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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13
14 SAN FRANCISCO DIVISION

15 **FREEDOM OF THE PRESS**
16 **FOUNDATION,**

17 Plaintiff,

18 v.

19 **UNITED STATES DEPARTMENT OF**
20 **JUSTICE,**

21 Defendant.

CASE NO. 15-cv-03503-HSG

**REQUEST OF THE REPORTERS
COMMITTEE FOR FREEDOM OF THE
PRESS AND 37 MEDIA
ORGANIZATIONS FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND BRIEF
*AMICUS CURIAE***

Date: August 18, 2016

Time: 2:00 p.m.

Courtroom 10, 19th Floor

Hon. Haywood S. Gilliam Jr.

REQUEST FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1
2 The Reporters Committee for Freedom of the Press (“Reporters Committee”), ALM Media,
3 LLC, American Society of News Editors, The Associated Press, Association of Alternative
4 Newsmedia, Association of American Publishers, Inc., BuzzFeed, Cable News Network, Inc.,
5 California Newspaper Publishers Association, Chicago Tribune Company, LLC, Committee to
6 Protect Journalists, The Daily Beast Company LLC, The E.W. Scripps Company, First Amendment
7 Coalition, First Look Media Works, Inc., Gannett Co., Inc., Gawker Media LLC, International
8 Documentary Assn., Investigative Reporters and Editors, Investigative Reporting Workshop at
9 American University, Los Angeles Times Communications LLC, The McClatchy Company, The
10 Media Consortium, MPA – The Association of Magazine Media, National Press Photographers
11 Association, National Public Radio, Inc., The New York Times Company, The News Guild - CWA,
12 Newspaper Association of America, North Jersey Media Group Inc., Online News Association,
13 ProPublica, Radio Television Digital News Association, Reporters Without Borders, Society of
14 Professional Journalists, Student Press Law Center, TEGNA Inc., and the Tully Center for Free
15 Speech (collectively, “*amici*”) respectfully request permission to file the attached *amicus curiae*
16 brief in support of the Freedom of the Press Foundation’s (“FPF”) Opposition to Defendants’
17 Motion for Summary Judgment and Cross-Motion for Summary Judgment in this action. The brief
18 of the Reporters Committee and the media coalition will assist the Court in providing background
19 on the U.S. Department of Justice’s new policies regarding the use of legal process to obtain
20 information from, or records of, the news media. *See* 28 C.F.R. § 50.10.
21
22
23

24 FPF has consented to the filing of the attached *amicus* brief. The Government takes no
25 position on the Reporters Committee’s request for leave to file the attached *amicus* brief.
26
27
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IDENTITY OF AMICI

1
2 The Reporters Committee for Freedom of the Press is an unincorporated nonprofit
3 association of reporters and editors that works to defend the First Amendment rights and freedom of
4 information interests of the news media. The Reporters Committee has provided assistance and
5 research in First Amendment and Freedom of Information Act litigation since 1970.

6 ALM Media, LLC publishes over 30 national and regional magazines and newspapers,
7 including *The American Lawyer*, *The National Law Journal*, *New York Law Journal* and *Corporate*
8 *Counsel*, as well as the website Law.com. Many of ALM's publications have long histories
9 reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for
10 example, has been published in northern California since 1877; *New York Law Journal* was begun a
11 few years later, in 1888. ALM's publications have won numerous awards for their coverage of
12 critical national and local legal stories, including many stories that have been later picked up by
13 other national media.
14

15
16 With some 500 members, American Society of News Editors ("ASNE") is an organization
17 that includes directing editors of daily newspapers throughout the Americas. ASNE changed its
18 name in April 2009 to American Society of News Editors and approved broadening its membership
19 to editors of online news providers and academic leaders. Founded in 1922 as American Society of
20 Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on
21 improving freedom of information, diversity, readership and the credibility of newspapers.
22

23 The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit
24 Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's
25 members and subscribers include the nation's newspapers, magazines, broadcasters, cable news
26 services and Internet content providers. The AP operates from 300 locations in more than 100
27 countries. On any given day, AP's content can reach more than half of the world's population.
28

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

6 The Association of American Publishers, Inc. (“AAP”) is the national trade association of
7 the U.S. book publishing industry. AAP’s members include most of the major commercial book
8 publishers in the United States, as well as smaller and nonprofit publishers, university presses and
9 scholarly societies. AAP members publish hardcover and paperback books in every field,
10 educational materials for the elementary, secondary, postsecondary and professional markets,
11 scholarly journals, computer software and electronic products and services. The Association
12 represents an industry whose very existence depends upon the free exercise of rights guaranteed by
13 the First Amendment.
14

15 BuzzFeed is a social news and entertainment company that provides shareable breaking
16 news, original reporting, entertainment, and video across the social web to its global audience of
17 more than 200 million.
18

19 Cable News Network, Inc. (“CNN”), a division of Turner Broadcasting System, Inc., a Time
20 Warner Company, is the most trusted source for news and information. Its reach extends to the
21 following: nine cable and satellite television networks; one private place-based network; two radio
22 networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news
23 websites in the United States; CNN Newsource, the world’s most extensively syndicated news
24 service; and strategic international partnerships within both television and the digital media.
25

26 The California Newspaper Publishers Association (“CNPA”) is a nonprofit trade association
27 representing the interests of nearly 850 daily, weekly and student newspapers throughout California.
28

1 For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to
2 all citizens and to the press by the First Amendment of the United States Constitution and Article 1,
3 Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of
4 information concerning government institutions in order for newspapers to fulfill their constitutional
5 role in our democratic society and to advance the interest of all Californians in the transparency of
6 government operations.

7
8 The Daily Beast was founded in 2008 as the vision of Tina Brown and IAC Chairman Barry
9 Diller. Curated to avoid information overload, the site is dedicated to breaking news and sharp
10 commentary. John Avlon serves as editor-in-chief of the site which regularly attracts over 20
11 million unique online visitors a month and is the winner of two consecutive Webby awards for ‘best
12 news’ site.

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

20
21 First Amendment Coalition is a nonprofit public interest organization dedicated to defending
22 free speech, free press and open government rights in order to make government, at all levels, more
23 accountable to the people. The Coalition’s mission assumes that government transparency and an
24 informed electorate are essential to a self-governing democracy. To that end, we resist excessive
25 government secrecy (while recognizing the need to protect legitimate state secrets) and censorship
26 of all kinds.
27

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

3 Gannett Co., Inc. is an international news and information company that publishes 108 daily
4 newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's
5 newspapers are distributed to an audience of more than 8 million readers and the digital and mobile
6 products associated with the company's publications serve online content to more than 100 million
7 unique visitors each month.

8
9 Gawker Media LLC is the publisher of some of the web's best-loved brands and
10 communities, including the eponymous Gawker, the gadget sensation Gizmodo, and the popular
11 sports site Deadspin. Founded in 2002, Gawker's sites reach over 100 million readers around the
12 world each month.

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

16
17 Investigative Reporters and Editors, Inc. is a grassroots nonprofit organization dedicated to
18 improving the quality of investigative reporting. IRE was formed in 1975 to create a forum in which
19 journalists throughout the world could help each other by sharing story ideas, newsgathering
20 techniques and news sources.

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

25
26 Los Angeles Times Communications LLC and Chicago Tribune Company, LLC are two of
27 the largest daily newspapers in the United States. Their popular news and information websites,

1 www.latimes.com and www.chicagotribune.com, attract national audiences. Los Angeles Times
2 Communications LLC and Chicago Tribune Company, LLC are subsidiaries of Tribune Publishing
3 Company.

4 The McClatchy Company is a 21st century news and information leader, publisher of iconic
5 brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte
6 Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy
7 operates media companies in 28 U.S. markets in 14 states, providing each of its communities with
8 high-quality news and advertising services in a wide array of digital and print formats. McClatchy is
9 headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol
10 MNI.
11

12 The Media Consortium is a network of the country's leading, progressive, independent
13 media outlets. Our mission is to amplify independent media's voice, increase our collective clout,
14 leverage our current audience and reach new ones.
15

16 MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for
17 magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media
18 companies with more than 900 magazine titles. The MPA represents the interests of weekly,
19 monthly and quarterly publications that produce titles on topics that cover politics, religion, sports,
20 industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA
21 has a long history of advocating on First Amendment issues.
22

23 The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit
24 organization dedicated to the advancement of visual journalism in its creation, editing and
25 distribution. NPPA's approximately 7,000 members include television and still photographers,
26 editors, students and representatives of businesses that serve the visual journalism industry. Since its
27 founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well
28

1 as freedom of the press in all its forms, especially as it relates to visual journalism. The submission
2 of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

3 National Public Radio, Inc. (NPR) is an award-winning producer and distributor of
4 noncommercial news, information, and cultural programming. A privately supported, not-for-profit
5 membership organization, NPR serves an audience of more than 26 million listeners each week via
6 more than 1000 noncommercial, independently operated radio stations, licensed to more than 260
7 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an
8 expanding audience via its digital properties, including NPR.org and NPR's applications, which see
9 more than 30 million unique visitors each month. National Public Radio, Inc. has no parent
10 company and issues no stock.

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

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

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

1 North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and
2 publishing company, parent of two daily newspapers serving the residents of northern New
3 Jersey: *The Record* (Bergen County), the state’s second-largest newspaper, and the *Herald*
4 *News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns
5 across five counties and a family of glossy magazines, including (201) Magazine, Bergen County’s
6 premiere magazine. All of the newspapers contribute breaking news, features, columns and local
7 information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing
8 the people, places and events of Bergen County.
9

10 Online News Association (“ONA”) is the world’s largest association of online journalists.
11 ONA’s mission is to inspire innovation and excellence among journalists to better serve the public.
12 ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers,
13 technologists, photographers, academics, students and others who produce news for the Internet or
14 other digital delivery systems. ONA hosts the annual Online News Association conference and
15 administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital
16 journalists and the public generally by encouraging editorial integrity and independence, journalistic
17 excellence and freedom of expression and access.
18

19 ProPublica is an independent, nonprofit newsroom that produces investigative journalism in
20 the public interest. In 2010, it was the first online news organization to win a Pulitzer Prize. In
21 2011, ProPublica won its second Pulitzer, the first ever awarded to a body of work that did not
22 appear in print. This year, ProPublica was awarded its third Pulitzer. In 2014, ProPublica won a
23 MacArthur Award for Creative and Effective Leadership. ProPublica is supported primarily by
24 philanthropy and offers its articles for republication, both through its website, propublica.org, and
25 directly to leading news organizations selected for maximum impact.
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1 Radio Television Digital News Association (“RTDNA”) is the world’s largest and only
2 professional organization devoted exclusively to electronic journalism. RTDNA is made up of news
3 directors, news associates, educators and students in radio, television, cable and electronic media in
4 more than 30 countries. RTDNA is committed to encouraging excellence in the electronic
5 journalism industry and upholding First Amendment freedoms.

6 Reporters Without Borders has been fighting censorship and supporting and protecting
7 journalists since 1985. Activities are carried out on five continents through its network of over 150
8 correspondents, its national sections, and its close collaboration with local and regional press
9 freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

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

16 Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since
17 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high
18 school and college journalists about the rights and responsibilities embodied in the First
19 Amendment to the Constitution of the United States. SPLC provides free legal assistance,
20 information and educational materials for student journalists on a variety of legal topics.

21 TEGNA Inc. owns or services (through shared service agreements or other similar
22 agreements) 46 television stations in 38 markets.
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1 The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I.
2 Newhouse School of Public Communications, one of the nation's premier schools of mass
3 communications.

4 **INTEREST OF AMICI**

5 As members and representatives of the news media, *amici* have a strong interest in
6 understanding the rules and procedures that the Federal Bureau of Investigation ("FBI") observes
7 when it uses NSLs, exigent letters, and other forms of legal process to obtain reporters'
8 communications records. The perspective and arguments of *amici* can assist the Court in ruling on
9 the cross-motions for summary judgment by providing additional information and analysis
10 regarding the need for the news media and the public to have access to the FBI's rules regarding
11 these processes. This issue, which is not fully addressed in the parties' briefs, is of critical
12 importance and will inform this Court's decision on the Government's Motion.
13

14 For these reasons, *amici* respectfully request leave to file the attached brief as *amicus curiae*
15 in support of Plaintiff's motion for summary judgment.
16

17 Dated: June 10, 2016

Respectfully submitted,

18 */s/Katie Townsend* _____

19 Katie Townsend

20 *Counsel of Record for Amici Curiae*

21 THE REPORTERS COMMITTEE FOR
22 FREEDOM OF THE PRESS
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
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**FREEDOM OF THE PRESS
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**UNITED STATES DEPARTMENT OF
JUSTICE,**

Defendant.

CASE NO. 15-cv-03503-HSG

**BRIEF *AMICUS CURIAE* OF THE
REPORTERS COMMITTEE FOR
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MEDIA ORGANIZATIONS IN SUPPORT
OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Date: August 18, 2016

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Courtroom 10, 19th Floor

Hon. Haywood S. Gilliam Jr.

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CORPORATE DISCLOSURE STATEMENT i

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 I. The manner in which the FBI uses legal process to obtain journalists’ toll billing records is of substantial interest and importance to the media and the public. 3

 II. The FBI’s use of NSLs and exigent letters to obtain journalists’ toll billing records is a matter of particular public interest and concern. 8

 A. NSLs, and the secrecy surrounding them, imperil the confidential relationship between reporters and sources..... 8

 B. The FBI has previously disregarded regulatory protections for the press by using informal requests to obtain news media records..... 13

CONCLUSION..... 15

APPENDIX A..... 16

CORPORATE DISCLOSURE STATEMENT

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

3
4 ALM Media, LLC is privately owned, and no publicly held corporation owns 10% or more
5 of its stock.

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

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

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

11
12 The Association of American Publishers, Inc. is a nonprofit organization that has no parent
13 and issues no stock.

14 BuzzFeed Inc. is a privately owned company, with no public companies that own 10% or
15 more of its stock.

16 Cable News Network, Inc. is a wholly owned subsidiary of Turner Broadcasting System,
17 Inc., which itself is a wholly owned subsidiary of Time Warner Inc., a publicly traded corporation.

18 California Newspaper Publishers Association is a mutual benefit corporation organized
19 under state law for the purpose of promoting and preserving the newspaper industry in California.

20
21 The Daily Beast Company LLC is owned by IAC/InterActiveCorp, a publicly traded
22 company, and the Sidney Harman Trust, with IAC holding a controlling interest.

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

25
26 First Amendment Coalition is a nonprofit organization with no parent company. It issues no
27 stock and does not own any of the party's or amicus' stock.

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

4 Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are
5 publicly owned. No publicly held company holds 10% or more of its stock.

6 Gawker Media LLC is privately held and wholly owned by privately held Gawker Media
7 Group, Inc. No publicly held corporation holds an interest of 10% or more in Gawker Media LLC.
8

9 The International Documentary Association is an non-for-profit organization with no parent
10 corporation and no stock.

11 Investigative Reporters & Editors (IRE) is an independent, 501c3 nonprofit organization that
12 provides resources and training for journalists. IRE has no parent company and does not sell stock.

13 The Investigative Reporting Workshop is a privately funded, nonprofit news organization
14 affiliated with the American University School of Communication in Washington. It issues no
15 stock.
16

17 Los Angeles Times Communications LLC and Chicago Tribune Company, LLC are
18 subsidiaries of Tribune Publishing Company. Tribune Publishing Company is publicly
19 held. Merrick Media, LLC, Nant Capital, LLC, Oaktree Capital Management, L.P., and Primecap
20 Management Company each own 10 percent or more of Tribune Publishing Company's stock.

21 The McClatchy Company is publicly traded on the New York Stock Exchange under the
22 ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common
23 stock of The McClatchy Company.
24

25 The Media Consortium has no parent corporation and no stock.

26 MPA – The Association of Magazine Media has no parent companies, and no publicly held
27 company owns more than 10% of its stock.
28

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

3 National Public Radio, Inc. is a privately supported, not-for-profit membership organization
4 that has no parent company and issues no stock.

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

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

9 Newspaper Association of America is a nonprofit, non-stock corporation organized under
10 the laws of the commonwealth of Virginia. It has no parent company.

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

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

15 Pro Publica, Inc. (“ProPublica”) is a Delaware nonprofit corporation that is tax-exempt
16 under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

17 Radio Television Digital News Association is a nonprofit organization that has no parent
18 company and issues no stock.

19 Reporters Without Borders is a nonprofit association with no parent corporation.

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

21 Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and
22 issues no stock.

23 TEGNA Inc. has no parent company, and no publicly-held company has a 10% or greater
24 ownership interest in TEGNA, Inc.

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

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1 Zalesin, Jeff, *AP Chief Points to Chilling Effect After Justice Investigation*,
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2 **Regulations**
28 C.F.R. § 50.10 *passim*

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INTRODUCTION

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2 This federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, case arises out of the
3 refusal of the Federal Bureau of Investigation (“FBI”), a component of the U.S. Department of
4 Justice (“DOJ” or “Defendant”), to release records requested by Plaintiff Freedom of the Press
5 Foundation (“Plaintiff”) regarding the FBI’s use of national security letters (“NSLs”) and exigent
6 letters to obtain the toll billing records of journalists. The Reporters Committee for Freedom of the
7 Press and 37 other media organizations (collectively, “*amici*”) write in support of Plaintiff’s
8 Opposition to Defendant’s Motion for Summary Judgment to emphasize the critical importance to
9 the press and the public of access to information about the manner in which the FBI seeks to use
10 legal process to obtain the toll billing records of reporters and news organizations. Because
11 compelled disclosure of journalists’ communications records has a corrosive effect upon the ability
12 of the press to gather news and report on matters of public concern, transparency about the rules and
13 practices that govern the FBI’s use of national security process to target journalists and the press for
14 investigative purposes is crucial.
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17 In February 2014, and again in January 2015, in response to concerns about the seizure of
18 journalists’ communications records, the Department of Justice revised its policies, which date back
19 to 1970, governing the use of legal process to obtain information from or records of members of the
20 news media, including toll billing records (the “Guidelines”). *See* 28 C.F.R. § 50.10. During this
21 period of time, the Department met repeatedly with representatives of the news media, including the
22 Reporters Committee and companies in this coalition, about the progress of its revisions. As
23 amended, the Guidelines impose limitations on the use of many forms of process, including
24 subpoenas, search warrants, and orders under the Stored Communications Act, to obtain
25 information from non-consenting members of the news media or from their communications service
26 providers. *Id.*
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1 The Justice Department did not hide the fact at the time that the revised Guidelines do not
2 apply to all forms of process that could be used against the press. Although NSLs are a form of
3 subpoena, and are akin to other types of process expressly regulated by the Guidelines, Defendant
4 restates in this case that the Guidelines do not extend to NSLs and has asserted that the FBI's
5 internal procedures and policies that *do* regulate the use of NSLs to obtain journalists'
6 communications records are exempt from disclosure under FOIA. It makes this contention about
7 the need for secrecy even though the existence of such a policy is on the public record and a
8 redacted version of it was made available through unrelated FOIA litigation before the current
9 Guidelines were revised.
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11 Defendant's own efforts to amend the Guidelines show that publicly available rules and
12 procedures constraining the government's ability to compel production of, among other things,
13 journalists' telephone and email records, are essential to ensuring public confidence that the
14 government's investigative methods do not impermissibly infringe on First Amendment rights. In
15 the absence of public disclosure of the policies governing NSLs and exigent letters, it is impossible
16 to assess the structures through which the FBI is allowed to obtain these materials outside of the
17 protections of the Guidelines. Warrantless, secret acquisition of journalists' communications
18 records damages the ability of reporters to safeguard the confidentiality of their sources and to
19 pursue stories free from government interference, which, in turn, hampers the media's ability to
20 fulfill its constitutionally recognized role of keeping the public informed. Whatever the government
21 might argue about the rationale for concealing specific NSL requests or exigent letters, it is hard to
22 fathom why the policy itself must remain hidden. For these reasons, as well as those set forth in
23 Plaintiff's opposition, *amici* urge this Court to deny Defendant's Motion for Summary Judgment.
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INTEREST OF AMICI CURIAE¹

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2 The Reporters Committee for Freedom of the Press (“Reporters Committee”), ALM Media,
3 LLC, American Society of News Editors, The Associated Press, Association of Alternative
4 Newsmedia, Association of American Publishers, Inc., BuzzFeed, Cable News Network, Inc.,
5 California Newspaper Publishers Association, Chicago Tribune Company, LLC, Committee to
6 Protect Journalists, The Daily Beast Company LLC, The E.W. Scripps Company, First Amendment
7 Coalition, First Look Media Works, Inc., Gannett Co., Inc., Gawker Media LLC, International
8 Documentary Assn., Investigative Reporters and Editors, Investigative Reporting Workshop at
9 American University, Los Angeles Times Communications LLC, The McClatchy Company, The
10 Media Consortium, MPA – The Association of Magazine Media, National Press Photographers
11 Association, The New York Times Company, The News Guild - CWA, Newspaper Association of
12 America, North Jersey Media Group Inc., Online News Association, ProPublica, Radio Television
13 Digital News Association, Reporters Without Borders, Student Press Law Center, TEGNA Inc., and
14 the Tully Center for Free Speech (collectively, “*amici*”) submit this brief in support of the Plaintiff
15 in this matter. Plaintiff has consented to this filing. The Government takes no position on this
16 filing. *Amici* hereby incorporate by reference the statement of interest and descriptions of identity
17 of *amici* set forth in the motion for leave to file this brief as *amicus curiae*. Additional counsel for
18 *amici* are set forth in Appendix A.

ARGUMENT

I. The manner in which the FBI uses legal process to obtain journalists’ toll billing records is of substantial interest and importance to the media and the public.

24 The Department of Justice’s Guidelines governing the issuance of warrants or subpoenas to
25 members of the news media and for telephone toll records of members of the news media, as well as

27 ¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other
28 than *amici* or their counsel, make a monetary contribution to the preparation or submission of this
brief.

1 the interrogation, indictment, and arrest of members of the news media, have long played an
2 important role in constraining the government’s investigative and prosecutorial powers so as not to
3 infringe upon newsgathering activities protected by the First Amendment. *See* 28 C.F.R. § 50.10.
4 Generally speaking, the Guidelines require the Attorney General to authorize the use of a subpoena
5 or warrant to obtain records, including communications records, of a member of the news media. §
6 50.10(a)(3) . . . The “affected member of the news media” must also be given “reasonable and
7 timely notice” of the request. § 50.10(a)(4) . . . The Guidelines do not refer to NSLs, exigent letters,
8 or Foreign Intelligence Surveillance Act (“FISA”) warrants or applications, and thus leave open
9 serious questions as to the FBI’s practices regarding the availability and use of NSLs to obtain
10 communications records of journalists and news organizations.
11

12 The Guidelines are not limited to subpoenas issued *directly* to members of the news media.
13 They also regulate the issuance of subpoenas to third party entities for reporters’ toll billing records,
14 which include incoming and outgoing telephone calls. Prior to 2014, however, the Guidelines
15 imposed fewer requirements on third-party subpoenas for toll billing records than on subpoenas
16 directed at a member of the news media. For example, while the pre-2014 Guidelines required the
17 government to pursue negotiations with a member of the news media before issuing a subpoena
18 directed at that person, if the government sought toll billing records, it was required only to pursue
19 negotiations “where the responsible Assistant Attorney General determines that such negotiations
20 would *not* pose a substantial threat to the integrity of the investigation in connection with which the
21 records are sought.” 28 C.F.R. § 50.10(d) (1980) (emphasis added). As a result, the pre-2014
22 Guidelines codified a presumption that members of the media would *not* have the opportunity to
23 negotiate with the Department of Justice before investigators sought and obtained their toll billing
24 records from a third party.
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1 In 2013, reports of two separate incidents of the government's use of subpoena and search
2 warrant authority to obtain communications records of members of the news media provoked public
3 outcry and prompted the government to revise the Guidelines. First, news outlets reported that
4 Defendant had secretly subpoenaed two months' worth of records from twenty Associated Press
5 ("AP") telephone lines. *See* Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*,
6 Associated Press, May 13, 2013, <http://bit.ly/11zhUOg>.

7
8 Shortly thereafter, the public learned that the FBI had identified Fox News journalist James
9 Rosen as a "co-conspirator" in a search warrant application so that it could obtain his emails in
10 connection with a criminal investigation into a suspected leak of classified information by one of
11 the reporter's sources. *See Application for Search Warrant for E-mail Account*
12 *[redacted]@gmail.com*, No. 1:10-mj-00291-AK (D.D.C., Affidavit in support of application for
13 search warrant, unsealed Nov. 7, 2011). According to news accounts, Rosen was unaware of the
14 existence of the search warrant until it was reported in *The Washington Post*. *See* Ryan Lizza, *How*
15 *Prosecutors Fought to Keep Rosen's Warrant Secret*, *The New Yorker* (May 24, 2013),
16 <http://bit.ly/1TD3How>.

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18 These reports stunned the news media and the country. In response, President Obama stated
19 that he had directed then-Attorney General Eric Holder to "review existing Department of Justice
20 guidelines governing investigations that involve reporters, and he'll convene a group of media
21 organizations to hear their concerns as part of that review." Remarks by the President at the
22 National Defense University (May 23, 2013), *available at* <http://1.usa.gov/1EJEpTw>. A coalition of
23 over 50 news media organizations led by the Reporters Committee submitted comments to the
24 Department regarding ways to update and improve the news media Guidelines. *Ltr. from Reporters*
25 *Comm. to Attorney General Holder* (June 21, 2013), *available at* <http://bit.ly/1X12I88>; *Ltr. from*
26 *Reporters Comm. to Attorney General Holder* (June 28, 2013), *available at* <http://bit.ly/1THVbtV>.

1 In the months after the AP subpoenas and Rosen search warrant became public, Attorney General
2 Holder “personally held seven meetings with approximately 30 news media organizations as well as
3 with First Amendment groups, media industry associations and academic experts,” and the Justice
4 Department issued a public report outlining its revisions to the Guidelines and previewing the
5 formal changes in the Code of Federal Regulations. Statement of Attorney General Eric Holder on
6 the Justice Department Report on Revised Media Guidelines (July 12, 2013),
7 <http://1.usa.gov/1P1g5SJ>; *see also* Justice Department Report on Revised Media Guidelines (July
8 12, 2013), *available at* <http://1.usa.gov/1TTieSt> (“Justice Department Report”).
9

10 The Justice Department Report made clear that revisions to the Guidelines would make
11 significant policy changes. First and foremost, the Justice Department acknowledged the need to
12 “reverse and expand the presumption concerning notice to, and negotiations with,” members of the
13 news media whose records the Department seeks, either directly or from third parties. *Id.* at 2. The
14 Justice Department Report stated that “[a]dvance notice will afford members of the news media the
15 opportunity to engage with the Department regarding the proposed use of investigative tools to
16 obtain communications or business records, and also provide the news media with the opportunity
17 to challenge the government’s use of such tools in federal court.” *Id.* Second, the Justice
18 Department Report stated that the Department “would revise current policy” to require heightened
19 scrutiny and high-level approval for search warrants and court orders issued under the Stored
20 Communications Act, 18 U.S.C. § 2703(d), seeking records belonging to members of the news
21 media. *Id.* at 3. The Justice Department Report further called for formalized guidance and updated
22 training materials for the Department’s attorneys and law enforcement officials, *id.* at 5–6, as well
23 as the creation of a News Media Dialogue Group (“Dialogue Group”) “to discuss any policy issues
24 relating to the application of the Department’s news media policies.” *Id.* at 6.
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1 After these reforms were codified in amended regulations released in February 2014,
2 Attorney General Holder convened a meeting of the Dialogue Group, in which the Reporters
3 Committee's executive director and 10 other journalists and lawyers participated, to facilitate
4 discussion between stakeholders including Department of Justice prosecutors, journalists and news
5 media organizations, and civil society. See Kimberly Chow, *Revising the Attorney General's*
6 *Guidelines*, *The News Media and The Law* (Winter 2015), available at <http://bit.ly/1WPSaI6>.
7 Among other issues, the Dialogue Group addressed the textual changes to the amended Guidelines,
8 as well as the Department's effort to compel *New York Times* reporter James Risen to testify in the
9 Espionage Act trial of Jeffrey Sterling, a former government employee whom the government
10 suspected had leaked classified information to Risen. Steve Coll, *The Reporter Resists His*
11 *Government*, *N.Y. Rev. Books* (Feb. 19, 2015), <http://bit.ly/22qKT1x>. The Dialogue Group also
12 addressed the need for the Department to update crucial internal training documents, policies and
13 procedures, including the United States Attorneys' Manual ("USAM"), to reflect its revisions to the
14 Guidelines. The Guidelines were further revised in January 2015, and the Department updated the
15 USAM in April 2016 to correspond with the new Guidelines requirements. See USAM 9-13.400
16 (Apr. 2016); see also Editorial, *On Press Freedom, Eric Holder Makes the Right Call*, *Wash. Post*
17 (Jan. 16, 2015), <http://wapo.st/1Y6Zi2y> (commending the Department for making revisions to the
18 Guidelines).

21 Notwithstanding these reforms, neither the Justice Department Report nor the Guidelines as
22 amended mention NSLs or other forms of process, such as FISA warrants, that closely resemble
23 subpoenas and search warrants. See Reporters Committee for Freedom of the Press, *Summary of*
24 *Changes to the Attorney General Guidelines* (July 30, 2013), <http://bit.ly/1TErRo3>. At the time that
25 the Justice Department Report was issued, it was widely understood that revisions to the Guidelines
26 would not address the FBI's ability to obtain journalists' toll billing records using NSLs. See
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1 Charlie Savage, *Holder Tightens Rules on Getting Reporters' Data*, N.Y. Times (July 12, 2013),
2 <http://nyti.ms/1QUpeIK>. And the FBI's position that the requirements of the Guidelines do not
3 apply to NSLs is not new. In an appendix to the Domestic Investigations and Operations Guide
4 ("DIOG") entitled "National Security Letters For Telephone Toll Records of Members of the News
5 Media or News Organizations" released pursuant to an unrelated FOIA lawsuit in 2011, the FBI
6 states, "The [28 C.F.R. § 50.10] regulation concerns *only* grand jury subpoenas, not National
7 Security Letters (NSLs) or administrative subpoenas." DIOG App. § G.12 (Emphasis added).
8

9 In light of Defendant's distinction between, on the one hand, subpoenas and warrants
10 covered by the Guidelines, and, on the other, NSLs and other forms of national security process, the
11 Government's reluctance to disclose what policies or procedures do apply to NSLs seeking
12 journalists' communications records is troubling. While it is evident that the FBI has adopted at
13 least some policies and procedures specifically applicable to the use of NSLs to seek journalists' toll
14 billing records, *see* DIOG App. § G.12, it now seeks to keep those rules secret, claiming, among
15 other things, that disclosure would enable the targets of such requests—journalists and news
16 organizations—to purportedly circumvent the law. Gov't Mot. for Summ. J. at 22, 24. Public
17 access to such information is critical, and FOIA requires its disclosure.
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19 **II. The FBI's use of NSLs and exigent letters to obtain journalists' toll billing records is a**
20 **matter of particular public interest and concern.**

21 **A. NSLs, and the secrecy surrounding them, imperil the confidential relationship**
22 **between reporters and sources.**

23 Throughout the Guidelines revisions process, access to the policies and procedures that
24 regulate the Justice Department's ability to compel disclosure of journalists' communications
25 records has proven critical to the press and to the public. Yet in this and other cases, the
26 government has fought to keep secret its own rules, policies, and procedures that regulate the ways
27 in which it may use NSLs and other forms of process in order to obtain journalists' toll billing
28 records. The relevant DIOG appendix released in 2011 is heavily redacted but suggests that there

1 are approval requirements and specific procedures necessary to use an NSL for telephone records of
2 members of the news media and news organizations. The government’s position that releasing
3 these policies and procedures would enable individuals to “evade detection and circumvent the
4 law,” Gov’t Mot. for Summ. J. at 22, 24, is not only without merit, but also inconsistent with the
5 spirit and purpose of the Guidelines, as amended.

6 Public disclosure of the rules governing the use of NSLs and other national security process
7 to target journalists is especially critical because NSLs lack other safeguards typically present to
8 protect First Amendment rights. NSLs are frequently used at the early stages of investigations “to
9 connect investigative subjects with particular telephone numbers or e-mail addresses” in order to
10 support later applications for Foreign Intelligence Surveillance Act warrants, subpoenas, or
11 electronic surveillance orders. See OIG, *A Review of the Federal Bureau of Investigation’s Use of*
12 *National Security Letters* xxiv (Mar. 2007) (“NSL Report I”). While the material that the
13 government may obtain using an NSL is not coextensive with what it may obtain using a grand jury
14 subpoena—for example, NSLs may not compel the disclosure of content—like subpoenas and
15 Stored Communications Act orders, NSLs can compel disclosure of toll billing records. 18 U.S.C.
16 § 2709. *Amici* are especially concerned that the FBI may seek to use NSLs instead of subpoenas or
17 Stored Communications Act orders specifically in order to avoid the Guidelines requirements that
18 would otherwise apply, including exhaustion of alternative sources for the information sought. See
19 28 C.F.R. § 50.10. In addition, the process for issuing an NSL outlined in the Electronic
20 Communications Privacy Act prohibits an NSL recipient from notifying a target (or any other
21 person) of the request. 18 U.S.C. § 2709(d).² This provision is thus incompatible with the
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26 ² These nondisclosure requirements also give the FBI “the power to determine, on a case-by-case
27 basis, whether to allow NSL recipients to speak about the NSLs.” *In re NSLs*, Order *20, No. 11-
28 cv-02173-SI (N.D. Cal. Mar. 29, 2016), available at <http://bit.ly/1sRZ2c7>. Yet the government has
also resisted the application of procedural safeguards to the NSL nondisclosure regime, arguing that
the “statutory protections” now embedded in the NSL provision are sufficient to obviate the need

1 Guidelines, which create a presumption that the government must provide a news media subpoena
2 target with notice of the request. 28 C.F.R. § 50.10(a)(4). Nor do NSLs require oversight or
3 approval by the Department of Justice or its attorneys.

4 Likewise, Defendant's reluctance to make public its approval requirements and procedures
5 for issuing NSLs to obtain journalists' toll billing records stands in stark contrast to the publicly
6 available Guidelines, which govern the FBI's use of subpoenas and search warrants to obtain
7 identical information in criminal and civil investigations. The codification of the Guidelines, which
8 are intended to "provide protection to members of the news media from certain law enforcement
9 tools, whether criminal or civil, that might unreasonably impair newsgathering activities," facilitates
10 transparency with regard to the Department's investigative practices that affect the news media. 28
11 C.F.R. § 50.10. Yet Defendant here maintains that the rules—not any specific information relating
12 to particular NSLs but merely the rules themselves—that apply to acquiring reporters' toll billing
13 records using forms of process not expressly referenced in the Guidelines must remain secret.
14

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16 The Guidelines—and the cooperative dialogue process that informed the 2014 and 2015
17 revisions—make clear that knowing what types of information regarding journalists'
18 communications the government can obtain without notice or judicial process is of the utmost
19 importance to reporters and media organizations. Yet not only has the government continued to
20 obscure its own interpretations of the nature and scope of its authority to compel disclosure of
21 communications records through the use of an NSL, but nondisclosure requirements imposed on
22 NSL recipients have also severely limited the public's ability to know how NSLs are being utilized
23 in practice to obtain communications records, including journalists' records. *See* 18 U.S.C. §
24 2709(d) (prohibiting an NSL recipient from notifying any person of the request). Because any
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27 for additional protections overseen by the judicial branch. *Id.* at 22 (rejecting government's
28 contention that *Freedman v. Maryland*, 380 U.S. 51 (1965), does not apply to nondisclosure
scheme).

1 NSLs seeking communications records of journalists would be issued to third-party providers, the
2 journalists themselves would be unaware of the requests—and thus unable to challenge them in
3 court—because of the nondisclosure requirements.

4 Data available from the Department of Justice’s Office of the Inspector General (“OIG”),
5 which has issued three major reports on the FBI’s NSL usage, indicates that although hundreds of
6 thousands of NSLs have been issued in the last decade overall, very few recipients have been
7 permitted to speak openly about the experience. The most recent data from the OIG demonstrates
8 that, on average, approximately 44,000 NSLs were issued each year from 2003 to 2011. OIG, *A*
9 *Review of the FBI’s Use of NSLs: Assessment of Progress in Implementing Recommendations and*
10 *Examination of Use in 2007 through 2009* 65 (Aug. 2014) (“*NSL Report IIP*”). A recent report by
11 the Office of the Director of National Intelligence (“ODNI”) indicates that in calendar year 2015,
12 the FBI issued 12,870 NSLs, which collectively included 48,642 “requests for information” from
13 third-party service providers. ODNI, *Statistical Transparency Report Regarding Use of National*
14 *Security Authorities* 9 (Apr. 2016). And, in an earlier report, the OIG concluded based on the
15 review of a random sample of NSLs that 97 percent of those issued imposed nondisclosure
16 requirements. OIG, *A Review of the FBI’s Use of NSLs: Assessment of Corrective Actions and*
17 *Examination of NSL Usage in 2006* 124 (Mar. 2008) (“*NSL Report IP*”).

18 The result of the all-too-common nondisclosure requirements that accompany NSLs has
19 been to keep the public and press largely in the dark regarding the government’s use of this form of
20 legal process. To date, only a small number of NSL recipients have contested such nondisclosure
21 requirements in court.³ Indeed, only a handful of NSL attachments—the portion of the subpoena
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26 ³ See, e.g., Maria Bustillos, *What It’s Like to Get a National-Security Letter*, *The New Yorker* (June
27 27, 2013), <http://nyr.kr/1A1TkRm> (reporting on the Internet Archive’s successful challenge to an
28 NSL it received in 2008); Alison Leigh Cowan, *Four Librarians Finally Break Silence in Records*
Case, *N.Y. Times* (May 31, 2006), <http://nyti.ms/1A1TdFA> (reporting on the successful effort by a
Connecticut library consortium to lift an NSL gag order); see also *In re NSLs*, No. 11-cv-02173-SI

1 that sets out the types of information sought—have been made publicly available. *See Merrill v.*
2 *Lynch*, No. 14-CV-9763 (VM), 2015 WL 9450650 at *11 (S.D.N.Y. Aug. 28, 2015) (lifting
3 nondisclosure order); *see also* Chris Madsen, *Yahoo Announces Public Disclosure of National*
4 *Security Letters*, Yahoo! Global Public Policy (Jun. 1, 2016), <http://bit.ly/1XgPzb3>. In addition, the
5 only publicly available government interpretation of the FBI’s authority to compel the production of
6 electronic communications records is a 2008 memo from the Office of Legal Counsel (“OLC”),
7 which concluded that NSLs may only be used to seek subscriber information, “toll billing records,”
8 and “parallel” categories of information. *See* Requests for Info. Under the Elec. Commc’ns Privacy
9 Act, 32 Op. O.L.C. 2 (2008). The OLC, however, acknowledged that ambiguity exists in the
10 application of the phrase “toll billing records” to electronic communications. *See NSL Report III*, at
11 74. Nondisclosure requirements prevent the public from knowing how the FBI interprets this
12 ambiguous authority to compel production of electronic “toll billing records” and what types of
13 communications records it believes it is authorized to seek with NSLs.
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16 There is no question that, regardless of the specific legal mechanism, compelling production
17 of journalists’ communications records has a real and detrimental impact on the press. After the
18 news broke that the Department of Justice had subpoenaed the metadata from phone lines used by
19 more than 100 AP reporters and editors—i.e. the timing and duration of calls, as well as the
20 associated telephone numbers, *see* Sherman, *Gov’t Obtains Wide AP Phone Records in Probe*,
21 *supra*—AP President and CEO Gary Pruitt stated that sources were less willing to talk to AP
22 reporters: “Some of our longtime trusted sources have become nervous and anxious about talking to
23 us, even on stories that aren’t about national security.” Jeff Zalesin, *AP Chief Points to Chilling*
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27 (N.D. Cal. Mar. 29, 2016),; *In re NSL*, No. 2:13-cv-1048-RAJ (W.D. Wash. May 21, 2014)
28 (granting stipulated motion to lift nondisclosure order that prevented Microsoft from disclosing the
existence of an NSL).

1 *Effect After Justice Investigation*, The Reporters Comm. for Freedom of the Press (June 19, 2013),
2 <http://rcfp.org/x?CSPI>.

3 The lack of information regarding the scope of the FBI's legal authority to use NSLs or
4 other national security process to obtain communications records belonging to journalists makes it
5 difficult for journalists and the media industry to assess whether the Guidelines are effectively
6 protecting the interests they are designed to serve. It is and has been evident that the government
7 has ways around the Guidelines, but Defendant's unwillingness to disclose the FBI's own rules
8 regarding these practices raises serious concerns among the public and the press about the potential
9 for excessive reliance on national security process in cases that implicate newsgathering, and the
10 impact of these tools on First Amendment rights.

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12 **B. The FBI has previously disregarded regulatory protections for the press by**
13 **using informal requests to obtain news media records.**

14 As discussed in detail above, *supra* pp. 3–8, federal regulations constrain the circumstances
15 under which the FBI can use certain enumerated tools to obtain records of members of the news
16 media. 28 C.F.R. § 50.10. Nevertheless, the FBI has a history of attempting to circumvent these
17 regulatory requirements by seeking records of members of the news media using informal requests
18 such as exigent letters rather than the forms of process identified in the § 50.10 regulations. As a
19 result, disclosure of the policies that govern the use of exigent letters to obtain journalists'
20 communications records is equally critical to understanding how the Guidelines affects the FBI's
21 use of national security tools.

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23 In 2007, during the OIG's first review of NSL usage, the OIG found that the FBI had
24 frequently sought telephone toll billing records or subscriber information by using an exigent letter
25 rather than statutory methods of NSLs or grand jury subpoenas. *NSL Report I* at 87. In a follow-up
26 investigation, the OIG identified three leak investigations in which journalists' records had been
27 requested using methods that did not comply with 28 C.F.R. § 50.10. OIG, *A Review of the Federal*
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1 *Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone*
2 *Records* 89 (Jan. 2010), available at <https://oig.justice.gov/reports/2014/o1411.pdf> (“Exigent
3 Letters Report”). In one instance, the FBI obtained from a telephone provider 22 months of records
4 for reporter Ellen Nakashima, 22 months of records for *The Washington Post* bureau in Jakarta, as
5 well as records for journalists Alan Sipress, Natasha Tampubolon, Raymond Bonner and Jane
6 Perlez using an exigent letter. *See id.* at 95, 101; *see also* Raymond Bonner, *How a Telecom*
7 *Helped the Government Spy on Me*, ProPublica (Oct. 3, 2013 2:00 PM),
8 <https://www.propublica.org/article/how-a-telecom-helped-the-government-spy-on-me>. OIG called
9 this “a complete breakdown in the required Department procedures for approving the issuance of
10 grand jury subpoenas for reporters’ toll billing records.” *Exigent Letters Report* at 103.

12 In another leak investigation, an FBI agent emailed a telephone company analyst with “the
13 name and cellular phone number of a reporter, facts explaining the relevance of calling activity by
14 the reporter to the investigation, and information indicating that the cellular phone number of the
15 reporter was in contact with the target number of the subpoena during a particular period.” *Id.* at
16 116. Several phone companies then queried their own databases to obtain the reporter’s records.
17 OIG wrote that this was “a clear abuse of authority, in violation of the ECPA, federal regulation,
18 and Department policy.” *Id.* at 121.

20 The OIG “concluded that serious lapses in training, supervision, and oversight led to the
21 abuses involving the FBI’s improper requests for reporters’ records” in these instances. *Id.* at 279.
22 In response, the OIG recommended that “[t]he FBI, in conjunction with the National Security
23 Division (NSD) and other relevant [Justice] Department components, should review current policies
24 and procedures governing [classified and redacted] reporters by Department personnel.” *Id.* at 288.
25 A recent status report issued by the OIG indicates that the status of this recommendation is “On
26 Hold/Pending.” OIG, *Recommendations Issued by the Office of the Inspector General That Were*
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1 *Not Closed As of March 31, 2016* ¶ 702 (May 4, 2016), available at
2 <https://oig.justice.gov/reports/2016/r160504.pdf>.

3 The use of exigent letters to obtain journalists' communications records is of significant
4 interest not only to the individual members of the press whose records may be sought, but also to
5 the media industry, which relies on the Guidelines to ensure that individuals and organizations are
6 given notice and an opportunity to be heard before the government compels production of their
7 communications records. Indeed, the FBI's prior use of exigent letters to obtain the records of
8 journalists in violation of both ECPA and the § 50.10 regulations underscores the powerful interest
9 of both the press and the public at large in understanding the manner in which the FBI's policies
10 and procedures constrain—or allow—the use of process not governed by the Guidelines to obtain
11 records of journalists' communications.
12

13 CONCLUSION

14 For the reasons stated above, this Court should deny the government's motion for summary
15 judgment and grant Plaintiff's cross-motion for summary judgment.
16

17 Dated: June 10, 2016

Respectfully submitted,

19 */s/Katie Townsend* _____

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APPENDIX A

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