NO. 13–55172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAJI JAWDAT HAMDAN, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:10-cv-06149-DSF-JEM
The Honorable Dale S. Fischer, District Judge

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Bruce Brown
Counsel of Record
Gregg Leslie
Hannah Bloch-Wehba
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
*Additional *amici* counsel listed at end of document

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Ninth Circuit Rules of Appellate Procedure, *amici* disclose that:

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit 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.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no 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.

First Look Media, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media, Inc.

The International Documentary Association is a 501(c)3 not-for-profit corporation with no parent corporation and no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

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.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

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 New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News 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.

PEN American Center has no parent or affiliate corporation.

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, Californians Aware, The Center for Investigative Reporting, First Amendment Coalition, First Look Media, Inc., International Documentary Association, Investigative Reporting Workshop at American University, The McClatchy Company, The National Press Club, National Press Photographers Association, The New York Times Company, The News Guild - CWA, North Jersey Media Group Inc., Online News Association, PEN American Center, Society of Professional Journalists, and the Tully Center for Free Speech. *Amici* are described in more detail in Appendix A.

This case is of particular importance to *amici* because the panel below imposed an inappropriately deferential standard of review regarding the Federal Bureau of Investigation's (FBI) assertion that certain records are exempt from disclosure under Exemption 1 of the Freedom of Information Act (FOIA). The deference applied by the panel below both strays from binding Ninth Circuit

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amici* state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief. Pursuant to Rule 29(c)(4), all parties have consented to the filing of this brief.

precedent and undermines core provisions of FOIA that ensure meaningful public access to records whose contents are not properly classified.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the withholding of particular documents regarding the United States' involvement in mistreatment of a United States citizen abroad. Equally, however, this case is about the proper role of the courts in scrutinizing executive branch assertions about classification decisions, and in facilitating public access to government information under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. At issue here are the assertions of the Federal Bureau of Investigation that records responsive to Hamdan's FOIA request are exempt from disclosure because they are properly classified.

The panel below inappropriately "emphasized the importance of deference to executive branch judgments about national security secrets." *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 773 (9th Cir. 2015). In so doing, the panel erroneously imported a highly deferential standard of review from caselaw interpreting FOIA's Exemption 3, which is designed to incorporate other statutory exemptions. In the context of Exemption 1, the plain language of FOIA, coupled with the unambiguous legislative history of the statute, compels a more searching standard of review — one which this Court long ago recognized in *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991).

The application of the correct standard of review is crucial not only to FOIA requesters and litigants, but also to the question of separation of powers. Through

legislative history and the text of FOIA and its 1974 amendments, it is clear that although such judicial scrutiny must afford due weight to an agency's classification determination, such deference does not amount to a rubber stamp of agency action. Congress affirmatively gave such power to the judiciary because it saw FOIA as a meaningful vehicle for informing the public on issues related to national security and foreign policy.

This case is emblematic of the need to apply the correct standard for judicial assessments of classification decisions. Congress sought to address overclassification in the 1974 amendments to FOIA, but the overall amount of information classified by agencies has nevertheless climbed exponentially. This growth comes despite the fact that even former CIA Director Porter Goss has described the system as one of "gratuitous classification." *Intelligence Oversight and the Joint Inquiry: Hearing Before the Nat'l Comm'n on Terrorists Attacks Upon the U.S.* (May 22, 2003), *available at* http://perma.cc/A2F8-955X.

Against this background of clear congressional intent and executive mismanagement, the panel below found that the courts are required to apply a highly deferential standard of review when the government seeks to withhold records that, it asserts, are properly classified. Yet Congress intended the judiciary to ensure that those records are, indeed, properly classified — and to override the executive branch's classification determination when appropriate. *Amici* write to

support this Court's long-standing recognition that the judicial branch serves a vital role in facilitating meaningful review of the executive branch's classification decisions, and respectfully request that the Court reverse the panel's determination with respect to Exemption 1.

ARGUMENT

I. Congress explicitly authorized courts to substantively review executive branch classification decisions under Exemption 1 of FOIA.

In the face of the Executive Branch's power to classify information without meaningful oversight, Congress enacted FOIA and subsequently strengthened it to ensure that the judiciary had the authority to scrutinize an agency's classification claims. *See* FOIA Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (narrowing FOIA's Exemption 1 to exempt only records that "are in fact properly classified"). By enacting the 1974 amendments to FOIA, Congress sought to prevent improper classification claims and provide meaningful review of classification decisions so that citizens could better understand the actions of their government. The judiciary's role becomes increasingly important when, as in the present case, the Executive Branch asks for extreme deference for its initial classification decision.

a. The panel below erroneously embraced a deferential standard of review of FBI classification decisions from inapposite caselaw.

In the Ninth Circuit, an agency seeking to withhold records from disclosure under a FOIA exemption "must describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of . . . bad faith."

Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992). FOIA exempts from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). As this Court has recognized, "Though an executive agency's classification decisions are accorded substantial weight, the FOIA permits challenges to Exemption 1 withholdings, requires the district court to review the propriety of the classification, and places the burden on the withholding agency to sustain its Exemption 1 claims." *Wiener v. FBI*, 943 F.2d 972, 980 (9th Cir. 1991). The agency "must do more than show simply that it has acted in good faith." *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007).

Instead of following this well-established approach with regard to the FBI's asserted exemptions, the panel below took a different tack, following D.C. Circuit caselaw finding that "an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Larson v. Dep't of State*, 565 F.3d 857, 868 (D.C. Cir. 2009). The *Larson* approach, which explicitly holds that "the court should *not* conduct a more detailed inquiry . . . to evaluate whether the court agrees with the agency's opinion," *id.* (emphasis added), is incompatible with the *Wiener* approach, which "requires the district court to review the propriety of the classification." *Wiener*, 943 F.2d at 980. The panel's reliance on *Larson*, which is

not binding precedent, is particularly puzzling in light of the fact that *Wiener* squarely addresses FBI nondisclosure under Exemption 1 — the same exemption at issue here.

The level of deference afforded to the Central Intelligence Agency in *Larson* is additionally inappropriate when applied to the FBI in this case. In *Larson*, the CIA also invoked Exemption 3 of FOIA, which covers records "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Exemption 3 operates to incorporate nondisclosure provisions from other laws into FOIA. Under this exemption, "the CIA need only show that the statute claimed is one of exemption as contemplated by Exemption 3 and that the withheld material falls within the statute." *Larson*, 565 F.3d at 865. In *Larson*, the CIA relied upon the National Security Act (NSA), which confers "broad power to protect the secrecy and integrity of the intelligence process." *CIA v. Sims*, 471 U.S. 159, 160 (1985). As this Circuit has recognized, the NSA "provides that the Director of the CIA is 'responsible for protecting intelligence sources and methods from disclosure.'" *Hunt*, 981 F.2d at 1118. The practical impact of the NSA, in conjunction with Exemption 3, is to create "a near-blanket FOIA exemption." *Id.* at 1120.

Likewise, in the other cases upon which the panel relied, the responding agency invoked Exemption 3 as well as Exemption 1. For example, the Second Circuit found "searching review" inappropriate in a case in which the National

Security Agency issued *Glomar* responses pursuant to Exemptions 1 and 3 in conjunction with the National Security Agency Act (NSAA). *See Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009) (considering only the application of Exemption 3). The *Wilner* court found that the NSAA "eases" the agency's burden of proof under FOIA, *id.* at 75, and concluded that a court would "invariably" uphold the *Glomar* response "given the breadth of the NSAA." *Id.* at 76. Likewise, in 2007, this Court found in the Exemption 3 context that "judges are poorly positioned to evaluate the sufficiency of the CIA's intelligence claims." *Berman*, 501 F.3d at 1142

In *Larson*, *Hunt*, *Wilner*, and *Berman*, judicial deference is purportedly compelled by legislation expressing Congress's intent to withhold certain records pursuant to Exemption 3. As the Supreme Court has found in the context of the National Security Act, "The plain meaning of the statutory language, as well as the legislative history . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure." *CIA v. Sims*, 471 U.S. 159, 168–69 (1985). While this Court has recognized that the breadth of Exemption 3 "may well be contrary to what Congress intended," it has concluded that it is bound to interpret the National Security Act broadly. *Hunt*, 981 F.2d at 1120. Indeed, only Congress can rewrite the myriad statutes creating broad exemptions from disclosure that undermine

FOIA's purpose. *See also* Jennifer LaFleur, *FOIA Eyes Only: How Buried Statutes Are Keeping Information Secret*, ProPublica (Mar. 14, 2011, 12:30 P.M.), http://perma.cc/48H5-J6MU.

Here, in contrast, the FBI can point to no congressional action purporting to insulate it from judicial scrutiny. Instead, the great weight of legislative authority shows that the FBI is not entitled to comparably sweeping deference to its classification decisions, but rather that Congress intended courts to play an important role in substantively reviewing those claims. *See Wiener*, 943 F.2d at 988 ("The district court's findings of facts and conclusions of law must be sufficiently detailed to establish that the careful *de novo* review prescribed by Congress has in fact taken place.") (quoting *Van Bourg, Allen, Weinberg & Roger v. NLRB* (*Van Bourg I*), 656 F.2d 1356, 1357 (9th Cir.1981)).

As a result, the panel's decision imposes an excessively deferential standard upon FBI determinations regarding classification. For example, rather than requiring the FBI to describe each justification for nondisclosure in reasonable detail, the panel below relied on *Larson* to find that "there is nothing suspicious" about the FBI's repeated, generalized justifications for nondisclosure of each document. *Hamdan*, 797 F.3d at 774. Likewise, the panel found that the FBI adequately "explain[ed] the withholding of particular groups of documents" in affidavits. *Id.* As a result, the panel concluded, "the FBI has fairly provided as

much detail as it can without compromising the very secrets Exemption 1 is supposed to protect." *Id.* at 775.

The decision of the panel below will shield both documents and judicial decision-making from public view. In *Wiener*, this Court required a district court to make sufficiently detailed findings of fact, and remanded with instructions to "state in reasonable detail the reasons for its decision as to each document in dispute." 943 F.2d at 988 (citations omitted). Here, the District Court likewise made vague and conclusory factual determinations without stating adequate reasons for its decision. *See* Memorandum at 2, *Hamdan v. Dep't of Justice*, No. 2:10-cv-06149-DSF-JEM (N.D. Cal. Dec. 10, 2012) ("From a review of the totality of the record, the Court finds that the claimed exemptions were properly invoked.").

General and superficial factual findings like those made by the District Court burden the appellate court, which is "ill-equipped to conduct its own investigation into the propriety of claims for non-disclosure." *Van Bourg I*, 656 F.2d at 1358. But by evading requirements of detailed review and factual findings, the FBI also undermines the "heavy emphasis on disclosure" contemplated in FOIA. *Id.* at 1357. The effect of the panel's decision below is not only to exempt the records themselves from disclosure, but to shield the court's factual and legal basis from public scrutiny as well.

b. In amending FOIA in 1974, Congress sought to strengthen the judiciary's oversight of the executive branch by authorizing courts to review de novo whether classified material was properly withheld under Exemption 1.

The original enactment of FOIA in 1966 did not give federal courts the explicit power to review executive branch classification decisions under Exemption 1. In *EPA v. Mink*, 410 U.S. 73 (1973), the U.S. Supreme Court construed FOIA to limit a court's inquiry under Exemption 1 to procedural review. At the time the Court reviewed the statute, the text of section 552(b)(1) exempted from disclosure records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," without mention of whether the particular classification action was proper under the order. Freedom of Information Act, Pub. L. No. 89- 487, 80 Stat. 250 (1966).

In *Mink* the Court held that the test under Exemption 1 as it was originally written "was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret." *Mink*, 410 U.S. at 82. The Court also construed FOIA as forbidding courts to conduct in camera review of documents that the Executive Branch had classified. *Id*. at 81. Justice Potter Stewart, acknowledging the lack of judicial oversight of the Executive Branch's classification claims, noted in concurrence that the Court's interpretation of FOIA meant that there was "no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might

have been." *Id*. at 95 (Stewart, J., concurring). Recognizing that the limitation on judicial inquiry was a statutory constraint, the Court acknowledged Congress' power to amend the law to allow for substantive review of classification claims. *Id.* at 83.

Congress responded immediately to reverse the *Mink* decision and to direct federal courts to engage in the type of inquiry at issue in the present case. The Senate Judiciary Committee's report on the 1974 amendments stated that the amendments to Exemption 1 "will necessitate a court to inquire during de novo review not only into the superficial evidence — a 'Secret' stamp on a document or set of records — but also into the inherent justification for the use of such a stamp." S. Rep. No. 93-854 (1974), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 182 (1975), *available at* http://perma.cc/B3FX-GVEU ("FOIA SOURCEBOOK" hereafter). The House pursued the same legislative objective. *See* H.R. Rep. No. 93-876, *reprinted in* FOIA SOURCEBOOK, at 127 (discussing amendments "aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified . . . under Executive order and authority.").

Beyond superseding *Mink*, Congress also sought to address overbroad and improper classification efforts by the Executive, exactly the type of overclassification that has plagued the system since its inception. As Rep. Patsy

Mink (D-Hawaii) — the named plaintiff in the *Mink* case — stated on the House floor during debates on the bill, "Our intention in making this change is to place a judicial check on arbitrary actions by the Executive to withhold information that might be embarrassing, politically sensitive, or otherwise concealed for improper reasons rather than truly vital to national defense or foreign policy." 120 Cong. Rec. H1,787-803 (1974), *reprinted in* FOIA SOURCEBOOK, at 260.

The Senate was equally fearful that an agency's initial decision to classify information would not be reviewed by a neutral party. Referring to government officials with security clearances, Sen. Alan Cranston (D-Cal.) said that "we must not let 17,364 bureaucrats be the final judges of what we are to know from our Government." *Id.* at 301 (1975). Sen. Edmund Muskie (D-Me.) echoed these sentiments, stating that exempting classification decisions from judicial scrutiny would "foster the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge." *Id.* at 305.

The legislative history and statements by supporters of the amendments to Exemption 1 demonstrate that Congress intended not only to overrule the *Mink* decision but also to impose a structural check on the Executive Branch's ability to assert national security or foreign policy-based withholdings under FOIA. Recognizing that agencies sometimes fail to engage in the rigorous process

necessary to classify information, Congress empowered federal courts to scrutinize the substance of a withholding under FOIA's Exemption 1 so as to create additional oversight of the Executive Branch.

c. Congress forcefully affirmed its grant of judicial review of agency withholdings under Exemption 1 when it overrode President Ford's veto of the 1974 FOIA amendments.

Congress made plain its intent to place a judicial check on Executive Branch classification claims under Exemption 1 when it overrode a presidential veto and passed the 1974 amendments into law. President Ford vetoed the legislation in part because he believed courts lacked the expertise to review classification decisions. *See* Veto Message From President of the United States, Freedom of Information Act (Nov. 18, 1974), *reprinted in* FOIA SOURCEBOOK, at 484 (1975) ("[T]he courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise."). Although Congress was sensitive to concerns raised by the President regarding the federal courts' ability to properly determine whether documents should have been classified, it ultimately believed that courts could and should make such determinations. The override vote was 371 to 31 in the House and 65 to 27 in the Senate. *See id.* at 431, 480.

In overriding President Ford's veto, Congress made clear its confidence that the judiciary could undertake review of classification decisions. Sen. Muskie made

Congress' faith in the judiciary clear during the debates after President Ford's veto when he said, "I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy." *Id.* at 449.

Additionally, Congress believed that the benefit of fostering increased government transparency through active judicial scrutiny of Exemption 1 withholdings outweighed the President's concerns. *See* 120 Cong. Rec. H10,864-875, *reprinted in* FOIA SOURCEBOOK, at 407 ("By our votes to override this veto we can put the needed teeth in the freedom of information law to make it a viable tool to make 'open government' a reality in America.") (comments of Rep. Moorhead (D-Pa.)). In essence, Congress turned aside President Ford's concern that the federal courts could not make appropriate determinations regarding whether material was properly classified and withheld under Exemption 1 of FOIA.

d. Application of the correct standard of scrutiny is imperative to resolve the ongoing problem of overclassification

Regardless of whether the particular records at issue in this case are properly classified, the climate of overclassification in the Executive Branch makes it imperative that this Court continue to apply the correct standard to adjudicating Exemption 1 cases. According to the latest annual report prepared by the Information Security Oversight Office ("ISOO"), which is responsible for

oversight of the Executive Branch's classification system, agencies made more than 77 million classification decisions during the 2014 Fiscal Year. ISOO, Report to the President, at 6 (2014), *available at* https://perma.cc/S6F7-CHF4. The 2014 total represents a slight decrease from Fiscal Year 2013. *See id.*

Nonetheless, although classification decisions dropped between the late 1980s and through the 1990s, the last decade has seen a sharp increase in the government's classification activity. Figure 1 below is a graphic illustrating the annual total classification decisions from the latest ISOO annual report.

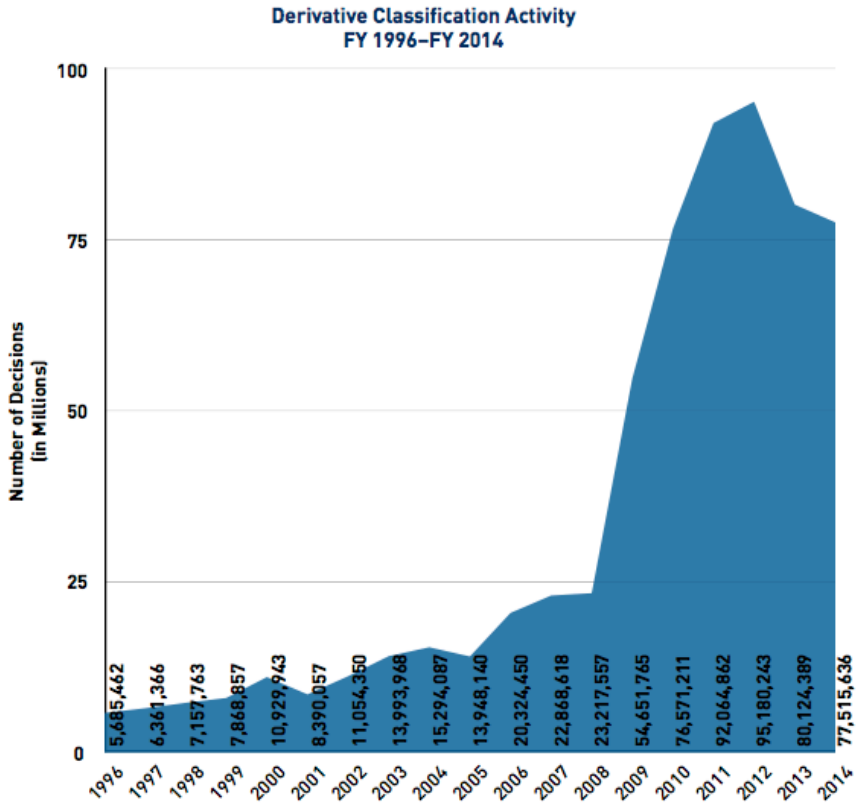

Figure 1. See Information Security Oversight Office, Report to the President, at p. 6.

As Figure 1 shows, classification decisions more than doubled between 2008 and

2009, the time period that coincides with Hamdan's meeting with the FBI in Abu Dhabi, and his detention, torture, and habeas corpus petition in the United States District Court. *Hamdan*, 797 F.3d at 767–68 (summarizing the events giving rise to Hamdan's FOIA request).

At the same time, the government frequently relies on Exemption 1. The most recent statistics suggest that the government invoked Exemption 1 over 6,000 times in Fiscal Year 2014, while agencies cited the exemption almost 8,500 times in Fiscal Year 2013. *See* Office of Information Policy ("OIP"), Dep't of Justice, Summary of Annual FOIA Reports for Fiscal Year 2014, at 8, *available at* http://1.usa.gov/20r79bX ("Notably, the government's use of Exemption[] 1 . . . decreased significantly by 29.1% . . ."); *see also* OIP, Dep't of Justice, Summary of Annual FOIA Reports for Fiscal Year 2013, at 7, *available at* http://1.usa.gov/1Q8OH3g (reporting that the government invoked Exemption 1 8,496 times).

The use of classification to shield documents from the public and the subsequent use of Exemption 1 to withhold them under FOIA compound the problem of state secrecy and inhibit meaningful discussion about important government activities. In this climate of secrecy, it is more important than ever that federal courts exercise the role Congress assigned to check Executive Branch classification decisions.

II. Congress deliberately balanced FOIA's goal of increasing access to government records against the potential harm of releasing national security information when it amended the statute in 1974.

Although Congress intended to provide a meaningful check against Executive Branch classification decisions, it remained sensitive to the fact that such review could potentially lead to the release of information which may do actual harm to national security or foreign policy interests. Accordingly, Congress sought to carefully balance the Executive Branch's concerns regarding judicial scrutiny of agency classification decisions against FOIA's overarching goal of transparency by requiring courts to provide some level of deference to agency classification claims. This process, embedded into the analysis courts undertake when reviewing Exemption 1 withholdings, protects both the statute's transparency goal and the need to protect legitimate secrets.

But, as the legislative history makes clear, Congress did not envision a level of deference that prevents a federal court from conducting a good-faith inquiry into the Executive Branch's underlying justifications. As the D.C. Circuit recognized when scrutinizing an agency's classification claims under Exemption 1, "[D]eference is not equivalent to acquiescence." *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

In an effort to satisfy Executive Branch concerns regarding judicial review of classification determinations, Congress instructed courts to "accord substantial

weight to an agency's affidavit concerning the details of the classified status" of documents withheld under Exemption 1. H.R. Rep. No. 93-1380 (1974) (Conf. Rep.), *reprinted in* FOIA SOURCEBOOK, at 229. This Court and others took the standard enunciated by Congress and incorporated it into the review they undertake when scrutinizing Exemption 1 claims. *See Hunt*, 981 F.2d at 1119 ("In evaluating the CIA's claim for exemption in the present case, the district court was required to accord 'substantial weight' to the CIA's affidavits.") (quoting *Miller v. Casey*, 730 F.2d 773, 776 & 778 (D.C.Cir.1984)); *see also Larson*, 565 F.3d at 864 (recognizing the "substantial weight" standard).

Nevertheless, Congress did not intend judicial deference to swallow the purpose behind strengthening FOIA in 1974. As discussed *supra*, erasing the distinction between affording an agency deference and creating a practically "blanket" exemption for an agency's classification claim would leave FOIA exactly where it was in *Mink*'s wake and before the 1974 Amendments.

Moreover, in amending FOIA, Congress both intended that courts would need to scrutinize agency classification claims under Exemption 1 and anticipated that courts would sometimes determine that the Executive Branch had improperly invoked the exemption. *See* S. Rep. No. 93-854, *reprinted in* FOIA SOURCEBOOK, at 183:

> It is essential, however, to the proper workings of the Freedom of Information Act that any executive branch review, itself, be

> reviewable outside the executive branch. [. . .] The judgments involved may often be delicate and difficult ones, but someone other than interested parties — officials with power to classify and conceal information — must be empowered to make them.

In light of Congress' 1974 amendments to FOIA, this Court has the authority to scrutinize the FBI's classification claims at issue in the present case, even as FOIA provides the Executive Branch with some deference. This deliberately calibrated standard strikes a balance between FOIA's transparency goals and the Executive Branch's concerns about national security. This deference, however, is no bar to this Court exercising its duty to rigorously review the agency classification determinations at issue and, should they be found to be improper, order the documents' disclosure.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the District Court's decision with respect to its findings regarding Exemption 1.

Dated: November 12, 2015

Respectfully submitted,

/s/ Bruce D. Brown
Bruce D. Brown
Gregg P. Leslie
Hannah Bloch-Wehba
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Fed. R. of App. P. 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 4,173, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/ Hannah Bloch-Wehba
Hannah Bloch-Wehba
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2015, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon all parties in the case. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Hannah Bloch-Wehba

Hannah Bloch-Wehba
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1250
Washington, DC 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310

APPENDIX A: DESCRIPTIONS OF *AMICI*

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 assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

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.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

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.

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

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

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

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 29 daily newspapers and related websites as well as numerous community newspapers and niche publications.

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

more than 250,000 guests come through its doors.

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

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

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

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned

printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state's second-largest newspaper, and the *Herald News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

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

PEN American Center is a non-profit association of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary

agents, and translators ("PEN"). PEN has approximately 4,300 members and is affiliated with PEN International, the global writers' organization with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and the Americas. PEN International was founded in 1921, in the aftermath of the First World War, by leading European and American writers who believed that the international exchange of ideas was the only way to prevent disastrous conflicts born of isolation and extreme nationalism. Today, PEN works along with the other chapters of PEN International to advance literature and protect the freedom of the written word wherever it is imperiled. It advocates for writers all over the world.

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

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

APPENDIX B: OF COUNSEL

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

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for Association of Alternative Newsmedia

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

Judy Alexander
Chief Legal Counsel
The Center for Investigative Reporting
2302 Bobcat Trail
Soquel, CA 95073

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

Lynn Oberlander
General Counsel, Media Operations
First Look Media, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Charles D. Tobin
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006
Counsel for The National Press Club

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
Counsel for National Press Photographers Association

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
Counsel for The Newspaper Guild – CWA

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

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Counsel for Online News Association

Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street

San Francisco, CA 94111
Counsel for Online News Association

Katherine Glenn Bass
PEN American Center
588 Broadway, Suite 303
New York, NY 10012

Bruce W. Sanford
James Romoser
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists