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CENTRAL DIST. OF CALIF.
RIVERSIDE
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order

7
8 Attorneys for the Electronic Privacy Information Center
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
EXECUTION OF A SEARCH
15 WARRANT ON A BLACK LEXUS
16 IS300, CALIFORNIA LICENSE
PLATE 35KGD203

ED No. CM 16-10 (SP)
**NOTICE OF MOTION AND
MOTION OF ELECTRONIC
PRIVACY INFORMATION
CENTER (EPIC) AND EIGHT
CONSUMER PRIVACY
ORGANIZATIONS FOR LEAVE
TO FILE AN *AMICUS CURIAE*
BRIEF.**

Hearing:

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

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1 The Electronic Privacy Information Center (“EPIC”), by and through
2 undersigned counsel, hereby files this Motion for Leave to File a Brief *Amicus Curiae*.
3 In support thereof, EPIC submits the following:
4

5 1. On February 16, 2016, this Court issued an Order compelling Apple, Inc. to
6 provide extraordinary assistance to the Federal Bureau of Investigation by providing a
7 software file or other technical means to accomplish three specific functions: (1) to
8 “bypass or disable the auto-erase function whether or not it is enabled,” (2) to “enable
9 the FBI to submit passcodes” electronically, and (3) to ensure that “software running
10 on the device will not purposefully introduce any additional delay between passcode
11 attempts beyond what is incurred by Apple hardware.” On February 25, 2016, Apple
12 filed a Motion to Vacate the Order.
13

14 2. This Order implicates substantial consumer privacy interests, closely tied to
15 the problems of data breach, financial fraud, and identity theft.
16

17 3. EPIC is a public interest research center in Washington, D.C., established in
18 1994 to focus public attention on emerging privacy and civil liberties issues.¹ EPIC
19 was specifically established to advocate for the use of strong encryption technology
20 and for the development of related Privacy Enhancing Technologies. EPIC led the
21 effort in the United States in the 1990s to support strong encryption tools and played a
22 key role in the development of the international framework for cryptography policy
23 that favored the deployment of strong security measures to safeguard personal
24 information. EPIC also published the first comparative studies of international
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¹ About EPIC, <https://epic.org/epic/about.html>.

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

3
4 4. The Center for Digital Democracy (“CDD”) is one of the leading consumer
5 protection and privacy organizations in the United States. Since its founding in 2001,
6 CDD has been at the forefront of research, public education, and advocacy protecting
7 consumers in the digital age.²

8
9 5. Constitutional Alliance is privately funded nonpartisan non-profit
10 organization whose stated mission is “preserve state and national sovereignty, and the
11 unalienable rights to life, liberty, and the pursuit of happiness as pronounced in the
12 Declaration of Independence and protected under the Bill of Rights of the United
13 States of America.”

14
15 6. Consumer Action empowers underrepresented consumers nationwide to assert
16 their rights in the marketplace and financially prosper through multilingual financial
17 education materials, community outreach, and issue-focused advocacy.³

18
19 7. Consumer Watchdog is a nonprofit organization dedicated to educating and
20 advocating on behalf of consumers for over 25 years. Its mission is to provide an
21 effective voice for the public interest. Consumer Watchdog’s programs include health
22 care reform, oversight of insurance rates, energy policy, protecting privacy rights,
23 protecting legal rights, corporate reform, and political accountability.⁴

24
25 8. Patient Privacy Rights (“PPR”) works to empower individuals and prevent
26 widespread discrimination based on health information using a grassroots, community

27 ² Center for Digital Democracy, <https://www.democraticmedia.org/>.

28 ³ Consumer Action, <http://www.consumer-action.org/>.

⁴ Consumer Watchdog, <http://www.consumerwatchdog.org/>.

1 organizing approach. PPR educates consumers, champions smart policies, and exposes
2 and holds industry and the government accountable.⁵

3
4 9. The Privacy Rights Clearinghouse (“PRC”) is a nonprofit consumer education
5 and advocacy organization based in San Diego, California. Established in 1992, the
6 PRC focuses on consumers’ rights and interests relating to informational privacy,
7 answers individual consumer inquiries, and maintains a robust website of practical
8 privacy protection tips.⁶

9
10 10. Privacy Times provides accurate reporting, objective analysis and thoughtful
11 insight into the events that shape the ongoing debate over privacy and Freedom of
12 Information.⁷

13
14 11. This case concerns the security and reliability of the Apple iPhone, a device
15 used by millions of consumers in the United States (and worldwide). Consumers rely
16 on the iPhone’s security features to protect their most sensitive personal data, including
17 private communications, photographs, bank account records, medical records, and log-
18 in credentials. One of the single greatest threats facing iPhone users today is that
19 criminals will gain access to the personal information stored on their devices. If Apple
20 were to create software that disables or circumvents these security features, it would
21 undermine the security of all iPhone users, and put at risk the personal information
22 stored on nearly 100 million iPhones in the United States.

23
24 12. Federal courts have previously granted EPIC leave to file *amicus* briefs in
25 many other consumer privacy cases. *See, e.g., In re Nickelodeon Consumer Privacy*
26

27 ⁵ Patient Privacy Rights, <https://patientprivacyrights.org/>.

28 ⁶ Privacy Rights Clearinghouse, <https://www.privacyrights.org/>.

⁷ Privacy Times, <http://www.privacytimes.com/>.

1 *Litig.*, No. 15-1441 (3d Cir. filed May 4, 2015) (addressing the definition of personally
2 identifiable information as applied to Internet addresses and other unique persistent
3 identifiers); *Gordon v. Softech Int'l*, 726 F.3d 42 (2d Cir. 2012) (arguing that resellers
4 of driver records should be strictly liable for downstream misuses); *Joffe v. Google,*
5 *Inc.*, 729 F.3d 1262 (9th Cir. 2013) (arguing that wi-fi communications are protected
6 by the Wiretap Act), *amended and superseded on reh'g*, 746 F.3d 920 (9th Cir. 2013);
7 *In re Google Inc. St. View Elec. Commc'ns Litig.*, 794 F. Supp. 2d 1067 (N.D. Cal.
8 2011) (same), *aff'd sub nom. Joffe v. Google, Inc.*, 729 F.3d 1262 (9th Cir. 2013). EPIC
9 has also filed *amicus* briefs in other federal cases, including cases before the United
10 States Supreme Court, concerning consumer privacy and data protection. *See, e.g.,*
11 *Spokeo v. Robins*, 135 S. Ct. 1892 (2015) (arguing that the violation of a consumer's
12 privacy rights under the Fair Credit Reporting Act constitutes an injury-in-fact
13 sufficient to confer Article III standing); *Smith v. LexisNexis Screening Solutions, Inc.*,
14 Nos. 15-2329 & 15-2330 (6th Cir. filed Feb. 29, 2016) (arguing that data brokers
15 should be liable when they mismatch records in employment background check
16 reports); *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. filed Jan. 22, 2016) (defending an
17 order interpreting the Telephone Consumer Protection Act by arguing that the
18 widespread adoption of cell phones has magnified the harm of unwanted
19 communications); *FTC v. Wyndham Hotels & Resorts, LLC*, 799 F.3d 236 (3d Cir.
20 2015) (arguing that regulation of data security practices is necessary to protect
21 consumers from identity theft and fraud).

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

1 whether to permit such participation. *E.g. Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th
2 Cir.1982), *abrogated on other grounds, Sandin v. Conner*, 515 U.S. 472 (1995);
3 *Missouri v. Harris*, No. 2:14-CV-00341, 2014 WL 2987284, at *2 & n.1 (E.D. Cal.
4 July 1, 2014); *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning*
5 *Comm'n*, 303 F.R.D. 266, 269 (D. Md. 2014); *Inst. of Med. Educ., Inc. v. W. Ass'n of*
6 *Sch. & Colleges*, No. 11-CV-05755, 2013 WL 6672443, at *3 (N.D. Cal. Dec. 18,
7 2013); *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996).
8
9 Courts typically permit *amicus* filings where the information provided is “timely and
10 useful.” *Ellsworth*, 917 F. Supp. at 846. The attached Brief of *Amicus Curiae* EPIC and
11 Eight Consumer Privacy Organizations satisfies both of these elements.
12

13
14 14. First, the EPIC *Amicus* Brief has been timely filed. On February 19, 2016,
15 the Court issued a Scheduling Order in this matter, specifying that “any amicus brief
16 shall be filed not later than March 3, 2016, along with any appropriate request seeking
17 leave of the Court to file such brief.”

18
19 15. Second, the EPIC *Amicus* Brief provides information that is useful to the
20 Court’s consideration of Apple’s Motion to Vacate. This case implicates the security of
21 a computing device that is used by millions of consumers to store and protect personal
22 information and to gain access to other secure systems. The EPIC *Amicus* Brief makes
23 clear the substantial risk to consumers if these techniques are altered or diminished as
24 the FBI has urged.

25
26 16. Pursuant to the Central District of California’s Local Civil Rules L.R. 7-19
27 and 7-19.1, EPIC has contacted both parties regarding this motion, and neither objects
28 to EPIC’s participation as *amicus curiae*.

1
2 Wherefore, EPIC requests that the Court grant this Motion and allow EPIC to
3 participate as *amicus curiae* by submitting the attached Brief of *Amicus Curiae*.
4

5 Dated: March 3, 2016

Respectfully submitted,

6 By: /s/ Alan J. Butler
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FILED
lodged/proposed order

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

BY _____

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3 **SAN BERNARDINO COUNTY**

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11 Attorney for the People of the State of California

ORIGINAL

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 EASTERN DIVISION

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

ED No. CM 16-10-SP

SAN BERNARDINO COUNTY
DISTRICT ATTORNEY'S
APPLICATION TO PARTICIPATE
AS AMICUS CURIAE

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

24 The District Attorney of San Bernardino County, California, attorney for
25 the People of the State of California, respectfully submits this Ex Parte
26 application for an order granting it leave to participate as amicus curiae in this
27 matter to file a brief in support of the *United States of America's Ex Parte Order*
28 *To Compel Apple, Inc. To Assist Agents In Search*. A copy of the District

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

4
5 I

6 CONSENT TO FILE AMICUS CURIAE BRIEF

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

11
12 II

13 INTEREST OF THE DISTRICT ATTORNEY AND THE PEOPLE OF THE
14 STATE OF CALIFORNIA AS AMICUS CURIAE

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

26 A. THE ACQUISITION OF EVIDENCE OF CRIMINAL ACTIVITY

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

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

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

12 On December 2, 2015 Mr. Farook and at least one accomplice committed
13 14 counts of willful deliberate premeditated murder a violation of Cal. Penal
14 Code §§ 187(a), 189 (Lexis 2016), with the special circumstances of multiple
15 murder Cal. Penal Code § 190.2(3) (Lexis 2016) specifying a penalty of death or
16 life imprisonment without the possibility of parole, and the commission of 22
17 counts of attempted murder in violation of Cal. Penal Code § 664/187 (Lexis
18 2016),. The murders were committed in furtherance of a conspiracy Cal. Penal
19 Code § 182 (Lexis 2016).

20 At the time that the murders were being perpetrated at least two 911 calls to
21 the San Bernardino Police Dispatch² center reported the involvement of three
22 perpetrators. Although the reports of three individuals were not corroborated, and
23 may ultimately be incorrect, the fact remains, that the information contained
24 solely on the seized iPhone could provide evidence to identify as of yet unknown
25

26 _____
27 ¹ It should be noted that the California License Plate for the vehicle is incorrectly noted in the
28 court caption. The correct license plate number, contained in the search warrant, is 5KGD203.

² A copy of the computerized dispatch center calls is attached as Exhibit A

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

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

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

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

16 The California Constitution guarantees victims of crimes committed in
17 California a Victim's Bill of Rights Cal. Const. Art. I, §28. Included in that Bill
18 of Rights is the expectation that those who commit felonies that injure victims
19 will be thoroughly investigated and speedily be brought before the courts and
20 tried in a timely manner. It also requires the good faith efforts and actions of
21 elected and appointed officials to accomplish these goals. Cal. Const. Art. I,
22 §28(a)(4). The victim's Bill of Rights also provides the right to "truth in evidence
23 and that "all relevant evidence" be admissible in a criminal proceeding. Cal.
24 Const. Art. I, §28(f)(2).

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

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

8 9 III

10 ARGUMENT

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

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

1 perspective to the court as to why the government's interest is compelling and
2 outweighs any arguments of interests that Apple can or will advance in support of
3 its position.

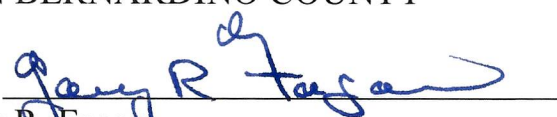
4
5 CONCLUSION

6 For the above mentioned reasons, the San Bernardino County District
7 Attorney, and our client, the People of the State of California, respectfully request
8 that the Court grant the San Bernardino County District Attorney's Ex Parte
9 Application, and allow him to participate as Amicus Curiae in support of the
10 United States' application to compel Apple to assist in unlocking the seized
11 iPhone before this Court. A proposed order is attached.

12 DATED: March 3, 2016

13
14 Respectfully Submitted,

15 MICHAEL A RAMOS
16 DISTRICT ATTORNEY
17 SAN BERNARDINO COUNTY

18 By: 
19 Gary R. Fagan
20 Chief Deputy District Attorney
21 San Bernardino County
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 13 Consumer Technology Association, the Information
 Technology Industry Council, and TechNet

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

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

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

Application of BSA|The Software Alliance, the Consumer Technology Association, the Information Technology Industry Council, and TechNet To File Brief of *Amici Curiae*

Hearing Date: March 22, 2016

Time: 1:00 p.m.

Location: Courtroom of the Hon. Sheri Pym

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 CLERK U.S. DISTRICT COURT
 CENTRAL DIST. OF CALIF.
 RIVERSIDE
 By *[Signature]*
 Lodge (proposed) order

1 **APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE***

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

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

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

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

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

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

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

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

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

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

1 a decision of such magnitude should be made by the People acting through the
2 political branches.

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

6 Counsel for *amici curiae* further states that they file this motion after
7 contacting the parties' counsel. Counsel for Apple consents to the filing of this
8 brief, and counsel for the United States does not oppose the filing of this brief.

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

12
13 Dated: March 3, 2016

MAYER BROWN LLP
JOHN NADOLENCO
RUTH ZADIKANY
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TRAVIS CRUM

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16 By: /rz
17 John Nadolenco

18 Attorneys for *Amici Curiae* BSA|The
19 Software Alliance, the Consumer
20 Technology Association, the Information
21 Technology Industry Council, and TechNet
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PROOF OF SERVICE

I, Janice Austgen, declare:

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Mayer Brown LLP, 350 South Grand Avenue, 25th Floor, Los Angeles, California 90071-1503. On March 3, 2016, I served a copy of the within document(s):

APPLICATION OF BSA|THE SOFTWARE ALLIANCE, THE CONSUMER TECHNOLOGY ASSOCIATION, THE INFORMATION TECHNOLOGY COUNCIL, AND TECHNET TO FILE A BRIEF OF *AMICI CURIAE*

X by placing the document(s) listed above in a sealed UPS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a UPS agent for delivery.

SEE ATTACHED SERVICE LIST

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

Executed on March 3, 2016, at Los Angeles, California.



Janice Austgen

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27 Office of U.S. Attorney
28 Chief, Cyber and Intellectual Property Crimes Section
312 North Spring Street 11th Floor
Los Angeles, CA 90012-4700

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

8 "District courts frequently welcome amicus briefs from non-parties concern-
9 ing legal issues that have potential ramifications beyond the parties directly in-
10 volved." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d
11 1061, 1067 (N.D. Cal. 2005); *see generally Hoptowit v. Ray*, 682 F.2d 1237, 1260
12 (9th Cir. 1982) (abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472
13 (1995)). This case has attracted extraordinary attention because the government's
14 position has broad implications far beyond the particular device at issue here. In-
15 deed, this Court invited *amici* to submit briefs, "along with an appropriate request
16 seeking leave of the Court to file such brief." Scheduling Order of February 18,
17 2016, Dkt. 9.

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

1 CDT is a nonprofit advocacy organization that works to ensure that the hu-
2 man rights we enjoy in the physical world are realized online and that technology
3 continues to serve as an empowering force for people worldwide. Integral to this
4 work is CDT's representation of the public interest in the creation of an open, in-
5 novative, and decentralized Internet that promotes the constitutional and democrat-
6 ic values of free expression, privacy, and individual liberty.

7 CDT was formed in 1994 as part of civil society's efforts to push back
8 against the backdoors mandated by the Communications Assistance for Law En-
9 forcement Act ("CALEA"), a statute directly relevant to this case. More than 20
10 years later, the public conversation on these important issues continues, as technol-
11 ogy rapidly expands into every portion of our lives. CDT is keenly aware of the
12 consequences of allowing the government to force private companies to break the
13 very security features they designed. CDT advocates for strong online privacy pro-
14 tections, which are essential to building the trust necessary for individuals to adopt
15 new technologies and access the multitude of benefits of an increasingly intercon-
16 nected world, while also maintaining privacy in their most personal communica-
17 tions, associations, interests, and activities.

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

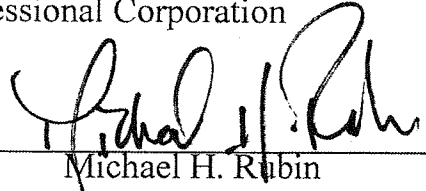
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CDT therefore asks the Court to give it leave to file the accompanying brief as *amicus curiae* in support of Apple's motion to vacate this Court's order compelling it to assist the government opposition to the government's motion to compel.

Dated: March 3, 2016

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: 
Michael H. Rubin

Attorneys for *Amicus Curiae*
Center for Democracy & Technology

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17 *Pro Hac Vice Motion Forthcoming

18 *Attorneys for [Proposed] Amicus Curiae The Media Institute*

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

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

5:16-cm-00010 (SP)

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

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

FILED
2016 MAR -3 PM 4:01
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
RIVERSIDE
BY [Signature]
Vedley (Proposed)
order

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

6 **III. *AMICUS CURIAE*'S PERSPECTIVE WILL BENEFIT THE COURT**

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

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

25 **IV. CONCLUSION**

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

1 this motion after conferring with the parties' counsel. Counsel for Apple and the United
2 States indicated that they have no opposition to The Media Institute's motion for leave to
3 file its *amicus curiae* brief in support of Apple.

4
5 Dated: March 3, 2016

Respectfully submitted,

6
7 
8 *N.L.*

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22 **Pro Hac Vice* Admission Pending

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Attorneys for *Amicus Curiae*
The Media Institute

ORIGINAL

PROOF OF SERVICE

I, Monika Kapuscinska, declare as follows:

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

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

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

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

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Counsel for Plaintiff USA

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1 **Jeffrey G. Landis**

2 **Marc J Zwillinger**

3 Zwillgen PLLC

4 1900 M Street NW Suite 250

5 Washington, DC 20036

6 Counsel for Respondent Apple Inc.

7
8 I declare under penalty of perjury under the laws of the United States of America
9 that the foregoing is true and correct. Executed at San Diego, California on March 3,
10 2016.

11 *Monika Kapuscinska*

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13 Monika Kapuscinska
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