

1 Joshua Koltun (Bar No. 173040)
2 joshua@koltunattorney.com
3 Attorney
4 One Sansome Street
5 Suite 3500, No. 500
6 San Francisco, California 94104
7 Telephone: 415.680.3410
8 Facsimile: 866.462.5959

9 Bruce D. Brown (*pro hac vice* pending)
10 bbrown@rcfp.org
11 Reporters Committee for Freedom of the Press
12 1101 Wilson Blvd., Suite 1100
13 Arlington, Virginia 22209
14 Telephone: 703.807.2100
15 Facsimile: 703.807.2109

16 Attorneys for Amicus Curiae
17 REPORTERS COMMITTEE FOR
18 FREEDOM OF THE PRESS

19 Additional counsel for *amici* in Appendix B

20
21
22
23
24
25
26
27
28
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FIRST UNITARIAN CHURCH OF LOS ANGELES, *et al.*,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Case No: 3:13-cv-03287 JSW

**BRIEF AMICI CURIAE OF
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 13
OTHER NEWS ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Date: February 7, 2014

Time: 9:00 a.m.

Hon. Jeffrey S. White

Courtroom 11 - 19th Floor

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CORPORATE DISCLOSURE STATEMENTS

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

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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

Belo Corp. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% 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.

Los Angeles Times Communications LLC, is a wholly owned subsidiary of Tribune Publishing Company, LLC, which is a wholly owned subsidiary of Tribune Company.

The McClatchy Company is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common stock of The McClatchy Company.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The Newspaper Guild – CWA is an unincorporated association. It has no parent and issues no stock.

North Jersey Media Group Inc. is a privately held company owned solely by Macromedia Incorporated, also a privately held company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

WP Company LLC (d/b/a The Washington Post) is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iii

DESCRIPTION OF AMICI CURIAE..... 1

INTRODUCTION 1

 I. THE INTEGRITY OF A CONFIDENTIAL REPORTER-SOURCE
 RELATIONSHIP IS CRITICAL TO PRODUCING GOOD
 JOURNALISM, AND MASS TELEPHONE CALL TRACKING
 COMPROMISES THAT RELATIONSHIP TO THE DETRIMENT OF
 THE PUBLIC INTEREST.....2

 A. There is a long history of journalists breaking significant stories by
 relying on information from confidential sources.3

 B. Recent developments highlight the link between mass call tracking
 and a chill on reporter-source communications.4

 C. Mass call tracking negates safeguards the government has pledged
 in response to threats to journalism.8

 II. THE MASS TELEPHONE CALL TRACKING PROGRAM IS AN
 INHERENTLY OVERBROAD SYSTEM OF MONITORING AND
 INVESTIGATION.....9

APPENDIX A 12

APPENDIX B 14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES

Application for Search Warrant for E-mail Account [redacted]@gmail.com, No. 1:10-mj-00291-AK (D.D.C., Affidavit in support of application for search warrant, unsealed Nov. 7, 2011) 6

Branzburg v. Hayes, 408 U.S. 665 (1972)..... 2

United States v. Sterling, 818 F. Supp. 2d 945 (E.D. Va. 2011)..... 4

STATUTES

USA PATRIOT Act, Public Law 107-56, 115 Stat. 272 (2001) 9

OTHER AUTHORITIES

Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act (Aug. 9, 2013) 1

Byers, Dylan, *Reporters Say There’s a Chill in the Air*, POLITICO, June 8, 2013 7

Department of Justice, *Report on Review of News Media Policies*, July 12, 2013 9

Downie Jr., Leonard, *The Obama Administration and the Press: Leak investigations and surveillance in post-9/11 America*, Comm. To Protect Journalists, Oct. 10, 2013..... 8, 13

Editorial, *A Journalist ‘Co-Conspirator’*, Wall St. J., May 20, 2013..... 6

Editorial, *Another Chilling Leak Investigation*, N.Y. Times, May 21, 2013..... 6

Face the Nation Transcripts, June 2, 2013, CBS News 7

Gellman, Barton, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, Wash. Post, Aug. 15, 2013..... 11, 12

Gerstein, Josh, *NSA broke rules on call-tracking program, court filings show*, Politico, Sept. 10, 2013 11

Komperda, Jack, *White House, lawmakers push for federal reporter shield law in wake of AP phone records seizure*, The Reporters Comm. for Freedom of the Press, May 15, 2013..... 10

Kravets, David, *Reporters Challenge Bonds’ Leak Subpoena*, Associated Press, May 31, 2006..... 3

Leonnig, Carol D., *Court: Ability to police U.S. spying program limited*, Wash. Post, Aug. 15, 2013..... 12

Nicholas, Peter, *Obama’s Other Mission: Soothing Allies on Espionage*, Wall St. Journal, Sept. 6 2013..... 13

1	Priest, Dana, <i>CIA Holds Terror Suspects in Secret Prisons</i> , Wash. Post, Nov. 2, 2005	4
2	Redden, Molly, <i>Is the ‘Chilling Effect’ Real?</i> , The New Republic, May 15, 2013.....	9
3	Reilly, Ryan J., <i>NYT Reporter Seeks to Quash Subpoena; Says Gov’t Tried to Intimidate Him</i> , Talking Points Memo TPMuckraker Blog, June 22, 2011	4
4	Risen, James & Eric Lichtblau, <i>Bush Lets U.S. Spy on Callers Without Courts</i> , N.Y. Times, Dec. 16, 2005	3, 13
5	Risen, James, <i>Lawmakers Question White House Account of an Internet Surveillance Program</i> , N.Y. Times, July 3, 2013.....	12
7	Robinson, Eugene, <i>Obama Administration Mistakes Journalism for Espionage</i> , Wash. Post, May 20, 2013	6
8	Royce-Bartlett, Lindy, <i>Leak Probe Has Chilled Sources, AP Exec Says</i> , CNN, June 19, 2013.....	5
9	Savage, Charlie, et al., <i>U.S. Confirms That It Gathers Online Data Overseas</i> , N.Y. Times, June 6, 2013	11
10	Schuman, Jamie, <i>The Shadows of the Spooks</i> , The News Media and the Law, Fall 2013.....	8, 9, 13
11	Sensenbrenner, James, <i>This Abuse of the Patriot Act Must End</i> , The Guardian, June 9, 2013.....	11
12	Shane, Scott, David Johnston, James Risen, <i>Secret U.S. Endorsement of Severe Interrogations</i> , N.Y. Times, Oct. 4, 2007	4
13	Sherman, Mark, <i>Gov’t Obtains Wide AP Phone Records in Probe</i> , Associated Press, May 13, 2013	5, 9
14	Transcript of President Obama’s Press Conference (Aug. 9, 2013).....	10
15	von Drehle, David, <i>FBI’s No. 2 Was ‘Deep Throat’: Mark Felt Ends 30-Year Mystery of The Post’s Watergate Source</i> , Wash. Post, June 1, 2005	3
16	Walt, Vivienne, <i>European Officials Infuriated by Alleged NSA Spying on Friendly Diplomats</i> , Time, June 30 2013	13
17	Zalesin, Jeff, <i>AP Chief Points to Chilling Effect After Justice Investigation</i> , The Reporters Comm. for Freedom of the Press, June 19, 2013	5

1
2
3
4
5
6
7
8
9
10
11
12
13

DESCRIPTION OF AMICI CURIAE

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 Advance Publications, Inc., American Society of News Editors, Belo Corp., The E.W. Scripps Company, First Amendment Coalition, Los Angeles Times, The McClatchy Company, National Press Photographers Association, The Newspaper Guild - CWA, North Jersey Media Group Inc., Online News Association, Society of Professional Journalists, and The Washington Post. They are more fully described in Appendix A.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

As the Obama administration explained in an August 9, 2013 “white paper,” the NSA collects logs of the time and duration of most telephone calls made or received in the United States with approval of the Foreign Intelligence Surveillance Court, a policy that has been in place for seven years. *See Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act* (Aug. 9, 2013), available at <http://bit.ly/15ebL9k>.

Plaintiffs move for partial summary judgment on the grounds that this program violates the First Amendment as well as Section 215 of the USA Patriot Act, 50 U.S.C. § 1861. *Amici* write separately to emphasize the corrosive effect that mass call tracking has on the ability of the media to report on matters of public interest.

Many significant pieces of American journalism have relied heavily on confidential sources. When the risk of prosecution reaches such sources, quality reporting is diminished. Since the public has become aware of the call tracking, many reporters at major news outlets

1 have said that this program and other NSA surveillance efforts have made sources less willing to
2 talk with them, even about matters not related to national security.

3 The mass call tracking's indiscriminate deployment of government power demands
4 exacting scrutiny from this Court. The government has shown a willingness to negotiate with the
5 media in individual cases regarding the investigation of leaks and the use of subpoena power
6 against journalists. This cooperation is rendered pointless when cast against the backdrop of
7 total surveillance of domestic telephone calls. The government's efforts to police its surveillance
8 have proven insufficient, and accordingly, *amici* turn to this Court to vindicate the well-
9 established rights of the press and public.
10

11 **I. THE INTEGRITY OF A CONFIDENTIAL REPORTER-SOURCE**
12 **RELATIONSHIP IS CRITICAL TO PRODUCING GOOD JOURNALISM, AND**
13 **MASS TELEPHONE CALL TRACKING COMPROMISES THAT**
14 **RELATIONSHIP TO THE DETRIMENT OF THE PUBLIC INTEREST.**

15 Wholesale government monitoring of telephone users leaves them uncertain of the
16 privacy of their communications and thus unwilling to exchange potentially sensitive
17 information. *Amici* are concerned that mass call tracking is infringing on the newsgathering
18 rights of reporters and harming journalism of all types.

19 Government intrusion into private relationships frightens sources into silence. "When
20 neither the reporter nor his source can rely on the shield of confidentiality against unrestrained
21 use of [government] power, valuable information will not be published and the public dialogue
22 will inevitably be impoverished." *Branzburg v. Hayes*, 408 U.S. 665, 732 (1972) (Stewart, J.,
23 dissenting). Although Justice Stewart was referring to the chilling effect of government
24 subpoenas on the media-source relationship, mass call tracking causes the same problem. And
25 unlike grand jury subpoenas, which provide notice to the media, decisions about what call logs to
26 review are made in secret, leaving both reporter and source vulnerable to government
27

1 surveillance at every turn, notwithstanding any promise of confidentiality. The result will be
2 self-censorship from sources and harm to the public discourse.

3 Confidential relationships between source and journalist are critical for effective
4 reporting and an informed public, and communications between the two regularly require the use
5 of telephones. Government monitoring via mass call tracking limits journalists' ability to gather
6 information in the public interest.

7
8 **A. There is a long history of journalists breaking significant stories by relying
on information from confidential sources.**

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

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

23
24 Other major stories have similarly relied on confidential sources. *The New York Times*
25 used these contacts to break the story that, long before the scope of the current surveillance came
26 to light, the NSA had an illegal wiretapping program that monitored phone calls and e-mail
27 messages involving suspected terrorist operatives without the approval of federal courts. See
28

1 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec.
2 16, 2005, at A1, <http://nyti.ms/neIMIB>.¹ The *Times* also used confidential sources to report on
3 the harsh interrogations that terrorism suspects in U.S. custody have faced. *See, e.g.*, Scott
4 Shane, David Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y.
5 Times, Oct. 4, 2007, at A1, available at <http://nyti.ms/1dkyMgF>. *The Washington Post* relied on
6 confidential government sources, among others, to break the story of the Central Intelligence
7 Agency's use of "black sites," a network of secret prisons for terrorism suspects. *See* Dana
8 Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005,
9 <http://wapo.st/Ud8UD>.

11 These are just a few examples of the important contributions to public knowledge that
12 come from anonymous sources speaking to journalists. The mass call tracking at issue here
13 compromises the ability of the news media to cultivate these sources.

14 **B. Recent developments highlight the link between mass call tracking and a**
15 **chill on reporter-source communications.**

16 The response to the Justice Department's recent seizure of records from 20 Associated
17 Press telephone lines demonstrates the climate of fear that develops when government
18 investigation tactics are brought to bear directly on the news media. *See* Mark Sherman, *Gov't*
19

20 ¹ Risen has testified to the efficacy and necessity of anonymous sources:

21 In my ongoing reporting and news gathering, numerous sources of confidential
22 information have told me that they are comfortable speaking to me in confidence
23 specifically because I have shown that I will honor my word and maintain their
24 confidence even in the face of Government efforts to force me to reveal their
25 identities or information. The fact that I have not previously revealed my sources
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 *Obtains Wide AP Phone Records in Probe*, Associated Press, May 13, 2013,
2 <http://bit.ly/11zhUOg>. These records, from phone lines used by more than 100 AP reporters and
3 editors, contained metadata – i.e. the numbers, timing and duration of calls. *See Id.* This is the
4 same type of information that the mass call-tracking program collects.

5 After learning about the secret subpoenas, AP President and CEO Gary Pruitt said in a
6 speech at the National Press Club that the seizure has made sources less willing to talk to
7 reporters at his news outlet: “Some of our longtime trusted sources have become nervous and
8 anxious about talking to us, even on stories that aren’t about national security.” Jeff Zalesin, *AP*
9 *Chief Points to Chilling Effect After Justice Investigation*, The Reporters Comm. for Freedom of
10 the Press, June 19, 2013, <http://rcfp.org/x?CSPI>. The chilling effect, Pruitt said, is not limited to
11 the AP: “Journalists at other news organizations have personally told me it has intimidated
12 sources from speaking to them.” *Id.* He continued, “In some cases, government employees that
13 we once checked in with regularly will no longer speak to us by phone and some are reluctant to
14 meet in person.” *See* Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*,
15 CNN, June 19, 2013, <http://bit.ly/11NGbOH>.

16
17
18 Earlier this year, the public also learned that the FBI identified Fox News journalist
19 James Rosen a “co-conspirator” in a search warrant application so that it could obtain his e-mails
20 relating to the criminal investigation of a source. *See Application for Search Warrant for E-mail*
21 *Account [redacted]@gmail.com*, No. 1:10-mj-00291-AK (D.D.C., Affidavit in support of
22 application for search warrant, unsealed Nov. 7, 2011).

23
24 Many commentators have explored the connection between the Rosen case and an overall
25 chill on the willingness of sources to come forward. *See* Editorial, *Another Chilling Leak*
26 *Investigation*, N.Y. Times, May 21, 2013, <http://nyti.ms/14vjDI5>. (“With the decision to label a
27 Fox News television reporter a possible ‘co-conspirator’ in a criminal investigation of a news
28

1 leak, the Obama administration has moved beyond protecting government secrets to threatening
2 fundamental freedoms of the press to gather news.”) *See also* Eugene Robinson, *Obama*
3 *Administration Mistakes Journalism for Espionage*, Wash. Post, May 20, 2013,
4 <http://bit.ly/13RvZrc>. (“The Obama administration has no business rummaging through
5 journalists’ phone records, perusing their emails and tracking their movements in an attempt to
6 keep them from gathering news. This heavy-handed business isn’t chilling, it’s just plain cold.”)

7
8 Together, the Rosen and AP cases show the danger to the flow of information to the
9 public when the news media is subject to invasive investigations. *See* Editorial, *A Journalist*
10 *‘Co-Conspirator’*, Wall St. J., May 20, 2013, <http://on.wsj.com/10K5nV7>. (“With the Fox News
11 search following the AP subpoenas, we now have evidence of a pattern of anti-media behavior.
12 The suspicion has to be that maybe these ‘leak’ investigations are less about deterring leakers
13 and more about intimidating the press.”)

14
15 Controversial and exceptional cases like the AP subpoena and the Fox News search
16 warrant cause serious harms to newsgathering, but mass call tracking has an equal or perhaps
17 even greater chilling effect as sources now have very good reason to believe that logs of their
18 phone contacts will always be on file with the government. When such widespread surveillance
19 is a standard practice, source intimidation is inevitable, leading to a less robust media. *New York*
20 *Times* executive editor Jill Abramson told CBS’s *Face the Nation*, “The reporters who work for
21 the *Times* in Washington have told me that many of their sources are petrified to even return
22 calls at this point.” *Face the Nation Transcripts*, June 2, 2013, CBS News,
23 <http://cbsn.ws/1aGmeyd>. *See also* Dylan Byers, *Reporters Say There’s a Chill in the Air*,
24 Politico, June 8, 2013, <http://politi.co/11znRrJ>. (“Reporters on the national security beat say it’s
25 not the fear of being prosecuted by the DOJ that worries them — it’s the frightened silence of
26 past trusted sources that could undermine . . . investigative journalism[.] Some formerly
27
28

1 forthcoming sources have grown reluctant to return phone calls, even on unclassified matters,
2 and, when they do talk, prefer in-person conversations that leave no phone logs, no emails, and
3 no records of entering and leaving buildings[.]”)

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

15
16
17 Discussing the NSA surveillance programs, *New York Times* investigative reporter and
18 three time Pulitzer Prize winner David Barstow said, “I have absolutely no doubt whatsoever that
19 stories have not gotten done because of this.” Jamie Schuman, *The Shadows of the Spooks*, *The
20 News Media and the Law*, Fall 2013, at 9.

21 Even sources whose work is removed from the national security realm – including many
22 federal employees, corporate directors and leaders of non-governmental organizations involved
23 in publicly controversial topics – have become less willing to talk. *Id.* at 11. *See also* Molly
24 Redden, *Is the ‘Chilling Effect’ Real?*, *The New Republic*, May 15, 2013,
25 <http://on.tnr.com/18Lgq3D>. (“Officials are reluctant to get anywhere close to the line...[I]t
26
27
28

1 actually has been much harder to get people to talk about anything, even in a sensitive-but-
2 unclassified area.”).

3 **C. Mass call tracking negates safeguards the government has pledged in**
4 **response to threats to journalism.**

5 One consequence of the outcry over the AP and Fox News seizures was the Department
6 of Justice’s decision to revisit its rules for issuing subpoenas to the media. *See generally*
7 Department of Justice, *Report on Review of News Media Policies*, July 12, 2013,
8 <http://1.usa.gov/12mkn9B>. The Justice Department will now require prosecutors to give the
9 news media advance notice of a subpoena, except in rare cases where notice poses a clear and
10 substantial threat to the investigation, risks grave harm to national security, or presents an
11 imminent risk of death or bodily harm. *Id.* at 2. This proposal of notice and negotiation is made
12 so that “members of the news media [have] the opportunity to engage with the Department
13 regarding the proposed use of investigative tools to obtain communications or business
14 records[.]” *Id.* at 2. The report says the Justice Department also will create a News Media
15 Review Committee to provide oversight of media-related investigations, *see id.* at 4, and that
16 journalists would not be considered suspects for “ordinary newsgathering activities,” *see id.* at
17 3.
18

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

1 steps to allow an adversary to argue before the court, which now only hears from a government
2 official. *Id.*

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 mass call tracking
6 continues unabated.

7 **II. THE MASS TELEPHONE CALL TRACKING PROGRAM IS AN INHERENTLY**
8 **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 mass call tracking at issue here. There is a significant distinction between monitoring specific
12 communications, based on a particularized suspicion of wrongdoing, and the implementation of a
13 widespread system of mass call tracking that stores information about every call made by the
14 subscribers of a particular telephone service provider over a defined yet renewed time period.
15 *See* Charlie Savage, et al., *U.S. Confirms That It Gathers Online Data Overseas*, N.Y. Times,
16 June 6, 2013, <http://nyti.ms/10SZXaO>.

17
18 The protections built into these enormous databases cannot prevent overstepping in all
19 cases.² Government documents released in September show that the NSA regularly searched call
20 logs of about 15,000 numbers that did not have a reasonable, articulable suspicion of terrorism
21 for three years until March 2009. Josh Gerstein, *NSA broke rules on call-tracking program*,

22
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, available at
<http://bit.ly/1duGJjt>.

1 *court filings show*, Politico, Sept. 10, 2013, <http://politi.co/17UxEJR>. Additionally, an internal
2 NSA audit from 2012 revealed that the agency conducted unauthorized searches of data,
3 including phone records and email, of thousands of Americans since 2008. *See* Barton Gellman,
4 *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, Wash. Post, Aug. 15, 2013,
5 <http://wapo.st/16SWco2>. These violations “include unauthorized access to intercepted
6 communications, the distribution of protected content[,] and the use of automated systems
7 without built-in safeguards to prevent unlawful surveillance.” *Id.* These breaches cast doubt on
8 the government’s ability to police itself when implementing such a far-reaching mass call-
9 tracking program. In fact, FISA Court chief judge Reggie B. Walton said his court “does not
10 have the capacity to investigate issues of noncompliance.” Carol D. Leonnig, *Court: Ability to*
11 *police U.S. spying program limited*, Wash. Post, Aug. 15, 2013, <http://wapo.st/1cR581f>.

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

25 Equivocations and noncompliance make it impossible for individuals, including
26 journalists and their sources, to understand the limits of the surveillance program. While the
27 government maintains that it only searches phone records in cases involving national security,
28

1 this label does not give reporters and sources enough guidance about the government's activities.
2 Concerns over "national security" can range from the very real threat of loss of life if certain
3 information is published to international embarrassment and damage to trade relations when our
4 allies realize the U.S. government has been spying on them. *See e.g.* James Risen and Eric
5 Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. Times, Dec. 16 2005,
6 <http://nyti.ms/16C62Xp>; Vivienne Walt, *European Officials Infuriated by Alleged NSA Spying*
7 *on Friendly Diplomats*, Time, June 30 2013, <http://ti.me/19LYkl5>; Peter Nicholas, *Obama's*
8 *Other Mission: Soothing Allies on Espionage*, Wall St. Journal, Sept. 6 2013,
9 <http://on.wsj.com/15BeQ0f>. Uncertainty about whether their communications are at risk of
10 exposure causes sources on a wide range of topics to fall silent. *See* Leonard Downie Jr., *The*
11 *Obama Administration and the Press: Leak investigations and surveillance in post-9/11*
12 *America*, Comm. To Protect Journalists, Oct. 10, 2013, <http://bit.ly/1c3Cnfg>; Jamie Schuman,
13 *The Shadows of the Spooks*, The News Media and the Law, Fall 2013.

14
15
16 Without judicial oversight, these problems could threaten to grow only worse. This
17 Court has the opportunity to step in and vindicate well-established rights of the media and public
18 under the First Amendment.

19
20 DATED: November 19, 13

Respectfully submitted,

21 By: /s/ Joshua Koltun

22 Joshua Koltun, Attorney (Bar No. 173040)

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

26 Attorneys for Amici Curiae
27 REPORTERS COMMITTEE FOR
28 FREEDOM OF THE PRESS AND 13 OTHER
NEWS ORGANIZATIONS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

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

Belo Corp. owns 20 television stations that reach more than 14% of U.S. television households.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company’s portfolio of locally focused media properties includes: 19 TV stations (ten ABC affiliates, three NBC affiliates, one independent and five Spanish-language stations); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service.

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

1 Los Angeles Times Communications LLC publishes the Los Angeles Times, the largest
2 metropolitan daily newspaper in the country. The Los Angeles Times operates the website
3 www.latimes.com, a leading source of national and international news.

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

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

14 The Newspaper Guild – CWA is a labor organization representing more than 30,000
15 employees of newspapers, newsmagazines, news services and related media enterprises. Guild
16 representation comprises, in the main, the advertising, business, circulation, editorial,
17 maintenance and related departments of these media outlets. The Newspaper Guild is a sector of
18 the Communications Workers of America. CWA is America’s largest communications and
19 media union, representing over 700,000 men and women in both private and public sectors.

20 North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and
21 publishing company, parent of two daily newspapers serving the residents of northern New
22 Jersey: *The Record* (Bergen County), the state’s second-largest newspaper, and the *Herald News*
23 (Passaic County). NJMG also publishes more than 40 community newspapers serving towns
24 across five counties and a family of glossy magazines, including (201) Magazine, Bergen
25 County’s premiere magazine. All of the newspapers contribute breaking news, features, columns
26 and local information to NorthJersey.com. The company also owns and publishes Bergen.com
27 showcasing the people, places and events of Bergen County.

28

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

9 Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting
10 journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to
11 encouraging the free practice of journalism and stimulating high standards of ethical behavior.
12 Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-
13 informed citizenry, works to inspire and educate the next generation of journalists and protects
14 First Amendment guarantees of freedom of speech and press.

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

18
19
20
21
22
23
24
25
26
27
28

APPENDIX B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Of counsel for *amici*:

Richard A. Bernstein
Sabin, Bermant & Gould LLP
4 Times Square, 23rd Floor
New York, NY 10036
Counsel for Advance Publications, Inc.

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors

Russell F. Coleman
Belo Corp.
400 S. Record Street
Dallas, TX 75202

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

Peter Scheer
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

Jeffrey Glasser
Senior Counsel
Tribune Company
202 West First Street
Los Angeles, CA 90012

Karole Morgan-Prager
Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,

1 Buffalo, NY 14203
2 *Counsel for National Press Photographers Association*

3 Barbara L. Camens
4 Barr & Camens
5 1025 Connecticut Ave., NW
6 Suite 712
7 Washington, DC 20036
8 *Counsel for The Newspaper Guild – CWA*

9 Jennifer A. Borg
10 General Counsel
11 North Jersey Media Group Inc.
12 1 Garret Mountain Plaza
13 Woodland Park, NJ 07424

14 Jonathan D. Hart
15 Dow Lohnes PLLC
16 1200 New Hampshire Ave., NW
17 Washington, DC 20036
18 *Counsel for Online News Association*

19 Bruce W. Sanford
20 Laurie A. Babinski
21 Baker & Hostetler LLP
22 1050 Connecticut Ave., NW
23 Suite 1100
24 Washington, DC 20036
25 *Counsel for Society of Professional Journalists*

26 John B. Kennedy
27 James A. McLaughlin
28 Kalea S. Clark
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

22
23
24
25
26
27
28