

No. S243805

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

JUL 23 2018

AMANDA FRLEKIN, et al.

Jorge Navarrete Clerk

Plaintiffs and Appellants,

Deputy

v.

APPLE, INC.

Defendant and Respondent.

On a Certified Question from the
United States Court of Appeals for the Ninth Circuit
Case No. 15-17382

**MOTION FOR JUDICIAL NOTICE BY AMICUS CURIAE CALIFORNIA
CORRECTIONAL PEACE OFFICERS' ASSOCIATION; MEMORANDUM OF
POINTS AND AUTHORITIES; DECLARATION OF YONATAN L.
MOSKOWITZ**

MESSING ADAM & JASMINE LLP
*Gregg McLean Adam, Bar No. 203436
gregg@majlabor.com
Yonatan L. Moskowitz, Bar No. 306717
yonatan@majlabor.com
235 Montgomery St., Suite 828
San Francisco, California 94104
Telephone: 415.266.1800
Facsimile: 415.266.1128

CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION
David A. Sanders, Bar No. 221393
General Counsel
david.sanders@ccpoa.org
Daniel M. Lindsay, Bar No. 142895
Chief Counsel
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634
Telephone: 800.821.6443

Attorneys for *Amicus Curiae*
California Correctional Peace Officers' Association

No. S243805

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AMANDA FRLEKIN, et al.

Plaintiffs and Appellants,

v.

APPLE, INC.

Defendant and Respondent.

On a Certified Question from the
United States Court of Appeals for the Ninth Circuit
Case No. 15-17382

**MOTION FOR JUDICIAL NOTICE BY AMICUS CURIAE CALIFORNIA
CORRECTIONAL PEACE OFFICERS' ASSOCIATION; MEMORANDUM OF
POINTS AND AUTHORITIES; DECLARATION OF YONATAN L.
MOSKOWITZ**

MESSING ADAM & JASMINE LLP
*Gregg McLean Adam, Bar No. 203436
gregg@majlabor.com
Yonatan L. Moskowitz, Bar No. 306717
yonatan@majlabor.com
235 Montgomery St., Suite 828
San Francisco, California 94104
Telephone: 415.266.1800
Facsimile: 415.266.1128

CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION
David A. Sanders, Bar No. 221393
General Counsel
david.sanders@ccpoa.org
Daniel M. Lindsay, Bar No. 142895
Chief Counsel
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634
Telephone: 800.821.6443

Attorneys for *Amicus Curiae*
California Correctional Peace Officers' Association

I.
INTRODUCTION

Amicus California Correctional Peace Officers' Association hereby requests this Court take judicial notice of the following matters, pursuant to Evidence Code Sections 452.

1. Exhibit 1. Defendant/Respondent Apple, Inc.'s Registered U.S. Trademark Number 4,277,914 (Jan. 22, 2013); and,
2. Exhibit 2. Brief for Technology Companies as Amicus Curiae in Support of Neither Party, *Carpenter v. United States* (June 22, 2018, No. 16-402) 585 U.S. __ [2018 WL 3073916].

A true and correct copy of the above-listed material is attached to the Declaration of Yonatan L. Moskowitz, filed herewith, as Exhibits 1 and 2.

II.
MEMORANDUM OF POINTS AND AUTHORITIES

California Evidence Code Section 452, subd. (c) provides that judicial notice may be taken of:

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

California Evidence Code Section 452, subd. (d) provides that judicial notice may be taken of:

(d) Records of (1) any court of this state or (2) and court of record of the United States or of any state of the United States.

California Evidence Code Section 452, subd. (h) provides that judicial notice may be taken of:

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

A. Exhibit 1

The Lanham Act (15 U.S.C. § 1051 *et seq.*) gave to the United States Patent and Trademark Office (“PTO”) the responsibility of overseeing the process of registering a trademark. If a trademark examiner believes registration of the mark is warranted, it publishes the mark in the Official Gazette of the PTO, (*Id.* § 1062), whereupon opponents of the mark may file opposition to occur before an administrative body. (*Id.* § 1063.) If the registration is granted, it conveys significant procedural and substantive legal advantages to the mark holder, including, *inter alia*, constituting “prima facie evidence of the validity” of the registered mark” and of the owner’s ownership of the mark. (*B & B Hardware, Inc. v. Hargis Indus., Inc.* (2015) 135 S.Ct. 1293, 1300 [citing 15 U.S.C. § 1057].)

The issuance of such a mark is therefore an official act of the United States federal government’s executive branch. It formally defines the rights of individuals, and the fact of its issuance is therefore proper subject matter for judicial notice under Evidence Code section 452, subd. (c). (See *Smiley v. Citibank* (1995) 11 Cal.4th 138, 145 fn.2 [taking judicial notice of “documents from federal administrative agencies”].)

Furthermore, the fact of the Trademark’s application and registration is available on the United States Patent and Trademark Office’s public

trademark search website.¹ It is therefore a proper subject for judicial notice under Evidence Code section 452, subd. (h), because it is capable of immediate and accurate determination and is not reasonably subject to factual dispute.

Exhibit 1 is not being submitted for truth of any of the matters asserted in the Trademark application, merely to show that such a Trademark was successfully registered. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

Exhibit 1 is relevant to the Court on the question of whether Apple believes the design of its store is a choice that Apple has made that brings it material benefits.

B. Exhibit 2

Amicus briefs in the United States Supreme Court qualify under California Evidence Code section 452, subd. (d) as records of a court of the United States. This Court has taken judicial notice of such briefs under section 452 before and should do so here. (See *Smiley v. Citibank* (1995) 11 Cal. 4th 138, 145 fn.2 [taking judicial notice of “submissions filed in the courts of California and a sister state”].)

¹ See “Trademark Status & Document Retrieval,” US Patent and Trademark Office, available at http://tsdr.uspto.gov/#caseNumber=4277914&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch

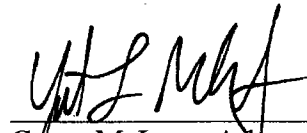
Furthermore, the fact that such filings occurred and the content of such a filing is capable of immediate and accurate determination and is not reasonably subject to factual dispute.

Exhibit 2 also is not being submitted in order to prove the matters Defendant/Respondent Apple, Inc. has asserted in their amicus filing in that other case. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.) It is, however, relevant to the Court on the question of whether Apple has committed to positions directly contrary to its current position in situations where its self-interest runs the other way.

DATED: July 9, 2018

MESSING ADAM & JASMINE LLP

By:



Gregg McLean Adam
Yonatan L. Moskowitz
Attorneys for Amicus Curiae
California Correctional Peace
Officers' Association

CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION

David A. Sanders, General Counsel
Daniel M. Lindsay, Chief Counsel

DECLARATION OF YONATAN L. MOSKOWITZ

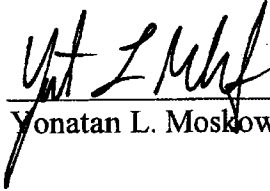
I, Yonatan L. Moskowitz, hereby declare:

1. I am associated with the law offices of Messing Adam & Jasmine LLP, attorneys for Amicus Curiae CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION ("CCPOA"). By virtue of that representation, I have personal knowledge of the facts set forth herein and if called as a witness I could and would testify competently as to them. I make this declaration in support of CCPOA's Motion for Judicial Notice filed concurrently with the Application to File Amicus Curiae Brief and Proposed Amicus Curiae Brief of California Correctional Peace Officers' Association.

2. Defendant/Respondent Apple, Inc.'s Registered U.S. Trademark Number 4,277,914 (Jan. 22, 2013), a true and correct copy of which is attached hereto as Exhibit 1; and,

3. Brief for Technology Companies as Amicus Curiae in Support of Neither Party, *Carpenter v. United States* (June 22, 2018, No. 16-402) 585 U.S. __ [2018 WL 3073916], a true and correct copy of which is attached hereto as Exhibit 2.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 9th day of July 2018 at San Francisco, California.



Yonatan L. Moskowitz

**CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA
RULES OF COURT RULE 8.504(d)(1)**

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 954 words.

DATED: July 9, 2018

MESSING ADAM & JASMINE LLP

By:



Gregg McLean Adam
Yonatan L. Moskowitz
Attorneys for Amicus Curiae
California Correctional Peace
Officers' Association

CALIFORNIA CORRECTIONAL PEACE
OFFICERS' ASSOCIATION

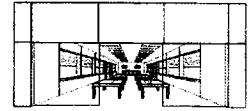
David A. Sanders, General Counsel
Daniel M. Lindsay, Chief Counsel

00054773-2

EXHIBIT 1

Generated on: This page was generated by TSDR on 2018-07-02 12:46:03 EDT

Mark:



US Serial Number: 85036990

Application Filing Date: May 12, 2010

US Registration Number: 4277914

Registration Date: Jan. 22, 2013

Register: Principal

Mark Type: Service Mark

Status: Registered. The registration date is used to determine when post-registration maintenance documents are due.

Status Date: Jan. 22, 2013

Publication Date: Jun. 05, 2012

Mark Information

Mark Literal Elements: None

Standard Character Claim: No

Mark Drawing Type: 2 - AN ILLUSTRATION DRAWING WITHOUT ANY WORDS(S)/ LETTER(S)/NUMBER(S)

Description of Mark: The mark consists of the design and layout of a retail store. The store features a clear glass storefront surrounded by a paneled facade consisting of large, rectangular horizontal panels over the top of the glass front, and two narrower panels stacked on either side of the storefront. Within the store, rectangular recessed lighting units traverse the length of the store's ceiling. There are cantilevered shelves below recessed display spaces along the side walls, and rectangular tables arranged in a line in the middle of the store parallel to the walls and extending from the storefront to the back of the store. There is multi-tiered shelving along the side walls, and a oblong table with stools located at the back of the store, set below video screens flush mounted on the back wall. The walls, floors, lighting, and other fixtures appear in dotted lines and are not claimed as individual features of the mark; however, the placement of the various items are considered to be part of the overall mark.

Color(s) Claimed: Color is not claimed as a feature of the mark.

Acquired Distinctiveness Claim: In whole

Design Search Code(s): 07.05.10 - Lobbies (interior parts of dwellings or buildings); Foyer

Related Properties Information

International Registration Number: 1060320

International Application(s)/Registration(s) Based on this Property: A0022070/1060320

Goods and Services

Note: The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: Retail store services featuring computers, computer software, computer peripherals, mobile phones, consumer electronics and related accessories, and demonstration of products relating thereto

International Class(es): 035 - Primary Class

U.S Class(es): 100, 101, 102

Class(es):
Class Status: ACTIVE
Basis: 1(a)
First Use: Sep. 2006

Use in Commerce: Sep. 2006

Basis Information (Case Level)

Filed Use: Yes	Currently Use: Yes	Amended Use: No
Filed ITU: No	Currently ITU: No	Amended ITU: No
Filed 44D: No	Currently 44D: No	Amended 44D: No
Filed 44E: No	Currently 44E: No	Amended 44E: No
Filed 66A: No	Currently 66A: No	
Filed No Basis: No	Currently No Basis: No	

Current Owner(s) Information

Owner Name: Apple Inc.
Owner Address: One Apple Park Way
Cupertino, CALIFORNIA 95014
UNITED STATES
Legal Entity Type: CORPORATION
State or Country Where Organized: CALIFORNIA

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Thomas R. La Perle

Attorney Primary Email Address: trademarkdocket@apple.com

Attorney Email Authorized: Yes

Correspondent

Correspondent Name/Address: Thomas R. La Perle
Apple Inc.
1 Infinite Loop
MS: 169-3IPL
Cupertino, CALIFORNIA 95014
UNITED STATES

Phone: (408) 974-2385

Correspondent e-mail: trademarkdocket@apple.com

Correspondent e-mail Authorized: Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Feb. 16, 2018	APPLICANT/CORRESPONDENCE CHANGES (NON-RESPONSIVE) ENTERED	88888
Feb. 16, 2018	TEAS CHANGE OF OWNER ADDRESS RECEIVED	
Jan. 22, 2018	COURTESY REMINDER - SEC. 8 (6-YR) E-MAILED	
Sep. 06, 2017	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Sep. 06, 2017	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Oct. 05, 2016	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Oct. 05, 2016	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Feb. 10, 2014	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Feb. 10, 2014	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Jan. 22, 2013	REGISTERED-PRINCIPAL REGISTER	
Dec. 18, 2012	EXTENSION OF TIME TO OPPOSE PROCESS - TERMINATED	
Jul. 03, 2012	EXTENSION OF TIME TO OPPOSE RECEIVED	
Jun. 05, 2012	PUBLISHED FOR OPPOSITION	
May 16, 2012	NOTICE OF PUBLICATION	

Apr. 27, 2012	LAW OFFICE PUBLICATION REVIEW COMPLETED	69712
Apr. 18, 2012	APPROVED FOR PUB - PRINCIPAL REGISTER	
Mar. 21, 2012	AMENDMENT FROM APPLICANT ENTERED	69712
Mar. 21, 2012	CORRESPONDENCE RECEIVED IN LAW OFFICE	69712
Mar. 21, 2012	APPLICANT/CORRESPONDENCE CHANGES (NON-RESPONSIVE) ENTERED	69712
Feb. 27, 2012	PAPER RECEIVED	
Feb. 23, 2012	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Feb. 23, 2012	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Aug. 23, 2011	NON-FINAL ACTION MAILED	
Aug. 23, 2011	NON-FINAL ACTION WRITTEN	76145
Aug. 15, 2011	ASSIGNED TO EXAMINER	76145
Apr. 09, 2011	AMENDMENT FROM APPLICANT ENTERED	69712
Apr. 09, 2011	CORRESPONDENCE RECEIVED IN LAW OFFICE	69712
Apr. 01, 2011	ASSIGNED TO LIE	69712
Mar. 30, 2011	ASSIGNED TO LIE	59554
Mar. 22, 2011	ASSIGNED TO LIE	65581
Mar. 11, 2011	PAPER RECEIVED	
Sep. 07, 2010	NON-FINAL ACTION MAILED	
Sep. 06, 2010	NON-FINAL ACTION WRITTEN	69222
Aug. 13, 2010	ASSIGNED TO EXAMINER	69222
May 19, 2010	NOTICE OF DESIGN SEARCH CODE MAILED	
May 18, 2010	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
May 15, 2010	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information - None

File Location

Current Location: PUBLICATION AND ISSUE SECTION

Date in Location: Jan. 22, 2013

Proceedings

Summary

Number of Proceedings: 1

Type of Proceeding: Extension of Time

Proceeding Number: 85036990

Filing Date: Jul 03, 2012

Status: Terminated

Status Date: Dec 18, 2012

Interlocutory Attorney:

Defendant

Name: Apple Inc.

Correspondent Address: TED DAVIS
KILPATRICK TOWNSEND AND STOCKTON
1100 PEACHTREE ST NE STE 2800
ATLANTA GA , 30309-4528
UNITED STATES

Associated marks

Mark	Application Status	Serial Number	Registration Number
	Registered	<u>85036990</u>	<u>4277914</u>

Potential Opposer(s)

Name: Microsoft Corporation

Correspondent Address: Kevin S. Costanza
Seed IP Law Group PLLC
701 Fifth Avenue, Suite 5400
Seattle WA , 98108

UNITED STATES

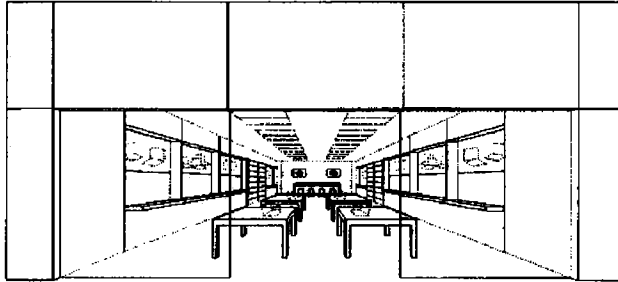
Correspondent e-mail: annw@seedip.com

Prosecution History

Entry Number	History Text	Date	Due Date
1	INCOMING - EXT TIME TO OPPOSE FILED	Jul 03, 2012	
2	EXTENSION OF TIME GRANTED	Jul 03, 2012	
3	INCOMING - EXT TIME TO OPPOSE FILED	Oct 02, 2012	
4	EXTENSION OF TIME GRANTED	Oct 02, 2012	

United States of America

United States Patent and Trademark Office



Reg. No. 4,277,914

Registered Jan. 22, 2013

Int. Cl.: 35

SERVICE MARK

PRINCIPAL REGISTER

APPLE INC. (CALIFORNIA CORPORATION)
1 INFINITE LOOP
MS 36-4TM
CUPERTINO, CA 95014

FOR: RETAIL STORE SERVICES FEATURING COMPUTERS, COMPUTER SOFTWARE, COMPUTER PERIPHERALS, MOBILE PHONES, CONSUMER ELECTRONICS AND RELATED ACCESSORIES, AND DEMONSTRATION OF PRODUCTS RELATING THERETO, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 9-0-2006; IN COMMERCE 9-0-2006.

THE MARK CONSISTS OF THE DESIGN AND LAYOUT OF A RETAIL STORE. THE STORE FEATURES A CLEAR GLASS STOREFRONT SURROUNDED BY A PANELED FACADE CONSISTING OF LARGE, RECTANGULAR HORIZONTAL PANELS OVER THE TOP OF THE GLASS FRONT, AND TWO NARROWER PANELS STACKED ON EITHER SIDE OF THE STOREFRONT. WITHIN THE STORE, RECTANGULAR RECESSED LIGHTING UNITS TRAVERSE THE LENGTH OF THE STORE'S CEILING. THERE ARE CANTILEVERED SHELVES BELOW RECESSED DISPLAY SPACES ALONG THE SIDE WALLS, AND RECTANGULAR TABLES ARRANGED IN A LINE IN THE MIDDLE OF THE STORE PARALLEL TO THE WALLS AND EXTENDING FROM THE STOREFRONT TO THE BACK OF THE STORE. THERE IS MULTI-TIERED SHELVING ALONG THE SIDE WALLS, AND A OBLONG TABLE WITH STOOLS LOCATED AT THE BACK OF THE STORE, SET BELOW VIDEO SCREENS FLUSH MOUNTED ON THE BACK WALL. THE WALLS, FLOORS, LIGHTING, AND OTHER FIXTURES APPEAR IN DOTTED LINES AND ARE NOT CLAIMED AS INDIVIDUAL FEATURES OF THE MARK; HOWEVER, THE PLACEMENT OF THE VARIOUS ITEMS ARE CONSIDERED TO BE PART OF THE OVERALL MARK.



SEC. 2(F).

SER. NO. 85-036,990, FILED 5-12-2010.

MICHAEL W. BAIRD, EXAMINING ATTORNEY

David J. Kappas

Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*

What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.* See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*

What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or
reminder of these filing requirements.**

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

EXHIBIT 2

No. 16-402

IN THE
Supreme Court of the United States

TIMOTHY IVORY CARPENTER,
Petitioner,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF FOR TECHNOLOGY COMPANIES
AS AMICI CURIAE IN SUPPORT OF
NEITHER PARTY**

SETH P. WAXMAN
Counsel of Record
JONATHAN G. CEDARBAUM
CATHERINE M.A. CARROLL
ROBBIE MANHAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	9
ARGUMENT.....	12
I. FOURTH AMENDMENT DOCTRINE MUST ADAPT TO THE CHANGING REALITIES OF THE DIGITAL ERA	12
A. Digital Data And Devices Are Perva- sive, Personal, And Often Necessary To Modern Life.....	14
B. Users Of Digital Technologies Cannot Avoid Transmitting Sensitive Data To Service Providers, But They Expect That Data To Remain Private.....	17
C. Amici’s Compliance With Law- Enforcement Requests Respects User Privacy.....	21
II. RIGID ANALOG-ERA RULES SHOULD YIELD TO CONSIDERATION OF REASONABLE EX- PECTATIONS OF PRIVACY IN THE DIGITAL AGE.....	23
A. A Flexible Test Grounded In Today’s Reasonable Expectations Of Privacy Should Govern In The Digital Context.....	23
B. Transmission To A Service Provider Should Not Automatically Foreclose Protection Of Digital Data.....	26

TABLE OF CONTENTS—Continued

	Page
C. “Non-Content” Digital Data Should Not Automatically Be Excluded From Protection.....	29
CONCLUSION	32

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Ex parte Jackson</i> , 96 U.S. 727 (1878)	29, 30
<i>In re Google Inc. Cookie Placement Consumer Privacy Litigation</i> , 806 F.3d 125 (3d Cir. 2015)	32
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	24
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001)	12, 25, 28
<i>Missouri v. McNeely</i> , 133 S. Ct. 1552 (2013)	21
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958)	32
<i>Oliver v. United States</i> , 466 U.S. 170 (1984)	23
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017)	12, 15, 17, 26
<i>Riley v. California</i> , 134 S. Ct. 2473 (2014)	<i>passim</i>
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979)	12, 26, 27, 28
<i>State v. Zeller</i> , 172 Wash. App. 1008 (2012)	21
<i>United States v. Dotson</i> , 715 F.3d 576 (6th Cir. 2013)	17
<i>United States v. Figueroa</i> , 2008 WL 5423982 (E.D. Wis. Dec. 30, 2008)	14
<i>United States v. Holm</i> , 326 F.3d 872 (7th Cir. 2003)	17
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	18, 24, 25, 27, 30

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Karo</i> , 468 U.S. 705 (1984).....	25, 28
<i>United States v. LaCoste</i> , 821 F.3d 1187 (9th Cir. 2016).....	14, 17
<i>United States v. Miller</i> , 425 U.S. 435 (1976).....	12, 26
<i>United States v. Peterson</i> , 248 F.3d 79 (2d Cir. 2001).....	25
<i>United States v. Pineda-Moreno</i> , 617 F.3d 1120 (9th Cir. 2010).....	31
<i>United States v. Sofsky</i> , 287 F.3d 122 (2d Cir. 2002).....	14
<i>United States v. Voelker</i> , 489 F.3d 139 (3d Cir. 2007).....	25
<i>United States v. Warshak</i> , 631 F.3d 266 (6th Cir. 2010).....	21, 23, 29, 30

DOCKETED CASES

<i>Microsoft v. United States</i> , No. 16-cv-00538 (W.D. Wash.).....	22
--	----

**STATUTES, RULES AND LEGISLATIVE
MATERIALS**

Stored Communications Act, 18 U.S.C. § 2703.....	21, 30
Fed. R. Crim. P. 4.1.....	21
H.R. Rep. No. 114-528 (2016).....	21

TABLE OF AUTHORITIES—Continued

	Page(s)
OTHER AUTHORITIES	
Anderson, Monica, <i>6 Facts About Americans and their Smartphones</i> , Pew Res. Ctr., Apr. 1, 2015, http://www.pewresearch.org/fact-tank/2015/04/01/6-facts-about-americans-and-their-smartphones/	14
Apple Inc., <i>Legal Process Guidelines: Government & Law Enforcement Within the United States</i> , https://www.apple.com/legal/privacy/law-enforcement-guidelines-us.pdf (visited Aug. 13, 2017).....	22
Apple Inc., <i>Privacy Policy</i> , https://www.apple.com/legal/privacy/en-ww/ (visited Aug. 14, 2017)	20
Apple Inc., <i>Report on Government and Private Party Requests for Customer Information</i> , https://images.apple.com/legal/privacy/transparency/requests-2016-H2-en.pdf (visited Aug. 13, 2017).....	22
Bellovin, Steven M. et al., <i>It's Too Complicated: How the Internet Opens</i> Katz, Smith, and <i>Electronic Surveillance Law</i> , 30 Harv. J.L. & Tech. 1 (2016)	17, 18
Bowman, Courtney M., <i>A Way Forward After Warshak: Fourth Amendment Protections for E-mail</i> , 27 Berkeley Tech. L.J. 809 (2012).....	15

TABLE OF AUTHORITIES—Continued

	Page(s)
CTIA, <i>Semi-Annual Wireless Industry Survey</i> (2011), http://files.ctia.org/pdf/CTIA_Survey_MY_2011_Graphics.pdf (visited Aug. 14, 2017)	13
Crist, Ry, <i>Home Automation Buying Guide</i> , C Net (Apr. 28, 2017 9:07 a.m.), https://www.cnet.com/news/smart-home-buying-guide-home-automation/	16
Colb, Sherry F., <i>What Is A Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of A Remedy</i> , 55 <i>Stan. L. Rev.</i> 119 (2002).....	29
Dewey, Caitlin, <i>How Many Hours of Your Life Have You Wasted on Work Email? Try our Depressing Calculator</i> , <i>Wash. Post</i> , Oct. 3, 2016, https://www.washingtonpost.com/news/the-intersect/wp/2016/10/03/how-many-hours-of-your-life-have-you-wasted-on-work-email-try-our-depressing-calculator/?utm_term=.54666f34830d	14
Dropbox, Inc., <i>Privacy Policy</i> , https://www.dropbox.com/privacy (visited Aug. 14, 2017)	20
Dropbox, Inc., <i>Transparency Overview</i> , https://www.dropbox.com/transparency (visited Aug. 13, 2017)	22

TABLE OF AUTHORITIES—Continued

	Page(s)
Facebook, Inc., <i>Two Billion People Coming Together on Facebook</i> (June 27, 2017), https://newsroom.fb.com/news/2017/06/two-billion-people-coming-together-on-facebook/	15
Google Inc., <i>Cloud Platform Security</i> , https://cloud.google.com/security/compliance (visited Aug. 13, 2017)	20
Google Inc., <i>Privacy, Your Security Comes First in Everything We Do</i> , https://privacy.google.com/your-security.html (visited Aug. 13, 2017).....	20
Madden, Mary & Lee Rainie, <i>Americans' Attitudes About Privacy, Security and Surveillance</i> , Pew Research Center, May 20, 2015, http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/	19
Madden, Mary, <i>Public Perceptions of Privacy and Security in the Post-Snowden Era</i> , Pew Research Center (Nov. 14, 2014), http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/	18
Marya, Radhika, <i>Cellphones are now essentials for the poor</i> , USA Today, Sept. 14, 2013, https://www.usatoday.com/story/money/personalfinance/2013/09/14/cellphones-for-poor-people/2805735/	14

TABLE OF AUTHORITIES—Continued

	Page(s)
Mastroianni, Brian, <i>Survey: More Americans Worried About Data Privacy than Income</i> , CBS News, Jan. 28, 2016, http://www.cbsnews.com/news/truste-survey-more-americans-concerned-about-data-privacy-than-losing-income/	19
Meeker, Mary, <i>2016 Internet Trends Report</i> , Kleiner Perkins Caufield & Byers (June 1, 2016), http://www.kpcb.com/blog/2016-internet-trends-report	15
Microsoft Trust Center, <i>Security, Audits, and Certifications</i> , https://www.microsoft.com/online/legal/v2/en-us/MOS_PTC_Security_Audit.htm (visited Aug. 13, 2017)	20
National Security Telecommunications Advisory Committee, <i>NSTAC Report to the President on Emerging Technologies: Strategic Vision Executive Summary</i> (May 18, 2017), https://www.dhs.gov/sites/default/files/publications/Draft%20NSTAC%20ETSV%20Report%20Executive%20Summary%20508%20Compliant_1.pdf	16
Note, <i>If These Walls Could Talk: The Smart Home and the Fourth Amendment Limits of the Third Party Doctrine</i> , 130 Harv. L. Rev. 1924 (2017).....	16, 27

TABLE OF AUTHORITIES—Continued

	Page(s)
Organisation for Economic Co-operation Development, <i>Bridging the Digital Divide</i> , https://www.oecd.org/site/schoolingfortomorrowknowledgebase/themes/ict/bridgingthedigitaldivide.htm (visited Aug. 13, 2017)	13
Parlante, Nick, <i>The Internet-TCP/IP, CS101—Introduction to Computing Principles, CS01</i> , https://web.stanford.edu/class/cs101/network-3-internet.html (visited Aug. 13, 2017)	17
Pesciotta, Daniel T., <i>I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century</i> , 63 Case W. Res. L. Rev. 187 (2012)	28
Pew Research Center, <i>Mobile Fact Sheet</i> (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/mobile/	13
Pew Research Center, <i>Online Shopping and E-Commerce</i> (Dec. 19, 2016), http://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce/	15
Radicati Group, Inc., <i>Email Statistic Report, 2017-2021</i> (Feb. 6, 2017), http://www.radicati.com/wp/wp-content/uploads/2017/01/Email-Statistics-Report-2017-2021-Executive-Summary.pdf	13
Shuler, Rus, <i>How Does The Internet Work?</i> (2002), https://www.scribd.com/document/316562293/Rus-Shuler-How-Does-the-Internet-Work	17

TABLE OF AUTHORITIES—Continued

	Page(s)
Silliman, Craig, <i>Musing About the Third Party Doctrine During Network Planning Meetings</i> (Oct. 10, 2016), https://www.linkedin.com/pulse/musing-third-party-doctrine-during-network-planning-craig-silliman	31
Snap Inc., <i>Transparency Report</i> , https://www.snap.com/en-US/privacy/transparency/2015-02-28 (visited Aug. 13, 2017).....	22
Twitter Inc., <i>Transparency Report: United States</i> , https://transparency.twitter.com/en/countries/us.html (visited Aug. 13, 2017)	22
United States Government Accountability Office, <i>Internet of Things: Communities Deploy Projects By Combining Federal Support With Other Funds And Expertise</i> , GAO-17-570 (July 2017).....	16, 17
Warner, Timothy L., <i>Protect Your Online Privacy by Removing Exif Data from Your Photos</i> , Que Publishing (May 15, 2014), http://www.quepublishing.com/articles/article.aspx?p=2216446	16
Wasik, Bill, <i>In the Programmable World, All Our Objects Will Act As One</i> , Wired, May 14, 2013 6:30 a.m., https://www.wired.com/2013/05/internet-of-things-2/	16

STATEMENT OF INTEREST¹

Amici are the world's leading technology companies. Billions of people rely daily on amici's search engines, email services, social networks, smartphones, cloud storage, Internet-based devices and applications, and wireless networks for their businesses and personal lives.

Amici have a substantial interest in the legal standards governing law-enforcement access to data about their customers. Those customers entrust amici with some of their most intimate information, including what they search, where they are, and details of their daily lives. Given the sensitivity of this data, amici work continuously to secure their customers' privacy. And amici agree that Fourth Amendment doctrine should recognize that, in the evolving digital era, where such data is disclosed to or collected by service providers to provide technologies that are increasingly integrated into daily life, people reasonably expect that their data will be stored securely and remain private.

Although amici do not take a position on the outcome of this case, they believe Fourth Amendment protections for digital data should be strong. Rigid rules such as the third-party doctrine and the content/non-content distinction make little sense in the context of digital technologies and should yield to a more nuanced understanding of reasonable expectations of privacy, including consideration of the sensitivity of the data

¹ No counsel for a party authored this brief in whole or in part, and no entity or person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of amicus briefs are on file with the Clerk.

and the circumstances under which such data is collected by or disclosed to third parties as part of people's participation in today's digital world.

Airbnb is a trusted community marketplace for people to list, discover, and book unique accommodations in more than 65,000 cities and 191 countries. Since its founding in 2008, there have been over 200 million guest arrivals in the over 4 million listings on Airbnb worldwide. While negative incidents are rare, Airbnb works with law enforcement to protect the rights of its Hosts, its Guests, and the community at large. At the same time, Airbnb respects the privacy interests of its community members. Airbnb sets forth in its law-enforcement guidelines how and when it complies with its legal obligations to provide user data to law enforcement. Airbnb publishes a Transparency Report to inform the public of the nature and volume of law-enforcement requests it receives and processes annually.

Apple Inc. offers highly secure hardware, software, and servers to customers worldwide. Apple's business strategy leverages its unique ability to design and develop its own operating systems, hardware, application software, and services to provide customers products and solutions with superior security, ease of use, seamless integration, and innovative design. In addition to the iPhone, iPad, Mac computer, and iPod, Apple offers its users iCloud—a cloud service for storing photos, contacts, calendars, documents, device backups, and more, keeping everything up to date and available to customers on whatever device they are using. Apple is committed its users' privacy and to helping users understand how it handles their personal information. Apple strives to provide straightforward