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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE, et al.,

Defendants.

CASE NO. C16-0538JLR

ORDER ON MOTIONS TO  
INTERVENE

**I. INTRODUCTION**

Before the court are two motions to intervene: (1) Stephen P. Wallace’s Emergency Motion to Intervene for Declaratory Judgment Under “Bivens Claim” Violations (Wallace Mot. (Dkt. # 12)) and (2) the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, “the ACLU”)’s Motion to Intervene (ACLU Mot. (Dkt. #13)). Microsoft Corporation (“Microsoft”) opposes Mr. Wallace’s motion (Microsoft Resp. I (Dkt. # 19)), but does not oppose the ACLU’s

1 motion (Microsoft Resp. II (Dkt # 34)). Defendant United States Department of Justice  
2 (“the DOJ”) opposes the ACLU’s motion (DOJ Resp. (Dkt. # 33)), but did not respond to  
3 Mr. Wallace’s motion (*see generally* Dkt.). Both Mr. Wallace and the ACLU filed reply  
4 briefs in support of their motions to intervene. (Wallace Reply (Dkt. # 32)); (ACLU  
5 Reply (Dkt. # 37)). The court has considered the motions, all related submissions, the  
6 balance of the record, and the applicable law. Being fully advised,<sup>1</sup> the court DENIES  
7 the motions to intervene and GRANTS the ACLU amicus curiae status.<sup>2</sup>

## 8 II. BACKGROUND

9 This case is about whether the Constitution allows the government to collect a  
10 person’s electronically stored information from the person’s service provider without  
11 giving notice to the affected person. It is also about whether the Constitution permits  
12 court orders forbidding service providers from notifying their customers of the  
13 government’s information requests. The statutes that allow for these actions—which  
14 Microsoft challenges—are part of the Electronic Communications Privacy Act of 1986  
15 (“ECPA”).

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19 <sup>1</sup> Although the ACLU requests oral argument on its motion to intervene, the court finds  
20 that oral argument is unnecessary to the court’s disposition of the motion. (*See* ACLU Mot. at  
21 1); Local Rules W.D. Wash. LCR 7(b)(4) (“Unless otherwise ordered by the court, all motions  
22 will be decided by the court without oral argument.”).

<sup>2</sup> On August 26, 2016, the ACLU filed an opposition to the DOJ’s pending motion to  
dismiss. (*See* Resp. (Dkt. # 43).) The ACLU requests leave to file its opposition brief as amicus  
curiae if the court denies the ACLU’s motion intervene. (*Id.* at 1 n.1.)

1 **A. ECPA**

2 ECPA “addresses various areas of electronic surveillance, including wiretaps,  
3 tracking devices, stored wire and electronic communications, pen registers, and trap and  
4 trace devices.” *See United States v. Anderson*, Case No. 2:15-cr-00200-KJD-PAL, 2016  
5 WL 4191045, at \*7 (D. Nev. Apr. 27, 2016). ECPA focuses on “two types of computer  
6 services” in terms of government surveillance: “electronic communications services  
7 (e.g., the transfer of electronic messages, such as email, between computer users) and  
8 remote computing services (e.g., the provision of offsite computer storage or processing  
9 of data and files).” *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1103 (9th Cir. 2014).  
10 Accordingly, an electronic communications service provider (“ECS provider”) is an  
11 entity that provides “any service which provides to users thereof the ability to send or  
12 receive wire or electronic communications,” 18 U.S.C. § 2510(15), and a remote  
13 computing service provider (“RCS provider”) is an entity that provides “to the  
14 public . . . computer storage or processing services by means of an electronic  
15 communications system,” 18 U.S.C. § 2711(2). A subscriber is a person who uses those  
16 services. *See, e.g., In re Application of the U.S. for an Order Pursuant to 18 U.S.C.*  
17 *§ 2705(b)*, 131 F. Supp. 3d 1266, 1268 (D. Utah 2015) (discussing subscribers as those  
18 individuals who use electronic communications and remote computing services).

19 1. The Stored Communications Act

20 Title II of ECPA—the Stored Communications Act (“SCA”)—governs the  
21 government’s access to “electronic information stored in third party computers.” *In re*  
22 *Zynga*, 750 F.3d at 1104. Two SCA statutes, 18 U.S.C. § 2703 and 18 U.S.C. § 2705,

1 “regulate relations between a government entity which seeks information; a service  
2 provider which holds information; and the subscriber of the service who owns the  
3 information and is therefore a target of investigation.” *In re Application of the U.S.*, 131  
4 F. Supp. 3d at 1268. The information sought from ECS and RCS providers “may contain  
5 content or . . . non-content metadata.” *Id.*

6 *a. Section 2703 of the SCA*

7 Section 2703 authorizes the government to acquire a subscriber’s information  
8 from a service provider when the subscriber is a “target” of the government’s information  
9 request. *See* 18 U.S.C. § 2703. The provision “establishes a complex scheme pursuant to  
10 which a governmental entity can, after fulfilling certain procedural and notice  
11 requirements, obtain information from [a service provider] via administrative subpoena  
12 or grand jury or trial subpoena.” *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965,  
13 974-75 (C.D. Cal. 2010) (citing 18 U.S.C. § 2703(b)). Section 2703 requires the  
14 government to give notice to subscribers that it has obtained their information from a  
15 service provider in some circumstances, but not in others. *See* 18 U.S.C. § 2703(a)-(c)  
16 (describing various notice requirements for communication contents and records in  
17 electronic storage and remote computing services).

18 *b. Section 2705 of the SCA*

19 Section 2705 addresses when the government may withhold notice that is  
20 otherwise required under Section 2703. *See* 18 U.S.C. § 2705(a)-(b); *In re Application of*  
21 *the U.S.*, 131 F. Supp. 3d at 1268. Under Section 2705(a), the government may delay  
22 giving notice to the subscriber that the government has collected the subscriber’s

1 information if certain requirements are met; under Section 2705(b), the government may  
2 apply for “a preclusion-of-notice order,” which “command[s] a provider of electronic  
3 communications service or remote computing service not to notify any person of the  
4 existence of a grand jury subpoena [or other acceptable court order under the SCA] which  
5 the Government has served on the provider.” *Id.* at 1267. A court can issue such a  
6 “preclusion-of-notice order” if the court

7 determines that there is reason to believe that notification of the existence  
8 of the warrant, subpoena, or court order will result in (1) endangering the  
9 life or physical safety of an individual; (2) flight from prosecution; (3)  
10 destruction of or tampering with evidence; (4) intimidation of potential  
11 witnesses; or (5) otherwise seriously jeopardizing an investigation or  
12 unduly delaying a trial.

13 18 U.S.C. § 2705(b). “The combined effect of [§§ 2703] and 2705(b) is that the  
14 subscriber may never receive notice of a warrant to obtain content information from a  
15 remote computing service and the government may seek an order under § 2705(b) that  
16 restrains the provider indefinitely from notifying the subscriber.” *In re Application of the*  
17 *U.S.*, 131 F. Supp. 3d at 1271.

## 18 **B. Microsoft’s Suit**

19 On April 14, 2016, Microsoft, a service provider under ECPA,<sup>3</sup> filed a complaint  
20 against the DOJ seeking declaratory relief (Compl. (Dkt. # 1)), and later amended its  
21 complaint on June 17, 2016 (Am. Compl. (Dkt. # 28)). The gravamen of Microsoft’s  
22 complaint is that Section 2705(b) is unconstitutional under the First and Fourth

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<sup>3</sup> Microsoft is both an ECS provider and an RCS provider. *See Crispin*, 717 F. Supp. 2d at 978 (citing *United States v. Weaver*, 636 F. Supp. 2d 769, 770 (C.D. Ill. 2009)).

1 Amendments and that Section 2703 is unconstitutional under the Fourth Amendment “to  
2 the extent it permits warranted searches and seizures without the government providing  
3 notice to the person whose communications are being searched and seized.” (*Id.*)

4 In Microsoft’s view, “the government has increasingly adopted the tactic of  
5 obtaining the private digital documents of cloud<sup>4</sup> customers not from the customers  
6 themselves, but through legal process directed at online cloud providers like Microsoft.”  
7 (*Id.* ¶ 4. (footnote added)) The government then “seeks secrecy orders under 18 U.S.C.  
8 § 2705(b) to prevent Microsoft from telling its customers (or anyone else) of the  
9 government’s demands” for that information. (*Id.*) According to Microsoft, “[t]he vast  
10 majority of these secrecy orders relate[] to consumer accounts and prevent Microsoft  
11 from telling affected individuals about the government’s intrusion into their personal  
12 affairs; others prevent Microsoft from telling business customers that the government has  
13 searched and seized the emails of individual employees of the customer.” (*Id.* ¶ 16.)  
14 Microsoft alleges that federal courts have issued “more than 3,250 secrecy orders” over a  
15 20-month period ending May 2016. (*Id.* ¶ 5.) Nearly two-thirds of the orders are  
16 allegedly for an indefinite length of time. (*Id.*)

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19 <sup>4</sup> The “cloud” is “a metaphor for the ethereal internet.” *In re U.S.’s Application for a*  
20 *Search Warrant to Seize & Search Elec. Devices from Edward Cunnius*, 770 F. Supp. 2d 1138,  
21 1144 n.5 (W.D. Wash. 2011) (internal quotations omitted) (quoting David A. Couillard,  
22 *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations*  
*in Cloud Computing*, 93 Minn. L. Rev. 2205, 2216 (2009)). “An external cloud platform is  
storage or software access that is essentially rented from (or outsourced to) a remote public cloud  
service provider, such as Amazon or Google.” *Id.*

1 Microsoft contends that Section 2705(b) is unconstitutional on its face and as  
2 applied because it violates the First Amendment right of a business to “talk to [the  
3 business’s] customers and to discuss how the government conducts its investigations.”  
4 (*Id.* ¶ 1.) Specifically, Microsoft contends that Section 2705(b) is overbroad; imposes  
5 impermissible prior restraints on speech, imposes impermissible content-based  
6 restrictions on speech, and improperly inhibits the public’s right to access search  
7 warrants. (*Id.* ¶¶ 23-26).

8 Microsoft also alleges that Sections 2705(b) and 2703 are unconstitutional on their  
9 faces and as applied because they violate the Fourth Amendment right of “people and  
10 businesses . . . to know if the government searches or seizes their property.” (*Id.* ¶ 33.)  
11 Microsoft contends that the statutes are facially invalid insofar as they allow the  
12 government to forgo giving notice of its searches and seizures, and to obtain secrecy  
13 orders that “prohibit providers from telling customers when the government has accessed  
14 their private information” without constitutionally sufficient proof and without sufficient  
15 tailoring. (*Id.* ¶ 35.) Microsoft further alleges that Sections 2703 and 2705(b) are  
16 unconstitutional as applied because “[t]he absence of a government notice obligation,  
17 combined with the imposition of secrecy orders on Microsoft, has resulted, and will  
18 continue to result, in unconstitutional delay of notice to Microsoft’s customers, in  
19 violation of their Fourth Amendment rights.” (*Id.* ¶ 40.) Microsoft asserts that it has  
20 third-party standing to “vindicate” its customers’ rights to notice of search and seizure  
21 under the Fourth Amendment. (*Id.* ¶¶ 38-39.)  
22

1 **C. Mr. Wallace’s Motion**

2 Mr. Wallace filed his *pro se* “emergency motion” to intervene on May 17, 2016.<sup>5</sup>  
3 (*See generally* Wallace Mot.) In his motion, Mr. Wallace contends that he and his sister  
4 are victims of embezzlement and conversion of their “\$40+ million Irrevocable  
5 Spendthrift Trust Estate” (*id.* at 1), and that two federal judges have “hack[ed] ALL of  
6 [Mr. Wallace’s] private Microsoft E-Mail Accounts” (*id.* at 2 (emphasis in original  
7 omitted)). In addition, Mr. Wallace attaches a number of documents to his “emergency  
8 motion,” which appear to be primarily about prior—and unrelated—litigation in which  
9 Mr. Wallace was involved. (*See id.* at 3-45.)

10 Microsoft opposes Mr. Wallace’s motion to intervene, arguing that Mr. Wallace  
11 does not satisfy the standards under Federal Rule of Civil Procedure 24 for either  
12 intervention as of right or permissive intervention. (Microsoft Resp. I at 1-2); *see also*  
13 Fed. R. Civ. P. 24. Mr. Wallace also filed a “supplement/amended memorandum” in  
14 which he “asserts his Standing as Private Attorney General,” reiterates his allegations of  
15 embezzlement and fraud, and further discusses unrelated litigation in which he was  
16 involved. (Reply (Dkt. # 32) at 1-6.) The court construes Mr. Wallace’s  
17 “supplement/amended memorandum” as a reply brief in support of his “emergency

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20 <sup>5</sup> The court construes Mr. Wallace’s “emergency motion” to intervene as a Federal Rule  
21 of Civil Procedure 24 motion to intervene as of right or, in the alternative, permissively. (*See*  
22 Wallace Mot.) Mr. Wallace is proceeding *pro se* and therefore the court must liberally construe  
his filings. *See Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013).

1 motion” to intervene.<sup>6</sup> *See Blaisdell*, 729 F.3d at 1241. The DOJ did not respond to Mr.  
2 Wallace’s intervention motion. (*See generally* Dkt.)

3 **D. The ACLU’s Motion**

4 The ACLU moved to intervene in this matter on May 26, 2016. (*See generally*  
5 ACLU Mot.) The ACLU is a Microsoft customer that relies “on Microsoft Corporation’s  
6 email and cloud-computing services to store and transmit sensitive records and  
7 communications.” (*Id.* at 1.) As a Microsoft customer, the ACLU argues that it has “an  
8 acute interest in ensuring that the government’s demands for the records of Microsoft’s  
9 customers are constitutional.” (*Id.*) It seeks to intervene “to vindicate [its] Fourth  
10 Amendment right to notice of searches and seizures that implicate their constitutionally  
11 protected privacy interests. Specifically, [the ACLU] seeks to ensure that the government  
12 . . . will notify [the ACLU] in the event it obtains [the ACLU’s] communications from  
13 Microsoft.” (*Id.*) The ACLU further contends that intervening may be its only way to  
14 challenge the constitutionality of Section 2703 because “customers deprived of notice  
15 are, by definition, unaware of the government’s secret searches of their communications,  
16 but once customers learn of a search, they no longer need the notice that the government  
17 failed to provide.” (*Id.* at 2.) The ACLU argues that it may intervene as of right, but, if

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19 <sup>6</sup> Mr. Wallace also filed an “objection” to Microsoft’s counsel apparently in response to  
20 Microsoft’s opposition to his motion and a “notice of spoliation of evidence in victim’s  
21 supplemental memorandum.” (*See* Obj. (Dkt. # 21); Not. (Dkt. # 36).) Mr. Wallace’s  
22 “objection” and “notice” are unrelated to any of the issues Mr. Wallace raises in his motion to  
intervene or any of the issues Microsoft raises in its opposition to Mr. Wallace’s motion. (*See*  
Obj.; Not.) Accordingly, the court has not considered them in ruling on Mr. Wallace’s motion to  
intervene.

1 the court finds that it may not, asks that the court exercise its discretion to nevertheless  
2 permit the ACLU to intervene. (*Id.* at 4, 11.)

3 Microsoft does not oppose the ACLU’s motion to intervene. (Microsoft Resp. II  
4 at 1 (“Microsoft has no objection to entry of an Order granting the ACLU’s Motion and  
5 allowing the filing of the ACLU’s proposed Complaint in Intervention for Declaratory  
6 and Injunctive Relief.”).) The DOJ, on the other hand, argues that the ACLU cannot  
7 establish that it is entitled to intervene as a matter of right or that the court may exercise  
8 its discretion to permit the ACLU to intervene.<sup>7</sup> (*See* DOJ Resp. at 7-12.) Specifically,  
9 the DOJ contends that the ACLU has not met the four requirements to intervene as of  
10 right. (*Id.* at 7-11.) The DOJ also argues that permissive intervention should not be  
11 granted because the “ACLU’s speculative claims . . . would not provide the Court with  
12 additional concrete context for the constitutional challenges here.” (*Id.* at 12.)

### 13 III. ANALYSIS

#### 14 A. Standards to Intervene

##### 15 1. Intervention as of Right

16 Federal Rule of Civil Procedure 24 provides for two types of intervention:  
17 intervention as of right and permissive intervention. Under Rule 24(a), a prospective  
18 intervenor may intervene as of right when a federal statute confers an unconditional right  
19 to intervene or when the prospective intervenor claims an interest that may, as a practical

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21 <sup>7</sup> The DOJ also argues that the ACLU may not intervene because the ACLU lacks  
22 independent standing or standing derived from another party. (*See id.* at 4-7.) The court  
declines to decide that issue at this time, however, because it has determined that the ACLU has  
not met the requirements to intervene as of right or permissively.

1 matter, be impaired by disposition of the pending action and that interest is not  
2 adequately represented by existing parties. *See* Fed. R. Civ. P. 24(a). The Ninth Circuit  
3 has held that to intervene as of right, a prospective intervenor must: (1) file a timely  
4 motion; (2) identify a significant protectable interest related to the subject matter of the  
5 action; (3) suffer practical impairment of an interest if intervention is not granted; and (4)  
6 be inadequately represented by existing parties. *Arakaki v. Cayetano*, 324 F.3d 1078,  
7 1083 (9th Cir. 2003), *as amended* (May 13, 2003). Failure to satisfy any of these  
8 requirements is fatal to a motion to intervene, and the court “need not reach the remaining  
9 elements if one of the elements is not satisfied.” *Perry v. Proposition 8 Official*  
10 *Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). The court, however, construes Rule 24(a)  
11 broadly in favor of intervention, *id.*, and must accept as true the nonconclusory  
12 allegations of the motion and proposed answer, *Sw. Ctr. for Biological Diversity v. Berg*,  
13 268 F.3d 810, 819 (9th Cir. 2001). The party seeking to intervene bears the burden of  
14 showing that all of the requirements for intervention have been met. *United States v.*  
15 *Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

## 16 2. Permissive Intervention

17 A proposed intervenor may also intervene by seeking the court’s permission under  
18 Rule 24(b). Fed. R. Civ. P. 24(b). The Ninth Circuit has held that a court may  
19 permissively allow intervention when the prospective intervenor meets three threshold  
20 requirements: (1) files a timely application; (2) shares a common question of law or fact  
21 with the main action; and (3) demonstrates that the court has an independent basis for  
22 jurisdiction over the intervenor’s claims. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th

1 Cir. 1998). Unlike intervention as of right, even if all three requirements are satisfied, the  
2 district court has considerable discretion to deny permissive intervention. *Id.* at 412; Fed.  
3 R. Civ. P. 24(b). “In exercising its discretion, the court must consider whether the  
4 intervention will unduly delay or prejudice the adjudication of the original parties’  
5 rights.” Fed. R. Civ. P. 24(b)(3); *see also Donnelly*, 159 F.3d at 412. The court should  
6 also consider whether the interests of the proposed intervenor are adequately represented  
7 in the proceedings already, *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989), and  
8 whether the party seeking intervention “will significantly contribute to full development  
9 of the underlying factual issues in the suit and to the just and equitable adjudication of the  
10 legal issues presented,” *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir.  
11 1977).

### 12 3. Notice and Pleading Requirements for Motion to Intervene

13 In addition, Rule 24(c) provides that a motion to intervene “must state the grounds  
14 for intervention and be accompanied by a pleading that sets out the claim or defense for  
15 which intervention is sought.” Fed. R. Civ. P. 24(c) (stating notice and pleading  
16 requirements). The Ninth Circuit has approved motions to intervene without a pleading  
17 or with some other technical defect, but only “as long as the prospective intervenor fully  
18 states the legal and factual grounds for intervention.” *S.E.C. v. Small Bus. Capital Corp.*,  
19 No. 5:12-CV-03237-EJD, 2014 WL 3749900, at \*7 n.2 (N.D. Cal. July 29, 2014) (citing  
20 *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (“Courts,  
21 including this one, have approved intervention motions without a pleading where the  
22 court was otherwise apprised of the grounds for the motion.”)).

1     **B. Mr. Wallace’s Motion**

2           Even liberally construing Mr. Wallace’s *pro se* motion as the court must, *see*  
3 *Blaisdell*, 729 F.3d at 1241, Mr. Wallace’s motion and the documents accompanying it  
4 do not adequately state grounds to intervene in this matter. (*See* Mot. at 1-2 (stating  
5 general allegations of conversion, embezzlement, and email hacking).) Given that Mr.  
6 Wallace alleges embezzlement, fraud, and hacking of his email by federal judges, the  
7 court cannot ascertain on what legal basis Mr. Wallace is moving to intervene.  
8 Accordingly, his motion to intervene is denied.

9           However, even if Mr. Wallace had adequately stated grounds to intervene, the  
10 court finds that he may not intervene as of right or permissively. First, he has not  
11 identified a legally protectable interest related to the subject matter of the action that  
12 would allow him to intervene as of right. *See Arakaki*, 324 F.3d at 1083. Assuming that  
13 Mr. Wallace has identified a legally protectable interest through his allegations of  
14 conversion, embezzlement, and email hacking, those interests are not related to the  
15 subject matter of this action—that Sections 2703 and 2705(b) are unconstitutional under  
16 the First and Fourth Amendments.<sup>8</sup> *Id.* For the same reason, the court declines to permit  
17 Mr. Wallace to intervene because his proposed claims do not share a common question of  
18 law or fact with Microsoft’s First and Fourth Amendment claims. *See Donnelly*, 159  
19 F.3d at 412 (holding that a proposed intervenor must meet three threshold requirements).

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21           <sup>8</sup> Because the court has found that Mr. Wallace fails to meet this element, which is fatal  
22 to his motion to intervene, it will not further analyze the other elements. *See Perry*, 587 F.3d at  
950.

1 Thus, Mr. Wallace has not established that he is entitled to intervene as of right, and the  
2 court will not allow Mr. Wallace to intervene permissively, given that the allegations in  
3 his motion have no nexus to this case.

#### 4 **C. The ACLU's Motion**

##### 5 1. Intervention as of Right

6 The ACLU has not established that it may intervene in this case as of right.

7 Where, as here, a party and the proposed intervenor share the same ultimate objective, the  
8 court presumes that the party will adequately represent the proposed intervenor's  
9 interests. *See Perry*, 587 F.3d at 951 (internal quotation marks and citations omitted).

10 The ACLU has not presented the court with compelling reasons to overcome that  
11 presumption. Because the court's finding that the ACLU has not established this element  
12 is fatal to the ACLU's motion to intervene as of right, the court does not address the other  
13 elements required for intervention as of right. *See id.* at 950.

##### 14 *a. Adequate Representation*

15 It is well established that "[w]here the party and the proposed intervenor share the  
16 same ultimate objective, a presumption of adequacy of representation applies, and the  
17 intervenor can rebut the presumption only with a compelling showing to the contrary."  
18 *Id.* at 951 (internal quotation marks and citations omitted). "Divergence of tactics and  
19 litigation strategy is not tantamount to divergence over the ultimate objective of the suit."  
20 *Id.* at 949. In determining whether a would-be intervenor's interests will be adequately  
21 represented by an existing party, the court considers: (1) whether the interest of a present  
22 party is such that it will undoubtedly make all of the intervenor's arguments; (2) whether

1 the present party is capable of and willing to make such arguments; and (3) whether the  
2 would-be intervenor would offer any necessary elements to the proceedings that other  
3 parties would neglect. *Berg*, 268 F.3d at 822. The most important factor is “how the  
4 interest compares with the interests of existing parties.” *Arakaki*, 324 F.3d at 1086. The  
5 proposed intervenor “bears the burden of demonstrating that the existing parties may not  
6 adequately represent its interest.” *Berg*, 268 F.3d at 822-23. Even though the burden is  
7 “minimal,” it is “not without teeth.” *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir.  
8 2006).

9 The ACLU contends that Microsoft may not adequately represent its interests in  
10 this litigation because the ACLU’s interests “are sufficiently different from Microsoft’s.”  
11 (ACLU Mot. at 9.) Specifically, the ACLU identifies three purportedly distinct interests:  
12 (1) as a customer, the ACLU is “uniquely positioned to articulate the necessity of  
13 government-provided notice”; (2) the ACLU seeks “to enforce solely the government’s  
14 constitutional obligation to provide notice” under the Fourth Amendment, while  
15 Microsoft’s “primary focus” is on communicating with its customers about the  
16 government’s searches and seizures; and (3) the ACLU can better provide “the factual  
17 context” necessary to help the court understand why a customer’s right to notice under  
18 the Fourth Amendment is important. (*Id.* at 9-10.) These interests are not sufficiently  
19 different—and therefore do not present sufficiently compelling reasons—to overcome the  
20 presumption that Microsoft will adequately represent the ACLU’s interests.

21 First, the ACLU contends that, as a Microsoft customer, it is uniquely situated in  
22 relationship to Microsoft’s position “[a]s a public company” whose “interests are

1 | diverse” and whose “ultimate responsibility is to its shareholders.” (ACLU Mot. at 14.)  
2 | But both parties challenge Section 2703 as unconstitutional to the extent it allows the  
3 | government to obtain communications without providing notice to subscribers, and there  
4 | is no indication that Microsoft’s challenge to Section 2703 is somehow significantly  
5 | different because Microsoft is a public company with “diverse” interests. (*Compare*  
6 | ACLU Mot. at 11 (seeking “a declaration that 18 U.S.C. § 2703 is unconstitutional to the  
7 | extent it permits the government to obtain electronic communications without providing  
8 | notice to the Microsoft customers or subscribers whose communications it has obtained”)  
9 | *with* Am. Compl. at 18 (seeking a declaration “that 18 U.S.C. § 2703 is unconstitutional  
10 | under the Fourth Amendment, at least to the extent it permits warranted searches and  
11 | seizures without the government providing notice to the person whose communications  
12 | are being searched and seized”).) Put simply, the ACLU and Microsoft share the same  
13 | ultimate objective—they want the court to find that Section 2703 violates the Fourth  
14 | Amendment’s notice requirement. Merely pointing to the different roles they occupy—  
15 | the ACLU as customer and Microsoft as a public company—does not explain why  
16 | Microsoft will not adequately represent the ACLU’s interests, particularly when they  
17 | share this same objective.

18 |         Second, the court finds the ACLU’s argument that Microsoft will somehow  
19 | inadequately litigate the issue of whether the government must provide notice under the  
20 | Fourth Amendment because Microsoft also asserts that it has the right to notify customers  
21 | of government searches and seizures to be unpersuasive. (*See* ACLU Mot. at 15.)  
22 | Microsoft’s claim that Section 2703 is unconstitutional because it allows the government

1 | to refrain from providing notice to subscribers is the same claim that the ACLU seeks to  
2 | bring. (*Compare* ACLU Mot. at 11 (seeking “a declaration that 18 U.S.C. § 2703 is  
3 | unconstitutional to the extent it permits the government to obtain electronic  
4 | communications without providing notice to the Microsoft customers or subscribers  
5 | whose communications it has obtained”) *with* Am. Compl. at 18 (seeking a declaration  
6 | “that 18 U.S.C. § 2703 is unconstitutional under the Fourth Amendment, at least to the  
7 | extent it permits warranted searches and seizures without the government providing  
8 | notice to the person whose communications are being searched and seized”).) The fact  
9 | that Microsoft also has other claims does not mean that it will necessarily give short shrift  
10 | to the one the ACLU champions. In addition, Microsoft asserts that it has third-party  
11 | standing “to vindicate its customers’ Fourth Amendment rights to notice” (Am. Compl.  
12 | ¶ 38), which further demonstrates its intent to fully pursue this claim. Accordingly, the  
13 | court has no reason to believe that Microsoft will not or is unable to fully litigate its claim  
14 | that Section 2703 is unconstitutional insofar as it allows the government to refrain from  
15 | giving notice to subscribers. *See Berg*, 268 F.3d at 822.

16 |         Finally, the court finds that the ACLU is not in a better position to provide “factual  
17 | background” in this case and therefore would not offer any necessary elements that  
18 | Microsoft would neglect. *Id.* The ACLU’s conclusory statement that its “participation  
19 | will ensure that the interests of Microsoft’s customers are directly before the [c]ourt”  
20 | (ACLU Mot. at 16) does not tell the court what “factual background” the ACLU would  
21 | bring to bear in this matter. The ACLU does not contend that the government has  
22 |

1 obtained its information from Microsoft without notice,<sup>9</sup> so it is unclear what factual  
2 information the ACLU could provide that Microsoft will not. This is all the more true  
3 because Microsoft has allegedly been required to turn over subscribers' information in  
4 thousands of cases and, in some of those cases, required to stay silent. (*See generally*  
5 *Am. Compl.*) Therefore, Microsoft, not the ACLU, is in the best position to provide the  
6 court with factual background to advance the argument that Section 2703 is  
7 unconstitutional.

8         The reasons the ACLU advances for why it is entitled to intervene are not  
9 sufficiently compelling to overcome the presumption that Microsoft will adequately  
10 represent their shared interests. Thus, the ACLU is not entitled to intervene as a matter of  
11 right.

## 12         2. Permissive Intervention

13         The court also declines to exercise its discretion to permit the ACLU to intervene  
14 in this case. Assuming that the ACLU establishes the three threshold requirements for  
15 permissive intervention and that there would be no undue delay or prejudice in allowing  
16 the ACLU to intervene, *see Donnelly*, 159 F.3d at 412, the court finds that other  
17 considerations counsel against allowing intervention, *see id.* (stating that a  
18 court has broad discretion to deny permissive intervention even if a proposed intervenor  
19 establishes the threshold requirements).

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21         <sup>9</sup> The Court acknowledges the ACLU's contention that the ACLU may not know if the  
22 government has obtained its information because Section 2703 allows the government to  
withhold notice in some instances (*see ACLU Mot.* at 7), but that contention does not bolster the  
ACLU's argument that it has helpful "factual background" such that it is entitled to intervene.

1 First, the ACLU's interests are adequately represented by Microsoft for the  
2 reasons discussed above. *See Venegas*, 867 F.2d at 530 (holding that a court may  
3 consider whether the proposed intervenor's interests are already adequately represented  
4 in exercising the court's discretion). The ACLU and Microsoft have the same ultimate  
5 objective—a determination that Section 2703 is unconstitutional. Accordingly, the court  
6 presumes that Microsoft will adequately represent the ACLU's interests in this case. *See*  
7 *Perry*, 587 F.3d at 951 (“[A] presumption of adequacy of representation applies” where  
8 “the party and the proposed intervenor share the same ultimate objective.”) The ACLU  
9 has offered no compelling justification to rebut that presumption because it has not  
10 demonstrated that Microsoft is incapable or unwilling to make all available arguments in  
11 support of the objectives it holds in common with the ACLU, or that the ACLU will  
12 contribute some element necessary to the adjudication of this case that would otherwise  
13 be omitted. *See Berg*, 268 F.3d at 822 (listing factors to consider in determining whether  
14 a proposed intervenor's interests would be adequately represented by an existing party).  
15 For this reason, the court declines to permit the ACLU to intervene.

16 Second, the ACLU will not significantly contribute to the “full development of the  
17 underlying factual issues in the suit.” *Spangler*, 552 F.2d at 1329. Even though the  
18 ACLU is a Microsoft customer, the ACLU has not, as far as it knows, been deprived of  
19 government notice based on the government obtaining its information from Microsoft  
20 under Section 2703. It is therefore unlikely to be able to provide any helpful background  
21 information in this matter.  
22

1 Finally, if the court were to allow the ACLU to intervene, there would be no  
2 principled basis for denying intervention to any other Microsoft customer, absent an  
3 untimely request to do so.<sup>10</sup> See *Venegas*, 867 F.3d at 531 (holding that “judicial  
4 economy is a relevant consideration” in exercising discretion on motion to permissively  
5 intervene). In seeking to intervene, the ACLU focuses on the fact that it is an  
6 organization that “rel[ies] on Microsoft Corporation’s email and cloud-computing  
7 services to store and transmit sensitive records and communications,” and that it  
8 “agree[s] with Microsoft that [Microsoft’s] customers have a Fourth Amendment right to  
9 notice.” (ACLU Mot. at 6.) The ACLU’s position does not appear to be meaningfully  
10 different from any other Microsoft customer that contends that the government must  
11 notify it if the government obtains its information from Microsoft. The court therefore  
12 concludes that, to effectively manage its docket and prevent undue delay in the  
13 disposition of this case, it will not permit the ACLU to intervene.

### 14 3. Amicus Curiae Status

15 The court has “broad discretion” to appoint amicus curiae. *Hoptowitz v. Ray*, 682  
16 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515  
17 U.S. 472 (1995). The ACLU filed a brief in opposition to the DOJ’s pending motion to  
18 dismiss and asked the court to grant the ACLU leave to file it as an amicus curiae brief  
19 should the court deny the ACLU’s motion to intervene. (Resp. at 1 n.1.) Because the

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20  
21 <sup>10</sup> Whether a motion to intervene is timely is determined by three factors: “(1) the stage of  
22 the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3)  
the reason for and length of the delay.” *Cal. Dep’t of Toxic Substances Control v. Commercial  
Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002).

