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14
15 **UNITED STATES DISTRICT COURT**
16 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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

ED No. CM 16-10 (SP)

BRIEF OF *AMICUS CURIAE*
AT&T MOBILITY LLC IN
SUPPORT OF APPLE INC.

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1 **INTEREST OF *AMICUS CURIAE***

2 *Amicus curiae* AT&T Mobility LLC (“AT&T”) is one of the world’s largest
3 providers of telecommunications and information services. AT&T’s customers
4 entrust it with some of their most personal and sensitive information, and AT&T is
5 deeply committed to protecting that information from intrusion or attack. At the
6 same time, AT&T also regularly receives, and responds appropriately to, lawful
7 demands for assistance from United States law enforcement, public safety, and
8 national security officials. Like many other communications and technology
9 companies, AT&T believes that the issues implicated by this Court’s order of
10 February 16, 2016, should be resolved not through the application of the All Writs
11 Act, but by federal legislation that sets forth a clear, uniform legal framework
12 applicable to all who participate in the telecommunications ecosystem.

13 **INTRODUCTION**

14 The issue before this Court is not whether the government should secure
15 evidence critical to the investigation of the heinous crimes committed when Syed
16 Rizwan Farook and Tashfeen Malik shot and killed 14 people and injured 22 others.
17 Of course, it should. Rather, the fundamental question is whether the law, as written
18 today, authorizes the particular mechanism the government has selected to compel
19 Apple’s assistance in pursuing evidence from the Apple iPhone at issue in this
20 Court’s order. On that narrow legal question, the answer appears to be no. AT&T
21 therefore requests that the Court vacate its order in deference to our elected
22 representatives in Congress, who should debate the important policy issues inherent
23 to this matter and expeditiously pass legislation providing clear rules for citizens and
24 companies alike.

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ARGUMENT

I. Congress Is The Right Body To Weigh The Compelling, but Competing, Interests in Privacy and Safety

All Americans benefit from the rapidly evolving communications and information technologies that continue to transform our economy and our society. That rapid evolution, however, has greatly complicated the public debate on the proper balance between privacy and security.

Smartphones and other personal devices contain “a digital record of nearly every aspect of [users’] lives – from the mundane to the intimate,” *Riley v. California*, 134 S. Ct. 2473, 2490 (2014), including what users say, hear, write, read, and buy, as well as where they go – including their “specific movements down to the minute.” *Id.* Consumers reasonably expect the “broad array of private information” in their personal records and communications to remain within their personal control. *Id.* at 2491.

At the same time, the government is entitled to seek reasonable assistance from industry to protect public safety and national security. As this case reminds us, a compelling public interest exists in protecting lives by obtaining information that might prevent a future terrorist attack. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (“[T]he Government’s interest in combating terrorism is an urgent objective of the highest order.”).

As a nation, we need a legal regime that responds to these technological changes through fair, uniform procedures that govern when and how the government may compel any private company to provide access to customer information. Congress is the right body to create such a comprehensive regime addressing all relevant considerations. Indeed, only Congress can do so.

Notably, Congress has previously responded to technological changes and addressed the interests of law enforcement and privacy in just this manner. In 1994,

1 Congress passed the Communications Assistance for Law Enforcement Act
2 (“CALEA”), to “make clear a telecommunications carrier’s duty to cooperate in the
3 interception of communications for law enforcement purposes.” Pub. L. No. 103-
4 414, 108 Stat. 4279 (1994). But communications services have changed
5 dramatically in the past two decades. Information about who communicates with
6 whom is no longer controlled primarily by telecommunications carriers. Rather,
7 personal data are largely controlled by device, search, operating system, application,
8 and social media companies that barely existed when CALEA was passed.

9 These developments demand a new legislative solution that strikes a fair
10 balance between privacy and law enforcement, accounts for current technology,
11 applies equally to all holders of personal information, and sets appropriate limits on
12 what government officials may compel companies to do. These issues should be
13 resolved by a public vote after a public debate following “the kind of investigation,
14 examination, and study that legislative bodies can provide and courts cannot.”
15 *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980).

16 As another Magistrate Judge concluded just this week in a similar case,
17 balancing the competing interests here “is a matter of critical importance to our
18 society,” and must be done by “legislators who are equipped to consider the
19 technological and cultural realities of a world their predecessors could not begin to
20 conceive.” Anything less would “betray our constitutional heritage and our people’s
21 claim to democratic governance.” *In re Order Requiring Apple, Inc. to Assist in the*
22 *Execution of a Search Warrant Issued by this Court*, No. 15-MC-1902, slip op. at 49
23 (E.D.N.Y. Feb. 29, 2016) (“*In re Order Requiring Apple*”). And, in fact, Congress
24 is actively considering the very issues presented by this case and by other
25 government efforts to secure stored communications.

1 **II. The All Writs Act Cannot Substitute for a New Legislative Solution**

2 In light of the above, basic separations of powers principles dictate that the
3 All Writs Act should not be pressed into duty here in place of a legislative solution.
4 The All Writs Act states that a court “may issue all writs necessary or appropriate in
5 aid of their respective jurisdictions and agreeable to the usages and principles of
6 law.” 28 U.S.C. § 1651(a). The Act is, by its terms, permissive and, as the
7 reference to existing “usages and principles of law” suggests, it must be applied with
8 sensitivity to the established roles of Congress and the judiciary. It is not a tool for
9 breaking new ground. Rather, it is a “residual source of authority,” *Pennsylvania*
10 *Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985), designed
11 to plug modest gaps, not a “grant of plenary power to the federal courts.” *Plum*
12 *Creek Lumber Co. v. Hutton*, 608 F.2d 1283, 1289-90 (9th Cir. 1979).

13 Consistent with that established understanding, courts properly rely on the All
14 Writs Act to mandate third-party assistance with law enforcement only where a
15 number of conditions are met. Two are particularly relevant here.

16 *First*, courts seek to ensure that the compelled action reflects what “Congress
17 clearly intended to permit.” *United States v. New York Tel. Co.*, 434 U.S. 159, 176
18 (1977); *see also In re Order Requiring Apple*, slip op. at 24 & n.21, 26-30. In
19 particular, courts must look for some “clear indication by Congress” that the
20 particular device or method is a “permissible law enforcement tool.” *New York Tel.*,
21 434 U.S. at 177-178; *see id.* at 176-77 (discussing legislative history establishing
22 that Congress contemplated law enforcement use of “pen registers”).

23 *Second*, courts inquire whether the government seeks to compel assistance
24 similar to actions the private company would take in the ordinary course of its
25 business. *See id.* at 174-75 (company “regularly employ[ed] such devices without
26 court order for the purposes of checking billing operations, detecting fraud, and
27 preventing violations of law”); *In re Application of U.S. for an Order Authorizing*
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1 *an In-Progress Trace of Wire Commc'ns Over Tel. Facilities*, 616 F.2d 1122, 1126
2 (9th Cir. 1980) (company “routinely” used similar devices in its ordinary business).
3 Congress is presumed not to intend that private parties be compelled to undertake
4 unreasonable or unusual actions.

5 Apple’s evidence suggests that neither of these conditions are present here.
6 To AT&T, it appears that the government’s proposed order compels Apple to take
7 quite unusual and significant actions. *See* ECF No. 16, at 12-14; ECF No. 16-33,
8 ¶ 50 (“What the government is requesting Apple do is not something that Apple has
9 ever done before or would otherwise do.”). In addition to the burdens associated
10 with the steps that Apple must take with respect to this particular iPhone, Apple
11 claims that the mere act of creating this software would put at risk the privacy and
12 integrity of data stored on millions of iPhones worldwide. *See* ECF No. 16, at 25;
13 ECF No. 16-33, ¶ 47. If the Court credits this evidence – and AT&T sees no reason
14 why it should not – then the government’s request clearly extends beyond what
15 Congress could have contemplated.

16 Which brings us to the essential point of this *amicus* brief. The government
17 can and should use every means available to it to investigate the tragic events in San
18 Bernardino, and that includes compelling Apple’s cooperation to the full extent
19 permitted by law. In this case, however, the government seeks to compel
20 cooperation that was not intended by Congress, that may risk substantial harm to the
21 security of millions of iPhones, and that, put simply, is more than what can be
22 supported under the All Writs Act. If the All Writs Act must be read as broadly as
23 the government asserts, private companies throughout the telecommunications
24 ecosystem could be compelled into government service in any number of cases with
25 few limits and even less predictability. ECF No. 16, at 24-26; *see also* ECF Nos.
26 16-03, 16-04 (examples of such requests).

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Respectfully submitted,

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