

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5136

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,

Plaintiff-Appellee,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ET AL.,

Defendants-Appellants.

*Appeal from the United States District Court for the
District of Columbia, Case No. 1:01-cv-00498-RWR*

**BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 32 OTHER MEDIA ORGANIZATIONS,
IN SUPPORT OF PLAINTIFF-APPELLEE**

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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW,
AND RELATED CASES**

Pursuant to D.C. Cir. R. 28(a), *amici* states as follows:

Parties and Amici. All parties appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants. No *amici* appeared in the district court. *Amici* Reporters Committee for Freedom of the Press, Advance Publications, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, the Association of American Publishers, Inc., Atlantic Media, Inc., Bay Area News Group, Bloomberg L.P., Cable News Network, Inc., Dow Jones & Company, Inc., the E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., the McClatchy Company, Media General, Inc., NBCUniversal Media, LLC, the National Press Club, the National Press Photographers Association, Newspaper Association of America, the Newsweek/Daily Beast Company LLC, the New York Times Company, North Jersey Media Group Inc., Online News Association, POLITICO LLC, Radio Television Digital News Association, Reuters America LLC, the Seattle Times Company, Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company, and The Washington Post appear in this Court as *amici curiae* in support of the Plaintiff-Appellee.

Rulings Under Review. References to the rulings at issue appear in the Brief for Defendants-Appellants.

Related Cases. This case has not previously come before this Court. Counsel for *amici curiae* are aware of no other related cases pending before this

Court or any other court.

/s/ Bruce D. Brown
Bruce D. Brown

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES1

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*.....5

SOURCE OF AUTHORITY TO FILE7

FED. R. APP. P. 29(c)(5) STATEMENT.....7

SUMMARY OF ARGUMENT8

ARGUMENT10

 I. Congress Explicitly Empowered the Judiciary to Substantively Review an Agency’s Classification Claims Under Exemption 1 of FOIA.10

 a. Congress Made Clear that Courts Are to Review *de novo* Whether the Executive Has Properly Classified Material Withheld Under Exemption 1.11

 b. Congress Forcefully Affirmed its Grant of Judicial Review of Agency Withholdings Under Exemption 1 When it Overrode President Ford’s Veto of the 1974 FOIA Amendments.15

 II. In Amending FOIA, Congress Deliberately Balanced the Statute’s Goal of Increasing Access to Government Records Against the Potential Harm of Releasing Sensitive National Security Information.....17

 a. Congress Addressed the Government’s Fears Regarding the Potential Release of Harmful Information by Requiring Courts to Afford Due Weight to Executive Claims of National Security.18

 b. Although Congress Required Courts to Afford Great Deference to Executive Classification Decisions, it did not Intend for Courts to Simply Rubber Stamp Such Claims.20

 III. Courts Have Repeatedly Undertaken Exemption 1 Review as Established by Congress to Weigh Concerns about Potential Harm to National Security Against FOIA’s Command to Open Government Records to Public Scrutiny.21

CONCLUSION.....25

CERTIFICATE OF COMPLIANCE.....26

ADDENDUM: DESCRIPTIONS OF *AMICI CURIAE*.....A-1

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

<i>Abuhouran v. U.S. Dep't of State</i> , 843 F. Supp. 2d 73 (D.D.C. 2012).....	21
<i>ACLU v. CIA</i> , ___ F. Supp. 2d ___, 2012 WL 4356338 (D.D.C. Sept. 25, 2012).....	21, 22
<i>ACLU v. Dep't of Justice</i> , 808 F. Supp. 2d 280 (D.D.C. 2011)	21
<i>ACLU v. Dep't of State</i> , ___ F. Supp. 2d ___, 2012 WL 2989833 (D.D.C. July 23, 2012)	21
<i>ACLU v. ODNI</i> , 2011 WL 5563520 (S.D.N.Y. Nov. 15, 2011).....	23
* <i>Allen v. CIA</i> , 636 F.2d 1287 (D.C. Cir. 1980)	9
<i>Campbell v. Dep't of Justice</i> , 164 F.3d 20 (D.C. Cir. 1998)	17
<i>Crooker v. Bureau of Alcohol, Tobacco & Firearms</i> , 670 F.2d 1051 (D.C. Cir. 1981) (en banc).....	10
<i>Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.</i> , 777 F. Supp. 2d. 77 (D.D.C. 2011).....	21
* <i>Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.</i> , 845 F. Supp. 2d 252 (D.D.C. 2012).....	9, 18, 21
<i>Ctr. for Nat'l Sec. Studies v. Dep't of Justice</i> , 331 F.3d 918 (D.C. Cir. 2003).....	18
<i>Darui v. U.S. Dep't of State</i> , 798 F. Supp. 2d 32 (D.D.C. 2011)	21
<i>Dep't of Air Force v. Rose</i> , 425 U.S. 352 (1976).	20

Donovan v. FBI, 806 F.2d 55 (2d Cir. 1986).....10

Electronic Frontier Foundation v. Dep’t of Justice,
 ___ F. Supp. 2d ___, 2012 WL 4319901 (D.D.C. Sept. 21, 2012)21

EPA v. Mink, 410 U.S. 73 (1973) 10, 11

Fischer v. U.S. Dep’t of Justice, 723 F. Supp. 2d 104 (D.D.C. 2010)21

Gov’t Accountability Project v. U.S. Dep’t of State,
 699 F. Supp. 2d 97 (D.D.C. 2010).....21

Hall v. CIA, 668 F. Supp. 2d 172 (D.D.C. 2009).....21

Hall v. CIA, ___ F. Supp. 2d ___, 2012 WL 3143839 (D.D.C. Aug. 3, 2012)21

Hetzler v. FBI, ___ F. Supp.2d ___,
 2012 WL 3886367 (W.D.N.Y. Sep. 6, 2012)..... 22, 23

Int’l Counsel Bureau v. C.I.A., 774 F. Supp. 2d. 262 (D.D.C. 2011).....21

Int’l Counsel Bureau v. U.S. Dep’t of Defense, ___ F. Supp. 2d. ___,
 2012 WL 1865413 (D.D.C. May 23, 2012).....21

Int’l Counsel Bureau v. U.S. Dep’t of Defense,
 723 F. Supp. 2d 54 (D.D.C. 2010).....21

Jarvik v. CIA, 741 F. Supp. 2d 106 (D.D.C. 2010).....21

Judicial Watch, Inc. v. U.S. Dep’t of Defense,
 857 F. Supp. 2d 44 (D.D.C. 2012).....21

Larson v. Dep’t of State, 565 F.3d 857 (D.C. Cir. 2009)18

McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).....18

Mobley v. Dep’t of Justice, ___ F. Supp. 2d ___,
2012 WL 2354352 (D.D.C. June 8, 2012).....21

Moore v. FBI, ___ F. Supp. 2d ___, 2012 WL 3264566 (D.D.C. Aug. 13, 2012).....21

Morley v. CIA, 699 F. Supp. 2d 244 (D.D.C. 2010)21

Physicians for Human Rights v. U.S. Dep’t of Defense,
675 F. Supp. 2d 149 (D.D.C. 2009).....21

Schoenman v. FBI, 763 F. Supp. 2d. 173 (D.D.C. 2011)21

Schoenman v. FBI, 841 F. Supp. 2d 69 (D.D.C. 2012)21

Stein v. Dep’t of Justice, 662 F.2d 1245 (7th Cir. 1981)10

U.S. Dep’t of Justice v. Landano, 508 U.S. 165 (1993)10

Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991).....10

Statutes

* 5 U.S.C. § 552..... 3, 6, 17

* Freedom of Information Act Amendments of 1974,
Pub. L. No. 93-502, 88 Stat. 15618

Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).....10

Other Authorities

* FREEDOM OF INFORMATION ACT
AND AMENDMENTS OF 1974 (1975)..... 11, 12, 13, 14, 15, 16, 18, 19

Legislative History

* 120 Cong. Rec. H1,787-803 (1974).....12

* 120 Cong. Rec. H10,864-875 (1974).....15

* 120 Cong. Rec. S19,806-823 (1974)19

H.R. Rep. No. 93-1380 (1974) (Conf. Rep.)16

* H.R. Rep. No. 93-876 (1974).....11

S. Rep. No. 93-854 (1974) 11, 18

Veto Message From President of the United States,
Freedom of Information Act (Nov. 18, 1974)14

Pursuant to D.C. Cir. R. 28(a)(2), authorities upon which we chiefly rely are marked with asterisks.

**STATEMENT OF IDENTITY
AND INTEREST OF AMICI CURIAE**

Amici comprise national and regional news organizations, nonprofit open government, freedom of information (“FOI”) and First Amendment advocacy groups and news professional and trade associations that regularly gather and disseminate valuable news and information to the public in a variety of media or otherwise support and defend such efforts to do so.¹

Amici and their members regularly investigate and report on government action and government relations. To fully realize their constitutionally protected watchdog role, *amici* rely on the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, (“FOIA”) to document and scrutinize the conduct of the government. To that end, they have an ongoing stake in ensuring that FOIA and similar

¹ *Amici* are The Reporters Committee for Freedom of the Press, Advance Publications, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, the Association of American Publishers, Inc., Atlantic Media, Inc., Bay Area News Group, Bloomberg L.P., Cable News Network, Inc., Dow Jones & Company, Inc., the E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., the McClatchy Company, Media General, Inc., NBCUniversal Media, LLC, the National Press Club, the National Press Photographers Association, Newspaper Association of America, the Newsweek/Daily Beast Company LLC, the New York Times Company, North Jersey Media Group Inc., Online News Association, POLITICO LLC, Radio Television Digital News Association, Reuters America LLC, the Seattle Times Company, Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company, and The Washington Post. A description of each of the *amici* is set forth in the addendum to this brief.

disclosure laws remain robust and allow for individuals to continue to open up government activity to public scrutiny.

Amici believe that the judiciary's *de novo* review of agency withholding determinations under Exemption 1 of FOIA serves as a crucial check against Executive branch classification claims that may be overbroad or otherwise improper under the Executive Order governing the classification process. Defendants-Appellants seek from this court a rule that would undercut this necessary process by which federal courts are empowered to scrutinize agency classification claims under Exemption 1 of FOIA. Such a rule would run counter to the very process Congress established for courts when examining Executive classification claims and would ultimately harm *amici*'s ability to use FOIA as a means of informing the public on issues related to national security and foreign policy.

Amici submit this brief specifically to emphasize the critical function the judiciary serves in determining whether the Executive Branch has lawfully asserted Exemption 1 of FOIA and, contrary to the government's contention in this case, to dispense of any doubt that Congress affirmatively intended the judiciary to assume this role in such situations. Without such a procedural check grounded firmly within the judicial branch, the public stands to lose an important counterweight to overzealous and unlawful applications of Exemption 1 under FOIA.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a) and D.C. Cir. R. 29(b), *amici* represent that all parties have consented to this filing.

FED. R. APP. P. 29(c)(5) STATEMENT

Amici state that:

- (A) no party's counsel authored this brief in whole or in part;
- (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (C) no person—other than the *amici curiae*, its members or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The district court's decision in the present case is a textbook example of a federal court performing its congressionally mandated role to review classification decisions that form the basis of an agency determination to withhold a document under FOIA. The Government appeals that decision, arguing in part that the district court exceeded its authority when it disagreed with the Executive's classification determination. The Government further argues that a district court cannot second-guess the Executive when it comes to national security or foreign policy determinations, and that to do so constitutes an impermissible foray into Executive Branch powers.² Such an overreaching position ignores FOIA's plain text and Congress' explicit command that courts are to serve as a check against Executive over-classification within the context of FOIA Exemption 1.³

Consistent with FOIA's goal of opening up government activity to public scrutiny, the legislative history of the 1974 FOIA amendments makes clear that Congress sought to dispel any federal court hesitance to scrutinize Executive classification claims related to documents withheld under Exemption 1. In particular, Congress commanded courts—overriding a presidential veto to enact the amendments—that they must substantively review the legitimacy of

² See Appellants' Br. at 53 (“The district court’s refusal to accept the government’s plausible and detailed explanation was improper second-guessing in an area outside the judiciary’s expertise.”).

³ 5 U.S.C. § 552(b)(1) exempts from disclosure under FOIA records that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”

classification claims made within the context of Exemption 1. And although such judicial scrutiny was to afford due weight to an agency's classification determination—a recognition of the Executive's primacy in areas of foreign affairs—such deference does not amount to a rubber stamp of agency action. Hence, federal courts have the explicit power to determine if and when an agency fails to meet its Exemption 1 burden under FOIA.

The Government's position that federal courts must cede to Executive Branch Exemption 1 determinations is additionally misplaced as courts in the decades since the 1974 amendment's passage have continually been tasked with resolving the very conflicts between FOIA's disclosure requirements and concerns about revealing sensitive national security and foreign policy information that are at issue in this case. They do so guided by the process Congress articulated when it amended FOIA in 1974.

FOIA's legislative history and the process courts use to make determinations under Exemption 1 demonstrate that the district court in the present case did nothing out of the ordinary. In actively scrutinizing the Government's claims regarding its classification withholdings under Exemption 1, the district court properly exercised its role under FOIA, behaving just as Congress intended when it strengthened the law in 1974. This Court should therefore affirm the district court's decision as a proper exercise of its congressionally mandated power to substantively review classification determinations under Exemption 1.

ARGUMENT

I. Congress Explicitly Empowered the Judiciary to Substantively Review an Agency's Classification Claims Under Exemption 1 of FOIA.

The district court's decision to scrutinize the Executive's classification claim in the present case is entirely consistent with the legislative scheme Congress created when it amended FOIA in 1974. Indeed, after reviewing the Government's basis for withholding the document at issue in this case—over three rounds of summary judgment proceedings—the district court held that the agency had failed to meet its burden to show that the document had been properly classified and withheld under Exemption 1. *See* JA __ (DE#56), reported at *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 845 F. Supp. 2d 252, 253 (D.D.C. 2012).

On appeal, the Government argues that the district court engaged in “searching judicial review” and improperly second-guessed the Executive when the court determined that the Government failed to meet its burden under Exemption 1. *See* Appellants' Br. at 54. This argument fails to recognize that when Congress amended FOIA in 1974, it clearly empowered courts to determine whether documents withheld under FOIA were properly classified, including the use of *in camera* review to aid in such decisions. *See* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561.

This Court recognized Congress' explicit command that federal courts were to substantively review agency classification claims soon after the 1974 amendments became law. *See Allen v. CIA*, 636 F.2d 1287, 1295 (D.C. Cir. 1980) (recognizing that Congress charged courts “with the responsibility of reviewing de

novo the substantive as well as procedural propriety of the classification”), *abrogated on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). Other circuit courts have similarly acknowledged the impact of the 1974 amendments. *See, e.g., Donovan v. FBI*, 806 F.2d 55, 59 (2d Cir. 1986), *abrogated in part on other grounds by U.S. Dep’t of Justice v. Landano*, 508 U.S. 165 (1993) (recognizing that Congress’ amendments intended to bolster federal courts ability to review agency classification claims under Exemption 1); *Wiener v. FBI*, 943 F.2d 972, 980 (9th Cir. 1991) (recognizing federal court’s role to review the propriety of classification claims under Exemption 1); *Stein v. Dep’t of Justice*, 662 F.2d 1245, 1256-57 (7th Cir. 1981) (reviewing the procedural and substantive aspects of an agency’s classification claim under Exemption 1).

The District Court was therefore properly exercising its authority in reviewing the document at issue, fulfilling Congress’ intent to check against Executive power and to further FOIA’s goal of fostering government transparency.

a. Congress Made Clear that Courts Are to Review *de novo* Whether the Executive Has Properly Classified Material Withheld Under Exemption 1.

The original enactment of FOIA in 1966 did not give federal courts the explicit power to review whether material was properly classified and withheld under Exemption 1. Rather, it conferred on courts the power to determine whether the Executive had followed the proper classification procedures. In *EPA v. Mink*, 410 U.S. 73 (1973), the U.S. Supreme Court construed FOIA to bound a court’s

inquiry under Exemption 1 withholdings to procedural review. At the time the Court reviewed the statute, text of section 552(b)(1) included only the first clause of the current version of the statute, exempting from disclosure records “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.” Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

The Court in *Mink* held that the test under Exemption 1 as it was originally written “was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret.” *Mink*, 410 U.S. at 82. The court also construed FOIA as forbidding courts to conduct *in camera* review of documents that the Executive had classified. *Id.* at 81. Despite this, some members of the Court acknowledged the lack of judicial oversight of the Executive’s classification claims. As Justice Stewart noted in his concurrence, the Court’s interpretation of FOIA meant that there was “no means to question an Executive decision to stamp a document ‘secret,’ however cynical, myopic, or even corrupt that decision might have been.” *Id.* at 95 (Stewart, J., concurring). Recognizing that the limitation on judicial inquiry was a statutory constraint, the court acknowledged Congress’ power to amend the law to allow for substantive review of classification claims. *Id.* at 83.⁴

⁴ The Court wrote “Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose on such congressional ordering.”

Congress responded immediately to reverse the *Mink* decision. In the legislative history of the 1974 amendments, Congress explicitly directed federal courts to engage in the type of inquiry undertaken in the present case. The Senate committee's report on the bill stated that the amendments to Exemption 1:

will necessitate a court to inquire during de novo review not only into the superficial evidence—a “Secret” stamp on a document or set of records—but also into the inherent justification for the use of such a stamp. Thus a government affidavit certifying the classification of material pursuant to executive order will no longer ring the curtain down on an applicant's effort to bring such material to public light.

S. Rep. No. 93-854 (1974), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 182 (1975).⁵ The House's version of the bill was also written for the same purpose. *See* H.R. Rep. No. 93-876, *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 127 (“Two amendments to this Act included in this bill are aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified by the Department of Defense and other agencies under Executive order and authority.”).

Beyond superseding *Mink*, Congress also sought to push back against overbroad and impermissible classification efforts by the Executive. As Rep. Patsy Mink (D-Haw.)—one of the plaintiffs in the *Mink* case—stated on the House floor during debates on the bill, “Our intention in making this change is to place a judicial check on arbitrary actions by the Executive to withhold information that might be embarrassing, politically sensitive, or otherwise concealed for improper

⁵ Available at http://www.loc.gov/rr/frd/Military_Law/pdf/FOIA-1974.pdf.

reasons rather than truly vital to national defense or foreign policy.” 120 Cong. Rec. H1,787-803 (1974), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 260. “We are not saying any material must be released, only that it must be submitted to an impartial judge to determine whether its withholding meets the provisions and purposes of the act.” *Id.*⁶

The Senate was equally concerned with the Executive improperly classifying documents to avoid FOIA’s disclosure requirements. As Sen. Alan Cranston (D-Cal.) said during debates on the bill, “we must not let 17,364 bureaucrats be the final judges of what we are to know from our Government.” *Id.* at 301 (1975). Sen. Edmund Muskie (D-Me.) echoed these statements, stating that “by giving classified material a status unlike that of any other claimed Government secret, we foster the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge.” *Id.* at 305.

The legislative history and statements by supporters of the amendments to Exemption 1 make clear that Congress intended not only to overrule the *Mink*

⁶ Other supporters of the House bill provided similar statements regarding the amendment’s purpose. *See, e.g., id.* at 237 (“Experience has taught us, however, that the scope of this legitimate shield which was provided by the act could be stretched to suit particular partisan or personal purposes.”) (comments of Rep. Spark Matsunaga (D-Haw.)); *id.* at 273 (“These new procedures, I hope, will reduce the appalling incidence of smokescreen ‘national security’ defenses raised by the Government in Freedom of Information Act cases.”) (comments of Rep. Michael Harrington (D-Mass.)); *id.* at 389 (“First of all, this does allow a court to review what could, and sometimes, I am sure, in the past, has been an arbitrary decision to classify a document for security reasons.”) (comments of Rep. Carlos Moorhead (R-Cal.)).

decision but also to impose a structural check on the Executive's ability to assert national security or foreign policy-based withholdings under FOIA. The law therefore clearly empowers federal courts to scrutinize the substance of a withholding under FOIA Exemption 1, just as the district court did in the present case.

b. Congress Forcefully Affirmed its Grant of Judicial Review of Agency Withholdings Under Exemption 1 When it Overrode President Ford's Veto of the 1974 FOIA Amendments.

Congress made plain its intent to place a judicial check on Executive classification claims under Exemption 1 when it overrode a presidential veto and passed the 1974 amendments into law. President Ford vetoed the legislation in part because he believed courts lacked the expertise to review classification decisions—an argument the Government raises almost 40 years later in this case. Although Congress was sensitive to concerns raised by the Executive regarding the federal courts' ability to properly determine whether documents should have been classified, discussed further, *infra*, it ultimately believed that courts could and should make such determinations. The override vote was 371 to 31 in the House and 65 to 27 in the Senate. *See* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 431, 480.

Nearly four decades after Congress made clear that federal courts must substantively review Executive classification claims under Exemption 1, the Executive still believes that courts should not be substantively reviewing agency classification claims. *Compare* Appellants' Br. at 53 ("The district court's refusal

to accept the government's plausible and detailed explanation was improper second-guessing in an area outside the judiciary's expertise.") *with Veto Message From President of the United States, Freedom of Information Act* (Nov. 18, 1974), *reprinted* in *FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974*, at 484 (1975) ("However, the courts should not be forced to make what amounts to the initial classification decision *in sensitive and complex areas where they have no particular expertise.*") (emphasis added).

But in passing the 1974 Amendments to FOIA, members of Congress trusted that the judiciary could undertake review of Executive classification decisions. Sen. Muskie made Congress' faith in the judiciary clear during the debates after President Ford's veto when he said, "I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy." *FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974*, at 449 (1975). Rep. William Broomfield (R-Mich.) also expressed his confidence in the judiciary when he said, "I have faith that in genuinely gray areas, Federal judges will tend to rule in favor of national security. But when something clearly does not meet the test, it is going to come out." *Id.* at 418.⁷

⁷ Other members of Congress expressed similar beliefs that the judiciary should be empowered to review decisions regarding the propriety of Exemption 1 withholdings. *See id.* at 406 ("I find it totally unrealistic to assume—as apparently the President's legal advisers have assumed—that the Federal judiciary system is somehow not to be trusted to act in the public interest to safeguard truly legitimate

Additionally, Congress believed that by enabling judicial review, it was fundamentally strengthening FOIA and furthering the statute's purpose by increasing government transparency. *See* 120 Cong. Rec. H10,864-875, *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 407 (“By our votes to override this veto we can put the needed teeth in the freedom of information law to make it a viable tool to make ‘open government’ a reality in America.”) (comments of Rep. Moorhead (R-Pa.)).

In essence, Congress turned aside President Ford's concern—and, by extension, the Government's claim in the present case—that the federal courts could not make appropriate determinations regarding whether material was properly classified and withheld under Exemption 1 of FOIA. Instead, it believed that the benefit of fostering increased government transparency through active judicial scrutiny of Exemption 1 withholdings outweighed the Executive's concerns.

II. In Amending FOIA, Congress Deliberately Balanced the Statute's Goal of Increasing Access to Government Records Against the Potential Harm of Releasing Sensitive National Security Information.

Although Congress intended to provide a meaningful check against Executive Branch classification decisions, it remained sensitive to concerns made then and now that such review could potentially lead to the release of information that may do actual harm to national security or foreign policy interests.

Accordingly, Congress sought to carefully balance the Executive's concerns

national defense or foreign policy secrets of our government”) (comments of Rep. Moorhead (R-Pa.)).

regarding judicial scrutiny of agency classification decisions against FOIA's overarching goal of transparency by requiring courts to provide some level of deference to agency classification claims. This process, embedded into the analysis courts undertake when reviewing Exemption 1 withholdings, protects both the statute's transparency goal and the need to withhold legitimate secrets.

But, as the legislative history makes clear, Congress did not envision a level of deference wherein a federal court simply rubber stamps an agency's classification claim and does not conduct a good-faith inquiry into the Executive's underlying justifications. And as this Court has recognized when scrutinizing an agency's classification claims under Exemption 1, "deference is not equivalent to acquiescence." *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

a. Congress Addressed the Government's Fears Regarding the Potential Release of Harmful Information by Requiring Courts to Afford Due Weight to Executive Claims of National Security.

In an effort to satisfy Executive concerns regarding judicial review of classified information, Congress instructed courts to give due consideration to an agency's decision to withhold documents under Exemption 1. *See* H.R. Rep. No. 93-1380 (1974) (Conf. Rep.), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 229 ("Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.").⁸

⁸ Rep. Moorhead articulated the balance courts were to undertake during a floor speech:

This Court and others took the standard enunciated by Congress and incorporated it into the review they undertake when scrutinizing Exemption 1 claims. *See Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009) (“We ‘accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.’”) (quoting *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (adopting the “substantial weight” review standard from the legislative history of the 1974 FOIA amendments).

In creating such a standard, Congress recognized the Executive’s concerns and balanced them against the command of FOIA that government records are presumptively open. 5 U.S.C. § 552(a)(4)(B) (stating that the burden is on the government to justify withholding documents under FOIA). This standard, deliberately calibrated by Congress, strikes a balance between FOIA’s transparency goals and the Executive’s concerns about national security. This standard was applied in the present case, with the district court even going so far as to allow the Government three attempts to justify its withholding under Exemption 1’s deferential standard. *See Ctr. for Int'l Envtl. Law*, 845 F. Supp. 2d at 256-60

The bill contains the requirement [. . .] that, where there is a stamp, a classification stamp, the court could go behind that, but we specified that the court should give great weight to an affidavit that this was properly classified. What we are trying to overrule is the situation described in the famous *Mink* case, where the court said to Congress, no matter how frivolous or capricious the classification should be, that the court could not go behind it.

120 Cong. Rec. H10,001-009, *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 388.

(applying the deferential standard and concluding that after three rounds of summary judgment, the document at issue did not fall within Exemption 1).

b. Although Congress Required Courts to Afford Great Deference to Executive Classification Decisions, it did not Intend for Courts to Simply Rubber Stamp Such Claims.

Despite Congress providing that courts must afford deference to an agency classification claim under Exemption 1 of FOIA, it did not intend such deference to swallow the purpose behind strengthening FOIA in 1974. The government in the present case seeks to conflate the deferential standard courts apply when scrutinizing Exemption 1 withholdings with a wholesale removal of judicial oversight of an agency's classification determinations. *See* Appellants' Br. at 53 ("Nor should a court override the Executive's judgment concerning its negotiating options when dealing with foreign governments in the diplomatic arena."). But, as discussed *supra*, erasing the distinction between affording an agency deference and rubber stamping an agency's classification claim would leave FOIA exactly where it was in *Mink*'s wake and before the 1974 Amendments.

Moreover, in amending FOIA, Congress not only intended that courts would need to scrutinize agency classification claims under Exemption 1, it also anticipated that courts would sometimes determine that the Executive had improperly invoked the exemption. *See* S. Rep. No. 93-854, *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 183:

It is essential, however, to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch. [. . .] The judgments involved may often be delicate and difficult ones, but someone other

than interested parties—officials with power to classify and conceal information—must be empowered to make them.

Sen. Ted Kennedy (D-Mass.) recognized that accountability for the executive's classification claims necessarily meant that courts would come to different conclusions in some instances, saying that “[j]udicial review will be effective only if a Federal judge is authorized to review classification decisions objectively, without any presumptions in favor of secrecy. That is what our system of checks and balances is all about.” 120 Cong. Rec. S19,806-823, *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 438.

To hold, as the government contends, that an agency's classification determination alone is sufficient to withstand an Exemption 1 challenge would violate Congress' explicit intent in amending Exemption 1 and frustrate FOIA's aim “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

III. Courts Have Repeatedly Undertaken Exemption 1 Review as Established by Congress to Weigh Concerns about Potential Harm to National Security against FOIA's Command to Open Government Records to Public Scrutiny.

In the decades since Congress passed the 1974 FOIA amendments, courts have repeatedly followed the process created by the law to scrutinize Executive classification claims under Exemption 1. Indeed, the District Court for the District of Columbia has balanced the competing interests of national security and FOIA's disclosure requirements under Exemption 1 more than 20 times in the last three

years alone, according to a search of reported cases.⁹ As the rate of review of agency classification determinations under Exemption 1 makes clear, courts in this circuit undertake the analysis Congress established regularly and often.¹⁰

A recent FOIA case seeking information from the CIA regarding unauthorized interrogation techniques highlights how courts are able to engage in the review process Congress intended under Exemption 1 when it amended FOIA in 1974. In *ACLU v. CIA*, ___ F. Supp. 2d ___, 2012 WL 4356338 (D.D.C. Sept. 25,

⁹ See *ACLU v. CIA*, ___ F. Supp. 2d ___, 2012 WL 4356338 (D.D.C. Sept. 25, 2012); *Electronic Frontier Foundation v. Dep't of Justice*, ___ F. Supp. 2d ___, 2012 WL 4319901 (D.D.C. Sept. 21, 2012); *Moore v. FBI*, ___ F. Supp. 2d ___, 2012 WL 3264566 (D.D.C. Aug. 13, 2012); *Hall v. CIA*, ___ F. Supp. 2d ___, 2012 WL 3143839 (D.D.C. Aug. 3, 2012); *ACLU v. Dep't of State*, ___ F. Supp. 2d ___, 2012 WL 2989833 (D.D.C. July 23, 2012); *Mobley v. Dep't of Justice*, ___ F. Supp. 2d ___, 2012 WL 2354352 (D.D.C. June 8, 2012); *Int'l Counsel Bureau v. U.S. Dep't of Defense*, ___ F. Supp. 2d ___, 2012 WL 1865413 (D.D.C. May 23, 2012); *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 857 F. Supp. 2d 44 (D.D.C. 2012); *Ctr. for Int'l Envtl. Law*, 845 F. Supp. 2d 252; *Abuhouran v. U.S. Dep't of State*, 843 F. Supp. 2d 73 (D.D.C. 2012); *Schoenman v. FBI*, 841 F. Supp. 2d 69 (D.D.C. 2012); *ACLU v. Dep't of Justice*, 808 F. Supp. 2d 280 (D.D.C. 2012); *Darui v. U.S. Dep't of State*, 798 F. Supp. 2d 32 (D.D.C. 2011); *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 777 F. Supp. 2d 77 (D.D.C. 2011); *Int'l Counsel Bureau v. CIA*, 774 F. Supp. 2d 262 (D.D.C. 2011); *Schoenman v. FBI*, 763 F. Supp. 2d 173 (D.D.C. 2011); *Jarvik v. CIA*, 741 F. Supp. 2d 106 (D.D.C. 2010); *Fischer v. U.S. Dep't of Justice*, 723 F. Supp. 2d 104 (D.D.C. 2010); *Int'l Counsel Bureau v. U.S. Dep't of Defense*, 723 F. Supp. 2d 54 (D.D.C. 2010); *Morley v. CIA*, 699 F. Supp. 2d 244 (D.D.C. 2010); *Gov't Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97 (D.D.C. 2010); *Physicians for Human Rights v. U.S. Dep't of Defense*, 675 F. Supp. 2d 149 (D.D.C. 2009); *Hall v. CIA*, 668 F. Supp. 2d 172 (D.D.C. 2009).

¹⁰ *Amici* highlight the cases described in this section only as illustrative examples of the *process* courts routinely undertake when scrutinizing agency withholdings under Exemption 1 to emphasize that this is an ongoing and regular practice.

2012), the CIA withheld 11 documents from the requestor under Exemption 1. The district court first examined whether the documents were properly classified according to the procedure outlined in the relevant Executive Order. *Id.* at *8. After determining that the government had followed proper classification procedures, the district court moved on to determining whether the material was in fact properly classified. *ACLU*, __ F. Supp. 2d __, 2012 WL 4356338 at *8.

The district court then devoted significant time to determining whether release of the information withheld could potentially harm national security. *Id.* at *8-10. It reviewed the declarations of agency officials and scrutinized their underlying justifications, including that release of the information could alert potential terrorists to CIA activities. *Id.* at *9. The district court then considered the requestor's argument that the information would not be harmful. In this instance, the court ultimately determined that the CIA had met its burden to withhold material under Exemption 1. *Id.* at *10.

Such judicial balancing occurs in courts nationwide. Another recent FOIA case highlights courts' ability to individually examine the propriety of Executive classification claims in the face of broad national security concerns. In *Hetzler v. FBI*, __ F. Supp.2d __, 2012 WL 3886367 (W.D.N.Y. Sep. 6, 2012), an author sought records from the FBI about the subject of the biography she is writing. *Id.* at *4. The FBI withheld several records under Exemption 1, claiming that they included details about investigation techniques and sources that, if released, would harm national security. *Id.* at *4-7.

The district court broke down the specific claims made by the FBI under Exemption 1 and compared them with the justification for withholding the documents provided by the FBI. *Id.* With regard to some of the withholdings, such as a letter from a foreign government to a U.S. embassy, the district court found that the FBI had not met its burden to show that the information, if released, was likely to harm national security. *Id.* at *7. But in other cases, particularly those involving the withholding of names of targets of foreign intelligence activities, the court found that Exemption 1 was properly invoked. *Id.*

Finally, another recent case shows that courts can weigh competing concerns when the subject of the FOIA request at issue involves foreign intelligence surveillance. In *ACLU v. ODNI*, 2011 WL 5563520 (S.D.N.Y. Nov. 15, 2011), the district court scrutinized whether documents detailing the number of foreign intelligence surveillance applications and related reports, legal memoranda, and complaints could be withheld under Exemption 1. *Id.* at 2. After reviewing the *Vaughn* index and declarations claiming that release of such information would harm national security, the district court determined that the agencies had not logically shown that the withheld information fell within Exemption 1. *Id.* at 5.

The cases above demonstrate that courts regularly follow the process Congress established to weigh the merits of an agency's classification decision and national security claims against FOIA's presumption of openness. This process is designed to both prevent overbroad classification—which could be used to cover up government malfeasance—and to limit the release of information that is truly harmful to national security or foreign policy interests. The district court in the

present case undertook the exact same process as the cases described above, weighing the competing claims and scrutinizing the government's justifications. The fact that it arrived at a different conclusion than the one desired by the government should not prompt this Court to retreat from its congressionally mandated role to continue to undertake such scrutiny of agency classification claims under Exemption 1.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the district court's decision.

Dated: Oct. 31, 2012
Arlington, VA

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Fed. R. of App. P. 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 6,270.

/s/ Bruce D. Brown
Bruce D. Brown

ADDENDUM

Descriptions of *amici curiae*:

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

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

Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark., Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV, the 24-hour local news service, NewsChannel 8 and the news web sites, WJLA.com and TBD.com. An affiliated company operates the ABC affiliate in Charleston, S.C.

With some 500 members, the **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 the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the American

Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like *The Village Voice* and *Washington City Paper*. AAN newspapers and their web sites 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.

Atlantic Media, Inc. is a privately held integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at

federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes the San Jose Mercury News, Oakland Tribune, Contra Costa Times, Marin Independent Journal, West County Times, Valley Times, East County Times, Tri-Valley Herald, The Daily Review, The Argus, Santa Cruz Sentinel, San Mateo County Times, Vallejo Times Herald and Vacaville Reporter. These newspapers rely on constitutional, statutory and common law protections for journalists' confidential sources and unpublished information in order to obtain and provide vital information to the public about government and corporate activities that affect their lives.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations

worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com, which receives 3.5 million individual user visits each month.

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 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 web sites 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.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, *Barron’s*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information web sites, and licensing and syndication. The company’s portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the

Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

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

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the Sacramento Bee, the Miami Herald, the Kansas City Star and the Charlotte Observer. The newspapers have a combined average circulation of approximately 2.5 million daily and 3.1 million Sunday.

Media General, Inc. is a leading provider of news, information and entertainment across multiple media platforms, serving consumers and advertisers

in strong local markets, primarily in the Southeastern United States. The company's operations include 18 network-affiliated television stations and associated web sites, 21 daily newspapers and associated web sites, more than 200 specialty publications that include weekly newspapers and niche publications targeted to various demographic, geographic and topical communities of interest.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 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.

National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still

photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today’s newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

The Newsweek/Daily Beast Company LLC publishes *Newsweek* magazine and operates the web site TheDailyBeast.com. Through nine print editions, *Newsweek* magazine appears weekly in more than 170 countries and is read by 19 million people. The Daily Beast was launched in 2008 by Tina Brown and Barry Diller of IAC. It is a multi-platform brand consisting of a news and current affairs web site that attracts an average of 6 million unique visitors per month from around the world, as well as a conference division and a book publishing imprint.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe and 15 other daily newspapers. It also owns and operates more than 50 web sites, including nytimes.com, Boston.com and About.com.

North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and publishing company, parent of two daily newspapers serving

the residents of northern New Jersey: The Record (Bergen County), the state's second-largest newspaper, and The Herald News (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties, including some of the best weeklies in the state. Its magazine group produces high-quality glossy magazines including "(201) Best of Bergen," nearly a dozen community-focused titles and special-interest periodicals such as The Parent Paper. The company's Internet division operates many news and advertising web sites and online services associated with the print publications.

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

POLITICO LLC is a nonpartisan, Washington-based political journalism organization that produces a newspaper and web site covering politics and public policy.

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.

Reuters America LLC serves the financial markets and news media with real-time, high-impact multimedia news and information services and is part of Reuters, the world's largest international news agency. Through Reuters.com and affiliated web sites around the world and via multiple platforms including online, mobile, video and outdoor electronic displays, Reuters provides trusted, unbiased, professional-grade business news, financial information, market data and national and international news directly to an audience of business professionals around the world. In addition, Reuters publishes a portfolio of market-leading titles and online services, providing authoritative and unbiased market intelligence to investment banking and private equity professionals.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic*, the *Walla Walla Union Bulletin*, *The Issaquah Press*, *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.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the Las Vegas, Nev., Review-Journal.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including *Time*, *Fortune*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *InStyle* and *Real Simple*. Time Inc. publications reach over 100 million adults and its web sites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and “Superstation” WGN America. On the publishing side, Tribune publishes eight daily newspapers — Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Va.), The Morning Call (Allentown, Pa.) and South Florida Sun-Sentinel.

The Washington Post publishes a daily and Sunday newspaper with the nation’s fifth-largest print circulation, as well as a website ([washingtonpost.com](http://www.washingtonpost.com)) that attracts more than 17 million unique visitors per month.

CERTIFICATE OF SERVICE

I certify that on October 31, 2012, I electronically filed the foregoing Brief for Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that my electronic filing caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on the following registered counsel for the parties:

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