

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4227

In The Matter Of The Application Of The United States of America for An Order
Directing A Provider Of Electronic Communications Service To Disclose Records
To The Government

On Appeal from the United States District Court
for the Western District of Pennsylvania
The Honorable Terrence F. McVerry, United States District Judge, Presiding
Magistrate's No. 2:07-mj-00524M

Motion of *Amici Curiae*

Electronic Frontier Foundation, The American Civil Liberties Union, The ACLU-
Foundation of Pennsylvania, Inc., and the Center for Democracy and Technology
For Additional Time For Oral Argument

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This motion is filed on behalf of *Amici Curiae* The Electronic Frontier Foundation (“EFF”), the American Civil Liberties Union (“ACLU”), the ACLU-Foundation of Pennsylvania, Inc. (“ACLU-PA”) and the Center for Democracy and Technology (“CDT”). *Amici* hereby request of this Honorable Court thirty (30) minutes for oral argument, if argument is granted, to be split between EFF Senior Staff Attorney Kevin S. Bankston and Professor Susan Freiwald, who filed a separate *amicus* brief in this matter. In support of this motion, *Amici* aver as follows.

1. As the district court noted when it first appointed EFF and Professor Freiwald as *amici* below, this case raises issues of “importance and novelty” and “presents, as a matter of first impression in this Circuit, issues regarding the Government’s entitlement to cell-phone-derived location information, by *ex parte* Order under the provisions of electronic communications legislation and absent a showing of probable cause.” Briefing Order of May 2, 2008 (Docket No. 13) at p.1.

2. In addition to raising issues of first impression regarding the Fourth Amendment’s application to cell phone location information, this case also raises equally important and novel questions concerning a statutory electronic communications privacy regime that is a “complex, often convoluted area of the law,” *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998), “famous (if not

infamous) for its lack of clarity.” *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 462 (5th Cir. 1994). The Court’s answers to these difficult questions will directly or indirectly impact the statutory and constitutional privacy rights of every American carrying a cell phone.

3. The undersigned *Amici* and *amicus* Professor Freiwald, who were specifically invited to brief the District Court in this matter and have also graciously been permitted to brief this Court, respectfully believe that they are in a unique position to assist this panel in evaluating the Government’s arguments at oral argument, if such argument is scheduled.

4. Both EFF and Professor Freiwald have considerable experience at navigating the oft-times difficult intersection between the Fourth Amendment and the federal electronic privacy statutes. EFF has participated as party, counsel or *amicus* in a wide range of cases addressing statutory and constitutional issues surrounding electronic communications privacy,¹ while Professor Freiwald is one

¹ See, e.g., *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994); *U.S. Telecom Ass’n v. F.C.C.*, 227 F.3d 450 (D.C. Cir. 2000); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002); *U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2005) (en banc); *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974 (N.D.Cal. 2006); *In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register and Trap and trace Device and (2) Authorizing Release of Subscriber Info. and/or Cell Site Info.*, 396 F.Supp.2d 294 (E.D.N.Y. 2005); *Snow v. DirecTV, Inc.*, 450 F.3d 1314 (11th Cir. 2006); *Doe v. Gonzales*, 449 F.3d 415 (2nd Cir. 2006); *Warshak v. U.S.*, 490 F.3d 455 (6th Cir. 2007); and *U.S. v. Forrester*, 512 F.3d 500 (9th Cir. 2008).

of the few academics to regularly publish articles on the subject.²

5. The undersigned *Amici*'s brief addresses the question of whether courts have discretion under 18 U.S.C. § 2703(d) to deny Government applications for court orders to obtain cell phone location information absent a probable cause showing. *Amici* further address whether the Fourth Amendment, directly or through the doctrine of constitutional avoidance, requires such a denial. Professor Freiwald's brief also addresses the direct Fourth Amendment question, and in even greater depth.

6. The undersigned *Amici* respectfully submit that oral argument from both the EFF *amici* (represented by EFF Senior Staff Attorney Kevin S. Bankston) and Professor Freiwald would best guarantee that the complex questions raised by this case are fully and competently presented to the Court.

7. Given these circumstances, we anticipate that the usual allotment of fifteen (15) minutes per side may not allow the Court adequate time to fully explore the important issues raised by this case. *Amici* therefore request an additional fifteen (15) minutes of oral argument, for a total of thirty (30) minutes per side. The undersigned *Amici* and Professor Freiwald have agreed to split the

² See, e.g., Susan Freiwald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act*, 69 So. Cal. L. Rev. 949 (1996); Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 Ala. L. Rev. 9 (2004); Susan Freiwald, *First Principles of Communications Privacy*, Stanford J. Law. & Tech. 2007; and Patricia L. Bellia and Susan Freiwald, *Fourth Amendment Protection for Stored E-mail*, 2008 U.Chi. L. Forum 121.

time, should the court so allow.

8. On January 14, 2010, counsel for the Government, Mark Eckenwiler, informed counsel for *Amici* Jennifer Granick that, should the Court request oral argument, the Government believes that a maximum of 15 minutes is sufficient for this appeal. Accordingly, the Government intends to request only the customary 15 minutes, or whatever amount of time the Court may grant to *amici*.

9. For the reasons stated, the undersigned *Amici* respectfully request that their motion for additional time to participate in oral argument be granted, and that the Court allow that time to be split between Mr. Bankston and Professor Freiwald.

Respectfully submitted,

Dated: January 20, 2010

/s/ Kevin S. Bankston

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