

No. 19-5278

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

CABLE NEWS NETWORK, INC.,
Plaintiff-Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION,
Defendant-Appellant.

On Appeal from the
United States District Court for the District of Columbia
No. 1:17-cv-01167-JEB

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 29 MEDIA
ORGANIZATIONS IN SUPPORT OF APPELLEE**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
PURSUANT TO CIRCUIT RULE 28(a)(1)**

A. Parties and amici curiae

Except for the following amici, all parties, intervenors, and amici appearing before the district court and in this Court are listed in Appellant's brief: Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press, BuzzFeed, The Center for Public Integrity, The Daily Beast Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, Hearst Corporation, Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MediaNews Group Inc., National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, TIME USA, LLC, Tribune Publishing Company, Tully Center for Free Speech, and The Washington Post.

B. Rulings under review

References to the rulings at issue appear in Appellee's brief.

C. Related cases

This case was previously before this court. *See Cable News Network, Inc. v. Federal Bureau of Investigation*, Nos. 18-5041, 18-5118, 2018 WL 3868760 (D.C. Cir. 2019). Counsel for amici are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

ALM Media, LLC is privately owned, and no publicly held corporation owns 10% or more of its stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

BuzzFeed Inc. is a privately owned company, and National Broadcasting Company (NBC) owns 10% or more of its stock.

The Center for Public Integrity is a nonprofit organization with no parent corporation and no stock.

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MediaNews Group Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

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

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

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The News Leaders Association has no parent corporation and does not issue any stock.

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.

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The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

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

Time USA, LLC is a privately held limited liability company. No publicly held corporation owns 10% or more of its stock.

Tribune Publishing Company is a publicly held corporation. Alden Global Capital and affiliates own over 10% of Tribune Publishing Company's common stock. Nant Capital LLC, Dr. Patrick Soon-Shiong and California Capital Equity, LLC together own over 10% of Tribune Publishing Company's stock.

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

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

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GLOSSARY

Archey Declaration	The declaration of FBI Special Agent David Archey, executed on October 13, 2017, and filed under seal in support of the FBI's motion for summary judgment
CNN	Cable News Network, Inc.
Comey Memos	A series of memoranda prepared by former FBI Director James Comey about his discussions with President Donald Trump
FBI	Federal Bureau of Investigation
FOIA or the Act	Freedom of Information Act

**IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND
THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF**

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b).

Amici are the Reporters Committee for Freedom of the Press, ALM Media, LLC, The Associated Press, BuzzFeed, The Center for Public Integrity, The Daily Beast Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, Hearst Corporation, Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MediaNews Group Inc., National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, TIME USA, LLC, Tribune Publishing Company, Tully Center for Free Speech, and The Washington Post.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an

unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Full descriptions of other amici are included as Appendix A.

Amici are news organizations and organizations that advocate on behalf of journalists and the press. Amici or the news outlets and reporters they represent frequently rely upon access to court records to report on matters of public concern. Accordingly, amici have a powerful interest in ensuring that courts properly apply the First Amendment and common law rights to access judicial records. This case concerns access to court records in a Freedom of Information Act (“FOIA” or the “Act”) lawsuit. Because FOIA cases are often of interest to the public news media, amici have a particular interest in this Court’s application of the First Amendment and common law rights of access here. Amici write to explain the importance of public access to court records in this case and in other FOIA lawsuits.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this

brief; and no person—other than amici, its members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(d) CERTIFICATION

Pursuant to D.C. Circuit Rule 29(d), amici certify that this brief is necessary to provide the perspective of media organizations and journalists. Amici submit this brief to address the vital interests served by the First Amendment and common law rights of access to court records, which enable the press to fulfill its constitutional role of informing the public about the judicial system. Amici are not aware of any other party filing an amicus brief in support of Plaintiff-Appellee.

SUMMARY OF ARGUMENT

Plaintiff-Appellee Cable News Network, Inc. (“CNN”) seeks access to sealed portions of a declaration by FBI Deputy Assistant Director David W. Archey (the “Archey Declaration”) that Defendant-Appellant the Federal Bureau of Investigation (“FBI”) submitted entirely under seal and *in camera* to the district court in a FOIA lawsuit brought by CNN. CNN’s FOIA request underlying the lawsuit sought memoranda written by then-FBI Director James Comey detailing his interactions with President Trump (the “Comey Memos”). The FBI submitted the Archey Declaration to the district court to explain why, in its view, the Comey Memos could be withheld under FOIA’s exemptions.

The Comey Memos are of immense public interest. They were incorporated into a report by Special Counsel Robert Mueller into allegations of Russian interference in the 2016 presidential election, including links between the Russian government and associates of the Trump Campaign. Because of this public interest, the news media has reported extensively about the Special Counsel investigation and report and the Comey Memos. The public has a significant and legitimate interest in understanding the government’s justification for withholding the Comey Memos, which is detailed in the Archey Declaration.

The Archey Declaration is subject to both the First Amendment and common law presumptions of access to court records. The First Amendment and

common law rights of access to judicial records give the public insight into how the judiciary decides the cases before it, fostering public trust of the judiciary and the fair administration of justice. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017). The public interest peaks when a lawsuit involves the federal government, as “the public’s right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.” *See, e.g., Fed. Trade Comm’n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). In a FOIA case, such access assures the public that the judiciary is performing its statutory and constitutional role in determining whether an agency has properly invoked a FOIA exemption, rather than simply rubber stamping the agency’s determination.

FOIA’s statutory exemptions do not govern the sealing or unsealing of court records. The FBI’s argument to the contrary upends both the common law and First Amendment rights of access by importing FOIA’s exemptions into them. Not only does the FBI’s position find no basis in precedent or FOIA’s text, but it also contradicts the purposes of the common law and First Amendment rights of access and would veil information about judicial decisionmaking in FOIA cases.

For the reasons herein, amici urge the Court to affirm the district court’s holding that the common law right of access applies to the information redacted from the Archey Declaration and requires its disclosure.

ARGUMENT

I. The public has a strong interest in the Comey Memos and the government's justification for withholding them.

The public interest in Special Counsel Robert Mueller's investigation and report, the Comey Memos, and the government's justification for withholding the memos is extraordinarily strong. The Special Counsel's investigation and report concerned allegations of interference by Russia in the 2016 presidential election, including "links or coordination between the Russian government and individuals associated with the Trump Campaign." 1 Robert S. Mueller, III, U.S. Dep't of Justice, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* 1 (2019), <https://perma.cc/7UY9-YBSS>. Throughout the Special Counsel's investigation, the press and public eagerly followed Mr. Mueller's work and findings. Because of their importance to the country, the Special Counsel's investigation and report were the subject of numerous news reports. See, e.g., *Excerpts and Analysis From the Mueller Report*, N.Y. Times (Apr. 18, 2019), <https://perma.cc/BA9H-ATQZ>; Aruna Viswanatha & Sadie Gurman, *Mueller Report Lays Out Trump's Attempts to Curtail Inquiry*, Wall St. J. (Apr. 18, 2019), <https://on.wsj.com/3bjrE4f>.

Within the Special Counsel's report lies another record of immense public interest: the Comey Memos. See *Cable News Network, Inc. v. Fed. Bureau of Investigation*, 384 F. Supp. 3d 19, 21 (D.D.C. 2019). Concerned that the President

might distort the nature of their meetings, then-FBI Director Comey authored several memoranda that described his meetings and conversation topics with the President shortly after they occurred. *See id.* After the President fired Comey, the news media reported on the Comey Memos, and Congress eventually released redacted versions of the memos to the public. *See id.*

Although portions of the Comey Memos have been released, other portions remain redacted. Reporters and the public have spent hours poring over the redacted pages of the Comey Memos in order to better understand Comey's meetings with the President and the lead-up to his dismissal. *See, e.g.,* Chris Geidner, *The Comey Memos Have Been Released. Here's What He Said About Trump.*, BuzzFeed News (Apr. 20, 2018, 1:27 AM), <https://perma.cc/J29D-BQY3>; David A. Graham, *Four Things the Comey Memos Reveal*, Atlantic (Apr. 20, 2018), <https://perma.cc/4G8T-6XXL>; Byron Tau & Michael C. Bender, *Comey Memos Reveal Trump's Early Doubts About Flynn*, Wall St. J. (Apr. 20, 2018, 6:54 AM), <https://on.wsj.com/2U8K2ad>.

The press continues to report about the Special Counsel's investigation and report and the Comey Memos. *See, e.g.,* Michael Balsamo & Eric Tucker, *Feds Dropping Case for 2 Russian Companies in Troll Probe*, Associated Press (Mar. 16, 2020), <https://perma.cc/7XYW-NUF5?type=image>; Spencer S. Hsu & Devlin Barrett, *Judge Cites Barr's 'Misleading' Statements in Ordering Review of Mueller*

Report Redactions, Wash. Post (Mar. 5, 2020, 6:49 PM), <https://wapo.st/3dIZUYN>; Sharon LaFraniere, *Barr Increasingly Appears Focused on Undermining Mueller Inquiry*, N.Y. Times (Mar. 6, 2020), <https://perma.cc/NN84-T5QX>; Jason Leopold, Emma Loop & Anthony Cormier, *Mueller Memos Part 6: What Witnesses Told Investigators About Trump & Russia*, BuzzFeed News (Mar. 2, 2020, 11:49 PM), <https://perma.cc/6LTF-NK4K>; Nick Mutch, *Christopher Steele Whacks Mueller Report and 'Bad Faith' Team Trump*, Daily Beast (Mar. 7, 2020, 2:54 AM), <https://perma.cc/5D35-3JSM>; Jeremy Stahl, *Appeals Court Affirms That the Trump Administration Has to Release the Unredacted Mueller Report*, Slate (Mar. 10, 2020, 3:47 PM), <https://perma.cc/HEE6-KA27>; Byron Tau, *Judge Questions Barr's Handling of Mueller Report, to Review Unreleased Portions*, Wall St. Journal (Mar. 5, 2020, 8:34 PM), <https://on.wsj.com/2UD5x34>.

The FBI submitted several declarations, including the Archey Declaration, to explain why it believed the Comey Memos could be withheld under FOIA, and the district court relied on those declarations when it granted the FBI's first motion for summary judgment in CNN's FOIA lawsuit. *See Cable News Network v. Fed. Bureau of Investigation*, 401 F. Supp. 3d 187, 190 (D.D.C. 2019). While several of those declarations have been released, the government continues to withhold portions of the Archey Declaration. The public has a strong interest in

understanding the basis for the government’s position and the district court’s decision on the first motion for summary judgment that the Comey Memos could be withheld. Accordingly, the public has a strong interest in the full information contained in the Archey Declaration.

II. Reporters and the public rely on unsealed judicial records, including in FOIA cases, to understand the judiciary’s decisionmaking process.

- A. Unsealed records from FOIA cases have revealed newsworthy information that informs the public’s understanding of the judicial system.

News organizations have used records that were initially filed under seal and later unsealed in FOIA cases to report about matters of public concern and help the public understand how courts evaluate and make decisions in FOIA lawsuits. For example, an unsealed transcript of an ex parte portion of a status conference in *Citizens for Responsibility & Ethics in Washington. v. U.S. Department of Justice* (“*CREW*”)—a FOIA case—made national news.

In that case, CREW filed a FOIA request for all documents relating to “any investigation or inquiry” by the FBI’s Office of Professional Responsibility relating to former FBI Deputy Director Andrew McCabe. *See* Complaint at 1, *CREW*, No. 1:18-cv-1766-RBW (D.D.C. July 30, 2018), ECF No. 1. On September 30, 2019, Judge Reggie B. Walton of the United States District Court for the District of Columbia held a status conference in which he closed the courtroom to CREW’s attorneys and the public to discuss with only the

Department of Justice its justification for withholding records based on an ongoing law enforcement investigation of McCabe. *See* Transcript of Status Conference at 2–3, *CREW*, No. 1:18-cv-1766-RBW (D.D.C. Feb. 14, 2020), ECF No. 54-3, available at <https://perma.cc/57BB-CACQ>; Josh Gerstein, *Judge Slams Feds Over Murky Stance on McCabe*, Politico (Nov. 14, 2019, 7:45 PM), <https://perma.cc/JCQ5-2FDG>.

Upon *CREW*'s motion, *see CREW*, No. 1:18-cv-1766-RBW (D.D.C. Nov. 26, 2019), ECF No. 40, Judge Walton later unsealed the transcript of the ex parte portion of the status conference, revealing how he assessed the Department of Justice's legal positions. For instance, when the Department of Justice requested three more months to determine whether McCabe would be prosecuted, Judge Walton was skeptical. *See* Transcript of Status Conference at 5–6, *CREW*, No. 1:18-cv-1766-RBW (D.D.C. Feb. 14, 2020), ECF No. 54-3. He explained, “[H]aving been a part of the prosecution for a long time and respecting the role that prosecutors play in the system[,] I just think the integrity of the process is being unduly undermined by inappropriate comments and actions on the part of people at the top of our government.” The government had to do something to move the FOIA proceedings along, Judge Walton said, because a three months delay was “too [long].” *Id.* at 6.

The unsealed transcript provided crucial information about how the district court handled CREW's FOIA lawsuit. The transcript revealed that the district court independently assessed the validity of the government's assertions and properly performed its judicial function. Though the news media did not file the FOIA request at issue in *CREW*, reporters used the unsealed transcripts to provide the public with more context about the functioning of the executive branch, specifically with respect to McCabe's firing. See C. Ryan Barber, *Justice Dept. Won't Pursue Case Against Andrew McCabe, Ending Uncertainty*, Law (Feb. 14, 2020, 12:40 PM), <https://bit.ly/3bh5VK9>; Charlie Savage & Adam Goldman, *William Barr Moves to Take the Reins of Politically Charged Case*, N.Y. Times (Feb. 14, 2020), <https://perma.cc/Z5KT-Z5LB>.

CREW's lawsuit underscores the need for public access to judicial records in FOIA cases. Such access informs the public about how the judiciary assesses the government's justifications for withholding public records. In addition, most FOIA cases in which the news media could seek access to judicial records will not be brought by the press. While in this case a media party happens to be seeking to unseal records in their underlying FOIA lawsuit, media entities file a small fraction of the FOIA requests submitted to the federal government. See Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1381 (2016) (noting that commercial resellers of information file the vast majority of FOIA requests to the agencies

studied); Cory Schouten, *Who Files the Most FOIA Requests? It's Not Who You Think*, Colum. J. Rev. (Mar. 17, 2017), <https://perma.cc/UTQ3-DCU4> (noting that news media entities file only around 7.6 percent of all FOIA requests). The same is true of FOIA lawsuits. See FOIA Project Staff, *News Reporters Drive Growth in Media FOIA Litigation*, FOIA Project (Jan. 9, 2017), <https://perma.cc/54JR-N65Y> (noting that at its peak, media-filed FOIA lawsuits represented about 10.8 percent of all FOIA lawsuits). The right of access to judicial records is essential to the press's ability to inform the public about how the judicial branch handles FOIA cases brought by all kinds of requesters.

B. Unsealed records provide the public with valuable insight into the judicial branch and matters of public concern.

The news media frequently relies on unsealed judicial records in a variety of cases beyond FOIA lawsuits to report on newsworthy information to the public and enhance public understanding about judicial decisionmaking.

For example, after it was unsealed by this Court, the news media reported on affidavits submitted by Special Counsel Patrick Fitzgerald to support a subpoena issued to Judith Miller, a journalist who was jailed before eventually testifying before a grand jury regarding the leak of CIA operative Valerie Plame's identity. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006). In 2005, this Court held that Miller, journalist Matthew Cooper, and Time, Inc.—who were also subpoenaed—could be compelled to testify. See *In re Grand*

Jury Subpoena, Judith Miller, 397 F.3d 964, 971–73 (D.C. Cir. 2005) (per curiam) (holding that even if a common law reporters privilege protected Miller and the others from testifying, it was overcome), *republished and partially unsealed in* 438 F.3d 1141 (D.C. Cir. 2006). When the Court initially issued its opinion, part of Judge Tatel’s concurring opinion was redacted because it revealed information in two sealed affidavits submitted by Special Counsel Fitzgerald. *Compare In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 1002 (Tatel, J., concurring) (redacted), *with In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1180 (D.C. Cir. 2006) (Tatel, J., concurring) (partially unredacted). Thus, while Judge Tatel found that Miller’s testimony was both “critical and unobtainable from any other source,” he originally could not publicly provide details that justified this determination. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 1002 (Tatel, J., concurring). Indeed, Judge Tatel’s concurrence originally publicly stated that the government’s “voluminous classified filings” satisfied the standard, with the detailed explanation redacted. *Id.*

After more information about the Plame investigation became publicly available, the Court partially granted news organizations’ motion to unseal the concurring opinion. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1140. The Court also *sua sponte* unsealed parts of one of Special Counsel Fitzgerald’s affidavits upon which it relied in concluding that Miller’s evidence

was critical to the grand jury investigation. *Id.* The Court noted that “[i]f the public is to see our reasoning, it should also see what informed that reasoning.” *Id.*; see also *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–155 (D.C. Cir. 2007) (ordering further unsealing of Judge Tatel’s concurrence and Special Counsel Fitzgerald’s two affidavits).

The affidavits’ release allowed reporters and the public to understand Judge Tatel’s concurrence holding that Miller’s testimony was particularly necessary for the grand jury investigation. See David Johnston, *New Details Revealed on C.I.A. Leak Case*, N.Y. Times (Feb. 4, 2006), <https://perma.cc/ELA5-TCAA>. The unsealed documents also provided insight into the events that had led to investigating Miller. See Marcy Wheeler, *At About the Time He Subpoenaed Judy Miller, Patrick Fitzgerald Interviewed Cheney a Second Time*, emptywheel (Oct. 4, 2011), <https://perma.cc/HD8Z-TTY3> (noting that Special Counsel Fitzgerald issued Miller’s subpoena and wrote one of the supporting affidavits around the same time he spoke with Vice President Dick Cheney). Moreover, the unsealed concurrence provided the public valuable insight into how courts balance the reporters privilege with grand jury subpoenas. See, e.g., David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 Harv. C.R.-C.L. L. Rev. 473, 505–08 (2013)

(discussing the breadth of the reporter’s privilege after Miller and Judge Tatel’s concurrence).

In another instance, in 2018, Chief Judge Beryl Howell unsealed an impeachment referral report from the Watergate grand jury known as the “road map.” See Josh Gerstein, *Judge Orders Partial Release of Watergate ‘Road Map’*, Politico (Oct. 11, 2018, 9:45 PM), <https://perma.cc/AR4E-VE6M>. The document, nearly 45 years old, detailed evidence relevant to President Nixon’s involvement in Watergate. See Stephen Bates et al., *The Watergate ‘Road Map’ & the Coming Mueller Report*, Lawfare (Sept. 14, 2018, 12:21 PM), <https://perma.cc/ER32-HRKQ>. The grand jury submitted the road map to former Chief Judge John Sirica, who then approved its transmission to the House of Representatives for consideration in impeachment proceedings. *Id.* Following its unsealing in 2018, the press analyzed the road map and noted possible parallels with the Special Counsel investigation into President Trump. See Jack Goldsmith & Benjamin Wittes, *The Watergate Road Map: What It Says and What It Suggests for Mueller*, Lawfare (Oct. 31, 2018, 6:15 PM), <https://perma.cc/KLG8-646X>; Carrie Johnson, *Long Sealed, Newly Released Watergate ‘Road Map’ Could Guide Russia Probe*, NPR (Nov. 4, 2018, 7:00 am), <https://perma.cc/U8UW-LWD5>.

Unsealed records can also show how and why courts reach a decision. For example, in April 2019, San Francisco police officers and FBI agents raided the

home of journalist Bryan Carmody looking for a police report he had obtained relating to the death of a local public defender. *See* Thomas Fuller, *San Francisco Police Raid on Journalist Alarms Free Press Advocates*, N.Y. Times (May 13, 2019), <https://perma.cc/7QYC-U584>. Because the California Shield Law, Cal. Evidence Code § 1070; Cal. Penal Code § 1524(g), and California Constitution, Cal. Const. art. 1 § 2(b), protect journalists from being forced to reveal confidential sources or journalistic work product, many questioned how the police obtained warrants to search his home, phone, and office and why courts would approve those search warrants. *See* Fuller, *supra*. Unsealed court records later revealed that law enforcement officials minimized Carmody’s journalistic status when they sought court approval of the warrants and failed to mention obvious signs that he was a journalist. *See* Maria Dinzeo, *Judge Unseals Warrant Used to Search Journalist’s Home*, Courthouse News Servs. (Aug. 13, 2019), <https://perma.cc/FRH2-AGFK> (explaining that one warrant affidavit described Carmody as someone who “makes a career out of producing/selling hot news stories”); Sasha Ingber & Bill Chappell, *Judge Quashed Warrant For Journalist’s Phone After Police Downplayed His Occupation*, NPR (July 26, 2019, 2:53 PM), <https://perma.cc/YX3U-SVUK>; Dan Noyes & Khaled Sayed, *Journalist Bryan Carmody Has Victory in Court Over San Francisco Police in Jeff Adachi Death Investigation*, ABC7 News (July 19, 2019), <https://perma.cc/7MLA-5BUE>

(reporting that one of the judges who issued a search warrant said a warrant should have never been issued). Accordingly, the unsealed records demonstrated that when the court approved the search warrant, it likely was unaware that Carmody was a journalist who may have qualified for protection under the California Shield Law.

III. The common law and First Amendment rights of access govern access to the Archey Declaration, not FOIA.

- A. The common law and First Amendment rights of access apply to judicial records and foster public understanding and trust in the judicial system.

“What transpires in the courtroom is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947). As Supreme Court Chief Justice John Roberts has explained, “[I]t’s not as though we’re doing this in secret . . . [the judicial branch is] the most transparent branch in government.” Chief Justice John G. Roberts, Remarks at 2018 Federal Judicial Conference of the Fourth Circuit (June 29, 2018), *available at* <https://cs.pn/39cI4d4>.

Both the Supreme Court and this Court consistently recognize the public’s qualified right to access judicial records. *See Nixon v. Warner Commc’n, Inc.*, 435 U.S. 589, 597–98 (1978); *Metlife, Inc.*, 865 F.3d at 665; *United States v. Hubbard*, 650 F.2d 293, 315–16 (D.C. Cir. 1980). The public’s right of access to judicial proceedings and records stems from two sources: the First Amendment and the

common law. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980); *Nixon*, 435 U.S. at 597–98; *Hubbard*, 650 F.2d at 316.

Public access to judicial records ensures that the public can fully understand how courts reach their decisions. While “[t]he political branches of government claim legitimacy by election,” judges do so “by reason.” *See In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992). Courts do “not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Accordingly, the public must have access to the motions, briefs, and other materials that courts rely upon to make their decisions in order to understand the judicial process.

This transparency also allows the public and the press to oversee the workings of the judicial branch, fostering trust in the judicial system. *See Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Metlife, Inc.*, 865 F.3d at 665 (noting that access to judicial records ensures “the integrity of judicial proceedings in particular”); *Hubbard*, 650 F.2d at 315–16 (“Access to records serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.”). As the Supreme Court has recognized, “The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial

processes to extensive public scrutiny and criticism.” *Sheppard*, 384 U.S. at 350 (“A responsible press has always been regarded as the handmaiden of effective judicial administration.”).

B. FOIA’s exemptions do not govern the public’s right of access to the Archey Declaration, which is a judicial document.

Amici agree with CNN that the Archey Declaration is a judicial record to which the common law and First Amendment rights of access attach, and that the district court correctly determined that the redacted portions of the Archey Declaration must be released under the common law right of access.¹ Response Br. 14–16, 26, 39. The common law right of access ensures that all judicial documents are available for public inspection, subject to *Hubbard*’s balancing test. *See Hubbard*, 650 at 317. This is particularly the case for filings that are intended to influence a court’s decision, such as the Archey Declaration. *See Metlife, Inc.*, 865 F.3d at 668 (“Without access to the sealed materials, it is impossible to know which parts of those materials persuaded the court and which failed to do so (and why).”).

¹ Amici agree with CNN that the First Amendment right of access also requires release of the Archey Declaration in full. Response Br. 32–40. As this court’s sister circuit noted more than 30 years ago: “the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case” because “summary judgment adjudicates substantive rights and serves as a substitute for a trial.” *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988).

Under its plain language, FOIA applies only to agency records. *See* 5 U.S.C. § 552(a), (f)(1). The FBI’s argument that FOIA Exemption 3 prevents release of the redacted portions of the Archey Declaration is also contrary to the purpose of the Act.² “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning 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). FOIA is a statute intended to promote release of government records, not the withholding of them. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004) (noting that FOIA’s “statutory purpose” is “that the public know what its government is up to”). Indeed, most of FOIA’s exemptions are discretionary, *see Planning Research Corp. v. Fed. Power Comm’n*, 555 F.2d 970, 973 n.4 (D.C. Cir. 1977), and FOIA permits withholding of records only if an agency reasonably foresees that disclosure would harm an interest protected by a FOIA exemption or if disclosure is prohibited by law, 5 U.S.C. § 552(a)(8).

The FBI’s suggestion that a FOIA exemption displaces the common law right of access to court records threatens to keep certain judicial documents out of the public’s reach and radically undermines the common law’s purpose of fostering

² Amici also agree with CNN that the National Security Act does not displace the common law right of access. Response Br. 30–32.

trust in the judiciary. *See Metlife, Inc.*, 865 F.3d at 665. Most perversely, allowing FOIA's exemptions to limit access to court records would apply most sweepingly in litigation against the federal government, when a "citizen's desire to keep a watchful eye on the workings of public agencies" is at its height. *See Nixon*, 435 U.S. at 598; *see also Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."). This Court should reject the FBI's misguided interpretation of FOIA's exemptions and the common law right of access.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's determination that the common law right of access applies to the Archey Declaration and requires its disclosure in full.

Respectfully submitted,

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APPENDIX A

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including The American Lawyer, The National Law Journal, New York Law Journal and Corporate Counsel, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in northern California since 1877; New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The Center for Public Integrity was founded in 1989 by Charles Lewis.

We are one of the country's oldest and largest nonpartisan, nonprofit investigative news organizations and winner of the 2014 Pulitzer Prize for investigative journalism.

The Daily Beast delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop-culture, world news and more.

Dow Jones & Company is the world's leading provider of news and business information. Through The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps

serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

The Inter American Press Association (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

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, based at 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.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MediaNews Group Inc. publishes the Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post, the Boston Herald and the Detroit News and other regional and community papers throughout the United States, as well as numerous related online news sites.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

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 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 Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington

newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

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.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation’s oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

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.

TIME is a global multimedia brand that reaches a combined audience of more than 100 million around the world. TIME's major franchises include the TIME 100 Most Influential People, Person of the Year, Firsts, Best Inventions, Genius Companies, World's Greatest Places and more. With 45 million digital visitors each month and 40 million social media followers, TIME is one of the most trusted and recognized sources of news and information in the world.

Tribune Publishing Company is one of the country's leading media companies. The company's daily newspapers include the Chicago Tribune, New York Daily News, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call, the Virginian Pilot and Daily Press. Popular news and information websites, including www.chicagotribune.com, complement Tribune Publishing's publishing properties and extend the company's nationwide audience.

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.

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 6,238 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Bruce D. Brown

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REPORTERS COMMITTEE FOR

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