No. 11–20884

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: APPLICATIONS OF
THE UNITED STATES OF AMERICA
FOR HISTORICAL CELL–SITE DATA

On Appeal from the United States District Court
For the Southern District of Texas
Houston Division, Civil No. 4:11–MC–00223
Related Cases: 4:10–MJ–981, 4:10–MJ–990, 4:10–MJ–998

AMICUS CURIAE BRIEF OF PROFESSOR ORIN S. KERR IN SUPPORT OF THE APPELLANT IN FAVOR OF REVERSAL

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STATEMENT OF IDENTITY AND STATEMENT OF INTEREST IN CASE

Amicus is a law professor who teaches and writes about the Fourth Amendment and its application to new technologies. This case raises important questions of first impression concerning how to apply the Fourth Amendment to technological surveillance. Amicus believes that it is important that the Court have a complete understanding of the complex issues raised by this appeal, and of how the outcome of this appeal is likely to influence the development of Fourth Amendment law.

Amicus has no interest in the outcome of this litigation except as it relates to these concerns.

SOURCE OF AUTHORITY TO FILE

The United States is the only party to this litigation, and it has consented to the filing of this brief.

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SUMMARY OF ARGUMENT

Although the United States correctly argues that the order of the district court should be reversed, its brief identifies the wrong reason for reversal. The order of the district court must be reversed because ex parte applications for orders under 18 U.S.C. § 2703(d) do not create justiciable cases or controversies permitting judicial resolution of the complex Fourth Amendment issues raised by executing the orders. The Fourth Amendment issues raised in this case are fascinating but not yet ripe. They cannot be adjudicated at this time.

The lack of ripeness has important implications for this Court's jurisdiction. Because the denial of an ex parte application does not constitute a final order, this Court cannot exercise jurisdiction pursuant to 28 U.S.C. § 1291. Instead, this Court must and should exercise mandamus jurisdiction to correct the district court's error.

ARGUMENT

I. THE FOURTH AMENDMENT QUESTIONS RAISED IN THIS APPEAL ARE NOT RIPE FOR ADJUDICATION.

The district court's order is based on a fundamental error. The district court assumed that courts entertaining applications under 18 U.S.C. § 2703(d) can adjudicate the constitutionality of how the government might execute the order if granted. That is, the district court assumed that the constitutionality of the future execution of the search is ripe for adjudication at the time of the application.

The district court's assumption was incorrect. Judicial review of the constitutionality of how a court order is executed must occur *after* the government executes the order rather than *before*. When the government applies for a court order, judges must sign the application if its facial requirements have been met. How the Fourth Amendment might apply when the government executes the court order does not present a ripe dispute at the time of the application.

Because the constitutionality of the future execution of the order presently is not ripe for adjudication, this Court should vacate the district court's order and instruct the district court to grant the application because the statutory requirements of § 2703(d) have been satisfied.

(A) The Constitutionality of the Execution of a Court Order Under 18 U.S.C. § 2703(d) Is Not a Ripe Dispute at the Time of the Application for the Order.

The constitutionality of the execution of the government's proposed order is not yet ripe for adjudication. Whether a court order will be executed in a way that satisfies the Fourth Amendment generally must be judged *after* the search occurred, not *before*. *See Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc) (Sutton, J.) ("The Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly it generally should be applied after those circumstances unfold, not before."); *United States v. Grubbs*, 547 U.S. 90, 97–99 (2006) (holding that ex ante restrictions on searches pursuant to warrant must be limited to the facial requirements of particularity and probable cause, with

an ex post right "to suppress evidence improperly obtained and a cause of action for damages" based on the unlawful execution of the search).

This is essential because Fourth Amendment law is extremely fact-specific. A court cannot apply the Fourth Amendment when no facts yet exist. *See Sibron v. New York*, 392 U.S. 40, 59 (1968) (declining to rule on whether a New York statute satisfies the Fourth Amendment because the "constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case").

This is especially true with the technological surveillance regulated by § 2703(d). As the Sixth Circuit has explained, applying Fourth Amendment standards to § 2703(d) requires a concrete set of facts that must be established in an ex post challenge. *Warshak*, 532 F.3d at 526–30. Identifying when an expectation of privacy exists in this setting requires considering many "moving parts," and it is "an inquiry that may well shift over time, that assuredly shifts from internet-service agreement to

internet-service agreement and that requires considerable knowledge about ever-evolving technologies." *Id.* at 526–27.

Such an assessment cannot be made without a concrete factual record, and that record can be established only in a post-enforcement adversarial challenge. As Judge Sutton has explained:

> Concerns about the premature resolution of legal disputes have particular resonance in the context of Fourth Amendment disputes. In determining the "reasonableness" of searches under the Fourth Amendment and the legitimacy of citizens' expectations of privacy, courts typically look at the totality of the circumstances, reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law. Courts thus generally review such challenges in two discrete, post-enforcement settings: (1) a motion to suppress in a criminal case or (2) a damages claim under § 1983 or under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the officers who conducted the search. In both settings, the reviewing court looks at the claim in the context of an actual, not a hypothetical, search and in the context of a developed factual record of the reasons for and the nature of the search. A pre-enforcement challenge to future . . . searches, by contrast, provides no such factual context.

Id. at 528 (internal citations omitted). *See also United States v. Carmichael*, 343 F.3d 756, 761–62 (5th Cir. 2003) (dismissing

Fourth Amendment claim because the future facts alleged to be unconstitutional were "speculative"); *Hughes v. Rizzo*, 282 F. Supp. 881, 885 (E.D. Pa. 1968); Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 Va. L. Rev. 1241, 1278–84 (2010).

(B) The Unusual Procedural Context of this Appeal Renders the Constitutional Issues Presently Non-Justiciable.

The Fourth Amendment issues in this case presently are non-justiciable because of its unusual procedural context. When the United States applied for a routine court order under 18 U.S.C. § 2703(d), Magistrate Judge Smith simply assumed that he had the power to adjudicate the constitutionality of the future execution of the order at the time of the application. He envisioned what the future might look like if he signed the application, and he labeled that prediction "findings of fact." *See In re United States for Historical Cell Site Data*, 747 F. Supp.2d 827, 830–35 (S.D. Tex. 2010). Magistrate Judge Smith then wrote an opinion applying the Fourth Amendment to the "facts" he imagined. *Id.* at 835–46.

That is not how Fourth Amendment litigation works. In ordinary Fourth Amendment litigation, the subject of the alleged search and seizure brings a legal claim challenging a prior government act. Two adversarial parties dispute the lawfulness of a past event. The trial court can hold an adversarial hearing, develop the facts, and then issue a ruling and an opinion. The losing party can then appeal and the court of appeals can rule. *See, e.g.*, *United States v. Gomez*, 623 F.3d 265 (5th Cir. 2010) (criminal case); *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808 (5th Cir. 2010) (civil case); *Warshak*, 532 F.3d at 528.

This traditional process of litigating Fourth Amendment cases contrasts with the usual process of applying for ex parte court orders during criminal investigations. When Congress requires investigators to obtain a court order, government agents file an application and attempt to show that they have satisfied the requirements of obtaining the court order. The clerk's office dockets the application as a freestanding miscellaneous matter, not as part of a pending criminal case. The court then signs the application or refuses to sign. No formal "ruling" is made and no

opinion issues. A denial of an application is not a final order, so no appeal can be taken. *See United States v. Savides*, 658 F. Supp. 1399, 1404 (N.D. Ill. 1987), *aff'd sub nom. United States v. Pace*, 898 F.2d 1218 (7th Cir. 1990).

This case comes to the Court of Appeals as a strange hybrid between these two procedures. The government has not yet committed an act alleged to violate the Fourth Amendment. No current or future subject of the government's investigation has filed a legal claim. No adversarial process exists. And no factual record has been developed.

In this setting, courts lack the power to simply announce "findings of fact" sua sponte and then to treat the government's application as presenting a justiciable question of Fourth Amendment law. In the context of an ex parte application, no one knows what the facts may turn out to be. The application will not disclose the relevant information about the nature of the case. And the facts may be unknown by the government at the time of the application.

Magistrate Judge Smith filled in this gap by imagining what he believed would be a typical case. But what if he was wrong? As the United States points out, there are substantial reasons to doubt Magistrate Judge Smith's purported "findings" about cell phone technology. *See* Br. of United States 41–46. But the problem runs deeper. Even if Magistrate Judge Smith properly described the *technology*, he cannot know what the relevant facts might turn out to have been about the *individual* who used the telephone and created the records. And without that information, it is not possible to apply the Fourth Amendment accurately.

Consider a few possibilities. It might turn out that a person tracked used a phone obtained by fraud, and therefore likely has no reasonable expectation of privacy in its use under the principle of *United States v. Caymen*, 404 F.3d 1196, 1201 (9th Cir. 2005). Alternatively, the records might turn out to track a parolee who lacks an expectation of privacy under *Samson v. California*, 547 U.S. 843, 843–44 (2006). Similarly, it might turn out that the records relate to an inmate who has escaped from prison, and who lacks an expectation of privacy under *United States v. Ward*, 561

F.3d 414, 417 (5th Cir. 2009). Any of these facts might substantially impact the Fourth Amendment analysis.

At the time of the application, the existence of these facts will be unknown to the magistrate judge and may even be unknown to the United States. Because the facts are not yet known and yet might determine the proper Fourth Amendment outcome, the facts of the case are entirely speculative and the Fourth Amendment questions are not yet ripe for review. *See Warshak*, 532 F.3d at 526–30; *Carmichael*, 343 F.3d at 761–62 (dismissing Fourth Amendment claim on ripeness grounds because the future facts alleged to be unconstitutional were "speculative," and noting that "[a] claim is not ripe for review if 'it rests upon contingent future events that may not occur as anticipated'" (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998))).

United Transportation Union v. Foster, 205 F.3d 851 (5th Cir. 2000), is illustrative. In *Foster*, two unions filed a pre-enforcement challenge to a newly enacted state railroad safety law. *Id.* at 856. The unions asserted that the new law violated

the Fourth Amendment by allowing drug testing of railroad employees without probable cause. *Id.* The Court raised the ripeness of the unions' Fourth Amendment claim *sua sponte* and dismissed the challenge. *Id.* at 857–59. The unions' pre-enforcement challenge was based on "conjecture and speculation" as to the facts, making judicial review premature and the challenge non-justiciable. *Id.* *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 110–11 (1983) (holding that no case or controversy exists to adjudicate claim for prospective relief from future Fourth Amendment violation absent proof of "a real and immediate threat" of specific facts occurring).

The same principle applies here. This case comes to the Court of Appeals as an abstract question of law with no connection to a genuine factual record. The mere existence of an application for a court order does not empower magistrate judges to opine on profoundly important questions of Fourth Amendment law – and then to publish their conclusions in the Federal Supplement – based only on the judge's best guess as to what facts might unfold and what legal issues those facts might implicate that the judge

would like to address. Adjudication requires a genuine legal dispute based on real facts. The absence of that here requires reversal without reaching the merits of the Fourth Amendment question briefed by the United States.

(C) Magistrate Judges Lack the Authority to Rule on the Constitutionality of § 2703(d) Orders Because Congress Did Not Delegate that Authority to Magistrate Judges.

Under Article III, magistrate judges lack the power to rule on matters unless Congress intended to delegate that power to them. *See United States v. Dees*, 125 F.3d 261, 264 (5th Cir. 1997). Because the text of § 2703(d) does not indicate that Congress intended to delegate the matter of the constitutionality of surveillance practices to magistrate judges, magistrate judges lack the power to decide such questions in the context of § 2703(d) applications.

The text of § 2703(d) confirms that Congress did not intend to give magistrate judges the power to deny applications based on fears that the order would be executed in an unconstitutional way. To be sure, magistrate judges have the power to grant or deny

§ 2703(d) applications. *See* 18 U.S.C. § 2711(3)(A) (defining "court of competent jurisdiction" to include "a magistrate judge" of "any district court of the United States"). According to the text of § 2703(d), however, the matter is non-discretionary. An order "shall issue" when the statutory threshold has been satisfied. 18 U.S.C. § 2703(d). *See In re United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, __ F.Supp.2d __, 2011 WL 5508991, at *29–*31 (E.D. Va. Nov. 10, 2011) [hereinafter *O'Grady Opinion*].

The non-discretionary nature of § 2703(d) applications is inherent in the purpose of the Stored Communications Act. The goal of the Act was to require the government to satisfy certain thresholds before obtaining records from network service providers. *See generally* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209–13 (2004) [hereinafter Kerr, *User's Guide*]. Congress chose very low thresholds for some evidence, mid-level protections for other evidence, and a full search warrant for particularly sensitive types of evidence. *Id.* at 1222–23.

Under this scheme, Congress set a specific privacy threshold for the government to compel historical cell–site records. Congress specifically intended to set that threshold at the § 2703(d) standard. *See* H.R. Rep. 106–932 at *17 (2000) ("Law enforcement now uses its authority under 18 U.S.C. § 2703(d) . . . to obtain location information from mobile phone service providers."). It is peculiar to imagine that Congress somehow wished to delegate the rules of police investigations to each individual magistrate judge by empowering each judge to exercise discretion and either grant applications at the § 2703(d) standard or instead require a warrant based on probable cause.

A recent decision by the Third Circuit botched this analysis by misreading the Stored Communications Act. *See In re United States for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304 (3d Cir. 2010) [hereinafter *Third Circuit Opinion*]. In the view of the Third Circuit, magistrate judges have the option to deny § 2703(d) orders if they feel it would be preferable for investigators to obtain a warrant instead. *Id.* at 319.

This mistaken interpretation of the statute was based on two primary errors. First, the Third Circuit misread the provision of § 2703(d) stating that orders "may be issued" by courts of competent jurisdiction. The Third Circuit assumed that this provision empowered judges to *deny* applications, when in fact it empowered judges to *grant* them. As amicus explained in a section of a treatise he has co-authored:

> Section 2703(d) orders are a new kind of court order that was first introduced in 1994. The statutory authorization that courts "may" issue the orders bestows the power to grant the orders, not deny them. For that reason, magistrate judges should not have the discretion to insist that the government establish probable cause when applying for a court order authorized by § 2703(d).

2 LaFave et al., Criminal Procedure § 4.8(c) (3d ed. 2011). *See also O'Grady Opinion,* 2011 WL 5508991, at *29–*31.

Second, the Third Circuit misread the provision allowing the government to obtain a warrant instead of a § 2703(d) order to obtain historical cell–site records as suggesting a power of judges to deny § 2703(d) applications. That provision merely gives investigators the convenience of "one–stop shopping" when they apply for surveillance orders. *See O'Grady Opinion,* 2011 WL

5508991, at *30. When obtaining evidence from service providers protected by the Stored Communications Act, investigators often wish to collect different kinds of information regulated by different parts of the statute. Giving investigators the option of pursuing higher process allows investigators to apply for one order instead of requiring several orders at once. *Id.* (citing Kerr, *User's Guide*, *supra*, at 1220, 1222).

In short, nothing in the statutory scheme reflects an intent to confer discretion on magistrate judges to deny government applications based on prospective Fourth Amendment concerns. And to the extent the statute is ambiguous, it must be construed to avoid the constitutional issues discussed below. *See United States v. Johnston*, 258 F.3d 361, 363 (5th Cir. 2001).

(D) Article III May Not Permit Magistrate Judges to Reach the Merits of Constitutional Questions in Ex Parte Applications, and Permitting Them to Do so Would Establish an Institutionally Flawed Means of Developing Fourth Amendment Law.

Even if Congress intended to allow magistrate judges to reach this question, it is not clear that Article III permits it. As the Supreme Court reaffirmed recently in *Stern v. Marshall*, 131

S. Ct. 2594, 2595–96 (2011), Article III requires that the judicial power of the United States be vested in Article III courts. "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (internal punctuation omitted).

Magistrate judges are not Article III judges, and therefore can act only as adjuncts to Article III judges and only in specific contexts. *See Dees*, 125 F.3d at 268. The precedents on the permissible judicial authority of magistrate judges are complex, but at the very least there is a serious constitutional question as to whether Article III permits magistrate judges to enter constitutional rulings when they receive applications under § 2703(d). *See, e.g.*, *Johnston*, 258 F.3d at 372 (holding that Article III does not permit magistrate judges to decide 28 U.S.C. § 2255 motions with the consent of the parties). That is especially true given that decisions in the government's favor will not be reviewable at all by Article III courts. *Id.* at 370–72.

Even if Article III permits this exercise of judicial authority, this Court should not lightly sanction such an unsound method for adjudicating Fourth Amendment disputes. There are severe institutional difficulties inherent in any effort to engage in the elaboration of Fourth Amendment law in the context of ex parte applications.

Consider how such a system would work. If the Fourth Amendment issues adjudicated below are justiciable in this case, then it presumably means that magistrate judges are free to issue Fourth Amendment opinions *any time and every time* they entertain ex parte applications for records or surveillance. Because only the United States is a party to ex parte procedures, however, only a denial of the application can lead to judicial review. Appeals only can occur when the government loses. If a court rules in the government's favor at any stage, no one can file an appeal.

This dynamic creates a poor environment for the elaboration of constitutional principles. Any non-Article III magistrate judge can issue any opinion on critical Fourth Amendment issues at any

time with no briefing, and yet no appeals can be filed to review decisions in the government's favor. To be sure, magistrate judges serve an important role in the administration of our federal criminal justice system. But a system that gives magistrate judges the chief role in developing constitutional law – and that sharply limits the role of Article III courts – should be avoided.

II. THIS COURT MUST TREAT THE APPEAL AS AN APPLICATION FOR A WRIT OF MANDAMUS TO ESTABLISH APPELLATE JURISDICTION OVER THE DENIAL OF A § 2703(D) APPLICATION.

Because the district court ruled on non-justiciable grounds, establishing appellate jurisdiction over this appeal becomes somewhat complicated. To establish appellate jurisdiction, the Court must treat the Government's appeal as a petition for a writ of mandamus. Although mandamus jurisdiction is discretionary, this surely is an appropriate case in which to exercise it.

In the Fifth Circuit, establishing appellate jurisdiction for interlocutory government appeals in criminal cases ordinarily requires satisfying 18 U.S.C. § 3731. *United States v. Arce-Jasso*, 389 F.3d 124, 127, 130 n.4 (5th Cir. 2004). Section 3731 states

that the United States may bring interlocutory appeals in criminal cases only from the following decisions:

> 1) "a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment"
> 2) "a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding," or,
> 3) "a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release."

18 U.S.C. § 3731.

A denial of an application for a § 2703(d) order does not satisfy this provision. It does not involve a pending criminal prosecution, and it does not suppress evidence. Indeed, there is no criminal case yet at all, so § 3731 cannot apply. *See In re United States for an Order Authorizing the Interception of Oral Commc'ns*, 563 F.2d 637, 640–41 (4th Cir. 1977) [hereinafter *Oral Commc'ns*] (holding that § 3731 does not authorize appeals following the denial of an application for a Wiretap Act order because "it involves only an investigatory proceeding through which, at best, the Government entertains the mere expectancy of

obtaining evidence of crime"). In short, the odd procedural context of the district court's order brings it outside the usual path to appellate jurisdiction created by § 3731.

The best case for § 3731 jurisdiction is *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). *Smith* permitted an appeal from a district court order quashing a Rule 17(c) trial subpoena because the order "effectively suppresses or excludes evidence in a criminal proceeding." *Id.* at 967 (internal punctuation omitted) (quoting § 3731). *Smith* is distinguishable, however. No one in this case has been charged with a crime. There is no defendant. No criminal case exists. As a result, it is hard to see how the district court's order can be analogized to an order suppressing evidence.

The Government's brief advocates an alternative ground for appellate jurisdiction. The Government treats this appeal as a freestanding matter rather than an interlocutory appeal in a criminal case, potentially allowing jurisdiction under 28 U.S.C. § 1291 instead of 18 U.S.C. § 3731. *See* Br. of United States 2, n.1.

The Government's assertion of jurisdiction is unpersuasive. Denials of ex parte applications are not final orders. The denial of a freestanding application does not end a case. Indeed, it is not attached to any case at all. Nor should appeals be appropriate in routine denials of ex parte applications. Because constitutional questions are not properly justiciable at that stage, the denial of an application ordinarily should not raise any substantial legal issues worth appealing.

The Government's argument also should be rejected because it has a remarkable implication – that § 1291 permits appellate jurisdiction in *every* denial of an ex parte application. If the government is right, then the government can *always* appeal a denial of *any* freestanding ex parte application. The courts of appeals must *always* exercise appellate jurisdiction no matter how frivolous the grounds of the government appeal. In the case of applications for search warrants, however, the traditional understanding has been that denials cannot be appealed because they are not final orders. *Savides*, 658 F. Supp. at 1404 ("A probable cause determination on an application for a search

warrant by a magistrate is not a final order. Simply stated, the government has no right to appeal if it believes the magistrate erred in denying the warrant.").

In its defense of § 1291 jurisdiction, the United States notes that the Third Circuit exercised jurisdiction in another case involving an appeal from a denial of a § 2703(d) order. *See* Br. of United States 2, n.1 (citing *Third Circuit Opinion*, 620 F.3d 304). But appellate jurisdiction was not raised in that case. And no wonder – in an appeal with only one party, no appellee exists who has an incentive to question jurisdiction. The fact that the Third Circuit did not recognize the jurisdictional puzzle and failed to raise it *sua sponte* does not create a precedent that jurisdiction exists under § 1291.

The United States also notes that in the early days of the Federal Wiretap Act, 18 U.S.C. §§ 2510–22, two circuits did treat denial of Wiretap Act applications as final orders under 18 U.S.C. § 1291. *See Oral Commc'ns*, 563 F.2d 637; *In re United States for Relief*, 427 F.2d 639 (9th Cir. 1970). The Wiretap Act expressly contemplates appeals from denials of applications, however, *see*

Oral Commc'ns, 563 F.2d at 640 (citing various provisions of 18 U.S.C. § 2518), while no analogous textual hook exists in § 2703(d).

Because neither § 3731 nor § 1291 permits jurisdiction, this Court must establish appellate jurisdiction by treating the appeal as an application for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. *See United States v. Williams*, 400 F.3d 277, 280 (5th Cir. 2005). Mandamus jurisdiction is discretionary rather than mandatory. Three requirements must be met before a writ of mandamus will issue:

> (1) the party seeking issuance of the writ must have no other adequate means to attain the relief he desires;
> (2) the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable; and
> (3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 280–81 (quoting *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380–81 (2004)).

All three requirements readily apply here, permitting the court to exercise appellate jurisdiction properly under the All

Writs Act. First, the government has no other way of seeking review of the district court's order because neither § 3731 nor § 1291 applies. Second, as explained elsewhere, the district court's order is based on a fundamental misunderstanding of the district court's authority. And third, the writ is entirely appropriate here to review the otherwise unreviewable practices of the district court. For these reasons, the Court should exercise mandamus jurisdiction over the district court's order.

CONCLUSION

The district court's order and the brief of the United States raise fascinating Fourth Amendment questions. This Court cannot reach those questions, however, because no ripe dispute currently exists. This Court should therefore exercise mandamus jurisdiction, vacate the order of the district court, and instruct the district court to grant the applications because the statutory requirements of § 2703(d) have been satisfied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, two copies of the foregoing AMICUS CURIAE BRIEF OF PROFESSOR ORIN S. KERR IN SUPPORT OF THE APPELLANT IN FAVOR OF REVERSAL, were sent by Federal Express overnight mail to the following counsel of record, and that said Brief was filed by dispatching an original and six copies via Federal Express overnight mail to the Clerk of the Court:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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