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17 UNITED STATES DISTRICT COURT  
18 CENTRAL DISTRICT OF CALIFORNIA  
19 EASTERN DIVISION

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

ED No. CM 16-10 (SP)

**APPLE INC'S MOTION TO VACATE  
ORDER COMPELLING APPLE INC.  
TO ASSIST AGENTS IN SEARCH,  
AND OPPOSITION TO  
GOVERNMENT'S MOTION TO  
COMPEL ASSISTANCE**

**Hearing:**

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

1 Apple Inc. (“Apple”), by and through its counsel of record, hereby files this  
2 Motion to Vacate the Order Compelling Apple Inc. to Assist Agents in Search, and  
3 Opposition to the Government’s Motion to Compel Assistance.

4 This Motion and Opposition is based upon the attached memorandum of points  
5 and authorities, the attached declarations of Nicola T. Hanna, Lisa Olle, and Erik  
6 Neuenschwander and exhibits, the files and records in this case, and such further  
7 evidence and argument as the Court may permit.

8  
9 Dated: February 25, 2016

Respectfully submitted,

10 GIBSON, DUNN & CRUTCHER LLP

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4 *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*,  
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6 2013 WL 8744216 (N.D. Cal. Jan. 31, 2013)..... 18

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16 *In re Application of U.S. of Am. for an Order Directing X to Provide*  
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21 *Baker v. Carr*,  
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23 *Bernstein v. Dep’t of State*,  
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27 *Clark v. Martinez*,  
28 543 U.S. 371 (2005)..... 18

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2	<i>Cnty. of Sacramento v. Lewis,</i>	
3	523 U.S. 833 (1998).....	34
4	<i>Costanich v. Dep’t of Soc. &amp; Health Servs.,</i>	
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6	<i>Diamond v. Chakrabarty,</i>	
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26	<i>United States v. Cameron</i> ,	
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28	<i>United States v. Catoggio</i> ,	
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2 *United States v. Cooper,*

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4 *United States v. Elcom Ltd.,*

5 203 F. Supp. 2d 1111 (N.D. Cal. 2002)..... 32

6 *United States v. Fricosu,*

7 841 F. Supp. 2d 1232 (D. Colo. 2012) ..... 30

8 *United States v. Hall,*

9 583 F. Supp. 717 (E.D. Va. 1984) ..... 21, 23, 27

10 *United States v. Navarro,*

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12 *United States v. New York Telephone Co.,*

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14 *Universal City Studios, Inc. v. Corley,*

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16 *Vieth v. Jubelirer,*

17 541 U.S. 267 (2004) (plurality opinion) ..... 19

18 *Xi v. INS,*

19 298 F.3d 832 (9th Cir. 2002) ..... 19

20 *Youngstown Sheet & Tube Co. v. Sawyer,*

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Apple Inc., *A Message to Our Customers* (Feb. 16, 2016) ..... 3, 22

Apple Inc. and Apple Distrib. Int’l, Written Evidence (IPB0093), (Dec. 21, 2015) ..... 7

Apple Inc., *iCloud: Back up your iOS device to iCloud*..... 11

Apple Inc., *iOS Security: iOS 9.0 or later* (September 2015)..... 6

Apple Inc., *Privacy, Government Information Requests*..... 33

Cyrus R. Vance Jr., *No Smartphone Lies Beyond the Reach of a Judicial Search Warrant*, N.Y. Times (Feb. 18, 2016) ..... 10, 24

Damian Paletta, *How the U.S. Fights Encryption—and Also Helps Develop It*, Wall St. J. (Feb. 22, 2016) ..... 6

Ellen Nakashima, *Hacks of OPM Databases Compromised 22.1 Million People, Federal Authorities Say*, Wash. Post (July 9, 2015) ..... 1

Ellen Nakashima and Mark Berman, *FBI Asked San Bernardino to Reset the Password for Shooter’s Phone Backup*, Wash. Post (Feb. 20, 2016) ..... 34

Ellen Nakashima, *Proposal Seeks to Fine Tech Companies for Noncompliance with Wiretap Orders*, Wash. Post (Apr. 28, 2013)..... 9

FBI, Operational Technology, *Going Dark Issue* (last visited Feb. 23, 2016) ..... 4, 7

Gen. Michael Hayden Gives an Update on the Cyberwar, Wall St. J. (Feb. 17, 2016) ..... 5

H.R. 2233, 114th Cong. (2015) (same, adding additional amendments to the Foreign Intelligence Surveillance Act of 1978) ..... 9

H.R. Rep. No. 103-827(I), (1994) ..... 8, 17

James Comey, *Director Discusses Encryption, Patriot Act Provisions* (May 20, 2015) ..... 10

James Comey, *Encryption, Public Safety, and “Going Dark,”* ..... 4

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2 James Comey, *Going Dark: Encryption, Technology, and the Balances*

3 *Between Public Safety and Encryption*, Joint Statement with Deputy

4 Atty Gen. Sally Quillian Yates Before the Sen. Judiciary Comm. (July

5 8, 2015) ..... 7

6 James Comey, *Statement Before the Senate Comm. on Homeland Sec. &*

7 *Governmental Affairs* (Oct. 8, 2015) ..... 9

8 James Comey, *We Could Not Look the Survivors in the Eye if We Did Not*

9 *Follow This Lead* ..... 4

10 Kara Swisher, *White House. Red Chair. Obama Meets Swisher* (Feb. 15,

11 2015) ..... 10

12 Margaret Coker, et al., *The Attacks in Paris: Islamic State Teaches Tech*

13 *Savvy*, Wall St. J. (Nov. 17, 2015)..... 4

14 Mike McConnell et al., *Why The Fear Over Ubiquitous Data Encryption*

15 *Is Overblown*, Wash. Post (July 28, 2015) ..... 8

16 New America’s Open Technology Institute, *Joint Letter to President*

17 *Barack Obama* (May 19, 2015)..... 9

18 NPR, Weekend Edition, *It’s Not Just the iPhone Law Enforcement Wants*

19 *to Unlock* (Feb. 21, 2016) ..... 10

20 *Remarks by President Obama and Prime Minister Cameron of the United*

21 *Kingdom in Joint Press Conference* (Jan. 16, 2015) ..... 10

22 Secure Data Act of 2015, H.R. 726, 114th Cong. (2015)..... 9

23 Secure Data Act of 2015, S.135, 114th Cong. (2015) ..... 9

24 *Senior House Judiciary Committee Democrats Express Concern Over*

25 *Government Attempts to Undermine Encryption*, House Comm. on the

26 *Judiciary, Democrats* (Feb. 18, 2016)..... 9

27 Seung Lee, *The Murder Victim Whose Phone Couldn’t Be Cracked and*

28 *Other Apple Encryption Stories*, Newsweek (Feb. 19, 2016) ..... 3

Susan Landau, *The National-Security Needs for Ubiquitous Encryption*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is not a case about one isolated iPhone. Rather, this case is about the  
4 Department of Justice and the FBI seeking through the courts a dangerous power that  
5 Congress and the American people have withheld: the ability to force companies like  
6 Apple to undermine the basic security and privacy interests of hundreds of millions of  
7 individuals around the globe. The government demands that Apple create a back door  
8 to defeat the encryption on the iPhone, making its users' most confidential and  
9 personal information vulnerable to hackers, identity thieves, hostile foreign agents, and  
10 unwarranted government surveillance. The All Writs Act, first enacted in 1789 and on  
11 which the government bases its entire case, "does not give the district court a roving  
12 commission" to conscript and commandeer Apple in this manner. *Plum Creek Lumber*  
13 *Co. v. Hutton*, 608 F.2d 1283, 1289 (9th Cir. 1979). In fact, no court has ever  
14 authorized what the government now seeks, no law supports such unlimited and  
15 sweeping use of the judicial process, and the Constitution forbids it.

16 Since the dawn of the computer age, there have been malicious people dedicated  
17 to breaching security and stealing stored personal information. Indeed, the government  
18 itself falls victim to hackers, cyber-criminals, and foreign agents on a regular basis,  
19 most famously when foreign hackers breached Office of Personnel Management  
20 databases and gained access to personnel records, affecting over 22 million current and  
21 former federal workers and family members.<sup>1</sup> In the face of this daily siege, Apple is  
22 dedicated to enhancing the security of its devices, so that when customers use an  
23 iPhone, they can feel confident that their most private personal information—financial  
24 records and credit card information, health information, location data, calendars,  
25 personal and political beliefs, family photographs, information about their children—

26 \_\_\_\_\_  
27 <sup>1</sup> See, e.g., Hanna Decl. Ex. A [Ellen Nakashima, *Hacks of OPM Databases*  
28 *Compromised 22.1 Million People, Federal Authorities Say*, Wash. Post (July 9,  
2015)] (explaining that hackers used stolen logins and passwords to gain access to  
federal employee records databases for six months before detection).

1 will be safe and secure. To this end, Apple uses encryption to protect its customers  
2 from cyber-attack and works hard to improve security with every software release  
3 because the threats are becoming more frequent and sophisticated. Beginning with  
4 iOS 8, Apple added additional security features that incorporate the passcode into the  
5 encryption system. It is these protections that the government now seeks to roll back  
6 by judicial decree.

7         There are two important and legitimate interests in this case: the needs of law  
8 enforcement and the privacy and personal safety interests of the public. In furtherance  
9 of its law enforcement interests, the government had the opportunity to seek  
10 amendments to existing law, to ask Congress to adopt the position it urges here. But  
11 rather than pursue new legislation, the government backed away from Congress and  
12 turned to the courts, a forum ill-suited to address the myriad competing interests,  
13 potential ramifications, and unintended consequences presented by the government's  
14 unprecedented demand. And more importantly, by invoking "terrorism" and moving  
15 *ex parte* behind closed courtroom doors, the government sought to cut off debate and  
16 circumvent thoughtful analysis.

17         The order demanded by the government compels Apple to create a new  
18 operating system—effectively a "back door" to the iPhone—that Apple believes is too  
19 dangerous to build. Specifically, the government would force Apple to create new  
20 software with functions to remove security features and add a new capability to the  
21 operating system to attack iPhone encryption, allowing a passcode to be input  
22 electronically. This would make it easier to unlock the iPhone by "brute force," trying  
23 thousands or millions of passcode combinations with the speed of a modern computer.  
24 In short, the government wants to compel Apple to create a crippled and insecure  
25 product. Once the process is created, it provides an avenue for criminals and foreign  
26 agents to access millions of iPhones. And once developed for our government, it is  
27 only a matter of time before foreign governments demand the same tool.

28

1           The government says: “Just this once” and “Just this phone.” But the  
2 government knows those statements are not true; indeed the government has filed  
3 multiple other applications for similar orders, some of which are pending in other  
4 courts.<sup>2</sup> And as news of this Court’s order broke last week, state and local officials  
5 publicly declared their intent to use the proposed operating system to open hundreds of  
6 other seized devices—in cases having nothing to do with terrorism.<sup>3</sup> If this order is  
7 permitted to stand, it will only be a matter of days before some other prosecutor, in  
8 some other important case, before some other judge, seeks a similar order using this  
9 case as precedent. Once the floodgates open, they cannot be closed, and the device  
10 security that Apple has worked so tirelessly to achieve will be unwound without so  
11 much as a congressional vote. As Tim Cook, Apple’s CEO, recently noted: “Once  
12 created, the technique could be used over and over again, on any number of devices.  
13 In the physical world, it would be the equivalent of a master key, capable of opening  
14 hundreds of millions of locks—from restaurants and banks to stores and homes. No  
15 reasonable person would find that acceptable.” Declaration of Nicola T. Hanna  
16 (“Hanna Decl.”), Ex. D [Apple Inc., *A Message to Our Customers* (Feb. 16, 2016)].

17           Despite the context of this particular action, no legal principle would limit the  
18 use of this technology to domestic terrorism cases—but even if such limitations could  
19 be imposed, it would only drive our adversaries further underground, using encryption  
20 technology made by foreign companies that cannot be conscripted into U.S.

21  
22           <sup>2</sup> Hanna Decl. Ex. B [Letter to Court, *In re Order Requiring Apple, Inc. to Assist in*  
23 *the Execution of a Search Warrant Issued by this Court*, E.D.N.Y No. 15-MC-1902,  
Dkt. 27].

24           <sup>3</sup> *E.g.*, Hanna Decl. Ex. C [Seung Lee, *The Murder Victim Whose Phone Couldn’t Be*  
25 *Cracked and Other Apple Encryption Stories*, Newsweek (Feb. 19, 2016)] (Cyrus  
26 Vance, Manhattan District Attorney stating that he has “155 to 160” devices that he  
27 would like to access, while officials in Sacramento have “well over 100” devices  
28 for which they would like Apple to produce unique software so that they can access  
the devices’ contents); Hanna Decl. ¶ 5 at 18:28 [Charlie Rose, Television  
Interview of Cyrus Vance (Feb. 18, 2016)] (Vance stating “absolutely” that he  
“want[s] access to all those phones that [he thinks] are crucial in a criminal  
proceeding”).

1 government service<sup>4</sup>—leaving law-abiding individuals shouldering all of the burdens  
 2 on liberty, without any offsetting benefit to public safety. Indeed, the FBI’s repeated  
 3 warnings that criminals and terrorists are able to “go dark” behind end-to-end  
 4 encryption methods proves this very point. *See* Hanna Decl. Ex. F [FBI, Operational  
 5 Technology, *Going Dark Issue* (last visited Feb. 23, 2016) (“FBI, Going Dark”)].

6 Finally, given the government’s boundless interpretation of the All Writs Act, it  
 7 is hard to conceive of any limits on the orders the government could obtain in the  
 8 future. For example, if Apple can be forced to write code in this case to bypass  
 9 security features and create new accessibility, what is to stop the government from  
 10 demanding that Apple write code to turn on the microphone in aid of government  
 11 surveillance, activate the video camera, surreptitiously record conversations, or turn on  
 12 location services to track the phone’s user? Nothing.

13 As FBI Director James Comey expressly recognized:

14 Democracies resolve such tensions through robust debate. . . . It may be  
 15 that, as a people, we decide the benefits [of strong encryption] outweigh  
 16 the costs and that there is no sensible, technically feasible way to optimize  
 17 privacy and safety in this particular context, or that public safety folks  
 18 will be able to do their job well enough in the world of universal strong  
 19 encryption. Those are decisions Americans should make, but I think part  
 20 of my job is [to] make sure the debate is informed by a reasonable  
 21 understanding of the costs.

22 Hanna Decl. Ex. G [James Comey, *Encryption, Public Safety, and “Going Dark,”*  
 23 *Lawfare* (July 6, 2015, 10:38 AM) (“Comey, *Going Dark*”)]; *see also* Hanna Decl. Ex.  
 24 H [James Comey, *We Could Not Look the Survivors in the Eye if We Did Not Follow*  
 25 *This Lead*, *Lawfare* (Feb. 21, 2016, 9:03 PM) (“Comey, *Follow This Lead*”)]  
 26 (reiterating that the tension between national security and individual safety and privacy  
 27 “should not be resolved by the FBI, which investigates for a living[, but rather] . . . by  
 28 the American people . . .”). The government, by seeking an order mandating that

<sup>4</sup> *See* Hanna Decl. Ex. E [Margaret Coker, et al., *The Attacks in Paris: Islamic State Teaches Tech Savvy*, *Wall St. J.* (Nov. 17, 2015) (“Coker, *Tech Savvy*”)] (describing the technological sophistication of terrorists groups, including, for example, ISIS’s ability and willingness to shift to more secure communication methods).

1 Apple create software to destabilize the security of the iPhone and the law-abiding  
2 citizens who use it to store data touching on every facet of their private lives, is not  
3 acting to inform or contribute to the debate; it is seeking to avoid it.

4 Apple strongly supports, and will continue to support, the efforts of law  
5 enforcement in pursuing justice against terrorists and other criminals—just as it has in  
6 this case and many others. But the unprecedented order requested by the government  
7 finds no support in the law and would violate the Constitution. Such an order would  
8 inflict significant harm—to civil liberties, society, and national security—and would  
9 preempt decisions that should be left to the will of the people through laws passed by  
10 Congress and signed by the President. Accordingly, the Court should vacate the order  
11 and deny the government’s motion to compel.<sup>5</sup>

## 12 II. BACKGROUND

### 13 A. Apple’s Industry-Leading Device Security.

14 Apple is committed to data security. Encryption provides Apple with the  
15 strongest means available to ensure the safety and privacy of its customers against  
16 threats known and unknown.<sup>6</sup> For several years, iPhones have featured hardware- and

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17 <sup>5</sup> The government filed its motion to compel notwithstanding the Court allowing an  
18 eight-day period within which Apple could challenge the order compelling  
19 assistance, Apple’s express indication during the parties’ February 18 status  
20 conference that it intended to seek relief from the order, the Court’s entry of a  
21 briefing schedule to permit the parties to address the validity of the order, and the  
22 Court’s own skepticism about the utility of such a motion. That skepticism proved  
23 warranted. Only three pages into the government’s 25-page motion, it concedes the  
24 motion is “not legally necessary.” Dkt. 1 at 3 n.3. Nor could the government claim  
25 otherwise, as the motion—substantial portions of which appear to have been cut  
26 and pasted from the government’s *ex parte* application—seeks no relief beyond that  
27 contemplated by the order compelling assistance. Because the government’s  
28 motion serves no legal purpose, and the issues it raises will be fully briefed and  
addressed in Apple’s motion to vacate and the government’s opposition thereto, it  
should be denied. *See, e.g., Pipe Trades Council, U.A. Loc. 159 v. Underground  
Contractors Ass’n*, 835 F.2d 1275, 1279 (9th Cir. 1987) (concluding a district court  
properly denied a motion to compel as premature); *cf. Ayres v. Ocwen Loan Serv.,  
LLC*, 2013 WL 4784190, at \*3 (D. Md. Sept. 5, 2013) (striking *sua sponte* a motion  
that was “not technically ripe” and “meandering, redundant, transparent, and largely  
oblivious to the posture of the case”).

<sup>6</sup> Former NSA and CIA Director Michael Hayden has recognized that, on balance,  
America is more secure because of “end-to-end unbreakable encryption.” Hanna  
Decl. Ex. I [*Gen. Michael Hayden Gives an Update on the Cyberwar*, Wall St. J.  
(*Cont’d on next page*)



1 software-based encryption of their password-protected contents. Declaration of Erik  
 2 Neuenschwander (“Neuenschwander Decl.”) ¶ 8. These protections safeguard the  
 3 encryption keys on the device with a passcode designated by the user during setup. *Id.*  
 4 ¶ 9. This passcode immediately becomes entangled with the iPhone’s Unique ID  
 5 (“UID”), which is permanently assigned to that one device during the manufacturing  
 6 process. *Id.* ¶ 13. The iPhone’s UID is neither accessible to other parts of the  
 7 operating system nor known to Apple. *See generally* Hanna Decl. Ex. K [Apple Inc.,  
 8 *iOS Security: iOS 9.0 or later* (September 2015)]. These protections are designed to  
 9 prevent anyone without the passcode from accessing encrypted data on iPhones.  
 10 Neuenschwander Decl. ¶ 8 .

11 Cyber-attackers intent on gaining unauthorized access to a device could break a  
 12 user-created passcode, if given enough chances to guess and the ability to test  
 13 passwords rapidly by automated means. To prevent such “brute-force” attempts to  
 14 determine the passcode, iPhones running iOS 8 and higher include a variety of  
 15 safeguards. *Id.* ¶ 10. For one, Apple uses a “large iteration count” to slow attempts to  
 16 access an iPhone, ensuring that it would take years to try all combinations of a six-  
 17 character alphanumeric passcode. *Id.* ¶ 11. In addition, Apple imposes escalating time  
 18 delays after the entry of each invalid passcode. *Id.* ¶ 12. Finally, Apple also includes a  
 19 setting that—if activated—automatically deletes encrypted data after ten consecutive  
 20 incorrect attempts to enter the passcode. *Id.* This combination of security features  
 21 protects users from attackers or if, for example, the user loses the device.

22 **B. The Government Abandoned Efforts To Obtain Legal Authority For**  
 23 **Mandated Back Doors.**

24 Some in the law enforcement community have disparaged the security  
 25 improvements by Apple and others, describing them as creating a “going dark”

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27 (Feb. 17, 2016)]; *cf.* Hanna Decl. Ex. J [Damian Paletta, *How the U.S. Fights*  
 28 *Encryption—and Also Helps Develop It*, Wall St. J. (Feb. 22, 2016)] (describing  
 funding by U.S. government of stronger encryption technologies).

1 problem in which law enforcement may possess the “legal authority to intercept and  
2 access communications and information pursuant to court orders” but lack the  
3 “technical ability to carry out those orders because of a fundamental shift in  
4 communications services and technologies.”<sup>7</sup> As a result, some officials have  
5 advanced the view that companies should be required to maintain access to user  
6 communications and data and provide that information to law enforcement upon  
7 satisfaction of applicable legal requirements.<sup>8</sup> This would give the government, in  
8 effect, a back door to otherwise encrypted communications—which would be precisely  
9 the result of the government’s position in this case.<sup>9</sup>

10 Apple and other technology companies, supported by leading security experts,  
11 have disagreed with law enforcement’s position, observing that any back door enabling  
12 government officials to obtain encrypted data would also create a vulnerability that  
13 could be exploited by criminals and foreign agents, weakening critical security  
14 protections and creating new and unforeseen access to private information. For these  
15 reasons, Apple and others have strongly opposed efforts to require companies to enable  
16 the government to obtain encrypted information, arguing that this would compromise  
17 the security offered to its hundreds of millions of law-abiding customers in order to  
18 weaken security for the few who may pose a threat.<sup>10</sup>

19 As leading former national security officials have made clear, Apple’s  
20 “resistance to building in a back door” in whatever form it may take is well-justified,  
21

22 <sup>7</sup> Hanna Decl. Ex. F [FBI, *Going Dark*].

23 <sup>8</sup> See, e.g., Hanna Decl. Ex. L [James Comey, *Going Dark: Encryption, Technology,*  
24 *and the Balances Between Public Safety and Encryption*, Joint Statement with  
25 Deputy Atty. Gen. Sally Quillian Yates Before the Sen. Judiciary Comm. (July 8,  
2015)]. The repeated concern about the broader “going dark” problem, and the  
focus on universal back doors, stands in stark contrast to the comments by  
government officials that this case is about just one iPhone.

26 <sup>9</sup> See Hanna Decl. Ex. M [Susan Landau, *The National-Security Needs for*  
27 *Ubiquitous Encryption* (Feb. 1, 2016)].

28 <sup>10</sup> See Hanna Decl. Ex. N, ¶ 20 [Apple Inc. and Apple Distrib. Int’l, Written Evidence  
(IPB0093), (Dec. 21, 2015)].

1 because “the greater public good is a secure communications infrastructure protected  
2 by ubiquitous encryption at the device, server and enterprise level without building in  
3 means for government monitoring.”<sup>11</sup>

4 In recent years, however, the government, led by the Department of Justice, has  
5 considered legislative proposals that would have mandated such a back door. Those  
6 proposals sought to significantly expand the reach of the Communications Assistance  
7 for Law Enforcement Act (“CALEA”), 47 U.S.C. § 1001 *et seq.*, in which Congress  
8 defined the circumstances under which private companies must assist law enforcement  
9 in executing authorized electronic surveillance and the nature of—and limits on—the  
10 assistance such companies must provide.<sup>12</sup> In addressing the twin needs of law  
11 enforcement and privacy, Congress, through CALEA, specified when a company has  
12 an obligation to assist the government with decryption of communications, and made  
13 clear that a company has no obligation to do so where, as here, the company does not  
14 retain a copy of the decryption key. 47 U.S.C. § 1002(b)(3). Congress, keenly aware  
15 of and focusing on the specific area of dispute here, thus opted *not* to provide authority  
16 to compel companies like Apple to assist law enforcement with respect to data stored  
17 on a smartphone they designed and manufactured.<sup>13</sup>

18  
19 <sup>11</sup> Hanna Decl. Ex. O [Mike McConnell et al., *Why The Fear Over Ubiquitous Data*  
*Encryption Is Overblown*, Wash. Post (July 28, 2015)].

20 <sup>12</sup> Following a vigorous lobbying effort led by the FBI for enhanced surveillance and  
21 informational-access powers in the digital age, Congress “balance[d] three key  
22 policies: (1) to preserve a narrowly focused capability for law enforcement agencies  
23 to carry out properly authorized intercepts; (2) to protect privacy in the face of  
24 increasingly powerful and personally revealing technologies; and (3) to avoid  
25 impeding the development of new communications services and technologies.”  
26 H.R. Rep. No. 103-827(I), at 13 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3489,  
27 3493; *see also id.* at 17, 1994 U.S.C.C.A.N. at 3497 (“[A]s the potential  
28 intrusiveness of technology increases, it is necessary to ensure that government  
surveillance authority is clearly defined and appropriately limited.”).

<sup>13</sup> The government has acknowledged this. Dkt. 1 at 23. CALEA requires only  
“telecommunications carriers” to ensure that their “equipment, facilities, or  
services” enable the government to intercept communications pursuant to a court  
order or other lawful authorization. 47 U.S.C. § 1002. CALEA defines  
“telecommunications carrier” to exclude persons or entities providing “information  
services,” such as Apple. *Id.* § 1001(8).

1 The government’s proposed changes to CALEA would have dramatically  
 2 expanded the law’s scope by mandating that companies install back doors into their  
 3 products to ensure that authorities can access encrypted data when authorized to do  
 4 so.<sup>14</sup> In the face of this proposal—commonly referred to as “CALEA II”—leading  
 5 technology companies, including Apple, as well as public interest organizations like  
 6 the ACLU and Human Rights Watch, urged President Obama to “reject any proposal  
 7 that U.S. companies deliberately weaken the security of their products . . . [and]  
 8 instead focus on developing policies that will promote rather than undermine the wide  
 9 adoption of strong encryption technology.”<sup>15</sup>

10 The Executive Branch ultimately decided not to pursue CALEA II, and  
 11 Congress has left CALEA untouched, meaning that Congress never granted the  
 12 authority the government now asserts. Moreover, members of Congress have recently  
 13 introduced three pieces of legislation that would affirmatively prohibit the government  
 14 from forcing private companies like Apple to compromise data security.<sup>16</sup> On October  
 15 8, 2015, FBI Director Comey confirmed that the Obama Administration would not  
 16 seek passage of CALEA II at that time.<sup>17</sup> Instead, Director Comey expressed his view

17 <sup>14</sup> See Hanna Decl. Ex. P [Ellen Nakashima, *Proposal Seeks to Fine Tech Companies*  
 18 *for Noncompliance with Wiretap Orders*, Wash. Post (Apr. 28, 2013)].

19 <sup>15</sup> Hanna Decl. Ex. Q [New America’s Open Technology Institute, *Joint Letter to*  
 20 *President Barack Obama* (May 19, 2015)].

21 <sup>16</sup> See Secure Data Act of 2015, S.135, 114th Cong. (2015) (proposal to prohibit a  
 22 federal agency from requiring hardware or software manufacturers to design or alter  
 23 the security functions in their products to allow surveillance, and exempting  
 24 products used pursuant to CALEA); Secure Data Act of 2015, H.R. 726, 114th  
 25 Cong. (2015) (same); End Warrantless Surveillance of Americans Act, H.R. 2233,  
 26 114th Cong. (2015) (same, adding additional amendments to the Foreign  
 27 Intelligence Surveillance Act of 1978). In fact, just last week, four senior members  
 28 of the House Judiciary Committee issued a statement expressing concern that the  
 order in this case constitutes an “end-run around the legislative process.” Hanna  
 Decl. Ex. R [*Senior House Judiciary Committee Democrats Express Concern Over*  
*Government Attempts to Undermine Encryption*, House Comm. on the Judiciary,  
 Democrats (Feb. 18, 2016)]. Recognizing that Congress has not yet determined to  
 act on this issue, they stated that “there is little reason for the government to make  
 this demand on Apple—except to enact a policy proposal that has gained no  
 traction in Congress and was rejected by the White House.” *Id.*

<sup>17</sup> Hanna Decl. Ex. S [James Comey, *Statement Before the Senate Comm. on*  
*Homeland Sec. & Governmental Affairs* (Oct. 8, 2015)] (noting that while the  
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1 that the “going dark” debate raises issues that “to a democracy should be very, very  
 2 concerning” and therefore the issue is “worthy of a larger public conversation.”<sup>18</sup>  
 3 President Obama has also remarked that it is “useful to have civil libertarians and  
 4 others tapping us on the shoulder in the midst of this process and reminding us that  
 5 there are values at stake as well,” noting further that he “welcome[s] that kind of  
 6 debate.”<sup>19</sup> As the President has recognized, these issues are part of “a public  
 7 conversation that we should end up having.”<sup>20</sup>

### 8 **C. Apple’s Substantial Assistance In The Government’s Investigation**

9 Apple was shocked and saddened by the mindless savagery of the December 2,  
 10 2015 terrorist attack in San Bernardino. In the days following the attack, the FBI  
 11 approached Apple for help in its investigation. Apple responded immediately, and  
 12 devoted substantial resources on a 24/7 basis to support the government’s investigation  
 13 of this heinous crime. Declaration of Lisa Olle (“Olle Decl.”) ¶¶ 5-9.

14 Apple promptly provided all data that it possessed relating to the attackers’  
 15 accounts and that the FBI formally requested via multiple forms of legal process, in  
 16 keeping with Apple’s commitment to comply with all legally valid subpoenas and

17  
 18 

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19 “United States government is actively engaged with private companies to ensure  
 20 they understand the public safety and national security risks that result from  
 malicious actors’ use of their encrypted products and services . . . the administration  
 is not seeking legislation at this time.”).

21 <sup>18</sup> See Hanna Decl. Ex. T [James Comey, *Director Discusses Encryption, Patriot Act*  
*Provisions*, (May 20, 2015)]. Even Manhattan District Attorney Cyrus Vance, Jr.,  
 22 who is eager to see the government prevail here, has acknowledged that these issues  
 should be resolved by Congress. Hanna Decl. Ex. Z [Cyrus R. Vance Jr., *No*  
 23 *Smartphone Lies Beyond the Reach of a Judicial Search Warrant*, N.Y. Times (Feb.  
 18, 2016)]; Hanna Decl. Ex. U [NPR, Weekend Edition, *It’s Not Just the iPhone*  
 24 *Law Enforcement Wants to Unlock* (Feb. 21, 2016)] (“ . . . I think that the United  
 States Congress is going to have to step in here . . . We need to look at this with  
 25 independent eyes. And I believe Congress ultimately is going to have to make the  
 judgment call of where we draw that line [between privacy and public safety]”).

26 <sup>19</sup> Hanna Decl. Ex. V [*Remarks by President Obama and Prime Minister Cameron of*  
 27 *the United Kingdom in Joint Press Conference* (Jan. 16, 2015)].

28 <sup>20</sup> Hanna Decl. Ex. W [Kara Swisher, *White House. Red Chair. Obama Meets*  
*Swisher*, Re/Code.com (Feb. 15, 2015)].

1 search warrants that the company receives. *Id.* Additionally, Apple has furnished  
 2 valuable informal assistance to the government’s investigation—participating in  
 3 teleconferences, providing technical assistance, answering questions from the FBI, and  
 4 suggesting potential alternatives for the government to attempt to obtain data from the  
 5 iPhone at issue. *Id.* ¶ 6.

6 Unfortunately, the FBI, without consulting Apple or reviewing its public  
 7 guidance regarding iOS, changed the iCloud password associated with one of the  
 8 attacker’s accounts, foreclosing the possibility of the phone initiating an automatic  
 9 iCloud back-up of its data to a known Wi-Fi network, *see* Hanna Decl. Ex. X [Apple  
 10 Inc., *iCloud: Back up your iOS device to iCloud*], which could have obviated the need  
 11 to unlock the phone and thus for the extraordinary order the government now seeks.<sup>21</sup>  
 12 Had the FBI consulted Apple first, this litigation may not have been necessary.

13 **D. The Government’s *Ex Parte* Application Under The All Writs Act, And**  
 14 **This Court’s Order**

15 On February 16, 2016, the government filed an *ex parte* application and  
 16 proposed order asking the Court to compel Apple to assist in the government’s  
 17 investigation under the authority of the All Writs Act, codified at 28 U.S.C. § 1651.<sup>22</sup>

18 \_\_\_\_\_  
 19 <sup>21</sup> In its motion to compel, filed February 19 with this Court, the government sought  
 20 to shift the blame to the “owner” (San Bernardino County) in describing who  
 21 changed the password and why it allegedly has no other viable alternatives besides  
 22 the creation of a new operating system. Dkt. 1 at 18 n.7. The FBI later issued a  
 press release acknowledging that it “worked with” the County to reset the  
 password. *See* Hanna Decl. Ex. Y [*Statement to Address Misleading Reports that*  
*the County of San Bernardino Reset Terror Suspect’s iPhone Without Consent of*  
*the FBI*, issued by the FBI to Ars Technica (Feb. 21, 2016)].

23 <sup>22</sup> The government obtained the Order without notice to Apple and without allowing  
 24 Apple an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Tr. Co.*,  
 25 339 U.S. 306, 314 (1950) (recognizing that one of the “fundamental requisite[s] of  
 26 due process of law is the opportunity to be heard”) (quoting *Grannis v. Ordean*,  
 27 234 U.S. 385, 394 (1914)). But this was not a case where the government needed  
 28 to proceed in secret to safeguard its investigation; indeed, Apple understands that  
 the government alerted reporters before filing its *ex parte* application, and then,  
 immediately after it was signed and confirmed to be on the docket, distributed the  
 application and Order to the public at about the same time it notified Apple.  
 Moreover, this is the only case in counsel’s memory in which an FBI Director has  
 blogged in real-time about pending litigation, suggesting that the government does  
 not believe the data on the phone will yield critical evidence about other suspects.

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1 With no opposition or other perspectives to consider, the Court granted the  
2 government's request and signed the government's proposed order, thereby compelling  
3 Apple to create new software that would allow the government to hack into an iPhone  
4 5c used by one of the attackers. Order Compelling Apple Inc. to Assist Agents in  
5 Search, *In the Matter of the Search of an Apple iPhone Seized During the Execution of*  
6 *a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203*, No. ED 15-  
7 0451M (Feb. 16, 2016), Dkt. at 19 (the "Order").

8 The Order directs Apple to provide "reasonable technical assistance to assist law  
9 enforcement agents in obtaining access to the data" on the device. *Id.* ¶ 1. The Order  
10 further defines this "reasonable technical assistance" to include creating custom  
11 software that can be loaded on the iPhone to accomplish three goals: (1) bypass or  
12 disable the iPhone's "auto-erase" function, designed to protect against efforts to obtain  
13 unauthorized access to the device's encrypted contents by deleting encrypted data after  
14 ten unsuccessful attempts to enter the iPhone's passcode, (2) enable the FBI to  
15 electronically submit passcodes to the device for testing, bypassing the requirement  
16 that passcodes be manually entered, and (3) remove any time delays between entering  
17 incorrect passcodes. *Id.* ¶ 2. Because the government proceeded *ex parte*, Apple had  
18 no opportunity to weigh in on whether such assistance was "reasonable," and thus the  
19 government's request was assumed to be.

20 The software envisioned by the government simply does not exist today. Thus,  
21 at bottom, the Order would compel Apple to create a new version of the iPhone  
22 operating system designed to defeat the critical security features noted previously for  
23 the specific purpose of accessing the device's contents in unencrypted form—in other  
24 words, to write new software to create a back door to the device's encrypted data.

25  
26 \_\_\_\_\_  
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27 See Hanna Decl. Ex. G [Comey, *Going Dark*]; Hanna Decl. Ex. H [Comey, *Follow*  
28 *This Lead*].

1 **E. The Resources And Effort Required To Develop The Software Demanded**  
2 **By The Government**

3 The compromised operating system that the government demands would require  
4 significant resources and effort to develop. Although it is difficult to estimate, because  
5 it has never been done before, the design, creation, validation, and deployment of the  
6 software likely would necessitate six to ten Apple engineers and employees dedicating  
7 a very substantial portion of their time for a minimum of two weeks, and likely as  
8 many as four weeks. Neuenschwander Decl. ¶ 22. Members of the team would  
9 include engineers from Apple's core operating system group, a quality assurance  
10 engineer, a project manager, and either a document writer or a tool writer. *Id.*

11 No operating system currently exists that can accomplish what the government  
12 wants, and any effort to create one will require that Apple write new code, not just  
13 disable existing code functionality. *Id.* ¶¶ 24-25. Rather, Apple will need to design  
14 and implement untested functionality in order to allow the capability to enter  
15 passcodes into the device electronically in the manner that the government describes.  
16 *Id.* ¶ 24. In addition, Apple would need to either develop and prepare detailed  
17 documentation for the above protocol to enable the FBI to build a brute-force tool that  
18 is able to interface with the device to input passcode attempts, or design, develop and  
19 prepare documentation for such a tool itself. *Id.* ¶ 25. Further, if the tool is utilized  
20 remotely (rather than at a secure Apple facility), Apple will also have to develop  
21 procedures to encrypt, validate, and input into the device communications from the  
22 FBI. *Id.* This entire development process would need to be logged and recorded in  
23 case Apple's methodology is ever questioned, for example in court by a defense  
24 lawyer for anyone charged in relation to the crime. *Id.* ¶ 28.

25 Once created, the operating system would need to go through Apple's quality  
26 assurance and security testing process. *Id.* ¶ 29. Apple's software ecosystem is  
27 incredibly complicated, and changing one feature of an operating system often has  
28 ancillary or unanticipated consequences. *Id.* ¶ 30. Thus, quality assurance and  
security testing would require that the new operating system be tested on multiple



1 devices and validated before being deployed. *Id.* Apple would have to undertake  
 2 additional testing efforts to confirm and validate that running this newly developed  
 3 operating system to bypass the device’s security features will not inadvertently destroy  
 4 or alter any user data. *Id.* ¶ 31. To the extent problems are identified (which is almost  
 5 always the case), solutions would need to be developed and re-coded, and testing  
 6 would begin anew. *Id.* ¶ 32. As with the development process, the entire quality  
 7 assurance and security testing process would need to be logged, recorded, and  
 8 preserved. *Id.* ¶ 33. Once the new custom operating system is created and validated, it  
 9 would need to be deployed on to the subject device, which would need to be done at an  
 10 Apple facility. *Id.* ¶¶ 34-35. And if the new operating system has to be destroyed and  
 11 recreated each time a new order is issued, the burden will multiply. *Id.* ¶¶ 44-45.

### 12 III. ARGUMENT

#### 13 A. **The All Writs Act Does Not Provide A Basis To Conscript Apple To Create 14 Software Enabling The Government To Hack Into iPhones.**

15 The All Writs Act (or the “Act”) does not provide the judiciary with the  
 16 boundless and unbridled power the government asks this Court to exercise. The Act is  
 17 intended to enable the federal courts to fill in gaps in the law so they can exercise the  
 18 authority they already possess by virtue of the express powers granted to them by the  
 19 Constitution and Congress; it does not grant the courts free-wheeling authority to  
 20 change the substantive law, resolve policy disputes, or exercise new powers that  
 21 Congress has not afforded them. Accordingly, the Ninth Circuit has squarely rejected  
 22 the notion that “the district court has such wide-ranging inherent powers that it can  
 23 impose a duty on a private party *when Congress has failed to impose one*. To so rule  
 24 would be to usurp the legislative function and to improperly extend the limited federal  
 25 court jurisdiction.” *Plum Creek*, 608 F.2d at 1290 (emphasis added).

26 Congress has never authorized judges to compel innocent third parties to  
 27 provide decryption services to the FBI. Indeed, Congress has expressly withheld that  
 28 authority in other contexts, and this issue is currently the subject of a raging national

1 policy debate among members of Congress, the President, the FBI Director, and state  
2 and local prosecutors. Moreover, federal courts themselves have *never* recognized an  
3 inherent authority to order non-parties to become de facto government agents in  
4 ongoing criminal investigations. Because the Order is not grounded in any duly  
5 enacted rule or statute, and goes well beyond the very limited powers afforded by  
6 Article III of the Constitution and the All Writs Act, it must be vacated.

7 **1. The All Writs Act Does Not Grant Authority To Compel Assistance**  
8 **Where Congress Has Considered But Chosen Not To Confer Such**  
9 **Authority.**

10 The authority the government seeks here cannot be justified under the All Writs  
11 Act because law enforcement assistance by technology providers is covered by  
12 existing laws that specifically omit providers like Apple from their scope. The All  
13 Writs Act authorizes courts to “issue all writs necessary or appropriate in aid of their  
14 respective jurisdictions and agreeable to the usages and principles of law,” 28 U.S.C.  
15 § 1651(a), but as the Supreme Court has held, it “does not authorize [courts] to issue  
16 ad hoc writs whenever compliance with statutory procedures appears inconvenient or  
17 less appropriate,” *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 38, 43  
18 (1985) (holding that the Act did not confer power on the district court to compel non-  
19 custodians to bear the expense of producing the prisoner-witnesses); *see also In the*  
20 *Matter of an Application of U.S. of Am. for an Order Authorizing Disclosure of*  
21 *Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 578 (D. Md. 2011)  
22 (holding that the Act does not authorize an “end run around constitutional and statutory  
23 law”). The Ninth Circuit likewise has emphasized that the “All Writs Act is not a  
24 grant of plenary power to federal courts. Rather, it is designed to aid the courts in the  
25 exercise of their jurisdiction.” *Plum Creek*, 608 F.2d at 1289 (holding that the Act  
26 “does not give the district court a roving commission to order a party subject to an  
27 investigation to accept additional risks at the bidding” of the government); *see also Ex*  
28 *parte Bollman*, 8 U.S. 75 (1807) (“[C]ourts which are created by written law, and  
whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”).

1 Thus, in another pending case in which the government seeks to compel Apple to assist  
2 in obtaining information from a drug dealer's iPhone, Magistrate Judge Orenstein  
3 issued an order stating that while the Act may be appropriately invoked "to fill in a  
4 statutory gap that Congress has failed to consider," it cannot be used to grant the  
5 government authority "Congress chose not to confer." *In re Order Requiring Apple,*  
6 *Inc. to Assist in the Execution of a Search Warrant Issued by this Court* ("In re  
7 *Order*"), No. 15-MC-1902, 2015 WL 5920207, at \*2 (E.D.N.Y. Oct. 9, 2015).

8 Congress knows how to impose a duty on third parties to facilitate the  
9 government's decryption of devices. Similarly, it knows exactly how to place limits  
10 on what the government can require of telecommunications carriers and also on  
11 manufacturers of telephone equipment and handsets. And in CALEA, Congress  
12 decided not to require electronic communication service providers, like Apple, to do  
13 what the government seeks here. Contrary to the government's contention that  
14 CALEA is inapplicable to this dispute, Congress declared via CALEA that the  
15 government cannot dictate to providers of electronic communications services or  
16 manufacturers of telecommunications equipment any specific equipment design or  
17 software configuration.

18 In the section of CALEA entitled "Design of features and systems  
19 configurations," 47 U.S.C. § 1002(b)(1), the statute says that it "does not authorize any  
20 law enforcement agency or officer—

- 21 (1) to require any specific design of equipment, facilities, services,  
22 features, or system configurations to be adopted by any provider of  
23 a wire or electronic communication service, any manufacturer of  
24 telecommunications equipment, or any provider of  
25 telecommunications support services.
- 26 (2) to prohibit the adoption of any equipment, facility, service, or  
27 feature by any provider of a wire or electronic communication  
28 service, any manufacturer of telecommunications equipment, or any  
provider of telecommunications support services.

Apple unquestionably serves as a provider of "electronic communications services"  
through the various messaging services it provides to its customers through iPhones.

1 *See Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 901 (9th Cir. 2008).

2 Apple also makes mobile phones. As such, CALEA does not allow a law enforcement  
3 agency to require Apple to implement any specific design of its equipment, facilities,  
4 services or system configuration. Yet, that is precisely what the government seeks  
5 here. Thus, CALEA's restrictions are directly on point.

6 Moreover, CALEA also intentionally excludes information services providers,  
7 like Apple, from the scope of its mandatory assistance provisions.<sup>23</sup> This exclusion  
8 precludes the government from using the All Writs Act to require Apple to do that  
9 which Congress eschewed. But even if Apple were covered by CALEA, the law does  
10 not require covered telecommunication carriers (which Apple is not) to be responsible  
11 for “decrypting, or *ensuring the government’s ability to decrypt*, any communication  
12 encrypted by a subscriber or customer unless the encryption was provided by the  
13 carrier and the carrier possesses the information necessary to decrypt the  
14 communication.” 47 U.S.C. § 1002(b)(3) (emphasis added).

15 Thus, here again, CALEA makes a specific choice to allow strong encryption (or  
16 any other security feature or configuration) with keys chosen by end users to be  
17 deployed, and prevents the government from mandating that such encryption schemes  
18 contain a “back door.” *See also* H.R. Rep. 103-827(I), at 24, 1994 U.S.C.C.A.N. 3489,  
19 3504 (emphasizing that CALEA does not “prohibit a carrier from deploying an  
20 encryption service for which it does not retain the ability to decrypt communications  
21 for law enforcement access”; “[n]or does the Committee intend this bill to be in any  
22 way a precursor to any kind of ban or limitation on encryption technology. To the  
23 contrary, [§ 1002] protects the right to use encryption.”).

24 Similarly, outside of CALEA, Congress also knows how to require third parties  
25 to provide “technical assistance,” *see* Wiretap Act, 18 U.S.C. § 2518(4) (providing that

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26 <sup>23</sup> Information service providers are defined to include services that permit a customer  
27 to retrieve stored information from, or file information for storage in, information  
28 storage facilities; electronic publishing; and electronic messaging services. *See* 47  
U.S.C. § 1001.

1 upon the lawful execution of a wiretap, the government can seek an order compelling a  
2 third party to furnish “all information, facilities, and technical assistance necessary to  
3 accomplish the interception”); Pen/Trap Statute, *id.* § 3123(b)(2) (similar), but  
4 Congress has intentionally opted not to compel third parties’ assistance in retrieving  
5 stored information on devices. That Congress, confronted over the years with the  
6 contentious debate about where to draw the lines among competing security and  
7 privacy interests, made this decision, “indicates a deliberate congressional choice with  
8 which the courts should not interfere.” *Cent. Bank of Denver, N.A. v. First Interstate*  
9 *Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994). The Executive Branch, having  
10 considered and then declined to urge Congress to amend CALEA to enable it to  
11 compel the type of assistance demanded here, cannot seek that same authority via an *ex*  
12 *parte* application for a court order under the Act.

13 For the courts to use the All Writs Act to expand sub rosa the obligations  
14 imposed by CALEA as proposed by the government here would not just exceed the  
15 scope of the statute, but it would also violate the separation-of-powers doctrine. Just  
16 as the “Congress may not exercise the judicial power to revise final judgments,”  
17 *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (citing *Plaut v. Spendthrift Farm, Inc.*, 514  
18 U.S. 211 (1995)), courts may not exercise the legislative power by repurposing statutes  
19 to meet the evolving needs of society, *see Clark v. Martinez*, 543 U.S. 371, 391 (2005)  
20 (court should “avoid inventing a statute rather than interpreting one”) (citation,  
21 quotation marks, and alterations omitted); *see also Alzheimer’s Inst. of Am. Inc. v. Elan*  
22 *Corp.*, 2013 WL 8744216, at \*2 (N.D. Cal. Jan. 31, 2013) (Congress alone has  
23 authority “to update” a “technologically antiquated” statute “to address the new and  
24 rapidly evolving era of computer and cloud-stored, processed and produced  
25 data”). Nor does Congress lose “its exclusive constitutional authority to make laws  
26 necessary and proper to carry out the powers vested by the Constitution” in times of  
27 crisis (whether real or imagined). *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.  
28 579, 588–89 (1952). Because a “decision to rearrange or rewrite [a] statute falls within

1 the legislative, not the judicial prerogative[,]” the All Writs Act cannot possibly be  
2 deemed to grant to the courts the extraordinary power the government seeks. *Xi v.*  
3 *INS*, 298 F.3d 832, 839 (9th Cir. 2002).

4 If anything, whether companies like Apple should be compelled to create a back  
5 door to their own operating systems to assist law enforcement is a political question,  
6 not a legal one. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that a case is a  
7 nonjusticiable political question if it is impossible to decide “without an initial policy  
8 determination of a kind clearly for nonjudicial discretion”); see also *Vieth v. Jubelirer*,  
9 541 U.S. 267, 277–290 (2004) (plurality opinion) (dismissing claims of political  
10 gerrymandering under the political question doctrine because there was no “judicially  
11 discoverable and manageable standard for resolving” them); *Diamond v. Chakrabarty*,  
12 447 U.S. 303, 317 (1980) (“The choice [the court is] urged to make is a matter of high  
13 policy for resolution within the legislative process after the kind of investigation,  
14 examination, and study that legislative bodies can provide and courts cannot.”);  
15 *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552 (9th Cir. 2014) (per  
16 curiam) (affirming district court’s holding that the claims were “inextricably bound to  
17 an inherently political question” and thus were “beyond the jurisdiction of our courts”).

18 In short, a decision to “short-circuit public debate on this controversy seems  
19 fundamentally inconsistent with the proposition that such important policy issues  
20 should be determined in the first instance by the legislative branch after public  
21 debate—as opposed to having them decided by the judiciary in sealed, *ex parte*  
22 proceedings.” *In re Order*, 2015 WL 5920207, at \*3 n.1. Such an important decision  
23 with such widespread global repercussions goes well beyond the purview of the All  
24 Writs Act, which merely provides courts with a limited grant of ancillary authority to  
25 issue orders “in aid of their respective jurisdictions.” 28 U.S.C. § 1651(a).

1           **2.     *New York Telephone Co. And Its Progeny Confirm That The All***  
2           ***Writs Act Does Not Authorize Courts To Compel The Unprecedented***  
3           ***And Unreasonably Burdensome Conscription Of Apple That The***  
4           ***Government Seeks.***

5           The government relies heavily on the Supreme Court’s decision in *United States*  
6           *v. New York Telephone Co.*, 434 U.S. 159 (1977), to assert that the All Writs Act  
7           permits the Court to compel private third parties like Apple to assist the government in  
8           effectuating a search warrant by writing new software code that would undermine the  
9           security of its own product. The government misapplies this case.

10           In *New York Telephone Co.*, the district court compelled the company to install a  
11           simple pen register device (designed to record dialed numbers) on two telephones  
12           where there was “probable cause to believe that the [c]ompany’s facilities were being  
13           employed to facilitate a criminal enterprise on a continuing basis.” 434 U.S. at 174.  
14           The Supreme Court held that the order was a proper writ under the Act, because it was  
15           consistent with Congress’s intent to compel third parties to assist the government in the  
16           use of surveillance devices, and it satisfied a three-part test imposed by the Court.

17           First, the Court found that the company was not “so far removed from the  
18           underlying controversy that its assistance could not be permissibly compelled.” *Id.*  
19           Second, the assistance sought was “meager,” and as a public utility, the company did  
20           not “ha[ve] a substantial interest in not providing assistance.” *Id.* Third, “after an  
21           exhaustive search,” the FBI was unable to find a suitable location to install its own pen  
22           registers without tipping off the targets, and thus there was “no conceivable way in  
23           which the surveillance authorized by the District Court could have been successfully  
24           accomplished” without the company’s meager assistance. *Id.* at 175. Applying these  
25           factors to this case confirms that the All Writs Act does not permit the Court to compel  
26           the unprecedented and unreasonably burdensome assistance that the government seeks.

27           **a.     *Apple’s Connection To The Underlying Case Is “Far Removed”***  
28           ***And Too Attenuated To Compel Its Assistance***

          Nothing connects Apple to this case such that it can be drafted into government  
service to write software that permits the government to defeat the security features on

1 Apple's standard operating system. Apple is a private company that does not own or  
2 possess the phone at issue, has no connection to the data that may or may not exist on  
3 the phone, and is not related in any way to the events giving rise to the investigation.  
4 This case is nothing like *New York Telephone Co.*, where there was probable cause to  
5 believe that the phone company's own facilities were "being employed to facilitate a  
6 criminal enterprise on a continuing basis." *Id.* at 174.

7 The government relies on *United States v. Hall*, 583 F. Supp. 717 (E.D. Va.  
8 1984), and *In re Application of U.S. of Am. for an Order Directing X to Provide Access*  
9 *to Videotapes* ("Videotapes"), 2003 WL 22053105 (D. Md. Aug. 22, 2003), but these  
10 cases involved mere requests to produce existing business records, not the compelled  
11 creation of intellectual property. In *Hall*, the court found that the All Writs Act  
12 permitted an order compelling a credit card company to produce the credit card records  
13 of a federal fugitive's former girlfriend, because the government had reason to believe  
14 that she was harboring and supporting the fugitive, and thus potentially using her credit  
15 card to perpetrate an ongoing crime. 583 F. Supp. at 720 (reasoning that a credit card  
16 issuer "has an interest" in a transaction "when a credit card is used for an illegal  
17 purpose even though the act itself be not illegal"). Similarly, in *Videotapes*, the court  
18 compelled an apartment complex to provide access to videotape surveillance footage  
19 of a hallway in the apartment to assist with executing an arrest warrant on a fugitive.  
20 2003 WL 22053105, at \*3. This case is nothing like *Hall* and *Videotapes*, where the  
21 government sought assistance effectuating an arrest warrant to halt ongoing criminal  
22 activity, since any criminal activity linked to the phone at issue here ended more than  
23 two months ago when the terrorists were killed.

24 Further, unlike a telecommunications monopoly, Apple is not a "highly  
25 regulated public utility with a duty to serve the public." *New York Telephone Co.*, 434  
26 U.S. at 174; *see also Application of U.S. of Am. for an Order Authorizing an In-*  
27 *Progress Trace of Wire Commc'ns over Tel. Facilities* ("*Mountain Bell*"), 616 F.2d  
28 1122, 1132 (9th Cir. 1980) (discussing *New York Telephone Co.* and noting that its



1 ruling compelling assistance under the All Writs Act relied “[t]o a great extent . . .  
2 upon the highly regulated, public nature” of the phone company); *In re Order*, 2015  
3 WL 5920207, at \*4–5. Whereas public utilities have no “substantial interest in not  
4 providing assistance” to the government, 434 U.S. at 174, and “enjoy a monopoly in an  
5 essential area of communications,” *Mountain Bell*, 616 F.2d at 1131, Apple is a private  
6 company that believes that encryption is crucial to protect the security and privacy  
7 interests of citizens who use and store their most personal data on their iPhones, “from  
8 our private conversations to our photos, our music, our notes, our calendars and  
9 contacts, our financial information and health data, even where we have been and  
10 where we are going.” Hanna Decl. Ex. D at 1 [Apple Inc., *A Message to Our*  
11 *Customers* (Feb. 16, 2016)].

12 That Apple “designed, manufactured and sold the SUBJECT DEVICE, and  
13 wrote and owns the software that runs the phone,” Memorandum of Points and  
14 Authorities in Support of Government’s *Ex Parte* Application for Order Compelling  
15 Apple Inc. to Assist Agents in Search, *In the Matter of the Search of an Apple iPhone*  
16 *Seized During the Execution of a Search Warrant on a Black Lexus IS300, Cal.*  
17 *License Plate 35KGD203*, No. ED 15-0451M (Feb. 16, 2016), Dkt. 18 at 11 (the “*Ex*  
18 *Parte App.*”), is insufficient to establish the connection mandated by *New York*  
19 *Telephone Co.* The All Writs Act does not allow the government to compel a  
20 manufacturer’s assistance merely because it has placed a good into the stream of  
21 commerce. Apple is no more connected to this phone than General Motors is to a  
22 company car used by a fraudster on his daily commute. Moreover, that Apple’s  
23 software is “licensed, not sold,” *Ex Parte App.* at 5, is “a total red herring,” as Judge  
24 Orenstein already concluded, Hanna Decl. Ex. DD at 42:4–10 [*In re Order Requiring*  
25 *Apple Inc. to Assist in the Execution of a Search Warrant Issued by the Court*,  
26 E.D.N.Y No. 15 MC 1902, Dkt. 19 (“October 26, 2015 Transcript”)]. A licensing  
27 agreement no more connects Apple to the underlying events than a sale. The license  
28 does not permit Apple to invade or control the private data of its customers. It merely

1 limits customers' use and redistribution of Apple's software. Indeed, the government's  
2 position has no limits and, if accepted, would eviscerate the "remoteness" factor  
3 entirely, as any company that offers products or services to consumers could be  
4 conscripted to assist with an investigation, no matter how attenuated their connection  
5 to the criminal activity. This is not, and never has been, the law.

6 **b. The Order Requested By The Government Would Impose An**  
7 **Unprecedented And Oppressive Burden On Apple And Citizens**  
8 **Who Use The iPhone.**

9 An order pursuant to the All Writs Act "must not [1] adversely affect the basic  
10 interests of the third party or [2] impose an undue burden." *Hall*, 583 F. Supp. at 719.  
11 The Order violates both requirements by conscripting Apple to develop software that  
12 does not exist and that Apple has a compelling interest in not creating. The  
13 government's request violates the first requirement—that the Act "must not adversely  
14 affect the basic interests of the third party"—because Apple has a strong interest in  
15 safeguarding its data protection systems that ensure the security of hundreds of  
16 millions of customers who depend on and store their most confidential data on their  
17 iPhones. An order compelling Apple to create software that defeats those safeguards  
18 undeniably threatens those systems and adversely affects Apple's interests and those of  
19 iPhone users around the globe. *See id.*

20 The government's request violates the second requirement—that the Act "must  
21 not . . . impose an undue burden"—because the government's unprecedented demand  
22 forces Apple to develop new software that destroys the security features that Apple has  
23 spent years building. As discussed *supra* in section II.E, no operating system currently  
24 exists that can accomplish what the government wants, and any effort to create one  
25 would require that Apple write new code, not just disable existing functionality.  
26 Neuenschwander Decl. ¶¶ 23-25. Experienced Apple engineers would have to design,  
27 create, test, and validate the compromised operating system, using a hyper-secure  
28 isolation room within which to do it, and then deploy and supervise its operation by the  
FBI to brute force crack the phone's passcode. *Id.* ¶¶ 21-43; Olle Decl. ¶ 14. The

1 system itself would have to be tested on multiple devices to ensure that the operating  
2 system works and does not alter any data on the device. Neuenschwander Decl. ¶¶ 30-  
3 31. All aspects of the development and testing processes would need to be logged and  
4 recorded in case Apple’s methodology is ever questioned. *Id.* ¶¶ 28, 33.

5 Moreover, the government’s flawed suggestion to delete the program and erase  
6 every trace of the activity would not lessen the burden, it would actually increase it  
7 since there are hundreds of demands to create and utilize the software waiting in the  
8 wings. *Id.* ¶¶ 38-45. If Apple creates new software to open a back door, other federal  
9 and state prosecutors—and other governments and agencies—will repeatedly seek  
10 orders compelling Apple to use the software to open the back door for tens of  
11 thousands of iPhones. Indeed, Manhattan District Attorney Cyrus Vance, Jr., has made  
12 clear that the federal and state governments want access to *every* phone in a criminal  
13 investigation.<sup>24</sup> See Hanna Decl., Ex. Z [(Cyrus R. Vance, Jr., *No Smartphone Lies*  
14 *Beyond the Reach of a Judicial Search Warrant*, N.Y. Times (Feb. 18, 2016)]; Hanna  
15 Decl. ¶ 5 at 18:28 [Charlie Rose, Television Interview of Cyrus Vance (Feb. 18, 2016)]  
16 (Vance stating “absolutely” that he “want[s] access to all those phones that [he thinks]  
17 are crucial in a criminal proceeding”). This enormously intrusive burden—building  
18 everything up and tearing it down for each demand by law enforcement—lacks any  
19 support in the cases relied on by the government, nor do such cases exist.

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<sup>24</sup> Use of the software in criminal prosecutions only exacerbates the risk of disclosure, given that criminal defendants will likely challenge its reliability. See Fed. R. Evid. 702 (listing requirements of expert testimony, including that “testimony [be] the product of reliable principles and methods” and “the expert has reliably applied the principles and methods to the facts of the case,” all of which a defendant is entitled to challenge); see also *United States v. Budziak*, 697 F.3d 1105, 1111–13 (9th Cir. 2012) (vacating order denying discovery of FBI software); *State v. Underdahl*, 767 N.W.2d 677, 684–86 (Minn. 2009) (upholding order compelling discovery of breathalyzer source code). The government’s suggestion that Apple can destroy the software has clearly not been thought through, given that it would jeopardize criminal cases. See *United States v. Cooper*, 983 F.2d 928, 931–32 (9th Cir. 1993) (government’s bad-faith failure to preserve laboratory equipment seized from defendants violated due process, and appropriate remedy was dismissal of indictment, rather than suppression of evidence).

1           The alternative—keeping and maintaining the compromised operating system  
2 and everything related to it—imposes a different but no less significant burden, *i.e.*,  
3 forcing Apple to take on the task of unfailingly securing against disclosure or  
4 misappropriation the development and testing environments, equipment, codebase,  
5 documentation, and any other materials relating to the compromised operating system.  
6 *Id.* ¶ 47. Given the millions of iPhones in use and the value of the data on them,  
7 criminals, terrorists, and hackers will no doubt view the code as a major prize and can  
8 be expected to go to considerable lengths to steal it, risking the security, safety, and  
9 privacy of customers whose lives are chronicled on their phones. Indeed, as the  
10 Supreme Court has recognized, “[t]he term ‘cell phone’ is itself misleading shorthand;  
11 . . . these devices are in fact minicomputers” that “could just as easily be called  
12 cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums,  
13 televisions, maps, or newspapers.” *Riley v. California*, 134 S. Ct. 2473, 2488–89  
14 (2014) (observing that equating the “data stored on a cell phone” to “physical items”  
15 “is like saying a ride on horseback is materially indistinguishable from a flight to the  
16 moon”). By forcing Apple to write code to compromise its encryption defenses, the  
17 Order would impose substantial burdens not just on Apple, but on the public at large.  
18 And in the meantime, nimble and technologically savvy criminals will continue to use  
19 other encryption technologies, while the law-abiding public endures these threats to  
20 their security and personal liberties—an especially perverse form of unilateral  
21 disarmament in the war on terror and crime. *See n.4 supra* (describing ISIS’s shift to  
22 more secure communication methods).

23           In addition, compelling Apple to create software in this case will set a dangerous  
24 precedent for conscripting Apple and other technology companies to develop  
25 technology to do the government’s bidding in untold future criminal investigations. If  
26 the government can invoke the All Writs Act to compel Apple to create a special  
27 operating system that undermines important security measures on the iPhone, it could  
28 argue in future cases that the courts should compel Apple to create a version to track

1 the location of suspects, or secretly use the iPhone’s microphone and camera to record  
2 sound and video. And if it succeeds here against Apple, there is no reason why the  
3 government could not deploy its new authority to compel other innocent and unrelated  
4 third-parties to do its bidding in the name of law enforcement. For example, under the  
5 same legal theories advocated by the government here, the government could argue  
6 that it should be permitted to force citizens to do all manner of things “necessary” to  
7 assist it in enforcing the laws, like compelling a pharmaceutical company against its  
8 will to produce drugs needed to carry out a lethal injection in furtherance of a lawfully  
9 issued death warrant,<sup>25</sup> or requiring a journalist to plant a false story in order to help  
10 lure out a fugitive, or forcing a software company to insert malicious code in its auto-  
11 update process that makes it easier for the government to conduct court-ordered  
12 surveillance. Indeed, under the government’s formulation, any party whose assistance  
13 is deemed “necessary” by the government falls within the ambit of the All Writs Act  
14 and can be compelled to do anything the government needs to effectuate a lawful court  
15 order. While these sweeping powers might be nice to have from the government’s  
16 perspective, they simply are not authorized by law and would violate the Constitution.

17 Moreover, responding to these demands would effectively require Apple to  
18 create full-time positions in a new “hacking” department to service government  
19 requests and to develop new versions of the back door software every time iOS  
20 changes, and it would require Apple engineers to testify about this back door as  
21 government witnesses at trial. *See, e.g., United States v. Cameron*, 699 F.3d 621, 643–  
22 44 (1st Cir. 2012) (holding that reports generated by an Internet provider were  
23 testimonial, and thus could not be admitted without “giving [defendant] the  
24 opportunity to cross-examine the [provider’s] employees who prepared the []  
25 [r]eports”). Nothing in federal law allows the courts, at the request of prosecutors, to

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27 <sup>25</sup> Magistrate Judge Orenstein posed this same hypothetical to the government, and  
28 the government had no answer. Hanna Decl. Ex. DD at 43–47 [October 26, 2015  
Transcript].

1 coercively deputize Apple and other companies to serve as a permanent arm of the  
2 government's forensics lab. Indeed, the government fails to cite any case—because  
3 none exists—to support its incorrect contention that courts have invoked the All Writs  
4 Act to conscript a company like Apple to “to write some amount of code in order to  
5 gather information in response to subpoenas or other process.” Ex Parte App. at 15.

6 The burden imposed on Apple is thus in sharp contrast to *New York Telephone*  
7 *Co.*, where the public utility was compelled to provide “meager assistance” in setting  
8 up a pen register—a step which “required minimal effort on the part of the [c]ompany  
9 and no disruption to its operations.” 434 U.S. at 174–75 (noting that the company  
10 routinely employed pen registers without court order for purposes of checking billing  
11 operations and detecting fraud); *see also Mountain Bell*, 616 F.2d at 1132 (order  
12 compelling the phone company to use a tracing technique akin to a pen register did not  
13 impose a substantial burden because it “was extremely narrow in scope,” and  
14 “prohibit[ed] any tracing technique which required active monitoring by company  
15 personnel”). The very limited orders in those cases thus “should not be read to  
16 authorize the wholesale imposition upon private, third parties of duties pursuant to  
17 search warrants.” *Id.*

18 The other cases the government relies on involve similarly inconsequential  
19 burdens where third parties were asked to turn over records that were already in their  
20 possession or readily accessible, *Videotapes*, 2003 WL 22053105, at \*3 (directing  
21 apartment complex owner to share surveillance footage “maintained in the ordinary  
22 course of business”); *Hall*, 583 F. Supp. at 722 (directing bank to produce credit card  
23 records), or where the third party provided minimal assistance to effect a lawful  
24 wiretap, *In re Application of U.S. of Am. for an Order Directing a Provider of*  
25 *Comm’n Servs. to Provide Tech. Assistance to Agents of the U.S. Drug Enf’t Admin.*,  
26 2015 WL 5233551, at \*5 (D.P.R. Aug. 27, 2015). But unlike those cases, where the  
27 government directed a third party to provide something that already existed or sought  
28 assistance with a minimal and routine service, here the government wants to compel

1 Apple to deploy a team of engineers to write and test software code and create a new  
2 operating system that undermines the security measures it has worked so hard to  
3 establish—and then to potentially do that over and over again as other federal, state,  
4 local and foreign prosecutors make demands for the same thing.

5 The government’s reliance on two phone “unlocking” cases is similarly  
6 misplaced. Ex Parte App. at 9 (citing *United States v. Navarro*, No. 13-CR-5525  
7 (W.D. Wash. Nov. 13, 2013), ECF No. 39; *In re Order Requiring [XXX], Inc. to Assist*  
8 *in the Execution of a Search Warrant Issued by This Court by Unlocking a Cellphone*,  
9 2014 WL 5510865, at \*2 (S.D.N.Y. Oct. 31, 2014) (“*Order Requiring [XXX]*”). As an  
10 initial matter, the *Navarro* order is a minute order that does not contain any analysis of  
11 the All Writs Act, and it is unclear whether its limitations were ever raised or  
12 considered. The *Navarro* order is also distinguishable because it involved the  
13 government’s request to unlock an iPhone on an older operating system that did *not*  
14 require the creation of any new software. *Order Requiring [XXX]*, which was also  
15 issued without the benefit of adversarial briefing, is equally unavailing. 2014 WL  
16 5510865, at \*3 (granting *ex parte* application to compel a third party to bypass a lock  
17 screen on a phone to effectuate a search warrant). Although the court purported to  
18 apply *New York Telephone Co.*, it did not analyze all of the factors set forth in that  
19 case, such as whether the All Writs Act could be used to compel third parties to hack  
20 into phones, whether the cellphone company was “too far removed” from the matter,  
21 or whether hacking into the phone adversely affected the company’s interests. Rather,  
22 the court simply concluded the technical service sought was not “burdensome,” akin to  
23 “punching a few buttons” or installing a pen register. 2014 WL 5510865, at \*2  
24 (internal quotation marks omitted). As Apple has explained, the technical assistance  
25 sought here requires vastly more than simply pressing a “few buttons.”

26 The government has every right to reasonably involve the public in the law  
27 enforcement process. Indeed, each year Apple complies with thousands of lawful  
28 requests for data and information by law enforcement, and on many occasions has

1 extracted data from prior versions of its operating system for the FBI's use. *See* Olle  
2 Decl. ¶¶ 15-16. But compelling minimal assistance to surveil or apprehend a criminal  
3 (as in most of the cases the government cites), or demanding testimony or production  
4 of things that already *exist* (akin to exercising subpoena power), is vastly different, and  
5 significantly less intrusive, than conscripting a private company to create something  
6 *entirely new* and dangerous. There is simply no parallel or precedent for it.

7 **c. The Government Has Not Demonstrated Apple's Assistance**  
8 **Was Necessary To Effectuating The Warrant.**

9 A third party cannot be compelled to assist the government unless the  
10 government is authorized to act *and* the third party's participation is imperative. The  
11 order in *New York Telephone Co.* satisfied that requirement because the court had  
12 authorized surveillance, and "there [was] no conceivable way" to accomplish that  
13 surveillance without the company's assistance. 434 U.S. at 175 (noting that FBI had  
14 conducted "an exhaustive search" for a way to install a pen register in an undetectable  
15 location). The order compelling the phone company's assistance was therefore  
16 necessary "to prevent nullification of the court's warrant" and "to put an end to this  
17 venture." *Id.* at 174, 175 & n.23; *see also* *Mountain Bell*, 616 F.2d at 1129 (holding  
18 that an order compelling a third party to assist with tracing was necessary to carry out a  
19 wiretap and halt ongoing criminal activity); *Mich. Bell Telephone Co. v. United States*,  
20 565 F.2d 385, 389 (6th Cir. 1977) (concluding that telephone company was "the only  
21 entity that c[ould] effectuate the order of the district court to prevent company-owned  
22 facilities from being used in violation of both state and federal laws").

23 Here, by contrast, the government has failed to demonstrate that the requested  
24 order was absolutely necessary to effectuate the search warrant, including that it  
25 exhausted all other avenues for recovering information. Indeed, the FBI foreclosed  
26 one such avenue when, without consulting Apple or reviewing its public guidance  
27 regarding iOS, the government changed the iCloud password associated with an  
28 attacker's account, thereby preventing the phone from initiating an automatic iCloud



1 back-up. *See supra* II.C. Moreover, the government has not made any showing that it  
2 sought or received technical assistance from other federal agencies with expertise in  
3 digital forensics, which assistance might obviate the need to conscript Apple to create  
4 the back door it now seeks. *See* Hanna Decl. Ex. DD at 34–36 [October 26, 2015  
5 Transcript] (Judge Orenstein asking the government “to make a representation for  
6 purposes of the All Writs Act” as to whether the “entire Government,” including the  
7 “intelligence community,” did or did not have the capability to decrypt an iPhone, and  
8 the government responding that “federal prosecutors don’t have an obligation to  
9 consult the intelligence community in order to investigate crime”). As such, the  
10 government has not demonstrated that “there is no conceivable way” to extract data  
11 from the phone. *New York Tel. Co.*, 434 U.S. at 174.

### 12 **3. Other Cases The Government Cites Do Not Support The Type Of** 13 **Compelled Action Sought Here.**

14 The government does not cite a single case remotely approximating the demand  
15 it makes here; indeed, its cases only confirm the wild overreach of the Order.

16 The government relies, for example, on cases compelling *a criminal defendant*  
17 to take certain actions—specifically, *United States v. Fricosu*, 841 F. Supp. 2d 1232  
18 (D. Colo. 2012) and *United States v. Catoggio*, 698 F.3d 64 (2d Cir. 2012) (per  
19 curiam)—but those cases say nothing about the propriety of compelling an innocent  
20 third party to do so. In *Fricosu* the government moved to require the defendant to  
21 produce the “unencrypted contents” of her laptop computer. 841 F. Supp. 2d at 1235.  
22 This order placed no undue burden on the defendant because she could access the  
23 encrypted contents on her computer, and the court preserved her Fifth Amendment  
24 rights by not compelling the password itself, which was testimonial in nature. *See id.*  
25 at 1236–38. By contrast, the government’s request here creates an unprecedented  
26 burden on Apple and violates Apple’s First Amendment rights against compelled  
27 speech, as discussed below. And unlike the compelled creation of a compromised  
28 operating system for iOS devices, the order in *Fricosu* merely required the defendant

1 to hand over her own personal files, and thus posed no risk to third parties' privacy or  
2 security interests.

3 The government's reliance on *Catoggio*, which involved the seizure of  
4 defendant's property, is also inapt. Though the district court had not invoked the All  
5 Writs Act, the appellate court cited the Act in affirming the district court's order  
6 retaining a convicted defendant's property in anticipation of a restitution order. 698  
7 F.3d at 68–69. But whereas courts have uniformly held that the Act enables a court to  
8 restrain a convicted defendant's property pending a restitution order, *id.* at 67, no court  
9 has ever held that the All Writs Act permits the government to conscript a private  
10 company to build software for it.

11 Finally, the government relies on the Ninth Circuit's decision in *Plum Creek*—  
12 but that case only serves to illustrate the government's vast overreach under the All  
13 Writs Act. There, the Ninth Circuit affirmed the district court's order declining  
14 OSHA's request to compel an employer to rescind a company policy forbidding  
15 employees from wearing OSHA air-quality and noise-level testing devices, so that  
16 OSHA could more efficiently investigate the company's premises. 608 F.2d at 1289–  
17 90. The court reasoned that a government agency's interest in conducting an efficient  
18 investigation is not grounds for issuing a writ requiring a company to comply with the  
19 government's demands. *Id.* at 1290. This was particularly true where OSHA “c[ould]  
20 not guarantee that these devices would [not] cause” industry accidents, and the  
21 company bore the costs of those accidents. *Id.* at 1289 & n.4 (internal quotation marks  
22 omitted). Even though the investigation would take five times as long to complete  
23 without the use of the equipment OSHA sought to compel, the court could not compel  
24 their use absent a law requiring it. *Id.* at 1289 & n.6. The court held that the All Writs  
25 Act “does not give the district court a roving commission to order a party subject to an  
26 investigation to accept additional risks at the bidding of OSHA inspectors.” *Id.* at  
27 1289. *Plum Creek* thus provides no support for the government's attempt to compel  
28 Apple to create new software “when Congress has failed to impose” such a duty on

1 Apple. *Id.* at 1290. Forcing Apple to write software that would create a back door to  
2 millions of iOS devices would not only “usurp the legislative function,” *id.*, but also  
3 unconstitutionally compel speech and expose Apple iPhone users to exceptional  
4 security and privacy risks.

5 **B. The Order Would Violate The First Amendment And The Fifth**  
6 **Amendment’s Due Process Clause.**

7 **1. The First Amendment Prohibits The Government From Compelling**  
8 **Apple To Create Code.**

9 The government asks this Court to command Apple to write software that will  
10 neutralize safety features that Apple has built into the iPhone in response to consumer  
11 privacy concerns. Order ¶ 2. The code must contain a unique identifier “so that [it]  
12 would only load and execute on the SUBJECT DEVICE,” and it must be “‘signed’  
13 cryptographically by Apple using its own proprietary encryption methods.” *Ex Parte*  
14 *App.* at 5, 7. This amounts to compelled speech and viewpoint discrimination in  
15 violation of the First Amendment.

16 Under well-settled law, computer code is treated as speech within the meaning  
17 of the First Amendment. *See, e.g., Universal City Studios, Inc. v. Corley*, 273 F.3d  
18 429, 449 (2d Cir. 2001); *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000); *321*  
19 *Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1099–1100  
20 (N.D. Cal. 2004); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1126 (N.D. Cal.  
21 2002); *Bernstein v. Dep’t of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996).

22 The Supreme Court has made clear that where, as here, the government seeks to  
23 *compel* speech, such action triggers First Amendment protections. As the Court  
24 observed in *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988),  
25 while “[t]here is certainly some difference between compelled speech and compelled  
26 silence, . . . in the context of protected speech, the difference is without constitutional  
27 significance.” Compelled speech is a content-based restriction subject to exacting  
28 scrutiny, *id.* at 795, 797–98, and so may only be upheld if it is narrowly tailored to

1 obtain a compelling state interest, *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622,  
2 662 (1994).

3 The government cannot meet this standard here. Apple does not question the  
4 government's legitimate and worthy interest in investigating and prosecuting terrorists,  
5 but here the government has produced nothing more than speculation that this iPhone  
6 might contain potentially relevant information.<sup>26</sup> Hanna Decl. Ex. H [*Comey, Follow*  
7 *This Lead*] ("Maybe the phone holds the clue to finding more terrorists. Maybe it  
8 doesn't."). It is well known that terrorists and other criminals use highly sophisticated  
9 encryption techniques and readily available software applications, making it likely that  
10 any information on the phone lies behind several other layers of non-Apple encryption.  
11 *See* Hanna Decl. Ex. E [*Coker, Tech Savvy*] (noting that the Islamic State has issued to  
12 its members a ranking of the 33 most secure communications applications, and "has  
13 urged its followers to make use of [one app's] capability to host encrypted group  
14 chats").

15 Even more problematically, the Court's Order discriminates on the basis of  
16 Apple's viewpoint. When Apple designed iOS 8, it wrote code that announced the  
17 value it placed on data security and the privacy of citizens by omitting a back door that  
18 bad actors might exploit. *See, e.g.,* Hanna Decl. Ex. AA [*Apple Inc., Privacy,*  
19 *Government Information Requests*]. The government disagrees with this position and  
20 asks this Court to compel Apple to write new software that advances its contrary  
21 views. This is, in every sense of the term, viewpoint discrimination that violates the  
22

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23 <sup>26</sup> If the government did have any leads on additional suspects, it is inconceivable that  
24 it would have filed pleadings on the public record, blogged, and issued press  
25 releases discussing the details of the situation, thereby thwarting its own efforts to  
26 apprehend the criminals. *See Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S.  
27 211, 218-19 (1979) ("We consistently have recognized that the proper functioning  
28 of our grand jury system depends upon the secrecy of grand jury proceedings. . . .  
[I]f preindictment proceedings were made public, many prospective witnesses  
would be hesitant to come forward voluntarily, knowing that those against whom  
they testify would be aware of that testimony. . . . There also would be the risk that  
those about to be indicted would flee, or would try to influence individual grand  
jurors to vote against indictment.").

1 First Amendment. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S.  
2 789, 804 (1984).

3 Finally, the FBI itself foreclosed what would have likely been a promising and  
4 vastly narrower alternative to this unprecedented order: backing up the iPhone to  
5 iCloud. Apple has extensively cooperated and assisted law enforcement officials in the  
6 San Bernardino investigation, but the FBI inadvertently foreclosed a ready avenue by  
7 changing the passcode, which precluded the iCloud back-up option.<sup>27</sup>

8 To avoid the serious First Amendment concerns that the government's request to  
9 compel speech presents, this Court should vacate the Order.

## 10 **2. The Fifth Amendment's Due Process Clause Prohibits The** 11 **Government From Compelling Apple To Create The Request Code.**

12 In addition to violating the First Amendment, the government's requested order,  
13 by conscripting a private party with an extraordinarily attenuated connection to the  
14 crime to do the government's bidding in a way that is statutorily unauthorized, highly  
15 burdensome, and contrary to the party's core principles, violates Apple's substantive  
16 due process right to be free from "arbitrary deprivation of [its] liberty by  
17 government." *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1110 (9th  
18 Cir. 2010) (citation omitted); *see also, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S.  
19 833, 845-46 (1998) ("We have emphasized time and again that '[t]he touchstone of  
20 due process is protection of the individual against arbitrary action of government,' . . .  
21 [including] the exercise of power without any reasonable justification in the service of  
22 a legitimate governmental objective." (citations omitted)); *cf. id.* at 850 ("Rules of due  
23 process are not . . . subject to mechanical application in unfamiliar territory.").

24  
25  
26 <sup>27</sup> Hanna Decl. Ex. BB [John Paczkowski and Chris Geidner, *FBI Admits It Urged*  
27 *Change Of Apple ID Password For Terrorist's iPhone*, BuzzFeed News (updated  
28 Feb. 21, 2016 2:01 AM)]; Hanna Decl. Ex. CC [Ellen Nakashima and Mark  
Berman, *FBI Asked San Bernardino to Reset the Password for Shooter's Phone*  
*Backup*, Wash. Post (Feb. 20, 2016)].

#### IV. CONCLUSION

Apple has great respect for the professionals at the Department of Justice and FBI, and it believes their intentions are good. Moreover, Apple has profound sympathy for the innocent victims of the attack and their families. However, while the government's desire to maximize security is laudable, the decision of how to do so while also protecting other vital interests, such as personal safety and privacy, is for American citizens to make through the democratic process. Indeed, examples abound of society opting *not* to pay the price for increased and more efficient enforcement of criminal laws. For example, society does not tolerate violations of the Fifth Amendment privilege against self-incrimination, even though more criminals would be convicted if the government could compel their confessions. Nor does society tolerate violations of the Fourth Amendment, even though the government could more easily obtain critical evidence if given free rein to conduct warrantless searches and seizures. At every level of our legal system—from the Constitution,<sup>28</sup> to our statutes,<sup>29</sup> common law,<sup>30</sup> rules,<sup>31</sup> and even the Department of Justice's own policies<sup>32</sup>—society has acted to preserve certain rights at the expense of burdening law enforcement's interest in investigating crimes and bringing criminals to justice. Society is still debating the important privacy and security issues posed by this case. The government's desire to leave no stone unturned, however well intentioned, does not authorize it to cut off debate and impose its views on society.

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<sup>28</sup> *See, e.g.*, U.S. Const. amend. IV (limitations on searches and seizures), amend. V (limitations on charging; prohibition on compelling testimony of accused).

<sup>29</sup> *See, e.g.*, 18 U.S.C. § 3282 (prohibition on prosecuting crimes more than five years' old), CALEA (limitations on ability to intercept communications).

<sup>30</sup> *E.g.*, attorney-client privilege, spousal privilege, and reporter's privilege, and priest-penitent privilege, all of which limit the government's ability to obtain evidence.

<sup>31</sup> *See, e.g.*, Fed. R. Evid. 404 (limitations on use of character evidence), 802 (limitations on use of hearsay).

<sup>32</sup> *See, e.g.*, U.S. Attorneys' Manual §§ 9-13-200 (limitations on communicating with witnesses represented by counsel), 9-13.400 (limitations on subpoenaing news media), 9-13-410 (limitations on subpoenaing attorneys), 9-13-420 (limitations on searches of attorneys' offices).

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Respectfully submitted,

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