

CASE NO. 20-16408

IN THE
**United States Court of Appeals
for the Ninth Circuit**

NSO GROUP TECHNOLOGIES LTD. ET AL.,

Defendants-Appellants,

v.

WHATSAPP INC. ET AL.

Plaintiffs-Appellees.

On Appeal from the United States District Court,
Northern District of California, Case No. 4:19-cv-07123-PJH

**REPLY OF AMICI CURIAE ACCESS NOW, AMNESTY
INTERNATIONAL, COMMITTEE TO PROTECT JOURNALISTS,
INTERNET FREEDOM FOUNDATION, PARADIGM INITIATIVE,
PRIVACY INTERNATIONAL, RED EN DEFENSA DE LOS DERECHOS
DIGITALES, AND REPORTERS WITHOUT BORDERS TO
APPELLANT’S RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF
OF AMICI CURIAE**

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BACKGROUND

On December 23, 2020, Access Now, Amnesty International, Committee To Protect Journalists, Internet Freedom Foundation, Paradigm Initiative, Privacy International, Red en Defensa de los Derechos Digitales (R3D), and Reporters Without Borders (collectively, “Human Rights Amici”) filed a motion for leave to file a brief of amici curiae in the above-captioned matter. Two days prior, on December 21, 2020, counsel for Human Rights Amici emailed counsel for both Appellants (“NSO”) and Appellees (“WhatsApp”) requesting consent to file their amici brief. Counsel for WhatsApp consented to filing on the same day. On December 22, 2020, counsel for NSO responded that it was not able to consent, stating that Human Rights Amici’s description of the brief appeared inconsistent with the guidance in Ninth Circuit Advisory Committee Note to Rule 29-1.

On January 4, 2021, NSO filed a joint response to the motion for leave to file of Human Rights Amici and the motion for leave to file of three law professors. In its response, NSO argued that this Court should reject Human Rights Amici’s brief on the grounds that it offends the abovementioned Advisory Committee Note by “raising the same points” as other amicus briefs and introduces allegedly impermissible factual assertions about NSO and its customers. Human Rights Amici submit this reply to respond to NSO’s contentions and supplement the arguments made in its December 23, 2020 motion for leave to file.

ARGUMENT

I. Human Rights Amici’s brief meets the controlling standard set forth by the Federal Rules of Appellate Procedure and is unique from the other amici briefs submitted to this court.

Federal Rule of Appellate Procedure 29(a)(3) sets forth the only legal standard governing whether a court should grant a motion for leave to file an amicus brief. NSO’s response fails to even mention Rule 29(a)(3), and for good reason: Human Rights Amici easily satisfies the standard, given that their interest in this appeal is significant and their brief is both desirable and helpful to the Court. Instead, NSO invokes a non-binding Advisory Committee Note to argue that this Court should reject Human Rights Amici’s brief out of hand because it “rais[es] the same points” as the other amici briefs filed in this case. NSO Response 5.

NSO’s attempt to paint Human Rights Amici’s brief in the broadest possible strokes ignores the distinct viewpoint that the groups bring to this appeal. Their brief is undersigned by eight international human rights organizations based in several different continents—groups unrepresented by any other amici brief filed in this matter. Given their regional presence and, in particular, Access Now’s digital security helpline¹ for activists on the ground, these organizations are unique from other amici, as they work directly alongside the civil society actors affected

¹ See *Digital Security Helpline*, Access Now, <https://www.accessnow.org/help/>.

by NSO's spyware. Three of these amici—R3D, Amnesty International, and Access Now—were themselves involved in unearthing major NSO surveillance revelations.² And with members personally working to advance human rights protections in the very countries whose governments patronize NSO, their interests and work are directly threatened by NSO's illegal actions and significantly impacted by the outcome of this appeal. Indeed, one of Amnesty International's own researchers was targeted with WhatsApp messages associated with NSO's Pegasus infrastructure in 2018.³

Because of this unique perspective, Human Rights Amici submit a brief that is substantively distinct from any submission provided by other amici. The brief provides detailed information about the human rights violations taking place in various countries that contract for NSO's services, which none of the other briefs provide. It explains, on a country-by-country basis, why redress for the Pegasus-enabled surveillance abuses is largely unattainable. It sets forth the international

² See *Spyware in Mexico: an interview with Luis Fernando García of R3D Mexico*, Access Now (June 22, 2017), <https://www.accessnow.org/spyware-mexico-interview-luis-fernando-garcia-r3d-mexico/>; *Moroccan Journalist Targeted With Network Injection Attacks Using NSO Group's Tools*, Amnesty International (June 22, 2020), <https://www.amnesty.org/en/latest/research/2020/06/moroccan-journalist-targeted-with-network-injection-attacks-using-nso-groups-tools/>.

³ See *Amnesty International Among Targets of NSO-powered Campaign*, Amnesty International (Aug. 1, 2018), <https://www.amnesty.org/en/latest/research/2018/08/amnesty-international-among-targets-of-nso-powered-campaign/>.

law and corporate governance standards on unlawful digital surveillance from the perspective of international civil society organizations that rely on those laws and standards to effect their work. And it provides this Court with details about the grave impact that unlawful extra-judicial surveillance has on human rights activists around the world. Human Rights Amici's brief goes beyond the briefs of other amici, providing information and perspective unique to any other brief on file in this appeal.

II. Adhering to both the spirit and guidance of the Advisory Committee Note to Rule 29-1, Human Rights Amici submitted a single joint brief on behalf of a broad coalition of human rights organizations, presenting the Court with the unique information and legal perspective of this combined coalition.

Although NSO suggests that Human Rights Amici should have simply joined the 12 other prospective amici in filing a single joint brief, *see* NSO Resp. 5 (“Instead of filing one “joint brief,” WhatsApp’s amici have filed five separate briefs . . .”), the Advisory Committee Note to Circuit Rule 29-1 does not contemplate or require any such undertaking. Indeed, to do so would be impractical, if not impossible. The disparity in perspectives and arguments would not only exceed this Court’s 7,000-word limit for amicus briefs, but would also significantly limit the usefulness of the briefing in conveying for the Court the unique views of individual amici groups.

Contrary to NSO's contentions, Human Rights Amici's brief fully reflects the spirit and intent of Advisory Committee Note to Rule 29-1, as it adheres to the very guidance that the Note provides for organizations that seek to make similar arguments before this Court in an amici brief. The judicial economy considerations underlying the Note encourage coalitions of groups with common interests, such as those represented by the Human Rights Amici brief, to work together in submitting common arguments and information. In accordance with this guidance, Human Rights Amici's respective organizations coordinated to prepare and present the common set of information and arguments on appeal contained in their brief. Together, they produced a single joint brief for this Court, undersigned by eight separate organizations.

That brief is exactly what the Note contemplates. Given their clear adherence to both the amicus rule and its spirit, Human Rights Amici should not be denied leave to file, simply because they were fourth in line to request NSO's consent.

III. Human Rights Amici's brief provides thoroughly sourced background information, consistent with well-settled amicus briefing practices.

Human Rights Amici's brief provides this Court with essential background information on the matter that is currently under consideration. Courts have time and again recognized the critical role that amici play in this regard. *See, e.g., Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Then-

Circuit Judge Alito recognizing the role of amicus briefs to “collect background or factual references” or “explain the impact a potential holding might have on an industry or other group”); [*Voices for Choices v. Illinois Bell Tel. Co.*](#), 339 F.3d 542, 545 (7th Cir. 2003) (Permitting amicus briefs that provide “insights, facts, or data that are not found in the parties’ briefs”); [*Prairie Rivers Network v. Dynege Midwest Generation, LLC*](#), 976 F.3d 761, 763 (7th Cir. 2020) (recognizing the role that amici play in “highlighting factual [] nuance glossed over by the parties,” “providing practical perspectives on the consequences of potential outcomes” and “supplying empirical data”); [*NVG Gaming, LTD. v. Upstream Point Molate, LLC*](#), 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) (holding that amicus briefs should be welcomed if they provide “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide”). Indeed, the very purpose of an amicus brief is to provide context and perspective that the parties themselves may not be able to offer.

Human Rights Amici are among the most reputable non-profit organizations in the world. They perform the classic role of amici in this matter by informing the Court about the impact of NSO’s technology, the countries that deploy it, and the human rights abuses that occur as a result. This background is thoroughly researched and reliably sourced from reputable news outlets like the New York Times, world-renowned NGOs like Amnesty International and Human Rights

Watch, and institutional research programs like Freedom House and The Citizen Lab at the University of Toronto. Each of the victims' accounts have been publicly reported, and are supported by multiple sources in the brief. This background is far from unverified—all of it is confirmed by countless reliable media, research, and watchdog groups. And it tells a very different story than the one NSO hopes to tell.

NSO has repeatedly contended that it is an unsung hero in the global fight against terrorism and crime. It did so most recently, in fact, in its response to Human Rights Amici's motion, where it cited to the story that it told in its opening brief regarding an allegedly foiled terrorism investigation. NSO Resp. 2; NSO Br. 1-2; 18. That story was sourced from a single Wall Street Journal article. *See* NSO Br. 1 n. 1. NSO opened the door to a discussion about the impact of its technology around the world, and yet it bemoans the well-supported background that Human Rights Amici's brief provides in response. It cites no authority to support the contention that the Human Rights Amici brief should be rejected on these grounds, and indeed it should not be. The insights, background facts, and practical considerations in Human Rights Amici's brief are important to the Court's determination of this appeal, and in line with well settled amicus brief practices. For these foregoing reasons, Human Rights Amici respectfully requests this Court grant its motion for leave to file its brief amici curiae.

