Dated: March 3, 2016

Respectfully submitted,

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