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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

19 CAROLYN JEWEL, *et al.*,
20
21 Plaintiffs,
22
23 v.
24 NATIONAL SECURITY AGENCY, *et al.*,
25
26 Defendants.

Case No: 08-CV-4373-JSW

**BRIEF AMICI CURIAE OF
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 18
OTHER NEWS ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Date: October 31, 2014
Time: 9:00 a.m.
Hon. Jeffrey S. White
Courtroom 5 – 2nd Floor

CORPORATE DISCLOSURE STATEMENTS

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The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Committee to Protect Journalists is an independent, nonprofit, nongovernmental organization that promotes press freedom worldwide, that has no parent company and does not sell stock

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

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2 Online News Association is a not-for-profit organization. It has no parent corporation, and no
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4 The Seattle Times Company: The McClatchy Company owns 49.5% of the voting common stock
5 and 70.6% of the nonvoting common stock of The Seattle Times Company.

6 The Tully Center for Free Speech is a subsidiary of Syracuse University.

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8 LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the
hands of the public.

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The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Additional *amici* are American Society of News Editors, the Committee to Protect Journalists, Courthouse News Service, First Amendment Coalition, First Look Media, Gannett Co., Inc., Investigative Reporters and Editors, Investigative Reporting Workshop at American University, The McClatchy Company, Media Consortium, MediaNews Group, Inc., d/b/a Digital First Media, The National Press Club, National Press Photographers Association, National Public Radio, Inc., Online News Association, The Seattle Times Company, Tully Center for Free Speech, and The Washington Post. They are more fully described in Appendix A.

INTRODUCTION

The Privacy and Civil Liberties Oversight Board, an executive branch body that advises President Obama, concluded in January that NSA surveillance programs deter confidential sources from speaking to journalists: “The Board believes that such a shift in behavior is entirely predictable and rational. Although we cannot quantify the full extent of the chilling effect, we believe that these results – among them greater hindrances to political activism and a less robust press – are real and will be detrimental to the nation.” Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, Jan. 23, 2014, at 164, <http://bit.ly/1d01fll>.

Plaintiffs move for partial summary judgment on the grounds that the government’s collections of the content of their Internet communications violates the Fourth Amendment.

1 *Amici* write separately to underscore the corrosive effect that this surveillance has on the ability
2 of the media to report on matters of public interest. Widespread seizures of Internet
3 communications are especially dangerous for reporters, who rely on confidentiality when
4 developing stories about sensitive topics.

5 Indeed, many significant pieces of American journalism would not have been written
6 without confidential sources. When the threat of dragnet surveillance reaches these sources,
7 quality reporting is diminished. Since the public has become aware of National Security Agency
8 surveillance programs, many reporters at major news outlets have said that these efforts have
9 made sources less willing to talk with them, even about matters not related to national security.

11 The surveillance programs' indiscriminate deployment of government power demand
12 exacting scrutiny from this Court. The government has shown a willingness to negotiate with the
13 media in individual cases regarding the investigation of leaks and the use of subpoena power
14 against journalists. Policy With Regard to the Issuance of Subpoenas to Members of the News
15 Media, 28 C.F.R. § 50.10(c)(4)(iii)(A) (2014) ("The government should have pursued
16 negotiations with the affected member of the news media, unless the Attorney General
17 determines that, for compelling reasons, such negotiations would pose a clear and substantial
18 threat to the integrity of the investigation, risk grave harm to national security, or present an
19 imminent risk of death or serious bodily harm."). This cooperation is rendered pointless when
20 cast against the backdrop of dragnet surveillance. The government's efforts to police its
21 surveillance have proven insufficient, and accordingly, *amici* turn to this Court to vindicate the
22 well-established rights of the press and public.
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1 **I. THE INTEGRITY OF A CONFIDENTIAL REPORTER-SOURCE**
2 **RELATIONSHIP IS CRITICAL TO PRODUCING GOOD JOURNALISM, AND**
3 **MASS SURVEILLANCE COMPROMISES THAT RELATIONSHIP TO THE**
4 **DETRIMENT OF THE PUBLIC INTEREST.**

5 Wholesale government monitoring of Internet users leaves them uncertain of the privacy
6 of their communications and thus unwilling to exchange potentially sensitive information. *Amici*
7 are concerned that widespread surveillance is infringing on newsgathering rights and harming
8 journalism of all types.

9 In a December 2013 opinion that found that the phone metadata collection program
10 violates the Fourth Amendment, the U.S. District Court for the District of Columbia explained
11 that “metadata from each person’s phone ‘reflects a wealth of detail about her familial, political,
12 professional, religious, and sexual associations.’” *Klayman v. Obama*, No. 13-0851, Slip Op. 1,
13 54 (D.C. Cir. Dec. 16, 2013) (internal quotation omitted). *But see ACLU v. Clapper*, No. 13 Civ.
14 3994, Slip Op. 1 (S.D.N.Y. Dec. 27, 2013).

15 As Justice Potter Stewart acknowledged, the spectre of government intrusion into private
16 details frightens sources into silence: “When neither the reporter nor his source can rely on the
17 shield of confidentiality against unrestrained use of [government] power, valuable information
18 will not be published and the public dialogue will inevitably be impoverished.” *Branzburg v.*
19 *Hayes*, 408 U.S. 665, 732 (1972) (Stewart, J., dissenting). Although Justice Stewart was
20 referring to the chilling effect of government subpoenas on the media-source relationship,
21 dragnet surveillance causes the same problem. And unlike grand jury subpoenas to the press,
22 which come with notice and an opportunity to quash, decisions about what communications to
23 review in a collection program are made in secret, leaving both reporter and source vulnerable to
24 surveillance at every turn, notwithstanding any promise of confidentiality. The result is self-
25 censorship from sources and harm to the public discourse.
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1 **A. There is a long history of journalists breaking significant stories by relying**
2 **on information from confidential sources.**

3 Confidentiality has been essential to the news media’s constitutionally protected duty of
4 providing information to the public about such matters as political corruption, national security
5 and foreign affairs. Many history-altering news stories would not have been reported without
6 confidential communications between journalists and sources.

7 Anonymous sources were the foundation of the more than 150 articles *Washington Post*
8 reporters Bob Woodward and Carl Bernstein wrote following the Watergate break-in. See David
9 von Drehle, *FBI’s No. 2 Was ‘Deep Throat’: Mark Felt Ends 30-Year Mystery of The Post’s*
10 *Watergate Source*, Wash. Post, June 1, 2005, <http://wapo.st/JLIYvZ>. Bernstein has said,
11 “Almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been
12 reported or published without the assistance of our confidential sources and without the ability to
13 grant them anonymity, including the individual known as Deep Throat.” David Kravets,
14 *Reporters Challenge Bonds’ Leak Subpoena*, Associated Press, May 31, 2006,
15 <http://wapo.st/1ff0UNS>.

17 Other major stories have similarly relied on confidential sources. *The New York Times*
18 used them to break the story that, long before the scope of the current surveillance came to light,
19 the NSA had an illegal wiretapping program that monitored phone calls and e-mail messages
20 involving suspected terrorist operatives without the approval of federal courts. See James Risen
21 & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at
22 A1, <http://nyti.ms/neIMIB>.¹ The *Times* also used confidential sources to report on the harsh
23

24 _____
25 ¹ Risen has testified to the necessity of anonymous sources:

26 In my ongoing reporting and news gathering, numerous sources of confidential
27 information have told me that they are comfortable speaking to me in confidence
28 specifically because I have shown that I will honor my word and maintain their

1 interrogations that terrorism suspects in U.S. custody have faced. *See, e.g.*, Scott Shane, David
 2 Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4,
 3 2007, at A1, <http://nyti.ms/1dkyMgF>. *The Washington Post* relied on confidential government
 4 sources, among others, to break the story of the Central Intelligence Agency's use of "black
 5 sites," a network of secret prisons for terrorism suspects. *See* Dana Priest, *CIA Holds Terror*
 6 *Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, <http://wapo.st/Ud8UD>.

7
 8 These are just a few examples of the important contributions to public knowledge that
 9 come from anonymous sources speaking to journalists. The mass call and email tracking at issue
 10 here compromises the ability of the news media to cultivate these sources.

11 **B. Recent developments highlight the link between NSA surveillance and a chill**
 12 **on reporter-source communications.**

13 The response to the Justice Department's seizure of records from 20 Associated Press
 14 telephone lines used by more than 100 reporters demonstrates the climate of fear that develops
 15 when government investigation tactics are brought to bear directly on the news media. *See* Mark
 16 Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, Associated Press, May 13, 2013,
 17 <http://bit.ly/11zhUOg>.

18 After learning about the secret subpoenas in May 2013, AP President and CEO Gary
 19 Pruitt said in a speech at the National Press Club that the seizure has made sources less willing to
 20 talk to his reporters: "Some of our longtime trusted sources have become nervous and anxious
 21

22
 23 confidence even in the face of Government efforts to force me to reveal their
 24 identities or information. The fact that I have not previously revealed my sources
 25 has allowed me to gain access to newsworthy information that I could not
 otherwise get.

26 *See* First Motion to Quash Subpoena, Attachment #2, Affidavit of James Risen at ¶ 64, *United*
 27 *States v. Sterling*, 818 F. Supp. 2d 945 (E.D. Va. 2011) (No. 10-485); *see also* Ryan J. Reilly,
 28 *NYT Reporter Seeks to Quash Subpoena; Says Gov't Tried to Intimidate Him*, Talking Points
 Memo TPMuckraker Blog, June 22, 2011, <http://bit.ly/14N87v>.

1 about talking to us, even on stories that aren't about national security." Jeff Zalesin, *AP Chief*
2 *Points to Chilling Effect After Justice Investigation*, The Reporters Comm. for Freedom of the
3 Press, June 19, 2013, <http://rcfp.org/x?CSPI>. The chilling effect, Pruitt said, is not limited to the
4 AP: "Journalists at other news organizations have personally told me it has intimidated sources
5 from speaking to them." *Id.* He continued, "In some cases, government employees that we once
6 checked in with regularly will no longer speak to us by phone and some are reluctant to meet in
7 person." See Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN, June
8 19, 2013, <http://bit.ly/11NGbOH>.

10 Also in 2013, the public learned that the FBI identified Fox News journalist James Rosen
11 as a potential "aider and abettor and/or co-conspirator" in a search warrant application so that it
12 could obtain his e-mails relating to the criminal investigation of a source. See *Application for*
13 *Search Warrant for E-mail Account [redacted]@gmail.com*, No. 1:10-mj-00291-AK (D.D.C.,
14 Affidavit in support of application for search warrant, unsealed Nov. 7, 2011).

16 Many commentators have explored the connection between the Rosen case and an overall
17 chill on the willingness of sources to come forward. See Editorial, *Another Chilling Leak*
18 *Investigation*, N.Y. Times, May 21, 2013, <http://nyti.ms/14vjDI5>. ("With the decision to label a
19 Fox News television reporter a possible 'co-conspirator' in a criminal investigation of a news
20 leak, the Obama administration has moved beyond protecting government secrets to threatening
21 fundamental freedoms of the press to gather news.") See also Eugene Robinson, *Obama*
22 *Administration Mistakes Journalism for Espionage*, Wash. Post, May 20, 2013,
23 <http://bit.ly/13RvZrc>. ("The Obama administration has no business rummaging through
24 journalists' phone records, perusing their emails and tracking their movements in an attempt to
25 keep them from gathering news. This heavy-handed business isn't chilling, it's just plain cold.")
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1 Together, the Rosen and AP cases show the danger to the flow of information to the
2 public when the news media is subject to invasive investigations that ignore the First
3 Amendment rights at stake. See Editorial, *A Journalist 'Co-Conspirator'*, Wall St. J., May 20,
4 2013, <http://on.wsj.com/10K5nV7>. (“With the Fox News search following the AP subpoenas,
5 we now have evidence of a pattern of anti-media behavior. The suspicion has to be that maybe
6 these ‘leak’ investigations are less about deterring leakers and more about intimidating the
7 press.”)

8
9 Cases such as the AP subpoena and the Fox News search warrant cause serious harms to
10 newsgathering, but unchecked surveillance has an equal or perhaps greater chilling effect.
11 Sources now have very good reason to believe that their communications with journalists will
12 always be “on file” with the government and that officials could disregard promised safeguards.

13 When such widespread surveillance is standard practice, source intimidation is inevitable,
14 leading to a less robust media to serve the public. The *New York Times*’ then-executive editor
15 Jill Abramson explained on CBS’s *Face the Nation*, “The reporters who work for the *Times* in
16 Washington have told me that many of their sources are petrified to even return calls at this
17 point.” *Face the Nation Transcripts*, June 2, 2013, CBS News, <http://cbsn.ws/1aGmeyd>. See
18 also Dylan Byers, *Reporters Say There’s a Chill in the Air*, Politico, June 8, 2013,
19 <http://politi.co/11znRrJ>. (“Reporters on the national security beat say it’s not the fear of being
20 prosecuted by the DOJ that worries them — it’s the frightened silence of past trusted sources that
21 could undermine . . . investigative journalism[.] Some formerly forthcoming sources have grown
22 reluctant to return phone calls, even on unclassified matters, and, when they do talk, prefer in-
23 person conversations that leave no phone logs, no emails, and no records of entering and leaving
24 buildings[.]”)

1 In a report that former *Washington Post* executive editor Leonard Downie Jr. wrote for
2 the Committee to Protect Journalists, numerous journalists said surveillance programs and leaks
3 prosecutions deter sources from speaking to them. *The Obama Administration and the Press:
4 Leak investigations and surveillance in post-9/11 America*, Comm. To Protect Journalists, Oct.
5 10, 2013, <http://bit.ly/1c3Cnfg>. Associated Press senior managing editor Michael Oreskes said:
6 “There’s no question that sources are looking over their shoulders. Sources are more jittery and
7 more standoffish, not just in national security reporting. A lot of skittishness is at the more
8 routine level.” *Id.* *Washington Post* national security reporter Rajiv Chandrasekaran said: “One
9 of the most pernicious effects is the chilling effect created across government on matters that are
10 less sensitive but certainly in the public interest as a check on government and elected officials.”
11 *Id.*

12
13 Even sources whose work is removed from the national security realm – including many
14 federal employees, corporate directors and leaders of non-governmental organizations involved
15 in publicly controversial topics – have become less willing to talk. Jamie Schuman, *The
16 Shadows of the Spooks*, *The News Media and the Law*, Fall 2013, at 11, <http://bit.ly/1f16OaS>.
17 *See also* Molly Redden, *Is the ‘Chilling Effect’ Real?*, *The New Republic*, May 15, 2013,
18 <http://on.tnr.com/18Lgq3D>. (“Officials are reluctant to get anywhere close to the line...[I]t
19 actually has been much harder to get people to talk about anything, even in a sensitive-but-
20 unclassified area.”). Discussing the NSA surveillance programs, *New York Times* investigative
21 reporter and three-time Pulitzer Prize winner David Barstow said, “I have absolutely no doubt
22 whatsoever that stories have not gotten done because of this.” Jamie Schuman, *The Shadows of
23 the Spooks* at 9.
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1 **C. The surveillance methods at issue here are especially damaging to journalism**
2 **because they target content as well as metadata.**

3 While the metadata at issue in *First Unitarian Church of Los Angeles v. National*
4 *Security Agency* puts the identity of sources at risk, the collection of content – which also is at
5 issue here – is potentially more damaging because it exposes the private words and thoughts that
6 lie at the heart of newsgathering and form the basis of news pieces.

7 Legislators and courts have long realized this distinction by granting more protection to
8 content of telephone and email messages than to metadata. The section of the Electronic
9 Communications Privacy Act known as the Wiretap Act institutes enhanced requirements to
10 obtain the content of telephone and electronic communications. 18 U.S.C. § 2518 (2006). *See*
11 *also The Content/Envelope Distinction in Internet Law* at 2113. Courts only issue these warrants
12 for select crimes, and evidence obtained in violation of the act can be excluded from trial. 18
13 U.S.C. § 2516, 2518 (2006). In contrast, the Pen Register Act, which sets rules for the collection
14 of metadata, does not even require a reasonable expectation of privacy for searches and
15 information obtained is not subject to the exclusionary rule. 18 U.S.C. §§ 3121-3127 (2006).
16 *See also The Content/Envelope Distinction in Internet Law*, 50 WM. & MARY L. REV. at 2113.
17 While *amici* believe that indiscriminate collection of metadata harms reporter-source
18 relationships, the additional protections that legislators have given to the substantive content of
19 communications shows how pernicious to the free flow of information the seizures at issue in
20 this case are.
21 this case are.

22 As early as 1878, the Supreme Court recognized an elevated privacy right in the content
23 of communications. *See Ex parte Jackson*, 96 U.S. 727 (1877) (finding searches of contents of
24 letters unreasonable in contrast to merely looking at the writings on the outside of envelopes).
25 Following *Ex parte Jackson*, *Katz v. United States* extended Fourth Amendment protection to the
26 content of people's telephone calls. 389 U.S. 347, 352 (1967) (explaining that a person is
27 content of people's telephone calls. 389 U.S. 347, 352 (1967) (explaining that a person is
28 content of people's telephone calls. 389 U.S. 347, 352 (1967) (explaining that a person is

1 “entitled to assume that the words he utters into the mouthpiece will not be broadcast to the
2 world”).

3 The content of communications receives this special protection because it contains
4 people’s “innermost thoughts.” Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A*
5 *General Approach*, 62 *Stan. L. Rev.* 1005, 1018-22 (2010) (comparing email content to the
6 inside of a person’s home, which also gets heightened Fourth Amendment protection). *See also*
7 *Warshak v. United States*, 490 F.3d 455, 473 (6th Cir. 2007) (finding people have reasonable
8 expectation of privacy in email content because it is material that the author “seeks to preserve as
9 private”) (internal quotation omitted), *vacated on other grounds*, 532 F.3d 521 (6th Cir. 2008).

11 It is especially important for journalists that the content of email and telephone messages
12 remain private because that work product forms the background for and basis of investigative
13 articles. When he was editor-in-chief of *Time Magazine*, Norman Pearlstine called information
14 from anonymous sources part of the “fabric of American journalism.” Norman Pearlstine, PBS
15 Frontline Interview, <http://to.pbs.org/1bkSCSV> (last visited Jan. 23, 2014). Carl Bernstein
16 added, “I know of very little important reporting of the last 30 to 40 years that has been done
17 without use of confidential sources...” Carl Bernstein, PBS Frontline Interview,
18 <http://to.pbs.org/1dSBtWR> (last visited Jan. 23, 2014).

20 This type of reporting is “essential to a flourishing self-governing society,” the
21 President’s Review Group on Intelligence and Communications Policies, which President
22 Obama appointed to offer recommendations for surveillance reform, emphasized in its December
23 2013 report. *Liberty and Security in a Changing World: Report and Recommendations of The*
24 *President’s Review Group on Intelligence and Communications Technologies*, 1, 127 (Dec. 12,
25 2013), <http://1.usa.gov/1cBct0k>. (“Part of the responsibility of our free press is to ferret out and
26 expose information that government officials would prefer to keep secret when such secrecy is
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28

1 unwarranted.”) Like the Privacy and Civil Liberties Oversight Board, this group warned that
2 surveillance programs could have “serious repercussions” on journalism. *Id.*

3 Fear of unchecked seizures of the content of communications directly threatens
4 journalism by chilling sources into silence.

5 **II. MASS SURVEILLANCE NEGATES SAFEGUARDS THE GOVERNMENT HAS**
6 **PLEDGED IN RESPONSE TO THREATS TO JOURNALISM.**

7 One consequence of the outcry over the AP and Fox News seizures was the Department
8 of Justice’s decision to revisit its rules for issuing subpoenas to the media. *See generally*
9 Department of Justice, *Report on Review of News Media Policies*, July 12, 2013,
10 <http://1.usa.gov/12mkn9B>. The Justice Department will now require prosecutors to give the
11 news media advance notice of a subpoena, except in rare cases where notice poses a clear and
12 substantial threat to the investigation, risks grave harm to national security, or presents an
13 imminent risk of death or bodily harm. *Id.* at 2. The report says the Department also will create
14 a News Media Review Committee to provide oversight of media-related investigations, *see id.* at
15 4.
16

17 Additionally, the Obama administration has asked Congress to adopt a federal shield law,
18 which would give journalists a qualified privilege not to testify about information from
19 confidential sources. *See* Jack Komperda, *White House, lawmakers push for federal reporter*
20 *shield law in wake of AP phone records seizure*, The Reporters Comm. for Freedom of the Press,
21 May 15, 2013, <http://rcfp.org/x?0lyA>. President Obama also has pledged to reform the Foreign
22 Intelligence Surveillance Court, which rules on the constitutionality of many NSA programs.
23 Transcript of President Obama’s Press Conference (Aug. 9, 2013), <http://1.usa.gov/13pyCLa>. In
24 addition to ordering the declassification of some Foreign Intelligence Surveillance Court
25 opinions, Obama has called on Congress to enable independent advocates to appear before the
26
27
28

1 court, which now only hears from a government official. Remarks by the President on Review
2 of Signals Intelligence, Jan. 14, 2014, <http://1.usa.gov/1awEWY8>.

3 With these steps, the government has professed an interest in handling investigations
4 affecting journalistic rights on a case-by-case basis, with meaningful analysis based on the
5 particular set of circumstances. This commitment is meaningless if rampant tracking of Internet
6 communications continues unabated.

7
8 **III. THE MASS SURVEILLANCE PROGRAM IS AN INHERENTLY OVERBROAD
SYSTEM OF MONITORING AND INVESTIGATION.**

9 Criminal investigations depend on monitoring the communications of suspects without
10 running afoul of those suspects' constitutional rights. This strategy is vastly different from the
11 surveillance at issue here. There is a significant distinction between monitoring specific
12 communications, based on a particularized reason to believe that a crime has occurred, and the
13 implementation of a widespread system of surveillance. *See* Charlie Savage, et al., *U.S.*
14 *Confirms That It Gathers Online Data Overseas*, N.Y. Times, June 6, 2013,
15 <http://nyti.ms/10SZXaO>.

16
17 The protections built into these enormous databases cannot prevent overstepping in all
18 cases.² In his January speech on NSA surveillance, President Obama acknowledged “the
19 potential for abuse as intelligence capabilities advance and more and more private information
20 is digitalized.” Remarks by the President on Review of Signals Intelligence, Jan. 17, 2014.
21

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23
24 ² The government's actions have been questioned under the USA PATRIOT Act, Public Law
25 107-56, 115 Stat. 272 (2001), as well. The act's author, Rep. James Sensenbrenner (R-Wis.),
26 spoke out against using Section 215 of the Patriot Act to justify such a broad program: “The
27 administration claims authority to sift through details of our private lives because the Patriot Act
28 says that it can. I disagree. I authored the Patriot Act, and this is an abuse of that law.” James
Sensenbrenner, *This Abuse of the Patriot Act Must End*, The Guardian, June 9, 2013,
<http://bit.ly/1duGJjt>.

1 Indeed, government documents released in September 2013 show that the NSA regularly
2 searched call logs of about 15,000 numbers that did not have a reasonable, articulable suspicion
3 of terrorism for three years until March 2009. Josh Gerstein, *NSA broke rules on call-tracking*
4 *program, court filings show*, Politico, Sept. 10, 2013, <http://politi.co/17UxEJR>. Additionally, an
5 internal NSA audit from 2012 revealed that the agency conducted unauthorized searches of data,
6 including phone records and email, of thousands of Americans since 2008. See Barton Gellman,
7 *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, Wash. Post, Aug. 15, 2013,
8 <http://wapo.st/16SWco2>. These breaches cast doubt on the government's ability to police itself
9 when implementing such a far-reaching mass call-tracking program. In fact, FISA Court chief
10 judge Reggie B. Walton said his court "does not have the capacity to investigate issues of
11 noncompliance." Carol D. Leonnig, *Court: Ability to police U.S. spying program limited*, Wash.
12 Post, Aug. 15, 2013, <http://wapo.st/1cR581f>.

14 Furthermore, public equivocations by national security leaders illuminate the need for
15 judicial involvement to protect the important rights at stake. In response to a question at a Senate
16 Committee hearing in March from U.S. Senator Ron Wyden asking, "Does the NSA collect any
17 type of data at all on millions or hundreds of millions of Americans?," Defendant Clapper said,
18 "No, sir." Glenn Kessler, *James Clapper's 'Least Untruthful' Statement to the Senate*, Wash.
19 Post, June 12, 2013, <http://wapo.st/170VVSu>. After the disclosure of the "vast Internet
20 surveillance program run by the National Security Agency," Defendant Clapper released a "letter
21 of apology" to Congress that the statements to the Senate were "clearly erroneous." James
22 Risen, *Lawmakers Question White House Account of an Internet Surveillance Program*, N.Y.
23 Times, July 3, 2013, <http://nyti.ms/16PNs0q>.

26 Equivocations and noncompliance make it impossible for individuals, including
27 journalists and their sources, to understand how the surveillance program interferes with their
28

1 protected communications. While the government maintains that it only uses signals intelligence
2 for “legitimate national security purposes,” *see* Remarks by the President on Review of Signals
3 Intelligence, Jan. 14, 2014, such a broad label does not give reporters and sources assurance that
4 their professional conversations are safe from government review. Concerns over “national
5 security” can range from the very real threat of loss of life if certain information is published to
6 minor embarrassment and damage to trade relations when our allies realize the U.S. government
7 has been spying on them. *See, e.g.*, James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on*
8 *Callers without Courts*, N.Y. Times, Dec. 16, 2005, <http://nyti.ms/16C62Xp>; Vivienne Walt,
9 *European Officials Infuriated by Alleged NSA Spying on Friendly Diplomats*, Time, June 30,
10 2013, <http://ti.me/19LYk15>; Peter Nicholas, *Obama’s Other Mission: Soothing Allies on*
11 *Espionage*, Wall St. Journal, Sept. 6, 2013, <http://on.wsj.com/15BeQ0f>. Uncertainty about
12 whether their communications are at risk of exposure causes sources on a wide range of topics to
13 fall silent. *See* Leonard Downie Jr., *The Obama Administration and the Press: Leak*
14 *investigations and surveillance in post-9/11 America*; Jamie Schuman, *The Shadows of the*
15 *Spooks*, The News Media and the Law, Fall 2013.

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18 Without judicial oversight, these problems could grow worse. This Court has the
19 opportunity to step in and vindicate well-established rights of the media and public under the
20 First Amendment.

21 DATED: July 31, 2014

Respectfully submitted,

22
23 By: /s/ Joshua Koltun
Joshua Koltun, Attorney

24 Bruce D. Brown
25 The Reporters Committee for Freedom of the Press

26 Attorneys for *Amici Curiae*
27 REPORTERS COMMITTEE FOR
28 FREEDOM OF THE PRESS AND 18 OTHER
NEWS ORGANIZATIONS

APPENDIX A

1
2 With some 500 members, American Society of News Editors (“ASNE”) is an
3 organization that includes directing editors of daily newspapers throughout the Americas. ASNE
4 changed its name in April 2009 to American Society of News Editors and approved broadening
5 its membership to editors of online news providers and academic leaders. Founded in 1922 as
6 American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top
7 editors with priorities on improving freedom of information, diversity, readership and the
8 credibility of newspapers.
9

10 The Committee to Protect Journalists promotes press freedom worldwide and defends the
11 right of journalists to report the news without fear of reprisal. CPJ ensures the free flow of news
12 and commentary by taking action wherever journalists are attacked, imprisoned, killed,
13 kidnapped, threatened, censored, or harassed.
14

15 Courthouse News Service is a California-based legal news service for lawyers and the
16 news media that focuses on court coverage throughout the nation, reporting on matters raised in
17 trial courts and courts of appeal up to and including the U.S. Supreme Court.
18

19 First Amendment Coalition is a nonprofit public interest organization dedicated to
20 defending free speech, free press and open government rights in order to make government, at all
21 levels, more accountable to the people. The Coalition’s mission assumes that government
22 transparency and an informed electorate are essential to a self-governing democracy. To that end,
23 we resist excessive government secrecy (while recognizing the need to protect legitimate state
24 secrets) and censorship of all kinds.
25

26 First Look Media, Inc. is a new non-profit digital media venture that produces The
27 Intercept, a digital magazine focused on national security reporting.
28

1 Gannett Co., Inc. is an international news and information company that publishes more
2 than 80 daily newspapers in the United States – including *USA TODAY* – which reach 11.6
3 million readers daily. The company’s broadcasting portfolio includes more than 40 TV stations,
4 reaching approximately one-third of all television households in America. Each of Gannett’s
5 daily newspapers and TV stations operates Internet sites offering news and advertising that is
6 customized for the market served and integrated with its publishing or broadcasting operations.

7
8 Investigative Reporters and Editors, Inc. is a grassroots nonprofit organization dedicated
9 to improving the quality of investigative reporting. IRE was formed in 1975 to create a forum in
10 which journalists throughout the world could help each other by sharing story ideas,
11 newsgathering techniques and news sources.

12 The Investigative Reporting Workshop, a project of the School of Communication (SOC)
13 at American University, is a nonprofit, professional newsroom. The Workshop publishes in-
14 depth stories at investigativereportingworkshop.org about government and corporate
15 accountability, ranging widely from the environment and health to national security and the
16 economy.

17
18 The McClatchy Company, through its affiliates, is the third-largest newspaper publisher
19 in the United States with 30 daily newspapers and related websites as well as numerous
20 community newspapers and niche publications.

21 The Media Consortium is a network of the country’s leading, progressive, independent
22 media outlets. Our mission is to amplify independent media’s voice, increase our collective
23 clout, leverage our current audience and reach new ones.

24
25 MediaNews Group's more than 800 multi-platform products reach 61 million Americans
26 each month across 18 states.

1 The National Press Club is the world's leading professional organization for journalists.
2 Founded in 1908, the Club has 3,100 members representing most major news organizations. The
3 Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including
4 news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

5 The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit
6 organization dedicated to the advancement of visual journalism in its creation, editing and
7 distribution. NPPA's approximately 7,000 members include television and still photographers,
8 editors, students and representatives of businesses that serve the visual journalism industry. Since
9 its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists
10 as well as freedom of the press in all its forms, especially as it relates to visual journalism. The
11 submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.
12

13 National Public Radio, Inc. is an award-winning producer and distributor of
14 noncommercial news programming. A privately supported, not-for-profit membership
15 organization, NPR serves a growing audience of more than 26 million listeners each week by
16 providing news programming to 285 member stations that are independently operated,
17 noncommercial public radio stations. In addition, NPR provides original online content and
18 audio streaming of its news programming. NPR.org offers hourly newscasts, special features and
19 10 years of archived audio and information.
20

21 Online News Association ("ONA") is the world's largest association of online journalists.
22 ONA's mission is to inspire innovation and excellence among journalists to better serve the
23 public. ONA's more than 2,000 members include news writers, producers, designers, editors,
24 bloggers, technologists, photographers, academics, students and others who produce news for the
25 Internet or other digital delivery systems. ONA hosts the annual Online News Association
26 conference and administers the Online Journalism Awards. ONA is dedicated to advancing the
27
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1 interests of digital journalists and the public generally by encouraging editorial integrity and
2 independence, journalistic excellence and freedom of expression and access.

3 The Seattle Times Company, locally owned since 1896, publishes the daily newspaper
4 *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla*
5 *Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

6 The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I.
7 Newhouse School of Public Communications, one of the nation's premier schools of mass
8 communications.
9

10 WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most
11 prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an
12 average of more than 20 million unique visitors per month.
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APPENDIX B

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