No. 16-9999

In the Supreme Court of the United States

IN THE MATTER OF THE SEARCH OF A PEAR, INC. E-PHONE AND LIBERTY, INC. SMART PHONE

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

BRIEF FOR THE UNITED STATES

JOSEPH V. DEMARCO
Counsel of Record

JEFFERY C. BARNUM
Attorney

Department of Justice
Washington, D.C., 20530-0001

QUESTIONS PRESENTED

1.) Does the All Writs Act empower a court to compel a third-party to design new software to provide the "reasonable technical assistance" contemplated by the Supreme Court in *United States V. New York Telephone Company*, 434 U.S. 159 (1977)?

2.) If so, does such compulsion run afoul of the First Amendment?

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STATEMENT OF THE CASE

On Friday January 22, 2016, two suspects (a male and female) entered a Santa Barbara, California County building where a holiday luncheon was taking place for all employees. The suspects opened fire, killing 14 people and seriously injuring 22.

The suspects fled. Shortly afterwards, they were apprehended by the Santa Barbara police while driving a Black Buick SUV. Both suspects were killed in the ensuing shootout. The male suspect's e-Phone (a Pear smart phone) and the female suspect's phone (a Liberty smart phone) were both recovered from the Buick. Subsequent FBI investigations revealed that the suspects had recently pledged their joint allegiance to the Islamic State on a social media site. The FBI is investigating the January 22 attack as an act of terrorism.

The FBI now seeks Pear Inc.'s help and that of Liberty, Inc. in unlocking the two e-Phones to access any information stored on them that may be relevant to its investigation. The Government argues that time is of the essence in order to apprehend any other possible suspects and in order to prevent any future terrorist attacks by the couples' cohorts.

The suspects were a married couple. They moved to the Santa Barbara area six months earlier. The male suspect had been employed by Santa Barbara County for the previous five months and had attended the holiday lunch. His e-Phone was a work phone issued to him by the county. The county has given the FBI permission to search the phone. The female suspect's e-Phone was privately owned. Additionally, the FBI requested and obtained a valid search warrant to search both of the phones.

Prior to moving to Santa Barbara, the suspects resided in Sacramento County in Northern California. The Sacramento Sherriff's Office is also investigating both suspects in conjunction with a series of armed robberies, one of which involved the shooting death of a convenience store clerk. In that regard, it obtained a warrant to search the suspects' home and is now also seeking access to the two suspects' e-phones.

A Federal District Court granted the FBI's request (and that of the Sacramento Sherriff); it issued an order under the All Writs Act, 28 U.S.C. § 1651(a) (the Order), compelling Pear, Inc. and Liberty, Inc. to help the FBI to access the locked e-Phones. The Order required Pear, Inc. and Liberty, Inc. to create a security bypass that would allow the FBI and the Sacramento Sherriff to access the information contained on both suspects' e-Phones. (Both companies contend that they currently lack the ability to bypass the security on the suspects' e-Phones, and would need to "invent" such a process from scratch.) Specifically, the security bypass mandated by the Order related only to the entry of the passcode into the phone and required: (1) that the requirement for the passcode

to be entered via the touchscreen be eliminated, (2) that the delay between unsuccessful attempts be eliminated, and (3) that the phone's contents would not be erased after ten unsuccessful attempts at entering the passcode.

After repeated efforts, neither the FBI nor the Sacramento Sherriff has been able to unlock the new high security codes on the Pear and Liberty e-Phones. Both Pear, Inc. and Liberty, Inc. have emphasized in their court briefs and in their customer literature how heavily they prioritize the security and privacy of their users, and that those priorities are reflected in their increasingly secure operating systems, intentionally created with no bypasses or back doors—and with end-to-end encryption. Both companies have publicly asserted that it would be wrong to intentionally weaken their products with a government-ordered backdoor and that if they lost control of their data, they would be putting their customers' privacy and safety at risk.

Plaintiffs Pear and Liberty filed a subsequent motion asking that the District Court to vacate its Order to Compel. Among their arguments was the assertion that the FBI's request and the Court's order was not authorized by the All Writs Act, and that, insofar as it was authorized, it violated the companies' First Amendment rights to free speech.

The District Court denied the Plaintiffs' motions but certified the matter for immediate interlocutory appeal under 28 U.S.C. § 1292(b). The Court of Appeals accepted certification, but affirmed the District Court on the merits. Subsequently, the Supreme Court granted the companies' joint petition for a writ of certiorari, and the matter has been calendared for review.

SUMMARY OF ARGUMENT

The District Court's Order was a proper exercise of its jurisdiction under the All Writs Act, and the court of appeals correctly affirmed the District Court.

The All Writs Act permits issuance of "all writs necessary or appropriate" in aid of the District Court's jurisdiction. 28 U.S.C. § 1651(a) (2014). The District Court had previously issued a search warrant for the suspect's smart phones, but the proper execution was frustrated by the security features of both phones. Guided by this Court's decision in *United States v. New York Telephone Company*, 434 U.S. 159 (1977), the District Court issued the Order compelling Pear, Inc., and Liberty, Inc. to construct a security bypass for two specific smart phones possessed by two terrorists.

The Order is a proper application of the All Writs Act under *New York Telephone* because the Order was necessary to effectively execute the previously granted search warrant. Further, the Order applied to Pear and Liberty who, by constructing the very impediments that frustrated the execution of the search warrant, were closely connected with the matter. While mandating action, the Order also provided for compensation for Pear and Liberty's services. Because the Order provided for compensation, and both Pear and Liberty possess the capacity to comply with the Order, the Order did not pose an unreasonable burden. Finally, without Pear and Liberty's assistance, the search warrant would not be able to be executed, and the information critical to a counter-terrorism investigation may not be extracted.

Not only is the Order proper under the All Writs Act, it is also proper under the First Amendment. Even though the Order may necessitate the creation of computer code (which may require the use of language), it does not compel speech. Computer code–especially in its compiled state–is primarily functional, useful only for issuing commands for the machine to execute. Other functional items, such as a car engine, are not protected by the First Amendment, and functional computer code is likewise unprotected. The functional nature of the code is underscored by the lack of any audience, save for the inert smart phones. The First Amendment protects expressive conduct, and even in its most expansive

definition, expressive conduct requires an audience. The Order, in fact, does not compel speech at all, but rather commands conduct, namely to construct a security bypass for the smart phones. Finally, even if the Order directly compelled speech, it would be permitted because speech may be compelled under certain circumstances to ensure the "essential operations of government" are realized.

ARGUMENT

I. THE ORDER IS PROPER UNDER THE ALL WRITS ACT AND *NEW YORK TELEPHONE*

The world is changing at a rapid rate. While the law can adapt, *see, e.g,, Riley v. California*, 134 S. Ct. 2473, 2484 (2014), it usually lags behind technological advances. Without flexible tools in this dynamic environment, the due administration of justice can be frustrated.

The All Writs Act (AWA) is one of those flexible tools permitting federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2014). In applying the AWA, this Court recognized that the "'law' is not a static concept, but expands and develops as new problems arise." *Price v. Johnston*, 334 U.S. 266, 282 (1948), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991). Thus, "[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 273 (1942). In fact, just months after the Court expressed its expansive view of the AWA in *Price v. Johnston*, Congress did not restrict but rather expanded the AWA to empower *all* federal courts to issue not only "necessary" writs but also "appropriate" ones. 80 Pub. L. 80-773, ch. 646, 62 Stat. 944 (June 25, 1948).

Both "necessary" and "appropriate" writs have been issued in a variety of cases, including obtaining credit card statements, *United States v. Hall*, 583 F. Supp. 717, 720-21

(E.D. Va. 1984), videotapes from a landlord, *In re Application of U.S. for an Order Directing X to Provide Access to Videotapes*, No. 03-89, 2003 WL 22053105, at *1-2 (D. Md. Aug. 22, 2003), or to provide "reasonable technical assistance" in unlocking a cell phone, *In re XXX Inc.*, 2014 WL 5510865, at *1-*3 (S.D.N.Y. 2014). Although it can be used to oblige citizens to assist government,[1] the AWA has also been used to coerce the *government* to perform certain actions such as accepting dredging spoils, *United States v. City of Detroit*, 329 F.3d 515, 524–26 (6th Cir. 2003), or accept prisoners to avoid overcrowding at city jails, *Benjamin v. Malcolm*, 803 F.2d 46, 54 (2d Cir. 1986).

However flexible, the All Writs Act does not provide the courts with a carte blanche to act as a judicial press gang. First, the issuance of a writ under the AWA must be in aid of a court's own jurisdiction. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) ("[T]he All Writs Act does not confer jurisdiction on the federal courts."). Second, in *United States v. New York Telephone Company*, the Court has provided guidance in the use of the AWA in issuing writs to third parties who are not directly involved in the case before the court. The Court articulated three factors to be considered: (1) the degree to which the party is intertwined with the underlying controversy; (2) the reasonableness of the burden upon that party; and (3) the necessity of the

[1] This obligation has a long pedigree. As the future Justice Cardozo noted while sitting as a New York Court of Appeals judge, "as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand." *Babington v. Yellow Taxi Corp.*, 164 N.E. 726, 727 (1928). *See also United States v. New York Telephone Company*, 434 U.S. 159, 175 n.24 (1977). This historical power is not only present in case law, but also in various current state laws mandating assistance to law enforcement. *See, e.g.*, N.Y. Penal Law § 195.10, Conn. Gen. Stat. Ann. § 53a-167b, Vt. Stat. Ann. T. 24 § 300-01.

party's assistance. *United States v. New York Telephone Company*, 434 U.S. 159, 174–75 (1977).

Here, the Order was issued "in aid of" the District Court's search warrant for both phones and in support of an ongoing criminal investigation in the court's jurisdiction. It also satisfies *New York Telephone*'s tripartite test because Pear and Liberty are closely connected with the underlying controversy, the Order's mandate does not pose an unreasonable burden, and, without Pear and Liberty's assistance, the effective execution of the court's search warrant (and the due administration of justice) will be thwarted.

A. Pear and Liberty are intertwined with the subject of the Order because they have created the very barriers that frustrate the execution of the search warrant

The AWA does not limit its scope to parties to the case or controversy, but empowers the court to issue writs to those who "are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *New York Telephone*, 434 U.S. at 174 (citations omitted); *see also In re Grand Jury Proceedings*, 654 F.2d 268, 279 (3d Cir. 1981) (upholding AWA writ to order state court judge to confer with U.S. Attorney). Indeed, like in this case, the writ in *New York Telephone* issued merely because "[a] United States District Court found that there was probable cause to believe that the Company's facilities were being employed to facilitate a criminal enterprise on a continuing basis." *New York Telephone*, 434 U.S. at 174; *see also Application of U. S. of Am. for an Order Authorizing an In-Progress Trace of Wire Commc'ns over Tel. Facilities*, 616 F.2d 1122, 1129 (9th Cir. 1980) ("*Mountain Bell*"); *Application of U. S. of Am. for Order Authorizing Installation of Pen Register or Touch-Tone Decoder & Terminating Trap*, 610 F.2d 1148, 1155 (3d Cir. 1979) ("Because the district court had found probable cause to believe that the company's facilities were being used for

criminal purposes, the company was not completely uninvolved in the matter before the court.").

But there's more. Although probable cause is enough on its own to support issuance of the writ, here Pear and Liberty have expressly constructed their software in such a manner that impedes the proper execution of the search warrant. While it is perhaps not their intent to frustrate this *particular* exercise of governmental authority, Pear and Liberty's software nonetheless has the effect of frustrating the proper exercise of judicial authority. Both Pear and Liberty are enmeshed with the current controversy because the impediments to the proper execution of the search warrant were created by Pear and Liberty for that very purpose.

B. The Order imposes only reasonable, compensable burdens on Pear and Liberty

As an initial matter, the onus to show an unreasonable burden rests with Pear and Liberty. *Mountain Bell*, 616 F.2d at 1132 ("Appellants did not show that the trace here involved significantly increased the possibility of a malfunction . . . . Nor did appellants prove that the compensation provided for in the Order was in any way inadequate."); *cf. United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991) ("Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance."). Here, both Pear and Liberty claim that the Order imposes an undue burden solely because it requires them to create via programming a security bypass into the ePhones.

But mere programming is not sufficient to create an undue burden. In *Mountain Bell*, as here, the AWA Order required the company to program several different computers to "trap" certain calls between exchanges. It also required constantly running software to identify telephone numbers under surveillance, and to execute further code when calls were made to or from those telephone numbers. *Mountain*

Bell, 616 F.2d at 1127. The company complained that the Order "(1) resulted in a serious drain upon existing personnel and equipment; and (2) increased the likelihood of system malfunctions while at the same time impairing the company's ability to correct such problems." *Id.* at 1132. The court rejected these assertions, noting that the company did not carry their burden. *Id.*

Compensation can lessen or eliminate the burden. In its only AWA burden analysis, the Supreme Court concluded that "the District Court's order [was not] in any way burdensome. The order provided that the Company be fully reimbursed at prevailing rates . . ." *New York Telephone*, 434 U.S. at 175. The *Mountain Bell* court explicitly incorporated this aspect in the burden analysis, observing that the company failed to "prove that the compensation provided for in the Order was in any way inadequate." *Mountain Bell*, 616 F.2d at 1132. *Mountain Bell* echoed an earlier Third Circuit case, which again plainly noted compensation in the burden analysis: "Moreover, the companies were to be fully compensated. A successful challenge to a tracing order must rest upon a showing of a greater burden than appellants have shown." *Application of the United States*, 610 F.2d at 1155; *see also City of Detroit*, 329 F.3d at 525–26 (finding no burden when involved parties agreed to pay for all costs associated with AWA order).

Both Pear and Liberty have failed to establish that the Order imposes an *unreasonable* burden. First, they are both large companies with extensive programming staffs that are able to tackle the modifications ordered by the Court. Second, they are to be fairly compensated for their expenditures. As in previous cases, the AWA can be used to compel the creation of code and, when fairly compensated, the third party subject of the order cannot complain of an undue burden.

C. Pear and Liberty's assistance is absolutely necessary to effectively execute the court's search warrant

Without Pear and Liberty's assistance, the smart phones would remain forever locked, and the evidence therein would remain unavailable to those working to prevent another terrorist attack on the United States. The FBI and the Sheriff's offices, while maintaining a small technical staff, are in the business of law enforcement, not designing, creating and deploying machine code to mobile devices.

Even if absolute necessity were not present here, the Order is still appropriate under the AWA. The AWA itself permits writs that are either "necessary *or* appropriate." Indeed, in *New York Telephone*, the FBI could have placed the pen register device, but could not place it in an unobtrusive location. *New York Telephone*, 434 U.S. at 175. Nonetheless, the Court upheld an order compelling the company to provide a leased line in order to *effectively* comply with the AWA writ. *Id.* at 178. In this case, not only is Pear and Liberty's assistance appropriate, it is also necessary because without their reasonable technical assistance, the government would be unable to access the information contained in the subject devices.

II. THE ORDER DOES NOT VIOLATE THE FIRST AMENDMENT

While all speech is comprised of language, not all language qualifies as speech protected by the First Amendment. This is especially true with computer code, communications which take many forms and contain both functional and expressive elements. Underscoring the functional nature of the code in question here, the Order does not compel Pear and Liberty to speak to *any* audience. In fact, the Order does not compel speech at all, but only conduct with potential, incidental effects on speech. Finally, to support the "essential operations of government" the First Amendment permits compulsion of speech in certain limited circumstances, circumstances that are present here.

A. All computer code is not speech protected by the First Amendment

Not *all* computer code qualifies as speech. This is, in part, because the term "Computer Code" encompasses a vast swath of computer files from source code to compiled object or machine code. But also because computer code–especially in its compiled form–combines "nonspeech and speech elements, *i.e.*, functional and expressive elements." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 451 (2d Cir. 2001) (citations omitted).

i. Computer code encompasses a wide array of potential communication

"Computer Code" as a descriptive term sweeps broadly and includes various different formulations of the same instructions to a computer, depending on the purpose of the code.

Most code starts out as source code, which is the human readable form of the instructions to the computer. For example, the source code for a simple program which prints "Hello, World" might look like this:

```
//C hello world example
#include <stdio.h>

int main()
{
  printf("Hello world\n");
  return 0;
}
```

The programmer uses source code to command the computer on how to function (in this case, directing it to display text on the screen via the "printf" command), but it also includes text which is not used by the computer in executing the commands. Here, the comment "//C hello world example" provides information to other programmers. These comments (denoted in the example above by "//") can be interspersed throughout source code to provide information

to other programmers as to how the program was intended to function.

However, source code, standing on its own, does not provide the instructions to the computer itself to perform certain actions. To do so, the source code must be translated or "compiled" into a language the computer can understand. *See* PC Magazine, *definition of: compiler*, http://www.pcmag.com/encyclopedia/term/40105/compiler (last visited May 15, 2016). The first lines of the compiled "hello, world" program, as displayed by a hexadecimal editor look like this:[2]

```
4d 5a 90 00 03 00 00 00 04 00 00 00 ff ff 00 00
b8 00 00 00 00 00 00 00 40 00 00 00 00 00 00 00
00 00 00 00 00 00 00 00 00 00 00 00 00 00 00 00
00 00 00 00 00 00 00 00 00 00 00 00 80 00 00 00
0e 1f ba 0e 00 b4 09 cd 21 b8 01 4c cd 21 54 68
69 73 20 70 72 6f 67 72 61 6d 20 63 61 6e 6e 6f
74 20 62 65 20 72 75 6e 20 69 6e 20 44 4f 53 20
6d 6f 64 65 2e 0d 0d 0a 24 00 00 00 00 00 00 00
50 45 00 00 64 86 11 00 64 6d 38 57 00 74 01 00
17 05 00 00 f0 00 27 00 0b 02 02 16 00 1e 00 00
00 1a 00 00 00 0a 00 00 d0 14 00 00 00 10 00 00
00 00 40 00 00 00 00 00 00 10 00 00 00 02 00 00
04 00 00 00 00 00 00 00 05 00 02 00 00 00 00 00
00 20 02 00 00 06 00 00 e3 fd 01 00 03 00 00 00
00 00 20 00 00 00 00 00 00 10 00 00 00 00 00 00
00 00 10 00 00 00 00 00 00 10 00 00 00 00 00 00
00 00 00 00 10 00 00 00 00 00 00 00 00 00 00 00
00 80 00 00 38 08 00 00 00 00 00 00 00 00 00 00
00 50 00 00 1c 02 00 00 00 00 00 00 00 00 00 00
```

As might be imagined, "[w]hile some people can read and program in object code, 'it would be inconvenient,

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[2] The source code was compiled on a Windows 10 machine using the MinGW C compiler. The compiled code was displayed using the HxD application. Compiled code is a string of "0s and 1s, or binary digits ('bits'), which are frequently converted both from and to hexadecimal (base 16) for human viewing and modification." David Hemmendinger, *machine language*, Encyclopaedia Brittanica, http://www.britannica.com/technology/machine-language (last visited May 15, 2016)

inefficient and, for most people, probably impossible to do so.'" *Corley*, 273 F.3d at 439 (citation omitted). *See also Bernstein v. U.S. Dep't of Justice*, 176 F.3d 1132, 1141 n.15 (9th Cir.) (differentiating between source code and object code in determining the scope of First Amendment protection), *reh'g granted, opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); *but see Corley*, 273 F.3d at 446 (noting that a writing in Sanskrit may be protected by the First Amendment).

ii. Computer code contains both expressive content, which could merit First Amendment protection, and functional commands, which do not

While computer code may contain some expressive elements, *see, e.g., Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011), at its core computer code issues a series of functional commands for the computer to execute. As the Second Circuit noted in *Corley*, "realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements." 273 F.3d at 451. The Second Circuit the correctly noted that "[t]he functionality of computer code properly affects the scope of its First Amendment protection," *id.* at 452, concluding that "functional capability is not speech within the meaning of the First Amendment." *Id.* at 454.

This was not the Second Circuit's first examination of the non-speech nature of functional computer code. In an earlier decision, the Second Circuit declined to extend First Amendment protection to computer code that "induce[d] action without the intercession of the mind or the will of the recipient." *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 111 (2d Cir. 2000). In *Vartuli* the computer code generated a message to the user, commanding the user to buy or sell a certain stock. Even though there was a human being inserted in the functional chain, "the fact that the system used words as triggers and a human being as a conduit, rather than programming commands as triggers and semiconductors as a conduit, appears to us to be irrelevant"

to the First Amendment analysis. *Id.* *See also United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1128 (N.D. Cal. 2002) (declining to extend First Amendment protection over functional aspects of computer code).

Here, the code is purely functional. It does not produce an interactive video game to engage the user, it does not produce any message to the user (unlike the "hello world" program depicted above), and it does not even curate news feeds for the user's consumption. *Cf.* *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994) (exercising editorial discretion is protected by the First Amendment). The code produces no output and merely controls how the phone functions. Indeed, here there was no "intent to convey a particularized message." *Spence v. State of Wash.*, 418 U.S. 405, 410–11 (1974) (per curiam).

To hold that this code is protected by the First Amendment would sweep broadly, bringing many activities never considered to be speech under the umbrella of the First Amendment. If purely functional *code* is protected, then other purely functional items would be similarly protected. A car engine for example, would merit First Amendment protection–not the blueprints for the engine, not instructions on how to fix the engine, but the engine itself as a functional item. If protected under the First Amendment, then, these items may withstand certain federal regulations as to their emissions, *see e.g.*, 40 C.F.R. § 88.104-94 (2015), because they infringe on the "speech" of the creator in creating the functional item (the engine). Similarly, an entity might resist certain calls for information because it requires the creation of an Excel formula (software) to meet certain regulatory demands. *See, e.g.*, 33 U.S.C. § 1318 (2014) (requiring maintaining water quality monitoring and providing the information upon request), 17 C.F.R. § 270.30b1-5 (2016) (mandating filing of a quarterly report for some investment companies).

B. The Order does not compel Pear nor Liberty to speak to any audience

To be protected by the First Amendment, speech must have an audience. Communications that occur in a vacuum without conveying *anything* to anybody else do not advance the purposes of the First Amendment. Put another way, if a person standing alone in a forest speaks and nobody hears them, have they engaged in a First Amendment protected activity? This question is particularly important when assessing the scope of First Amendment protection for computer code because there are three ways in which a programmer may be said to communicate through code: to another programmer (potentially protected), "to the user of the program (not necessarily protected) and to the computer (never protected)." *Corley*, 273 F.3d at 449.

A consistent tenet of First Amendment jurisprudence is that the speech requires an audience. Black's Law Dictionary defines speech as the "*expression* or *communication* of thoughts or opinions in spoken words." *Black's Law Dictionary*, Speech (2014) (emphasis added). The First Amendment is "designed and intended to remove governmental restraints from the *arena of public discussion*." *Cohen v. California*, 403 U.S. 15, 24 (1971) (emphasis added). The First Amendment "reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."). Indeed, it is impossible to create and nurture a *marketplace* of ideas in a void. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The same is true in cases involving compelled speech. The concern about compelled speech, of course, is that "when *dissemination of a view* contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 576 (1995) (emphasis added). Whether it is communicating to other drivers on the road, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), recipients of an agency's services, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2326 (2013), or other students or teachers in a classroom, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628 (1943), the compelled speech cases all involve some undesirable communication to another person. In each of these instances it is not the physical utterance or conduct which causes concern, it is the *communication* of a certain idea to another human being.

Similarly, cases examining the First Amendment protection of computer code involved communication of the underlying machine or source code. In *Bernstein*, the plaintiff wished to disseminate his work to the academic and scientific communities. 176 F.3d. at 1136. Similarly, the plaintiff in a Sixth Circuit case wished to post his source code to "demonstrate how computers work." *Junger v. Daley*, 209 F.3d 481, 483 (6th Cir. 2000). There has never been a case before the federal courts examining the First Amendment protection of computer code that did not involve some sort of publication or communication. *Corley*, 273 F.3d at 434–35 (posting machine code on Internet); *Vartuli*, 228 at 97–98 (selling of program); *Elcom Ltd.*, 203 F. Supp. 2d at 1118 (same), *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1089 (N.D. Cal. 2004) (same); *Def. Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680, 687 (W.D. Tex. 2015) (publishing files on internet); *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 3 (D.D.C. 1996) (including source code as part of book on cryptography).

Here, while the Order may require Pear and Liberty to *write* certain code, but it does not require them to *publish* or *communicate* that code. The so-called "speech" here is directed not at another sentient entity but at a computer, a communication which the Second Circuit correctly noted is "never protected." If the First Amendment tolerates compelled speech to a limited governmental audience, *see, e.g.*, *Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101, 1108 (D.C. Cir. 2011), then, to the extent it applies at all, it should *a fortiori* tolerate utterances without a human audience. The lack of an audience underscores the functional nature of the commands in question (discussed above) and also highlights the fact that the Order compels conduct, not speech (discussed below).

C. The Order compels non-expressive conduct with only incidental effects on speech

The fact that there isn't an audience for the purported speech highlights the nature of the performance required by the Order. The Order does not compel speech at all–at most, it compels conduct (to construct a security bypass) with incidental effects on speech. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

Compelled conduct may also violate the First Amendment, but only if the conduct is inherently expressive. *Id.* at 65–66. In determining the inherent expressiveness of the conduct, the court assesses "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11) (alterations in original). Indeed, the expressive elements must be "intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 406. And if the government action is not targeted at the expressive elements of the conduct, the government "generally has a freer hand in [regulating] expressive conduct than it has in

[regulating] the written or spoken word." *Id.* (citations omitted).

Here, the required actions (to build a security bypass into an individual smart phone) are not inherently expressive. This is in large part because the construction of this bypass is functional–much in the same way constructing a door into a fence is functional. While "performance carpentry" could be expressive conduct protected by the First Amendment, *see, e.g., Schacht v. United States*, 398 U.S. 58, 62–63 (1970), in the normal course of events mere construction of a functional item is not "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]." *Spence*, 418 U.S. at 409; *see also Rumsfeld*, 547 U.S. at 64 ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper").

Whatever expressive elements are present are "not created by the conduct itself but by the speech that accompanies it." *Rumsfeld*, 547 U.S. at 66. But accompanying speech cannot transform purely functional conduct into expressive content. As the *Rumsfeld* Court noted, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it. . . . Neither *O'Brien* nor its progeny supports such a result." *Id.*

Even if this conduct contradicts the software company's corporate message, the Order does not compel silence. The Court has previously recognized that high school students can differentiate between speech sponsored by their school and speech delivered under a legal compulsion. *See Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion); *accord*, *id.*, at 268 (Marshall, J., concurring in judgment) (cited in *Rumsfeld*, 547 U.S. at 65). This is especially true given the factual context of the Order and the public communications surrounding this litigation. No one would equate Pear and

Liberty's acquiescence to legal compulsion to endorsement of the government's position. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 841–42 (1995) (noting that when a speaker "has taken pains to dissociate itself from the … speech" fears of attribution are "not plausible")

Because the Order regulates conduct, not speech, it need only be "a neutral regulation [that] promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). Here, the Order compels Pear and Liberty to assist in the investigation of a crime, an interest that implements a "fundamental governmental role of securing the safety of the person." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). As noted above, the government cannot otherwise access the smart phones. Pear and Liberty's compliance with the District Court's order is not only the most effective way of accessing the smart phone's content, it is the *only* way.

D. Especially when there is no audience, the First Amendment tolerates compulsion of speech for "essential operations of government"

Even if the Court found that machine code transmitted to an inert computer was in fact speech, and even if the Court further found that the Order directly compelled speech, it is still permissible under the First Amendment because the government may compel speech to further the "essential operations of government [required] for the preservation of an orderly society." *Barnette*, 319 U.S at 645 (Murphy, J., concurring). Some of these "essential operations" include giving truthful evidence in court, *id*., registering as a sex offender, *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014), filing a tax return, *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995), disclosing facts to the Security and Exchange Commission, *Full Value Advisors*, 633 F.3d at 1108-09, or answering racial classification questions on a

census form. *Morales v. Daley*, 116 F. Supp. 2d 801, 816 (S.D. Tex. 2000).

Here, the government requested (and the District Court granted) an order compelling the assistance in investigating terroristic and criminal acts. The information contained on the subject's ePhones could be of critical importance in future anti-terrorism operations. The security of the nation is at least as important (and probably far more important) than the provision of personal financial details to a federal administrative agency or the provision of biographical details for the census. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."). Indeed, the other examples (providing testimony in court and registration of sex offenders) enable the government to effectively protect its citizens.

This protection–an essential operation of government–at times requires the active participation of its citizens. *See, e.g., United States v. Bryan*, 339 U.S. 323, 331 (1950) ("For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence." (quotations omitted)). This assistance has a strong historical pedigree. *See State v. Floyd*, 584 A.2d 1157, 1166 (1991) ("The basic concept that every citizen can be compelled to assist in the pursuit or apprehension of suspected criminals has ancient Saxon origins, predating the Norman Conquest."); *see also New York Telephone*, 434 U.S. at 175 n.24. So even if installing code on a computer constitutes speech, and even if the Order compels speech and not conduct, it would nonetheless be permitted because the investigation and suppression of criminal activity is an essential operation of government and would thus be permitted under the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOSEPH V. DEMARCO
JEFFERY C. BARNUM
Attorneys