

No. 16-706

IN THE
Supreme Court of the United States

DETROIT FREE PRESS, INC.,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

On Petition For A Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 28 MEDIA ORGANIZATIONS, IN
SUPPORT OF PETITIONER

BRUCE D. BROWN
Counsel of Record
KATIE TOWNSEND
ADAM A. MARSHALL
The Reporters Committee for
Freedom of the Press
1156 15th ST, NW., Suite 1250
Washington, DC 20005
202.795.9301
bbrown@rcfp.org

(Additional counsel for amici listed in Appendix C)

QUESTION PRESENTED

Exemption 7(C) of the Freedom of Information Act (FOIA) exempts from FOIA's disclosure obligation law enforcement records that, if publicly released, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In *Detroit Free Press, Inc. v. United States Department of Justice*, the Sixth Circuit held that the booking photographs of indicted federal defendants in ongoing criminal proceedings who have already appeared in court and whose names have already been made public are, as a categorical matter, not exempt from disclosure under 7(C). 73 F.3d 93, 98 (6th Cir. 1996). It held that there is no cognizable privacy interest in such photos and that the public interest would in any event outweigh any privacy interest. *Id.* at 97–98. In the decision below, a fractured *en banc* court overruled its prior precedent, concluding that the possible personal "embarrass[ment] and humiliat[ion]" that could be caused by disclosure of such booking photos outweighs the public's interest in disclosure. Pet. App. 6a.

The question presented is:

Does the Freedom of Information Act require disclosure of booking photos of publicly named, federal indictees who have already appeared in open court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
REASONS FOR GRANTING THE PETITION	5
I. THE SIXTH CIRCUIT’S <i>EN BANC</i> DECISION IS INCONSISTENT WITH PRECEDENT OF THIS COURT AND CONTRARY TO THE PURPOSES OF FOIA.....	5
II. ACCESS TO BOOKING PHOTOGRAPHS ENABLES THE NEWS MEDIA TO PROVIDE THE PUBLIC WITH IMPORTANT INFORMATION ABOUT LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE	10
CONCLUSION	16
APPENDIX A	A-1
APPENDIX B	A-18
APPENDIX C	A-27

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975)	8, 11
<i>Dep't of Justice v. Reporters Comm. for Freedom of the Press</i> , 489 U.S. 749 (1989)	4, 6, 12
<i>Dep't of Air Force v. Rose</i> , 425 U.S. 352 (1976)	3
<i>Firth v. Associated Press</i> , 176 F.Supp. 671 (D.S.C. 1959)	7
<i>Globe Newspaper v. Superior Court</i> , 457 U.S. 596 (1982)	8
<i>Kapellas v. Kofman</i> , 459 P.2d 912 (Cal. 1969)	11
<i>Nat'l Archives & Records Admin. v. Favish</i> , 541 U.S. 157 (2004)	4, 6, 12
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	4, 6, 7
<i>Richmond Papers v. Virginia</i> , 448 U.S. 555 (1980)	4, 10

STATUTES

5 U.S.C. §552..... 3, 5, 6

OTHER AUTHORITIES

- Alex Johnson, “*After Months of Requests, Mugshots of Stanford Rapist Brock Turner Finally Emerge.*” NBC News. (June 7, 2016)13
- David Ray Papke, FRAMING THE CRIMINAL (1987)8
- “Administration of the Freedom of Information Act”, House Report No. 92-1419 (1972)11
- Jonathan Finn, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY (2009)8
- Larry McDermott, *Where are the photos of church fire suspects?*, The Republican 20009 WLNR 157264312
- Raynal Pellicer, MUG SHOTS: AN ARCHIVE OF THE FAMOUS, INFAMOUS, AND MOST WANTED
- Sarah Boslaugh, “*Mugshots*”, THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA.....8
- Sheriff’s deputies choke Texas inmate for grinning during mugshot: “Man, stop smiling!”* New York Daily News (June 9, 2016)12

INTEREST OF THE *AMICUS CURIAE*¹

Amici Curiae are the Reporters Committee for Freedom of the Press (the “Reporters Committee”) and the following 28 media organizations (collectively, “*amici*”): American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, Association of American Publishers, Inc., Bloomberg L.P., Cable News Network, Inc., California Newspaper Publishers Association, Chicago Tribune Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Hearst Corporation, Los Angeles Times Communications LLC, The McClatchy Company, MediaNews Group, Inc., MPA – The Association of Magazine Media, The National Press Club, National Press Photographers Association, National Public Radio, Inc., New England First Amendment Coalition, The New York Times Company, News Corp, News Media Alliance, Radio Television Digital News Association, The Seattle Times Company, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.

The Reporters Committee is an unincorporated nonprofit organization of reporters and editors that works to defend the First Amendment’s guarantee of

¹ Pursuant to this Court’s Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*’s intention to file this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court’s Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

a free and unfettered press, and the freedom of information interests of the news media and the public. The Reporters Committee has participated as *amicus curiae* in First Amendment and Freedom of Information Act (“FOIA”) litigation since 1970. The remaining *amici* are described in Appendix B.

This case presents issues of significant importance to *amici* who, as members and representatives of the news media, frequently utilize FOIA to gather news and keep the public informed about the activities and operations of government. *Amici* thus have a strong interest in ensuring that FOIA is interpreted in a manner that facilitates public access to government records, as intended by Congress. In *amici*’s view, the splintered *en banc* ruling of the Sixth Circuit, below, warrants review by this Court. It runs contrary to long-standing historical practice and legal precedent affording members of the news media and the public access to booking photographs. In finding that federal indictees have a cognizable privacy interest in their booking photographs that prevents the disclosure of those photographs under Exemption 7(C) of FOIA, the Sixth Circuit has unduly limited the news media’s ability to keep the public informed of matters of the utmost public concern pertaining to the conduct of law enforcement and the administration of justice.

SUMMARY OF ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or “the Act”), was designed to provide for the broad disclosure of agency records to inform the public about the actions of government. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *EPA v. Mink*, 410 U.S. 73, 80 (1973). While the Act permits the withholding of “records or information compiled for law enforcement purposes, . . . to the extent that” disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(7)(C) (“Exemption 7(C)”), this exemption must be construed narrowly, and must be weighed against the public’s interest in disclosure. *See Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

In a fractured *en banc* decision, the Sixth Circuit concluded that the booking photographs of federal indictees who have not only been publicly named, but have appeared in open court, are agency records that may be withheld by the U.S. Marshals Service under Exemption 7(C). In so holding, the Sixth Circuit found that public disclosure of such photographs under FOIA may lead to embarrassment of an indictee and thus constitutes a legally cognizable invasion of privacy for purposes of Exemption 7(C). This holding not only undercuts the fundamental purposes of the Act, it is inconsistent with historical practice and precedent of this Court, and limits the news media’s ability to gather information and report on the activities of law enforcement and the administration of justice.

Contrary to the Sixth Circuit’s *en banc* opinion, there is no cognizable privacy interest in booking

photographs that permits their withholding under Exemption 7(C). This Court has instructed lower courts to evaluate privacy interests by examining Congressional intent and legal precedent. *See Nat'l Archives & Records Administration v. Favish*, 541 U.S. 157, 169 (2004); *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763–67 (1989). Neither the U.S. Constitution nor the common law gives rise to a privacy interest in photographs of persons who have been arrested, indicted, and have appeared in open court. *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that a person charged with a crime does not have a constitutional right of privacy in his booking photos); Restatement (Second) of Torts § 652D, Comment f. (stating that individuals that commit crimes are persons of public interest, meaning the public is entitled to information about their activity). Moreover, booking photos have historically been part of the public record and made available to the press and the public, and they are accessible under the vast majority of state public records laws.

Disclosure of federal booking photographs to the news media and public under FOIA serves the public interest. It has long been recognized that the news media plays an essential role in keeping the public informed about the operation of our criminal justice system. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). Access to indictees' booking photographs under the Act enhances journalists' ability to report on the activities of federal law enforcement and the courts. *See Reporters Comm.*, 489 U.S. at 773–75. Indeed, booking photographs not only serve as a record of official actions taken by the government, their public

dissemination by the news media allows for increased public scrutiny of those actions. Routine withholding of booking photographs of federal indictees under Exemption 7(C) obstructs the news media's ability to fulfill its duty of keeping the public informed as to matters of public concern.

For the reasons set forth herein, *amici* urge this Court to grant the petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S *EN BANC* DECISION IS INCONSISTENT WITH PRECEDENT OF THIS COURT AND CONTRARY TO THE PURPOSES OF FOIA.

FOIA was enacted to “ensure an informed citizenry, vital to the function of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (referencing the 1974 Source Book 38). The Act was “broadly conceived”; it was intended to “create a judicially enforceable public right to secure [official] information from possibly unwilling official hands.” *EPA v. Mink*, 410 U.S. 73, 80 (1973). Thus, while FOIA contains certain enumerated exemptions that permit the government to withhold certain types of agency records or portions thereof where applicable, *see* 5 U.S.C. §§ 552(b)(1)–(9), this Court has “often noted ‘the Act’s goal of broad disclosure’ and insisted that” its “exemptions be ‘given a narrow compass.’” *Milner v. Dep’t of the Navy*, 562 U.S. 562 (2011) (citations omitted).

Exemption 7(C) of FOIA permits an agency to withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Thus, for Exemption 7(C) to apply, a record (1) must be compiled for law enforcement purposes, and (2) its release must be reasonably expected to constitute an invasion of personal privacy that is (3) found to be “unwarranted,” after a weighing of both the private and public interests at stake. *See Detroit Free Press v. Dep’t of Justice*, 73 F.3d 93, 96 (6th Cir. 1996). Application of Exemption 7(C) therefore depends upon the existence of a cognizable personal privacy interest recognized under common law or the Constitution. *See Nat’l Archives & Records Administration v. Favish*, 541 U.S. 157, 169 (2004); *Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763–67 (1989).

This Court has made clear that no constitutional right of privacy is violated by the distribution of booking photos taken of individuals charged with crimes. *See Paul v. Davis*, 424 U.S. 693, 712 (1976). In *Davis*, the booking photo of Edward Davis, who had been previously arrested for shoplifting, was distributed to the public by Louisville police along with photographs of other “active” shoplifters. *Id.* at 695–96. Like the booking photographs at issue in this case, at the time Mr. Davis’s photograph was distributed to the public he had already been “charged with shoplifting[.]” *Id.* at 696. However, “his guilt or innocence of that offense

had never been resolved.” *Id.* This Court held that Mr. Davis had no constitutional right to privacy that was violated by the government’s public distribution of his booking photo. *Id.* at 713. In so holding, the Court focused on the distinction between the private and public spheres. *Id.* Unlike matters that implicate constitutionally protected privacy interests, such as marriage, contraception, and familial relationships, arrests made by law enforcement are “official acts” and matters of public significance; where booking photographs concern persons who have been arrested, indicted, and appeared in open court where any member of the public has the right to attend and see them, there is no constitutional privacy interest affected by dissemination of those photographs. *See id.*

Likewise, the common law does not recognize a personal privacy interest in booking photos. To the contrary, it is well settled that the disclosure of truthful information regarding an accused person within the criminal justice system is not actionable as a privacy tort under common law. As set forth in the Restatement (Second) of Torts, “[t]hose who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed.” Restatement (Second) of Torts § 652D, Comment f. *See also Firth v. Associated Press*, 176 F. Supp. 671, 676 (D.S.C. 1959) (holding that the publication of a booking photo is not actionable as an invasion of privacy because the subject of a warrant who is arrested by government officials is a public figure whose arrest is a matter of public interest).

Further, this Court, citing the Restatement (Second) of Torts, has found that even where a privacy interest in certain information exists, that interest fades where the information is otherwise available to the public. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). The fact that a person has been arrested and indicted on federal criminal charges is information that is available to the press and the public regardless of whether that person's booking photograph is requested and released under FOIA. Because there can be no privacy interest in the fact of a person's arrest and indictment, there can be no privacy interest in official records, like booking photos, that document that fact.

Booking photographs have historically been made available to the press and the public by law enforcement agencies—a practice rooted in this country's longstanding tradition of openness of criminal proceedings. *See Globe Newspaper v. Superior Court*, 457 U.S. 596, 605–06 (1982). Law enforcement agencies have been taking photographs of arrestees since the dawn of modern photography. *See Sarah Boslaugh, Mug Shots, in THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AND ENCYCLOPEDIA* 1143, 1143 (Wilbur R. Miller, ed., 2012). Distribution of such photos became a tool to engage the public and assist in the act of policing. *See Jonathan Finn, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY* 10 (2009); *see also* David Ray Papke, *FRAMING THE CRIMINAL* 138 (1987). And, while other means of identification have since developed, federal and state law enforcement entities throughout the country continue to disseminate booking photos as a means of furthering

law enforcement objectives. Given this history of public dissemination of booking photos by law enforcement, indicted individuals cannot be said to have any reasonable expectation of privacy in their booking photos. And, consistent with this historical practice, as well as constitutional and common law norms, the majority of states do not recognize any personal privacy interest in booking photographs, and require that they be made available to the press and the public under state open records laws. *See Detroit Free Press, Inc. v. DOJ*, 829 F.3d 478, 490 (6th Cir. 2016) (*en banc*) (Boggs, J. dissenting).

Contrary to the splintered *en banc* decision of the Sixth Circuit, the mere potential for embarrassment does not give rise to a legally cognizable privacy interest for purposes of Exemption 7(C). As Petitioner argues, inquiries regarding privacy interests are objective by nature; the test for determining whether a privacy interest exists is not a subjective examination from the perspective of the individual alleging an invasion of privacy. *See Pet'r's Br.*, 24–25. Moreover, while it is certainly possible that an individual may experience embarrassment because of an arrest and indictment, such embarrassment, alone, does not give rise to a legally cognizable expectation of privacy in the fact of his or her arrest, or in official records, like booking photos, that document that fact. Indeed, the embarrassment associated with an arrest stems from the fact of the arrest itself—information that is unquestionably public knowledge, regardless of whether a corresponding booking photograph is disseminated or not. Such embarrassment provides no justification for limiting public access to booking photos or any other

official record of an arrest.

Nor does the fact that the internet is an available means to disseminate booking photos alter the analysis. The *en banc* majority's opinion notes that new technologies may allow for booking photos to stay in circulation longer, making them potential fodder for "idle internet searches[.]" *Detroit Free Press, Inc.*, 829 F. at 482. Yet the development and use of new methods for disseminating public information neither lessens the public interest in access to booking photographs nor gives rise to a legally cognizable privacy interest justifying their nondisclosure under Exemption 7(C). The mere fact that the booking photograph of an individual arrested and indicted on federal charges may be made available on the internet does not determine whether that booking photograph is exempt from FOIA's disclosure requirement.

In sum, the booking photos that were requested by Petitioner under FOIA do not implicate any cognizable privacy interest under the Constitution or the common law, and thus do not trigger application of Exemption 7(C). Persons who have been arrested and indicted within the federal criminal justice system simply do not have any recognized right of privacy vis-à-vis booking photographs taken at the time of their arrest. Because disclosure of such booking photos cannot reasonably be expected to constitute an unwarranted invasion of personal privacy, *see Detroit Free Press*, 73 F.3d at 96, Exemption 7(C) does not apply.

II. ACCESS TO BOOKING PHOTOGRAPHS ENABLES THE NEWS MEDIA TO PROVIDE THE PUBLIC WITH IMPORTANT INFORMATION ABOUT LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE.

An open, publicly accountable criminal justice system is a fundamental feature of our nation's system of government. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 574 (1980) (stating that the “presumption of openness inheres in the very nature of a criminal trial under our justice system”). Because not every member of the public is able to be present at all stages of the prosecution of a criminal case, the news media plays a critically important role in ensuring that the public is informed about what has transpired from an arrest to sentencing. Journalists’ ability to report on the criminal justice system is thus essential to keeping that system accountable to the public. *See Richmond Newspapers*, 448 U.S. at 573 (stating that press access and publication of trials contributes “to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . .”); *Kapellas v. Kofman*, 459 P.2d 912, 924 (Cal. 1969) (stating that “[n]ewspapers have traditionally reported arrests or other incidents involving suspected criminal activity, and courts have universally concluded that such events are newsworthy matters of which the public has the right to be informed”).

The news media also plays an important role in obtaining and disseminating information in government records, including records obtained through FOIA. As this Court explained in *Cox*

Broadcasting Corporation, “[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.” 420 U.S. at 495. Similarly, in the more than 50 years since FOIA’s enactment, Congress has frequently acknowledged the benefits to the public that flow from news media use of the Act. For example, the legislative history of the 1974 amendments to FOIA highlights FOIA’s usefulness as a tool for newsgathering, which led Congress to shorten the statutory timeframe for agency release of information that is in the public interest, and provide a fee benefit for representatives of the news media. See H.R. Rep. No. 92-1419, pt. 4, at 38 (1975).

Members of the news media frequently rely on booking photographs to effectively report on arrests, which are both an official act of law enforcement, and the first step in the criminal justice process. Indeed, it is so common for local and national television news to air booking photographs of arrestees when reporting on an arrest that the public has come to expect them to be shown, and question when they are not. See Larry McDermott, *Where are photos of church fire suspects?*, The (Springfield Mass.) Republican, Jan. 25, 2009, at C7, available at 2009 WLNR 1572643. Publication of booking photographs are, in short, a routine feature of reporting on both law enforcement activities and the criminal system that enhances journalists’ ability to communicate to the public what their “government is up to.” *Reporters Comm.*, 489 U.S. at 773—75.

Public dissemination of booking photos by the

news media can serve as a direct check on governmental activity. Among other things, it subjects law enforcement conduct during or around the time of an arrest to public scrutiny. *See Reporters Comm.*, 489 U.S. at 774. For example, the release of booking photos earlier this year of a Texas inmate, Christopher Johnson, showed that he had apparently been choked by booking officers when he attempted to smile while being photographed. Alfred Ng, “Sheriff’s deputies choke Texas inmate for grinning during mugshot: ‘Man, stop smiling!’ New York Daily News available at <http://nydn.us/1rfgZzQ> (last accessed Dec. 1, 2016). Press and public access to Mr. Johnson’s booking photos thereby revealed questionable conduct by law enforcement officers towards an arrestee, allowing the public the opportunity to evaluate the actions of the officers. *See Favish*, 541 U.S. at 174.

There can be no question that booking photos not only serve as an official record of an arrest, memorializing official actions taken by law enforcement, but can also provide the public with meaningful additional information, including crucial context, that the mere fact of an arrest—information that is already public—does not alone provide. Indeed, the publication by members of the news media of booking photos has in numerous instances helped to inform the public and shaped the public’s perception of current events. One recent example involves Stanford University student Brock Turner who, after being arrested and charged with sexual assault and rape, became the subject of fierce public debate regarding the media’s depiction of him. *See* Alex Johnson, “After Months of Requests, Mugshots of Stanford Rapist Brock Turner Finally Emerge,” NBC

News, <http://nbcnews.to/1PCDw1w> (last visited Dec. 1, 2016). Once released, his booking photograph (reproduced in Appendix A) provided the public with an accurate image of Turner at the time of his arrest, an image far different from the one depicted in other photographs that were being used to report on his trial. Publication of Turner's booking photograph thus contributed meaningfully to public debate about his treatment within the criminal justice system.

The significant value to the public of access to booking photographs is underscored by the role that they have played in informing our understanding of important historical events. Many booking photos have come to symbolize critical moments in American history. *See* Raynal Pellicer, *MUG SHOTS: AN ARCHIVE OF THE FAMOUS, INFAMOUS, AND MOST WANTED* (2008) (containing booking photographs of, among others, Emma Goldman, Charles Ponzi, Al Capone, John Dillinger, Bruno Hauptmann, Hermann Goering, Julius and Ethel Rosenberg, Rosa Parks, Martin Luther King, Jr., Malcolm X, Janis Joplin, Jane Fonda, Lee Harvey Oswald, Sirhan Sirhan, members of The Weathermen, John Gotti, O.J. Simpson, Perry Smith, and Richard Hickock) (reproduced in Appendix A). The public's interest in access to these photos is not voyeuristic, but is rather an interest in understanding the broader social context behind the arrest such photos serve to record. For example, the booking photograph of civil rights icon Rosa Parks (reproduced in Appendix A) depicts dignity and resolve in the face of a government enforced system of racial segregation. Her image conveys a powerful commitment to her act of civil disobedience, in addition to serving as an official record of the fact that

she was arrested.

The decision of nine judges of the Sixth Circuit, sitting *en banc*, that public access to booking photos creates a potential for embarrassment amounting to an invasion of privacy substantial enough to warrant nondisclosure under Exemption 7(C) of FOIA, limits the news media's ability to effectively report on the conduct of law enforcement and the administration of justice. Even assuming, *arguendo*, that individuals arrested and indicted on federal criminal charges had some legally cognizable privacy interest in their booking photographs, which they do not, such privacy interest would be far outweighed by the public's powerful interest in access. For that reason, too, Exemption 7(C) does not apply.

For the reasons set forth herein, *amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the *en banc* decision of the Sixth Circuit.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court GRANT the petition for Writ of Certiorari.

Respectfully submitted,

BRUCE D. BROWN

Counsel of Record

KATIE TOWNSEND

ADAM A. MARSHALL

The Reporters Committee
for Freedom of the
Press

1156 15th ST, NW., Suite
1250

Washington, DC 20005

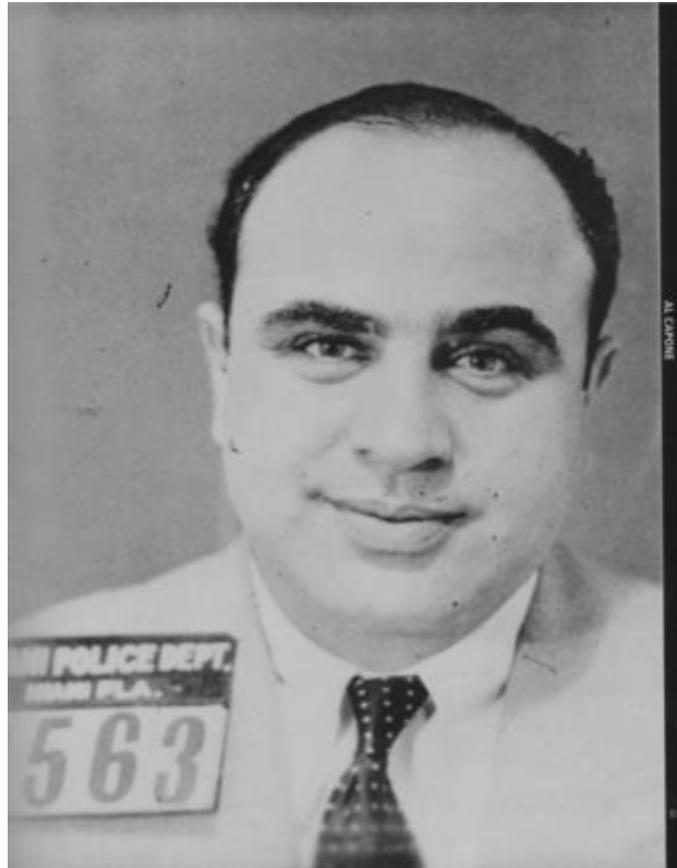
202.795.9301

bbrown@rcfp.org

December 28, 2016

APPENDIX A¹

Examples of Historical and Infamous Booking Photos



Al Capone

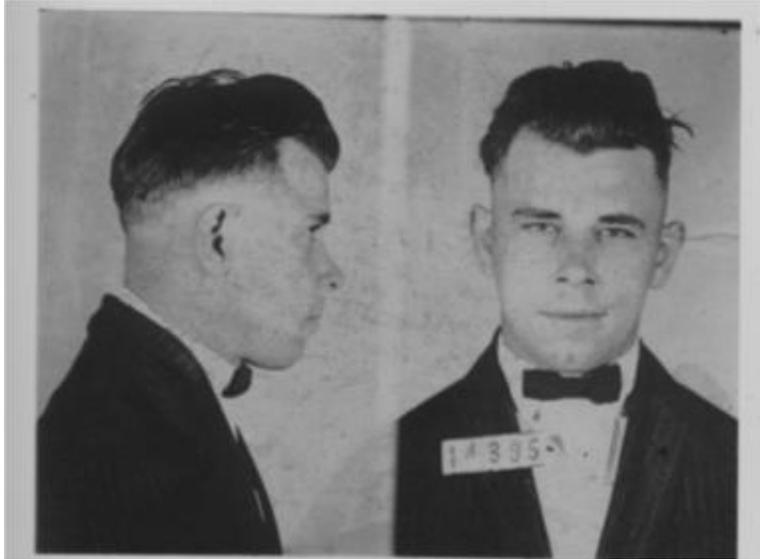
¹ Unless otherwise noted, booking photos in this appendix are taken from Raynal Pellicer, *MUG SHOTS: AN ARCHIVE OF THE FAMOUS, INFAMOUS, AND MOST WANTED* (2008).



Tom Delay²

² Tom Delay's booking photograph taken from "Thomas D. Ley" Sourcewatch by The Center for Media and Democracy *available at* http://www.sourcewatch.org/index.php/Thomas_D._DeLay (last visited Dec. 14, 2016).

A-3



John Dillinger

A-4



Jane Fonda

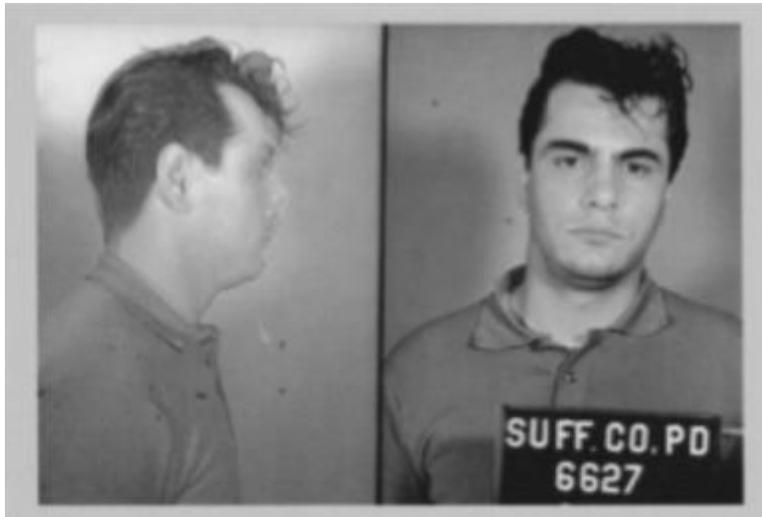


Hermann Goering

A-5



Emma Goldman



John Gotti

A-6

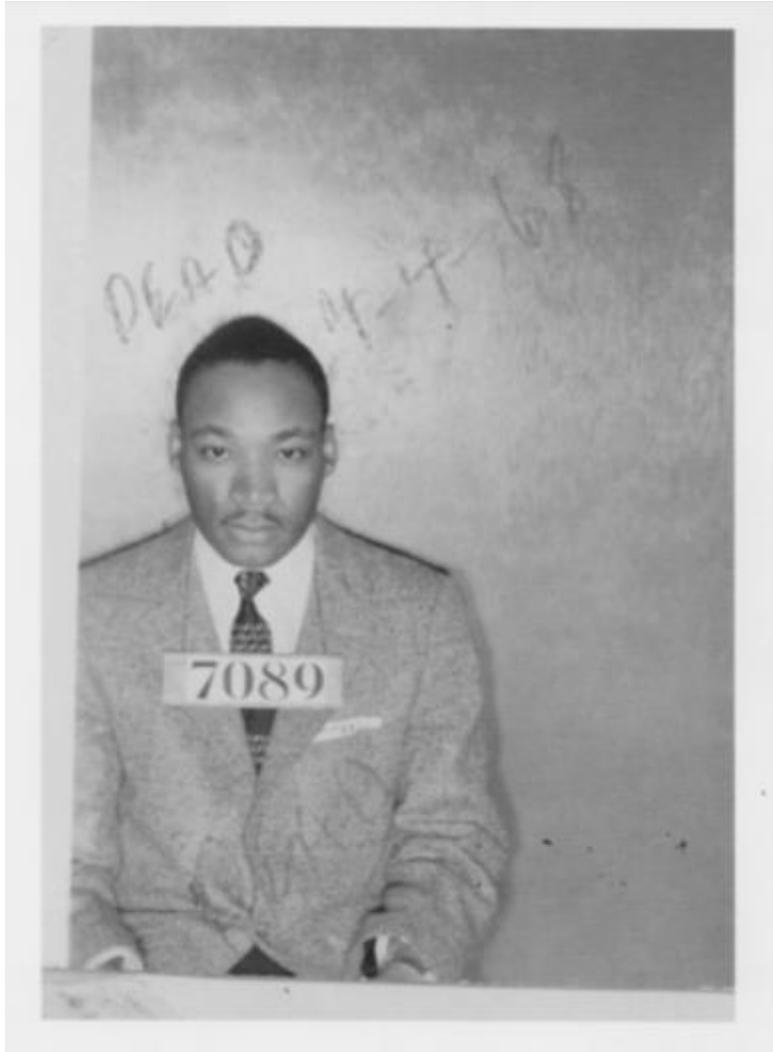


Bruno Hauptmann

A-7

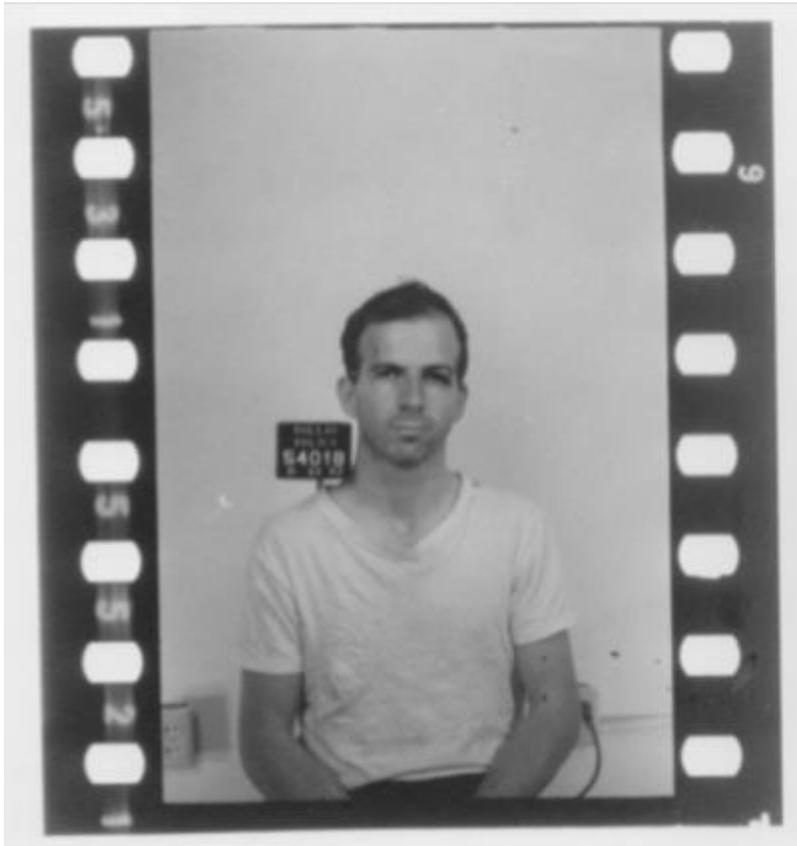


Janis Joplin



Martin Luther King, Jr.

A-9



Lee Harvey Oswald

A-10



Rosa Parks

A-11



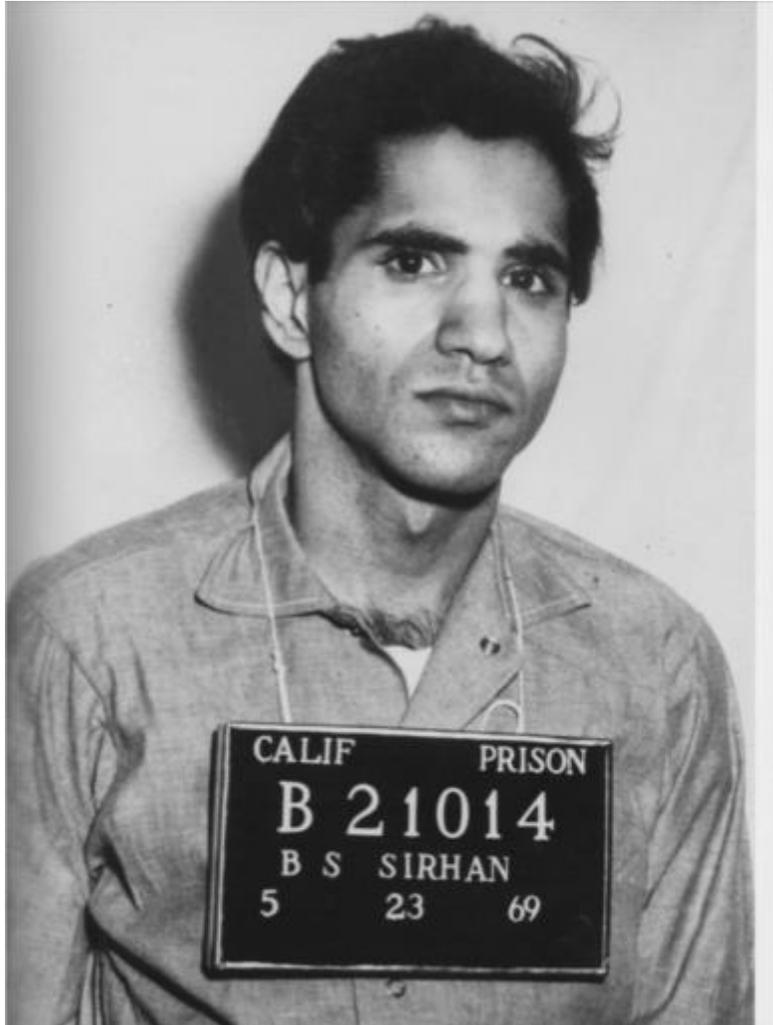
Charles Ponzi

A-12



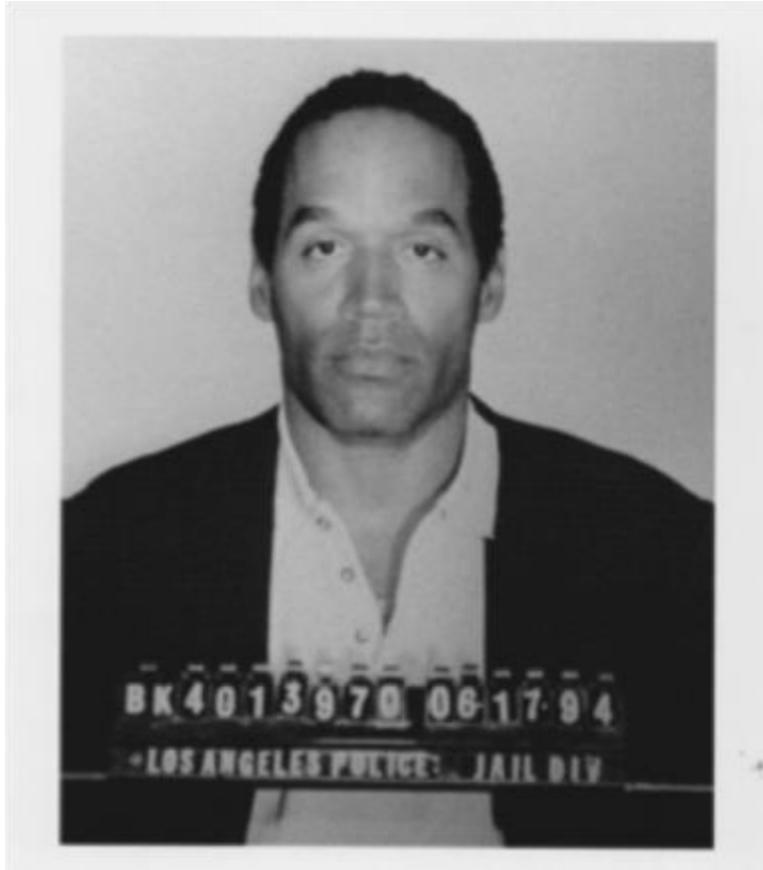
Julius and Ethel Rosenberg

A-13



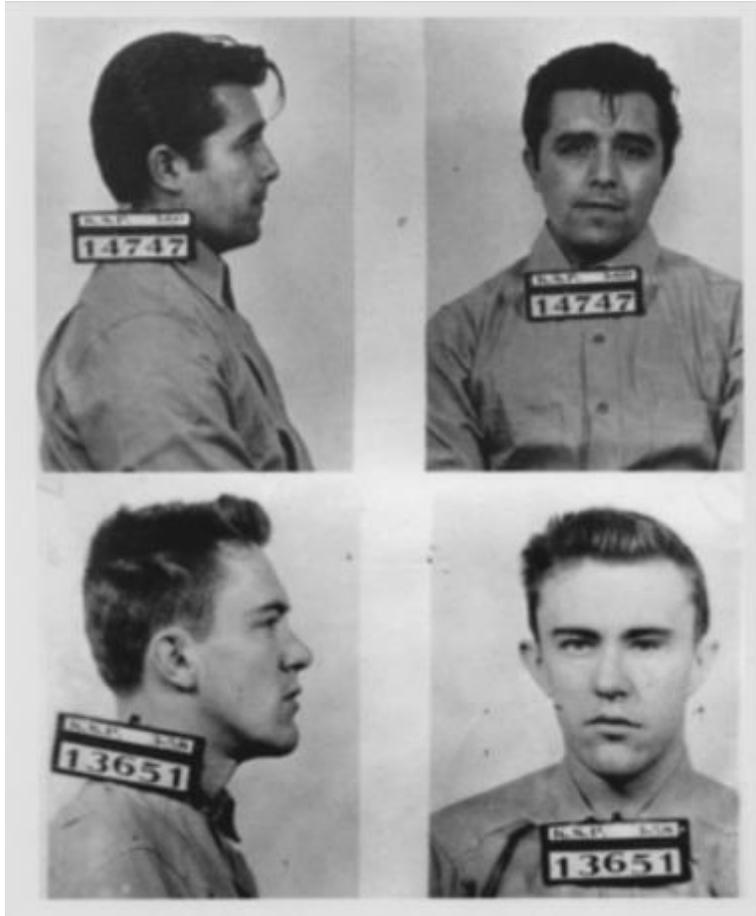
Sirhan Sirhan

A-14

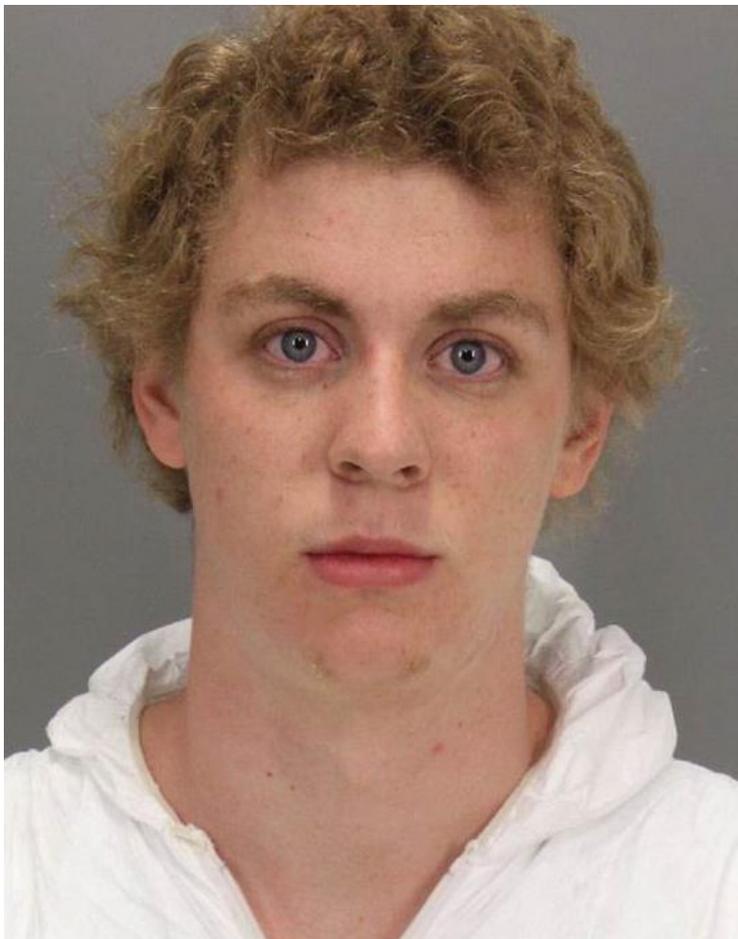


O.J. Simpson

A-15



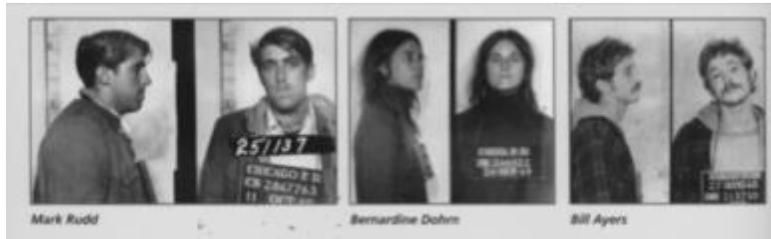
Perry Smith and Richard Hickock



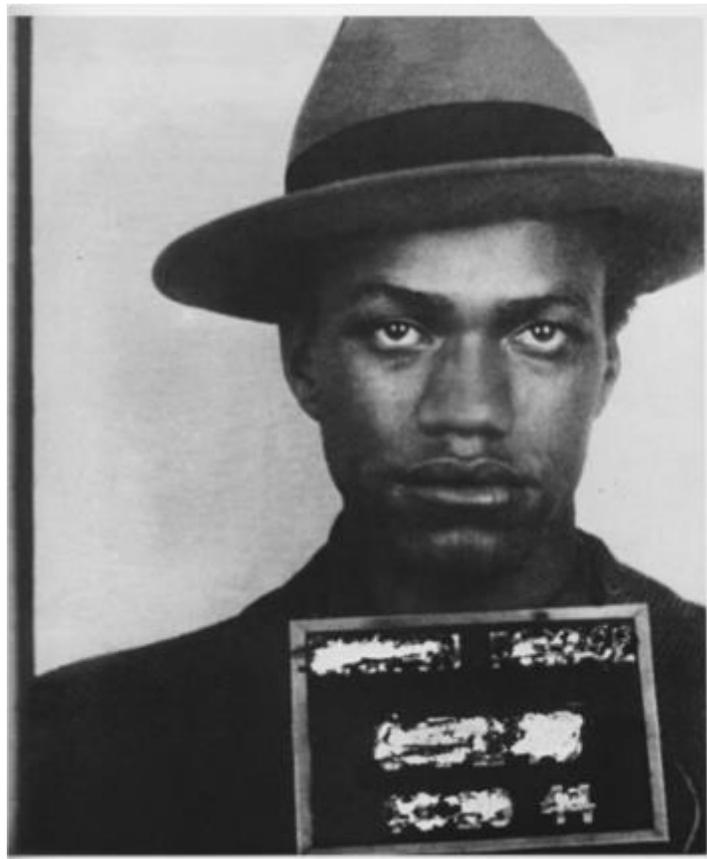
Brock Turner³

³ Brock Turner's booking photo taken from Alex Johnson, "After Months of Requests, Mugshots of Stanford Rapist Brock Turner Finally Emerge," NBC News, *available at* <http://nbcnews.to/1PCDwlw> (last visited Dec. 1, 2016).

A-17



The Weathermen



Malcom X

APPENDIX B

Identity and Interest of the *Amici Curiae*:

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.

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

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.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Bloomberg L.P. operates Bloomberg News, a 24-hour global news service based in New York with more than 2,400 journalists in more than 150 bureaus around the world. Bloomberg supplies real-time business, financial, and legal news to the more than 319,000 subscribers to the Bloomberg Professional service world-wide and is syndicated to more than 1000 media outlets across more than 60 countries. Bloomberg television is available in more than 340 million homes worldwide and Bloomberg radio is syndicated to 200 radio affiliates nationally. In addition, Bloomberg publishes Bloomberg Businessweek, Bloomberg Markets and Bloomberg Pursuits magazines with a combined circulation of 1.4 million readers and Bloomberg.com and Businessweek.com receive more than 24 million visitors each month. In total, Bloomberg distributes news, information, and commentary to millions of readers and listeners each day, and has published more than one hundred million stories.

Cable News Network, Inc. (“CNN”), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to the following: nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news websites in the United States; CNN Newsource, the world’s most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The California Newspaper Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and newspaper websites throughout California.

Chicago Tribune Company, LLC, publishes the Chicago Tribune, one of the largest daily newspapers in the United States. Its popular news and information website, www.chicagotribune.com, attracts a national audience.

Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of The Wall Street Journal, Barron’s, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world’s largest newsgathering operations, with more than 1,800 journalists in nearly fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow

Jones VentureSource. Dow Jones is a News Corporation company.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

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

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership in cable television networks such as A&E, HISTORY, Lifetime and ESPN; majority ownership of global ratings agency Fitch Group; Hearst Health, a group of medical information and services businesses; 30 television stations such as WCVB-TV in Boston and KCRA-TV in Sacramento, Calif., which reach a combined 19 percent of U.S. viewers; newspapers such as the Houston Chronicle, San Francisco Chronicle and Albany Times Union, more than 300 magazines around the world including Cosmopolitan, ELLE, Harper's BAZAAR and Car and Driver; digital

services businesses such as iCrossing and KUBRA; and investments in emerging digital and video companies such as Complex, BuzzFeed, VICE and AwesomenessTV.

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are two of the largest daily newspapers in the United States. Their popular news and information websites, www.latimes.com and www.sandiegouniontribune.com, attract audiences throughout California and across the nation.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

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

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and

quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

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.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of more than 26 million listeners each week via more than 1000

noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including NPR.org and NPR's applications, which see more than 30 million unique visitors each month. National Public Radio, Inc. has no parent company and issues no stock.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

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

News Corp is a global, diversified media and information services company focused on creating and distributing authoritative and engaging content to consumers throughout the world. The company comprises leading businesses across a range of media,

including: news and information services, digital real estate services, book publishing, digital education, and sports programming and pay-TV distribution.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

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

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.

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

APPENDIX C

Additional *amici* counsel:

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

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

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

Jonathan Bloom
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
*Counsel for The Association of American Publishers,
Inc.*

Randy L. Shapiro
Global Media Counsel
Bloomberg LP

731 Lexington Avenue
New York, NY 10022

David C. Vigilante
Johnita P. Due
Cable News Network, Inc.
1 CNN Center
Atlanta, GA 30303

Jim Ewert, General Counsel
Nikki Moore, Legal Counsel
California Newspaper Publishers Association
2701 K St.
Sacramento, CA 95816

Karen H. Flax
Tribune Publishing Company
435 North Michigan Ave.
Chicago, IL 60611
kflax@tribune.com

Jason P. Conti
Jacob P. Goldstein
Dow Jones & Company, Inc.
1211 Avenue of the Americas
New York, NY 10036
Counsel for Dow Jones & Company, Inc.

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

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

Jonathan Donnellan
Kristina Findikyan
Hearst Corporation
Office of General Counsel
300 W. 57th St., 40th Floor
New York, NY 10019

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

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

David S. Bralow
General Counsel
MediaNews Group
448 Lincoln Highway
Fairless Hills, PA 19030

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

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*

Jonathan Hart
Ashley Messenger
Micah Ratner
National Public Radio, Inc.
1111 North Capitol St. NE
Washington, D.C. 20002

Robert A. Bertsche (BBO #554333)
Prince Lobel Tye LLP
100 Cambridge Street
Boston, MA 02114
*Counsel for the New England First Amendment
Coalition*

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

Genie Gavenchak
News Corporation
1211 Avenue of the Americas
New York, NY 10036
Counsel for News Corporation

Kurt Wimmer
Covington & Burling LLP
850 10th Street NW
Washington, DC 20001
Counsel for the News Media Alliance

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
*Counsel for Radio Television Digital News
Association*

Bruce E. H. Johnson
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Counsel for The Seattle Times Co.

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

John B. Kennedy
James A. McLaughlin
Kalea S. Clark
The Washington Post
1301 K St. NW
Washington, DC 20071