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CLERK, U.S. DISTRICT COURT
MAR - 4 2016
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION
BY DEPUTY

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

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


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

**[PROPOSED] ORDER GRANTING
APPLICATION FOR LEAVE TO
FILE AMICI CURIAE BRIEF**

Date : March 22, 2016
Time : 1:00 p.m.
Location: Courtroom of the Hon.
Sheri Pym

16 Good cause appearing, the application of the California State Sheriffs'
17 Association, California Police Chiefs' Association and the California Peace
18 Officers' Association for leave to file the attached brief of Amici Curiae in support
19 of the United States is hereby granted and shall be deemed filed this date.

20
21 Dated: March 4 2016 IT IS SO ORDERED.

22
23 By: 
24 Hon. Sheri Pym,
25 Magistrate Judge, U.S. District Court
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BY FAX

PROOF OF SERVICE

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STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Boulevard, Fullerton, California 92835.

On March 3, 2016, I served the within **[PROPOSED] ORDER GRANTING LEAVE TO FILE AMICI CURIAE BRIEF** on the interested parties in said action by placing a true and correct copy or delivered by one or more of the means set forth below:

SEE ATTACHED SERVICE LIST

[Via Mail] By depositing said envelope with postage thereon fully prepaid in the United States mail at La Habra, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at La Habra, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit of mailing in affidavit.

[Via Electronic Service] By electronically transmitting the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. The transmission was reported as complete and without error. See Rules of Court, Rule 2.251.

[Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 3, 2016 at Fullerton, California.



LAURA MILLER

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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

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 3KGD203

CASE NUMBER:

5:16-cm-00010-SP

BRIEF OF AMICI CURIAE AND MEMORANDUM
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1 **BRIEF OF AMICI CURIAE**

2 **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY.**

3 Amici accept the procedural history and pertinent facts as set forth in the
4 briefs of the United States and Apple. Amici understand that the substantive legal
5 issues that are at stake in this matter will be fully briefed by the United States
6 Attorney’s Office. Amici defer to the legal arguments of the United States office
7 on these issues.

8 **II. INTRODUCTION.**

9 This matter stems from the FBI’s lawful seizure of an Apple iPhone that was
10 used by Syed Rizwan Farook (“Farook”) in carrying out the December 2, 2015
11 massacre in San Bernardino. Farook, along with his wife, murdered 14 people and
12 injured 22 others. The United States has fully complied with the Fourth
13 Amendment in seizing and attempting to gain access to the contents of the iPhone
14 – both by obtaining a warrant to search the phone and securing consent from the
15 owner of the phone. Nevertheless, Apple retains the exclusive technical ability to
16 access the data from the iPhone and has refused to assist in obtaining the requested
17 access.

18 In order to protect the American public from a possible future attack, law
19 enforcement needs to be able to use the existing legal tools at their disposal. These
20 tools are the warrant and order compelling compliance therewith.

21 The legal and privacy issues surrounding this case have been much debated
22 in the media. Apple has stated – both publically and to this court – that granting
23 the United States’ motion to compel would compromise the security of personal
24 data on millions of iPhones. In essence, Apple has set up an argument that pits the
25 privacy interests of its user’s data against the needs of a government investigation
26 into passed events. This argument is misplaced. The requested order would allow
27 Apple to achieve the goals of unlocking the iPhone in a technical manner of

1 Apple's choosing. See February 16, 2016 Order Compelling Apple Inc. to Assist
2 Agents in Search, pg. 3, ¶ 4 ("Order"); Memorandum of Points and Authorizes in
3 Support of Government's *Ex Parte* Application for Order Compelling Apple Inc.
4 to Assist Agents in Search, pg. 4. Thus, Apple can be in exclusive control of the
5 methods to unlock this iPhone. The possible future failure of Apple to safeguard
6 these methods from potential disclosure cannot outweigh the present compelling
7 need of the public to be protected.

8 Amici of course concur that society does not tolerate violations of the Fourth
9 Amendment - and that is exactly what has *not* occurred here. As tacitly conceded
10 by Apple, the various law enforcement agencies involved followed the letter of the
11 law in seizing and attempting to search this iPhone. Law enforcement is not now
12 asking this Court to compel the "locksmith" to give them a master key to unlock all
13 locks built by this locksmith. Nor is law enforcement asking the locksmith to leave
14 all similar doors unlocked. Rather, the United States is asking the court to compel
15 the locksmith to simply unlock this one door in the manner of the locksmith's
16 choosing. How the locksmith goes about unlocking that door and retaining,
17 securing, and/or discarding the key is up to the locksmith.

18
19 **III. THE GOVERNMENT HAS FULLY COMPLIED WITH THE**
20 **FOURTH AMENDMENT AND WILL BE REQUIRED TO DO SO IN**
21 **ALL FUTURE SEARCHES.**

22 The iPhone at issue is owned by the County of San Bernardino Department of
23 Public Health ("SBCDPH"), which was Farook's employer at the time of the massacre.
24 It was assigned to and used by Farook as part of his employment with SBCDPH. Farook
25 accepted SBCDPH's written policy that all such devices are subject to search by
26 SBCDPH. The iPhone was lawfully seized pursuant to a federal search warrant issued by
27 Magistrate Judge David T. Bristow on December 3, 2015. SBCDPH, as the owner of the

1 phone, has given consent to the search of the iPhone and to Apple's assistance in the
2 search. As such, even if a warrant had not been obtained, the only entity with cognizable
3 privacy interest in this iPhone has consented to the search. Nevertheless, all requirements
4 of the Fourth Amendment related to the search and seizure of this iPhone have been
5 satisfied.

6 The Order is limited to this iPhone; it does not, nor can it be applied to items
7 that were not seized pursuant to the warrant in this case. Law enforcement would
8 necessarily have to comply with the Fourth Amendment in any future searches of iPhones
9 by seeking a warrant and/or consent of the owner. Apple's argument that the
10 "government has filed multiple other applications for similar orders" simply proves this
11 point. See Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents
12 in Search and Opposition to Government's Motion to Compel Assistance, pg. 3.
13 ("Motion to Vacate"). This case does not set the precedent that Apple fears. For
14 example, in a recent ruling from the Eastern District of New York, the court there denied
15 the government's request for an order requiring Apple to bypass the passcode security on
16 an iPhone.¹

17 The Order does not compel Apple to turn over the methods it uses for disabling
18 the auto-erase function to the government. Nor does the Order actually compel Apple to
19 keep or otherwise maintain the program that it creates to disable the auto-erase function.
20 Apple would be free to destroy or otherwise discard any code that it creates to comply
21 with this Order. If Apple chooses to retain that program, any potential breach of security
22 would not be attributable to any governmental action.

23 ///

24
25 ¹ See Memorandum and Order, February 29, 2016, *In re Order Requiring Apple Inc. to Assist in the Execution of*
26 *Search Warrant Issued by This Court*, E.D.N.Y No. 15-MC-1902 (JO), Doc. 29, at 1. This ruling is limited to the
27 particular circumstances of that case. See *id.* at 1. There, the iPhone was owned by an individual arrested for
methamphetamine trafficking – not the county itself that consented to the search of the phone. See *id.* at 2. Further,
the government waited well over a year after seizing the iPhone to seek the order to compel Apple's assistance. See
id. at 2-4. In short, the application of this ruling should be limited to its facts.

1 Given the cited time and expense to create such a program, it would not be
2 inequitable to require any agency that secured a warrant to be required to compensate
3 Apple for the legitimate expenses incurred in complying with such an order. In short, all
4 of the procedural safeguards of the Fourth Amendment will necessarily remain in place
5 and be applicable to any future cases.

6 The ultimate decision to mandate that all companies such as Apple be compelled
7 to create a back door to their operating systems is clearly a political, not a judicial,
8 function. However, vacating this Order on that premise while we as a nation await
9 congressional action (or inaction) would be a disservice to the American public. In order
10 to adequately do their job, law enforcement needs to be able to use the existing tools at
11 their disposal to gain access to critical information on a case by case basis. One only
12 needs alter a few facts of the 2010 Times Square car bombing attempt to illustrate this
13 point. Replace the “smoke” that alerted passers-by to the location of the car bomb with
14 “data” on a locked iPhone and the dilemma faced by law enforcement is evident. In that
15 hypothetical situation, where seconds count, what tools does law enforcement have?
16 Absent voluntary compliance by Apple, or its compliance with a court order, law
17 enforcement would be in exactly the same position that it is in now – hampered in its
18 efforts to provide for the public’s safety.

19 Manifestly, Apple is refusing to assist the United States in its attempt to search
20 this iPhone. Part of the reasons for its present position is apparently Apple’s opinion that
21 this litigation might not have been necessary if the FBI had consulted with Apple first
22 before an iCloud account password was changed. See Motion to Vacate, pg. 11. This
23 statement is repugnant to California Law Enforcement. Apple is, in essence, saying to
24 the government “you had your chance”. Amici respectfully request that this court
25 disregard this argument in its analysis of the public safety issues at stake here.

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1 This case amply demonstrates that law enforcement has complied with the
 2 applicable Fourth Amendment safeguards here, and will be required to do so in all other
 3 cases. Apple's argument to the contrary is unsupported. Apple's fears regarding
 4 potential future security breaches as a result of this Order is simply speculation. Some
 5 possible future invasion of the iPhone security system – attributable solely to third parties
 6 who gained access to Apple's code via Apple's failure to secure (or even destroy) this
 7 code - does not outweigh the government's present compelling need in this case.

8 **IV. THIS ORDER DOES NOT OFFEND THE FIRST AMENDMENT.**

9 The Order, is, at most, a means to an end: to disable the auto-erase function of this
 10 iPhone so that it can be searched without the risk of losing all data. It does not "compel"
 11 Apple to engage in protected "speech" in any particular manner. While Amici do not
 12 dispute that computer code can be speech, it is certainly not compelled speech in the
 13 manner asserted by Apple. See *Riley v. Nat'l Fed'n of Blind* (1988) 487 U.S. 781, 798,
 14 108 S.Ct. 2667, 2678, 101 L.Ed.2d 669, 690 (exacting scrutiny applied to the requirement
 15 that professional fundraisers disclose to potential donors, before an appeal for funds, the
 16 percentage of charitable contributions collected during the previous 12 months that were
 17 actually turned over to charity).

18 Similarly, the Order cannot legitimately be characterized as impermissible
 19 viewpoint discrimination, any more than would a court order compelling compliance with
 20 signage standards under the Americans with Disabilities Act.

21 The realities of what computer code is, and its normal functions, "require a First
 22 Amendment analysis that treats code as combining nonspeech and speech elements, *i.e.*,
 23 functional and expressive elements." *Universal City Studios v. Corley* (2d Cir. 2001) 273
 24 F.3d 429, 451, citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 23 L. Ed. 2d
 25 371, 89 S. Ct. 1794 (1969) ("Differences in the characteristics of new media justify
 26 differences in the First Amendment standards applied to them.") Assuming, *arguendo*,
 27 that the Order compels "speech" on the part of Apple, the Order is a content neutral

1 directive to disable a single function of this iPhone – especially since the manner of
2 achieving that end is left to Apple.

3 Given these realities of “speech” in the context of computer code – and as set forth
4 in the cases cited by Apple - the appropriate standard to be applied is intermediate
5 scrutiny, i.e., if “it furthers an important or substantial governmental interest.” *Junger v.*
6 *Daley* (6th Cir. 2000) 209 F.3d 481, 485, citing *United States v. O'Brien* (1968) 391 U.S.
7 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680; see *321 Studios v. MGM Studios,*
8 *Inc.* (N.D.Cal. 2004) 307 F.Supp.2d 1085, 1101 (applying intermediate scrutiny to
9 regulation of computer code); *United States v. Elcom Ltd.* (N.D.Cal. 2002) 203 F.Supp.2d
10 1111, 1127-1128 (same). Under intermediate scrutiny, the Government must
11 “demonstrate that the recited harms are real, not merely conjectural, and that the
12 regulation will in fact alleviate these harms in a direct and material way.” *Turner*
13 *Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 624, 129 L.Ed.2d 497, 114 S.Ct.
14 2445.

15 Nevertheless, whether the test is “intermediate”, “strict” or “exacting” scrutiny,
16 the standard has been met in this case. This should not be an academic debate about First
17 Amendment protections or, as Apple suggests, one that can only be resolved through the
18 political process. Apple characterizes the need to access the iPhone as speculative;
19 claiming the iPhone was used in a past event where “any criminal activity linked to the
20 phone at issue ended two months ago when the terrorists were killed”. See Motion to
21 Vacate, pg. 21. This is myopic and disingenuous.

22 The massacre of December 2, 2015 – carried out by terrorists who pledged their
23 allegiance to ISIL - is a manifestation of a threat that has not ceased. The United States
24 has clearly set forth the value that data on this iPhone may have in the ongoing efforts to
25 protect the American people. Simply because the Order, might, in some way, compel
26 Apple to write code of its choosing to disable the auto-erase function, cannot, and does
27 not violate the First Amendment here.

1 **V. CONCLUSION.**

2 For all of the foregoing reasons, Amici respectfully request that this Court
3 grant the United States' Application for Order Compelling Apple Inc. to Assist
4 Agents in Search.

5 Dated: March 3, 2016

Respectfully submitted,

7 JONES & MAYER

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By: /s/ Martin J. Mayer
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Boulevard, Fullerton, California 92835.

On March 3, 2016, I served the within **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMICI CURIAE BRIEF** on the interested parties in said action by placing [X] a true and correct copy or [] delivered by one or more of the means set forth below:

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