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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES DEPARTMENT OF)
 JUSTICE, and LORETTA LYNCH, in her)
 official capacity as Attorney General of the)
 United States,)
)
 Defendants.)

Case No. 2:16-cv-00538 JLR

**UNOPPOSED MOTION OF THE
CHAMBER OF COMMERCE OF
THE UNITED STATES OF
AMERICA, THE CENTER FOR
DEMOCRACY AND
TECHNOLOGY, THE NATIONAL
ASSOCIATION OF
MANUFACTURERS, *ET AL.* FOR
LEAVE TO FILE AN *AMICI CURIAE*
BRIEF IN SUPPORT OF
MICROSOFT CORPORATION’S
OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS**

**NOTE ON MOTION CALENDAR:
September 2, 2016**

1 **INTRODUCTION**

2 The Chamber of Commerce of the United States of America; the Center for Democracy
3 and Technology; the National Association of Manufacturers; Alaska Airlines, Inc.; Archive360,
4 Inc.; AvePoint; BP America Inc.; Delta Air Lines, Inc.; Eli Lilly and Company; Getty Images
5 (US), Inc.; GlaxoSmithKline LLC; H5; the Information Coalition; Onsupport; and Wipfli LLP
6 (collectively, “Movants”) respectfully move for leave to file a brief as *amici curiae* in support
7 of Plaintiff Microsoft Corporation’s opposition to Defendants’ motion to dismiss. Movants
8 affirm that no counsel for a party has authored this brief in whole or in part and that no person
9 other than movants, their counsel, and their members made a monetary contribution to its
10 preparation or submission. Movants have conferred with counsel for Plaintiff and Defendants,
11 and both have consented to the granting of this motion for leave to file Movant’s proposed
12 *amici curiae* brief. The proposed *amici curiae* brief is attached hereto as Exhibit A; a proposed
13 order granting leave is attached as Exhibit B.

14 **IDENTITY AND INTEREST OF AMICI**

15 Movants are organizations representing businesses and individuals who use cloud-
16 computing services as well as individual companies that use these services. Because the Court’s
17 decision in this case could significantly affect the ability of businesses and individuals to
18 maintain the privacy of their most confidential information, *amici* have a substantial interest in
19 this proceeding. The proposed *amici curiae* brief explains the nature of cloud computing and its
20 importance to the U.S. economy, and why the statutory provisions at issue in this case, if
21 permitted to stand, will harm U.S. business and societal interests.

22 The proposed *amici* are:

- 23 • The Chamber of Commerce of the United States of America (“Chamber”) is the
24 world’s largest business federation representing 300,000 direct members and
25 indirectly representing an underlying membership of more than three million
26 businesses and organizations of every size, in every industry sector, and from every
27 region of the country. A central function of the Chamber is to represent the interests

1 of its members in matters before Congress, the Executive Branch, and the courts.

- 2 • The Center for Democracy and Technology (“CDT”) is a nonprofit advocacy
3 organization that works to ensure that the human rights we enjoy in the physical
4 world are realized online and that technology continues to serve as an empowering
5 force for people worldwide. Integral to this work is CDT’s representation of the
6 individual and public interest in the creation of an open, innovative, and
7 decentralized Internet that promotes the constitutional and democratic values of free
8 expression, privacy, and individual liberty.
- 9 • The National Association of Manufacturers (“NAM”) is the largest manufacturing
10 association in the United States, representing small and large manufacturers in every
11 industrial sector and in all 50 states. Manufacturing employs nearly 12 million men
12 and women, contributes more than \$2 trillion to the U.S. economy annually, has the
13 largest economic impact of any major sector, and accounts for two-thirds of private-
14 sector research and development. The NAM is the voice of the manufacturing
15 community and the leading advocate for a policy agenda that helps manufacturers
16 compete in the global economy and create jobs across the United States.
- 17 • Alaska Airlines, Inc. is a leading U.S. airline headquartered in Seattle, Washington.
18 Alaska and its regional partners fly approximately 32 million passengers annually to
19 over 110 destinations with an average of 970 daily flights throughout the United
20 States, including Hawaii, Canada, Costa Rica and Mexico.
- 21 • Archive360, Inc. is a global software technology company that provides next
22 generation email archive migration software solutions and cloud-based storage for
23 regulatory compliance, legal, and low touch data.
- 24 • AvePoint is the leader in Microsoft Cloud solutions, providing software and services
25 that migrate, manage, and protect Office 365 and SharePoint data for 15,000
26 organizations and 5 million cloud users.
- 27 • BP America Inc., is part of the BP group of companies which is a global leader in

1 the energy industry. Since 2006, BP has invested more than \$90 billion in U.S. oil,
2 gas, and renewable as well as the technology to produce them safely.

- 3 • Delta Air Lines, Inc., is a leader in the airline industry, offering service to over 300
4 destinations in 62 countries on six continents. Delta serves nearly 180 million
5 customers each year and employs 80,000 people worldwide.
- 6 • Eli Lilly and Company is a global healthcare leader that unites caring with
7 discovery to make life better for people around the world. Lilly was founded more
8 than a century ago by a man committed to creating high-quality medicines that meet
9 real needs, and today Lilly remains true to that mission in all its work. Across the
10 globe, Lilly employees work to discover and bring life-changing medicines to those
11 who need them, improve the understanding and management of disease, and give
12 back to communities through philanthropy and volunteerism.
- 13 • Getty Images (US), Inc., is among the world's leading creators and distributors of
14 award-winning still imagery, video, music, and multimedia products, as well as
15 other forms of premium digital content, available through its trusted house of
16 brands, including iStock and Thinkstock. With its advanced search and image
17 recognition technology, Getty Images (US), Inc., serves business customers in more
18 than 100 countries and is the first place creative and media professionals turn to
19 discover, purchase and manage images and other digital content.
- 20 • GlaxoSmithKline LLC is a Delaware limited liability company and the US
21 operating company for GlaxoSmithKline, a science-led global healthcare company
22 that researches and develops a broad range of innovative products in three primary
23 areas of pharmaceuticals, vaccines and consumer healthcare.
- 24 • H5 is a leading eDiscovery company that specializes in the expert use of advanced
25 technology combined with scientific expertise in search and information analysis to
26 find the documents that matter in high profile litigation and investigations and help
27 corporations and law firms meet litigation discovery, compliance and information

1 management objectives. H5's client list includes some of the nation's largest
2 corporations and most prominent law firms.

- 3 • The Information Coalition advances best practices in enterprise information and
4 information governance. The Information Coalition represents the interests of a
5 broad base of practitioners and vendors by providing collaborative, hands-on
6 resources that enable organizations to best reduce risk and increase value of their
7 information and processes.
- 8 • Onsupport is a leader in the healthcare industry, providing security risk analysis,
9 technology consulting, and cloud hosting services to covered entities and their
10 business associates. Onsupport helps businesses ranging from single practitioners to
11 large, hospital networks secure and protect ePHI (Electronic Protected Healthcare
12 Information).
- 13 • Wipfli LLP ranks among the top 20 accounting and business consulting firms in the
14 nation, with more than 1,700 associates located in 37 offices in the United States
15 and two offices in India. For over 86 years, Wipfli has provided private and publicly
16 held companies with industry-focused assurance, accounting, tax and consulting
17 services to help clients overcome their business challenges today and plan for
18 tomorrow.

19 Following Federal Rule of Civil Procedure 7.1, the Movants make the following
20 corporate disclosure statements:

- 21 • Alaska Airlines, Inc. is wholly owned by its parent corporation Alaska Air
22 Group, Inc. Apart from that relationship, no public company owns more than
23 10% of the stock of Alaska Airlines, Inc.
- 24 • BP America Inc., is a wholly owned indirect subsidiary of BP plc, which is a
25 publicly traded company. No publicly traded company owns 10% or more of BP
26 plc.
- 27 • Getty Images (US), Inc., is a wholly owned subsidiary of Getty Images, Inc.,

1 which is wholly owned by other entities that are not publicly traded. A majority
2 of those not publicly traded entities is indirectly held by an affiliate of The
3 Carlyle Group LP, which is a publicly traded Delaware limited partnership.

- 4 ● GlaxoSmithKline LLC is owned, through several levels of wholly-owned
5 subsidiaries, by GlaxoSmithKline plc, a publicly-traded public limited company
6 organized under the laws of England. GlaxoSmithKline plc has no parent
7 company. To the knowledge of GlaxoSmithKline LLC and GlaxoSmithKline
8 plc, none of the shareholders of GlaxoSmithKline plc beneficially owns ten
9 percent or more of its outstanding shares. However, Bank of New York Mellon
10 (“BNYM”) acts as Depository in respect to Ordinary Share American
11 Depository Receipts (“ADRs”) representing shares in GlaxoSmithKline plc. In
12 that capacity, BNYM is the holder, but not the beneficial owner, of more than
13 ten percent of the outstanding shares in GlaxoSmithKline plc on behalf of the
14 ADR owners who are the beneficial owners of these shares, none of whom to
15 GlaxoSmithKline plc’s knowledge own ten percent or more of its outstanding
16 shares.
- 17 ● None of the other proposed *amici* has a parent company, and no publicly held
18 company owns 10% or more of the stock of the other proposed *amici*.

19 AUTHORITY

20 District courts have “broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682
21 F.2d 1237, 1260 (9th Cir. 1982). “An amicus brief should normally be allowed . . . when the
22 amicus has unique information or perspective that can help the court beyond the help that the
23 lawyers for the parties are able to provide.” *Community Ass’n for Restoration of the Env’t v.*
24 *Deruyter Brothers Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *Miller-Wohl Co.*
25 *v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)).

26 Movants offer a unique perspective. They explain that remote computing services—the
27 storage “in the cloud” of individuals’ and companies’ most confidential information embodied

1 in emails, documents, photographs, and other materials—substitute for the storage of such
2 information on users’ own premises, either in physical form or in their own computer systems.
3 That technology provides substantial benefits to individuals, businesses, and the entire U.S.
4 economy—in the form of reduced cost, increased efficiency, and greater protection against
5 hackers and other unauthorized intruders.

6 Those benefits are threatened, however, by the government’s extensive use of gag
7 orders issued pursuant to the Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. §§
8 2703(b) & 2705(b). When information was stored in an individual’s home or on a business’s
9 premises, the government had to serve a warrant on the individual or business in order to obtain
10 the information—and the individual or business could contest the government’s demand.

11 ECPA’s broad gag order authority, therefore, has the effect of significantly reducing the
12 privacy protection for individuals and businesses that use cloud services. Users will be reluctant
13 to store information in the cloud if their privacy protection is diminished, and society will lose
14 the substantial cost-saving and efficiency gains of this emerging technology.

15 Proposed *amici* further argue that ECPA’s gag order provisions violate the Constitution.
16 In a variety of contexts, the Supreme Court has held that constitutional protections should not
17 be diluted by the use of new technologies. *See Riley v. California*, 134 S. Ct. 2473 (2014);
18 *United States v. Jones*, 132 S. Ct. 945 (2012); *Kyllo v. United States*, 533 U.S. 27 (2001). The
19 same result is warranted here.

20 First, by prohibiting companies like Microsoft from speaking about an issue of public
21 concern—namely, government surveillance of their customers—the gag orders constitute
22 content-based restrictions on speech and prior restraints. Such limitations are permissible only
23 if the strict scrutiny standard is satisfied, but ECPA’s “reason to believe” standard allows gag
24 orders based on a much lesser showing.

25 Second, ECPA’s provisions prohibiting customers from receiving notice about
26 government searches of their most intimate and private data also violate the Fourth
27 Amendment. Users’ data is protected by the Fourth Amendment, and notice is an essential

1 ingredient of the Fourth Amendment’s reasonableness analysis. ECPA authorizes surreptitious
2 searches without the strong justification for withholding or delaying notice that the Fourth
3 Amendment requires.

4 For these reasons, Movants respectfully request that the Court grant this unopposed
5 motion for leave to file a brief as *amici curiae*.

6 DATED this 2nd day of September, 2016.

7 LANE POWELL PC

8
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23 *Attorneys for Amici Curiae*

24 * Application for Leave to Appear Pro Hac Vice
25 Pending
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury
3 under the laws of the State of Washington, that on the 2nd day of September, 2016, the
4 document attached hereto was presented to the Clerk of the Court for filing and uploading to
5 the CM/ECF system. In accordance with their ECF registration agreement and the Court's
6 rules, the Clerk of the Court will send e-mail notification of such filing to those attorneys of
7 record registered on the CM/ECF system.
8

9 Executed on the 2nd day of September, 2016, at Seattle, Washington.
10

11 *s/Ryan P. McBride*

12 _____
13 Signature of Attorney
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23 of Commerce of the United States of
24 America, the Center for Democracy and
25 Technology, the National Association of
26 Manufacturers, *et al.*
27