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17 UNITED STATES DISTRICT COURT
 18 FOR THE DISTRICT OF ARIZONA

19 UNITED STATES OF AMERICA,
 20
 21 Plaintiff,
 22 v.
 23 DANIEL RIGMAIDEN,
 24 Defendant.

CASE NO.: 2:08-CR-00814-DGC

**UNOPPOSED MOTION BY AMICI CURIAE
 FOR LEAVE TO SUBMIT GOVERNMENT
 DOCUMENT**

25
 26
 27 On March 14, 2013, this Court issued an Order (ECF No. 981) on the

1 Government's motion for guidance on the issues at the March 28, 2013 hearing. *Amici*
2 respectfully request leave to submit a government document that is relevant to the first
3 issue in the Court's March 14, 2013, Order and that was recently received by *amici* from
4 the United States Department of Justice in response to a Freedom of Information Act
5 request.

6 The Court's March 14, 2013, Order states:

7 [I]n its response to the motion to suppress, the government states that "[t]he
8 tracking warrant was similar to numerous cell phone tracking warrants issued
9 across the United States by other U.S. magistrate judges, including U.S magistrate
10 judges here in the District of Arizona." Doc. 873 at 62. The government should
11 provide support for that assertion.

12 On March 22, 2013, counsel for *amici* received from the United States Department
13 of Justice documents in response to a Freedom of Information Act request pertaining to,
14 among other things, the government's use of location tracking technology in the Northern
15 District of California, the district in which the order central to this case issued. *See* Lye
16 Decl. ¶3, *filed herewith*. Included in the document production was an internal email string
17 from the United States Attorney's Office for the Northern District of California, dated
18 May 23, 2011, which states:

19 As some of you may be aware, our office has been working closely with the
20 magistrate judges in an effort to address their collective concerns regarding
21 whether a pen register is sufficient to authorize the use of law enforcement's WIT
22 technology (a box that simulates a cell tower and can be placed inside a van to
23 help pinpoint an individual's location with some specificity) to locate an
24 individual. It has recently come to my attention that many agents are still using
25 WIT technology in the field although the pen register application does not make
26 that explicit.

27 While we continue to work on a long term fix for this problem it is important that
28 we are consistent and forthright in our pen register requests to the magistrates
See id., Exhibit 1. Another participant in the email chain subsequently states: "And just to
be clear, the agents may not use the term 'WIT' (or 'WITT') but rather may be using the
term 'Triggerfish' or the term 'Stingray' *Id.*

As *amici* set forth in their brief, the government in this case failed to disclose to
the magistrate that it intended to use a stingray, what the technology is, or how it works.

1 See *Amici* Brief (ECF No. 920) at 6-12. Submitted in conjunction with a companion
2 application to use a pen register, the government's affidavit suggested that government
3 was only seeking leave to use a pen register device. See *id.* at 9.

4 The May 23, 2011 email from the United States Attorney's Office, authored
5 approximately three years after the July 2008 order at issue here, indicates federal agents
6 were using stingray "technology in the field" even though applications submitted to the
7 court did "not make that explicit." The email further indicates that once magistrates in the
8 Northern District of California learned of this practice, they expressed "collective
9 concerns."

10 Another participant in the May 23, 2011 email string goes on to state:

11 whether or not the initial intended purpose of the pen register was to use the WIT
12 technology to locate someone, did the agents eventually use the pen in that way?
13 In other words, a pen might have started as just a pen, and later the agents decided
14 to use the order to also attempt to locate the target. They may or may not have told
15 you about this decision. So check in with your agents and find out whether they
16 have been using pen register orders to locate targets with the WIT boxes, whether
17 or not they started out intended to do so.

18 Lye Decl., Exh. 1. This portion of the email thus bears on *amici's* additional argument
19 that the stingray search did not fall within the scope of N.D. Cal. Order 08-90330. See
20 *Amici* Brief (ECF No. 920) at 5-6 & n. 13. It also reinforces the most sensible reading of
21 the application, affidavit, and order -- that the government, at the time it submitted the
22 application, merely sought court authorization for *Verizon* to install a pen register device
23 and never sought a warrant to authorize the *government* to use a stingray. If that is so, the
24 government's current description of N.D. Cal. Order 08-90330 as a "warrant" on which
25 officers relied in good faith is an entirely *post hoc* but unjustified recharacterization of the
26 order.

27 Counsel for *amici* contacted counsel for the government and shadow counsel for
28 Mr. Rigmaiden the first business day after receiving the above-referenced email,
expressed the view that the email bears on the first issue in this Court's March 14, 2013,
Order, and requested that the government and Mr. Rigmaiden stipulate to or not oppose

1 submission of this document to the Court. The government has advised that it does not
2 oppose the submission of this document. Mr. Rigmaiden through his shadow counsel has
3 advised that Mr. Rigmaiden has no objection to the submission of this document. *See* Lye
4 Decl. at ¶¶5-7.

5 Dated: March 26, 2013

Respectfully submitted,

By: _____/s/
Linda Lye

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