

Oral Argument Not Yet Scheduled**No. 16-7081**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

John Doe, a.k.a. Kidane,*Plaintiff / Appellant*

v.

Federal Democratic Republic of Ethiopia,*Defendant / Appellee.***MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE UNITED
NATIONS HUMAN RIGHTS EXPERTS IN SUPPORT OF PLAINTIFF-
APPELLANT URGING REVERSAL**

United Nations human rights experts David Kaye, Maina Kiai and Michel Forst move for leave to file the accompanying *amici curiae* brief in support of Appellant. Appellant Kidane consents to this filing; Appellee Federal Democratic Republic of Ethiopia has not provided consent. *Amici* herein request leave to inform the Court of the potential implications of its ruling for the United States' compliance with its obligations under international human rights law. *Amici* come before the Court with significant expertise on the scope and implementation of

relevant international human rights norms, which will assist the Court's decisionmaking.

I. Interest of Amici

Special Rapporteurs are appointed by the United Nations ("U.N.") Human Rights Council, the central human rights institution of the U.N. and a subsidiary organ of the U.N. General Assembly. Special Rapporteurs examine, monitor, advise and report on the category of rights with which their mandates are concerned. They do this by receiving individual complaints, conducting country visits, issuing thematic reports, providing technical assistance to governments, and engaging in public outreach and promotional activities – all with the ultimate goal of promoting and protecting the relevant category of rights worldwide. It is against this background and within their mandates that the Special Rapporteurs seek to contribute to this case, in which the rights to freedom of opinion and expression, the rights to freedom of peaceful assembly and association and the situation of human rights defenders is at stake.

It is customary to note in the context of amicus filings that any submission by the Special Rapporteurs is provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Authorization for the positions and views expressed by the Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

Amicus curiae **David Kaye** is the **U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression** pursuant to Human Rights Council Resolutions 7/36 and 25/2. Professor Kaye is a Clinical Professor of Law, teaching international human rights law, at the University of California, Irvine School of Law. He has previously been on the faculties of UCLA School of Law, Whittier Law School, and the Georgetown University Law Center. He served as an attorney-adviser with the United States Department of State (1995-2005). Kaye and previous mandate holders have provided States and other members of the international community with extensive analysis and commentary on the human rights standards that govern State surveillance of digital communications and information, threats to digital security, and other interferences with freedom of expression online.¹ Professor Kaye, a U.S. citizen, took up his U.N. appointment on August 1, 2014.

¹ See e.g. David Kaye (Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Op. and Expression), Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye*, U.N. Doc. A/HRC/29/32 (May 22, 2015); Frank La Rue (Spec. Rapporteur on the Promotion and Protection of the Right to

Amicus curiae **Maina Kiai** is the **U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association**. The mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association was established by Human Rights Council resolution 15/21 in October 2010. The mandate was renewed for three years by Human Rights Council resolution 24/5 adopted in September 2013, and another three years by Human Rights Council Resolution 32/32 in 2016. Mr. Kiai, of Kenya, took up his duties as the first Special Rapporteur on the rights to freedom of peaceful assembly and of association on May 1, 2011. Kiai's reporting to the Human Rights Council and the General Assembly has focused on the critical role of information and communications technology in the organizing and holding of assemblies, and the mounting importance of online associations.²

Amicus curiae **Michel Forst** is the **U.N. Special Rapporteur on the situation of human rights defenders**. The mandate on the situation of human rights defenders was established in 2000 by the Commission on Human Rights to support implementation of the 1998 Declaration on human rights defenders. In

Freedom of Op. and Expression), Human Rights Council *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013).

² See e.g. Maina Kiai (Spec. Rapporteur on the Rights to Freedom of Peaceful Assembly and of Ass'n), Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai*, U.N. Doc. A/HRC/20/27 (May 21, 2012).

2014, with resolution 25/18, the Human Rights Council decided to continue the mandate on human rights defenders for a consecutive period of three years. In June 2014, Mr. Michel Forst, of France, was appointed by the President of the Human Rights Council as the UN Special Rapporteur on the situation of human rights defenders. Forst has conducted comprehensive surveys and case studies of the risks faced by human rights defenders and activists worldwide, including the threats posed by State surveillance and associated threats of intimidation, harassment and reprisal.³

Pursuant to their mandates established by the Human Rights Council, Kaye, Kiai and Forst also communicate regularly with the United States and other governments about alleged restrictions on the exercise of rights online. These communications have addressed human rights concerns raised by digital surveillance targeting human rights defenders and activists, mass surveillance activities, and measures to weaken digital security.⁴

³ See e.g. Michel Forst (Spec. Rapporteur on the Situation of Human Rights Defenders), Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, U.N. Doc. A/HRC/31/55 (Feb. 1, 2016); U.N. Secretary-General, Note dated Jul. 30, 2015 from Secretary-General addressed to the General Assembly, U.N. Doc. A/20/217 (Jul. 30, 2015) (transmitting the report of Michel Forst, Spec. Rapporteur on the Situation of Human Rights Defenders).

⁴ See e.g. Letters transmitted from Special Rapporteurs to various governments: the *United States of America* (Sept. 20, 2016), http://www.ohchr.org/Documents/Issues/Opinion/Legislation/USA_9_2016.pdf; the *Federal Republic of Germany* (Aug. 29, 2016),

II. *Amici* Will Assist The Court In Deciding This Appeal.

The standard for leave to file an *amicus* brief is whether it will assist the Court. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J) (“[I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.”); *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir.1997) (“An *amicus* brief should normally be allowed . . . when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”); *Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Com’n*, 197 F.3d 560, 567 (1st Cir. 1999) (“[A] a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers.”). *Amici* need not be neutral, and need not show that a party is inadequately represented. *Neonatology Assocs.*, 293 F.3d at 131-33; *see also* *Funbus Systems, Inc. v. State of Cal. Public Utilities Comm’n.*, 801 F.2d 1120, 1125 (9th Cir. 1986) (“[T]here is no rule that amici must be totally disinterested.”);

http://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_DEU_2.2016.pdf; the *Russian Federation* (Jul. 28, 2016), http://www.ohchr.org/Documents/Issues/Opinion/Legislation/RUS_7_2016.pdf; the *People’s Republic of China* (Oct. 29, 2015), [https://spdb.ohchr.org/hrdb/31st/public_-_UA_China_29.10.15_\(10.2015\).pdf](https://spdb.ohchr.org/hrdb/31st/public_-_UA_China_29.10.15_(10.2015).pdf); the *Republic of the Philippines* (Jun. 15, 2015), [https://spdb.ohchr.org/hrdb/31st/public_-_AL_Philippines_15.06.15_\(3.2015\).pdf](https://spdb.ohchr.org/hrdb/31st/public_-_AL_Philippines_15.06.15_(3.2015).pdf); the *Republic of Azerbaijan* (Aug. 12, 2014), [https://spdb.ohchr.org/hrdb/28th/public_-_UA_Azerbaijan_12.08.14_\(4.2014\).pdf](https://spdb.ohchr.org/hrdb/28th/public_-_UA_Azerbaijan_12.08.14_(4.2014).pdf).

Phillips v. AWH Corp., 376 F.3d 1382, 1383-84 (Fed. Cir. 2004) (“Amicus curiae briefs may be filed by bar associations, trade or industry associations, government entities, and other interested parties.”).

In this case, the surveillance activities described in the Appellant’s complaint violate rights guaranteed to him under the International Covenant of Civil and Political Rights, and engage the obligations of the United States under the Covenant. It is therefore critical for this Court to understand how its ruling might vindicate Appellant’s rights and enable the United States to comply with its international legal obligations. As human rights experts appointed by the United Nations to provide member Governments with commentary and analysis on the scope and implementation of human rights norms, *amici* offer unique information and perspective that will facilitate this understanding.

For these reasons, *amici* respectfully request that the Court grant them leave to file a brief in this appeal.

DATED: October 31, 2016

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 31, 2016.

All counsel are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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