No. 16-750

UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT

MATTATHIAS SCHWARTZ,
Plaintiff-Appellee,
v.
UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE

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LIST OF *AMICI CURIAE*

1. American Society of News Editors
2. Association of Alternative Newsmedia
3. Association of American Publishers, Inc.
4. The E.W. Scripps Company
5. First Look Media Works, Inc.
6. Gannett Co., Inc.
7. International Documentary Assn.
8. Investigative Reporting Workshop at American University
9. The McClatchy Company
10. The Media Consortium
11. Media Law Resource Center
12. MPA – The Association of Magazine Media
13. The National Press Club
14. National Press Photographers Association
15. NBCUniversal Media, LLC
16. The New York Times Company
17. The NewsGuild - CWA
18. Online News Association
19. Radio Television Digital News Association
20. The Reporters Committee for Freedom of the Press
21. Society of Professional Journalists
22. Tully Center for Free Speech
23. The Washington Post
24. WNYC

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Reporters Committee for Freedom of the Press and 23 media organizations. The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment's guarantee of a free and unfettered press, and the freedom of information interests of the news media and the public. Since 1970, the Reporters Committee has provided guidance and research, and participated as a party and as *amicus curiae*, in cases raising important issues under the First Amendment and the federal Freedom of Information Act ("FOIA"). The remaining *amici* are described in Appendix A.

As representatives and members of the news media, *amici* frequently rely on FOIA to gather information about the government and report on matters of vital public concern. *Amici* thus have a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. P. 29(a), all parties to the appeal have given consent for *amici curiae* to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

At its core, the appeal of the United States Drug Enforcement Administration ("DEA") in this case challenges the capability of the courts to independently evaluate an Executive Branch agency's claim that it may withhold certain information requested under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") because public disclosure would result in some kind of harm. That issue, however, has been conclusively answered by Congress, most prominently in its 1974 amendments to FOIA: it is the responsibility of the courts to conduct a *de novo* review of agency exemption claims under FOIA, aided, if they so choose in a given case, by *in camera* review of the records in question.

Here, in spite of the district court's careful evaluation of the video at issue in this case (the "Ahaus Video"), including an *in camera* review, the DEA argues that the district court "fail[ed] to recognize" why the video should be exempt from disclosure. Br. of Appellant at 17. The DEA had multiple opportunities over the course of the proceedings below to satisfy its burden under FOIA to justify its withholding of the Ahaus Video; among other things, it submitted four declarations—one of which was *ex parte* and under seal—to the district court, and participated in multiple rounds of briefing and oral argument. *See Schwartz v. United States Drug Enf't Admin.*, No. 13-CV-5004 (CBA) (RML), 2016 WL 154089, at *2 (E.D.N.Y. Jan. 12, 2016). Now on appeal, the DEA asks this Court

to conclude that its inability to demonstrate that the Ahaus Video is exempt from disclosure under FOIA is, instead, a failure on the part of the district court to simply rubber stamp the DEA's unsupported conclusion that the video should be withheld. *See* Br. of Appellant at 25 (arguing that the district court "erred in declining to heed the agency's predictive judgments about what the video would reveal to an expert"). As Judge Amon's detailed decision makes clear, the district court conducted the kind of careful, independent review of the DEA's exemption claims that Congress intended. It fully considered the agency's arguments in conjunction with its *in camera* review, and concluded that the agency's position lacked merit. *See Schwartz*, 2016 WL 154089 at * 2 (holding that "the DEA has failed to identify previously unknown techniques and procedures that would be exposed by disclosure of the limited portion of the Ahuas Video that Schwartz seeks."). The district court's decision should be affirmed.

For the reasons set forth in the brief of Plaintiff-Appellee Schwartz, *amici* agree that the records in this case were properly ordered to be disclosed, and write separately (1) to provide this Court with additional information regarding the history and importance of independent judicial review—including *in camera* review—of agency withholdings under FOIA, (2) to emphasize the consistency of the District Court's review with Congressional intent, and (3) to discuss the

particular importance of such review in the context of a rising number of Exemption 7(E) claims by federal agencies.

ARGUMENT

I. Congress intended for courts to conduct meaningful, independent review of agency exemption claims under FOIA, and to use in camera review as a tool to aid in the de novo evaluation of the propriety of agency withholdings.

In enacting the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Congress sought "to open agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989). The Act's purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To facilitate that purpose, FOIA's exemptions are narrowly construed, *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011), and "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought" may be withheld from disclosure, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citation omitted)*; see also Long v. Office of Pers. Mgmt.,* 692 F.3d 185, 190 (2d Cir. 2012) (stating same standards).

As originally enacted in 1966, FOIA required courts to evaluate claims of exemptions by agencies *de novo*, but it did not explicitly provide for district courts' discretionary ability to review records *in camera* to facilitate that independent

evaluation. *See* Pub. L. 89-487 (Jul. 4, 1966). Nevertheless, *in camera* review of records withheld in whole or in part was fairly routine in FOIA's early years. *See, e.g.*, *Soucie v. David*, 448 F.2d 1067, 1079 (D.C. Cir. 1971) ("The court can most effectively undertake the statutory *de novo* evaluation of the Government's claim by examining the [record] *in camera*."); *Cowles Commc'ns, Inc. v. U.S. Dep't of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971) (ordering *in camera* review of records to evaluate Exemption 7 claim); *Wellford v. Hardin*, 315 F. Supp. 175, 179 (D. Md. 1970), aff'd, 444 F.2d 21 (4th Cir. 1971) (ordering *in camera* review of records to evaluate Exemption 5 claim). The reason was simple: *in camera* review affords a judge additional—sometimes necessary—information to facilitate the court's evaluation of an agency's exemption claims when the judge is "not prepared to make a responsible *de novo* determination" on the basis of agency affidavits alone. *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

In 1973, the scope of district courts' authority to conduct *in camera* review in FOIA cases was called into question by the U.S. Supreme Court's decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) ("*Mink*"). The Court in *Mink* held that *in camera* review was unavailable to courts evaluating the propriety of an agency's withholding of records the Executive Branch claimed were classified and within the scope of Exemption 1. *See id*. The majority opinion in *Mink* relied heavily on the legislative history of FOIA to reach its conclusion

that the Judicial Branch should not second-guess judgments made by the Executive Branch when it comes to classifying information. *See id.* But as Justice Douglas's dissent notes, the decision appeared to be motivated at least in part by a belief, asserted by the Executive Branch agency in that case, that judges are simply unable to adequately evaluate whether certain information is exempt from disclosure:

> The Government is aghast at a federal judge's even looking at the secret files and views with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying 'secrets,' that judges are not familiar with the stuff with which these 'Top Secret' or 'Secret' documents deal.

Id. at 109 (Douglas, J., dissenting).

After *Mink*, the government undertook an effort to expand its holding by arguing that judges should not be allowed to review *in camera* material withheld under Exemption 7 (5 U.S.C. § 552(b)(7)). In *Stern v. Richardson*, for example, the government "urged the district court to refrain from an *in camera* inspection" of records withheld, *inter alia*, under Exemption 7. 367 F. Supp. 1316, 1318 n.3 (D.D.C. 1973). And, at the same time, argued to the D.C. Circuit in *Weisberg v. Department of Justice* that Exemption 7 "represents a blanket exemption and as such, despite the Act's requirement that the district court made a *de novo* review of the questioned material to determine whether or not the agency is justified in refusing disclosure, *in camera inspection is unwarranted and inappropriate*." *Id.* (summarizing the Government's argument in its petition for rehearing *en banc*)

(emphasis added). Less than a month later, the D.C. Circuit released its opinion in *Weisberg*, which suggested that *in camera* review of Exemption 7 withholdings was generally inappropriate. *See* 489 F.2d 1195, 1202–03 (D.C. Cir. 1973) (en banc); *see also id.* at 1206 (Bazelon, C.J., dissenting) (arguing the Supreme Court's decision in *Mink* did not foreclose *in camera* review of documents withheld under Exemption 7).

Congress, however, disagreed. In the wake of *Mink* and its progeny, the Senate and House moved swiftly to make clear that courts have both the authority and the responsibility to conduct a *de novo* review of *all* withholdings, and may use *in camera* review to fulfill that obligation.[2] While much of the legislative history of the 1974 amendments focuses on the desire of Congress to overturn *Mink*'s holding as to records withheld under Exemption 1 as classified, the Senate Judiciary Committee Report to S. 2543 makes clear that Congress was also intent on clarifying the power of the judiciary to conduct *in camera* review of records withheld under Exemption 7:

> It should be noted that on at least two occasions, however, the government has taken the position that the seventh exemption . . . also represents a blanket exemption where in camera inspection is unwarranted and inappropriate under the statute. [Citing *Stern* and *Weisberg*.] By expressly providing for in camera inspection regardless of the exemption invoked by the government, S. 2543 would make clear the congressional intent—implied but not expressed

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[2] Although efforts to reform FOIA began before *Mink* was decided, specific provisions were later added to address it. *See, e.g.*, S. Rep. No. 93-854 (1974).

> in the original FOIA—as to the availability of in camera examination in *all* FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

S. Rep. No. 93-854, at 169 (1974), *archived at* https://perma.cc/RA6R-JUC5 (emphasis in original). The Senate's position was later affirmed in the Conference Report on the 1974 amendments:

> the court may examine records *in camera* in making its determination under *any* of the nine categories of exemptions . . . While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. [. . .] The burden remains on the Government under this law.

H. Rep. No 93-1380, at 226 (1974) (Conf. Rep.) (emphasis added).

The 1974 amendments were fiercely opposed by the executive branch. *See* Dan Lopez, Thomas Blanton, Meredith Fuchs and Barbara Elias, *Veto Battle 30 Years Ago Set Freedom of Information Norms*, The National Security Archive (Nov. 23, 2004), *archived at* https://perma.cc/K5DD-AWHM. One of the principle arguments advanced against the amendments was essentially the same argument now put forth by the Defendant-Appellant in this case: "that judges lack the knowledge and expertise to evaluate the effects of releasing allegedly sensitive documents." *Ray*, 587 F.2d at 1211 (summarizing opposition to 1974 reforms); *see* Br. of Appellant at 25 (arguing that the district court "fail[ed] to recognize that the video would be likely to reveal information . . . that would not be readily apparent to a court."). Congress responded to this concern in two ways. First, it stated that

a court can and should make its determinations with the benefit of an agency's opinion expressed in the form of an affidavit, including, if necessary, an *in camera* affidavit. *See Ray*, 587 F.2d at 211. Second and more fundamentally, however, Congress flatly rejected the notion that judges lack the capacity to properly evaluate the propriety of an agency's withholding of government records requested under FOIA. As Senator Muskie stated:

> The conflict on this particular point boils down to one basic concern trust in the judicial system to handle highly sensitive material. * * * 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. As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

Ray, 587 F.2d at 1209 (citation omitted); *see also id.* at 1193–94 ("Those who prevailed in the legislature . . . insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security.").

Indeed, so firm was Congress's support for an independent, impartial review by judges that it overrode President Ford's veto, bringing into the Act many of the provisions that govern FOIA cases today. *Id.* Under those standards, a court's power to conduct an *in camera* review, in conjunction with the use of *Vaughn*

indices and application of FOIA's segregability requirement, "forecloses the possibility that an agency's sweeping claim of blanket exemption for any record or group of records will escape intensive court scrutiny." *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 320 (D.C. Cir. 1982).

II. The District Court's thorough review of the DEA's exemption claim in this case is consistent with Congressional intent.

Despite the clear Congressional mandate reflected in the 1974 amendments to FOIA, courts have often been reluctant to scrutinize agency claims of exemptions under the Act. As one scholar put it, "contrary to Congress's purpose, the judiciary has created a de facto system of deference in its judicial review of FOIA cases, while continuing to pay lip service to the de novo standard of review articulated in the statute." Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. Rev. 185, 187–88 (2013). Indeed, despite the fact that FOIA cases proceed under "the most aggressive judicial review standard available[,]" a review of FOIA cases between 1990 and 1999 found that district courts upheld agencies approximately 90% of the time—a rate far higher than in other types of cases where a *deferential* standard of review is applied. *See* Paul R. Verkuil*, An Outcomes Analysis of Scope of Review Standards,* 44 Wm. & Mary L. Rev. 679, 713 (2002). For example, the decisions of administrative law judges in Social Security Administration disability benefits cases are reviewed by district courts under an abuse of discretion standard, and yet are reversed at a rate of more than 50%. *Id.* at 704.

Judge Amon's decision below, however, is the product of precisely the type of independent judicial review that Congress intended for courts to apply in FOIA cases. Through *in camera* review of the record in question, along with a careful review of the multiple declarations and briefing submitted by the DEA, Judge Amon evaluated the Government's Exemption 7(E) claim and found it wanting. *See Schwartz*, 2016 WL 154089 at *28–45. Indeed, the DEA submitted four declarations to the district court, including a 20-page sealed *ex parte* declaration, that it admits included all the reasons it believed the Ahaus Video was exempt from disclosure. Br. of Appellant at 12. The district court's thorough assessment of each and every one of the DEA's arguments—far from demonstrating a lack of understanding—shows that the agency simply failed to carry its burden under the Act. *See Schwartz*, 2016 WL 154089 at *45. And the DEA's argument that this Court should conclude that Judge Amon was unable "to recognize" why the Ahaus Video is exempt, Br. of Appellant at 17, 25, is contrary to the clear intent of Congress that agencies bear the burden of justifying their withholdings, and courts be the final arbiters of any exemption claims.

The Judiciary's role in FOIA cases is not—as the DEA suggests—to simply rubber stamp whatever position is taken by an agency, but rather to "determine the matter de novo[.]" 5 U.S.C. § 552(a)(4)(B). That courts are frequently reluctant to apply the level of scrutiny intended by Congress does not make the district court's

searching review and ultimate rejection of the DEA's unsupported Exemption 7 claim in this case improper. To the contrary, the district court's evaluation of the agency's withholding of the Ahaus Video in this case is an example of how Congress intended for judges to approach FOIA cases when agencies offer only "vague and conclusory" reasons for withholding records from the public. *Schwartz*, 2016 WL 154089 at *8.

III. The value of *de novo* and *in camera* review by the courts is particularly important in FOIA cases involving the assertion of Exemption 7(E).

The level of scrutiny applied by the district court in this case, as well as its decision to undertake an *in camera* review of the Ahaus Video, takes on particular importance given the substantial increase in the number of Exemption 7(E) claims by Executive Branch agencies in general, and the DEA in particular, in recent years. *De novo* review of agency withholdings in FOIA cases guards against the tendency of Executive Branch agencies towards secrecy, the very ailment that FOIA was enacted to remedy. As the D.C. Circuit has explained, "[b]eing aware of the dangers of relying too much on agency 'expertise,' Congress required the courts to take a fresh look at decisions against disclosure as a check against both intentional misrepresentations and inherent biases." *Ray*, 587 F.2d at 1210.

The rise in Exemption 7(E) claims in recent years has been staggering. In FY 2015, agencies invoked Exemption 7(E) to withhold information from the

public more than 200,000 times—more than any other exemption that does not involve personal privacy. *See* FOIA.gov, https://www.foia.gov/data (follow link to create an advanced report, create report for "Exemptions", "All Agencies") (last visited Sep. 29, 2016). And at the DEA, the rise in Exemption 7(E) withholdings has been particularly explosive. In FY 2008, the DEA invoked Exemption 7(E) just 32 times. *Department of Justice Annual FOIA Report – FY08*, Dep't of Justice, https://www.justice.gov/oip/doj-foia-2008-annual-report-table-contents (last accessed Sep. 20, 2016). But by FY 2015 that number had risen to 529 times—an increase of 1,553%. *See Department of Justice Annual FOIA Report – FY 15*, Dep't of Justice, https://www.justice.gov/oip/department-justice-annual-foia-report-fy-15 (last accessed Sep. 19, 2016). That staggering increase is not attributable simply to an increase in the number of FOIA requests received by the agency, which changed only slightly during that time period; in FY 2008 the DEA applied Exemption 7(E) to less than 2.5% of the 1301 requests it processed, while in FY 2015 it applied it to approximately 32% of the 1677 requests it processed, a proportional increase of approximately 1,180%. *Compare Department of Justice Annual FOIA Report – FY 08*, *supra*, *with Department of Justice Annual FOIA Report – FY 15*, *supra*.

Whether due to an "inherent tendency to resist disclosure" by the agency, or something else, *Ray*, 587 F.2d at 1195, the DEA's increased reliance on Exemption

7(E) to withhold records requested under FOIA threatens the ability of the press and the public to oversee the conduct of that agency. *See* Mike Riggs, *Obama's Secretive Drug War: DEA FOIA Rejections Have Increased 114 Percent Since End of Bush Administration*, reason.com (Jun. 29, 2012), http://bit.ly/2cDE91U; Luke O'Neil, *Why is the DEA Not Cooperating with This FOIA Request?*, Esquire (Dec. 2, 2015), http://www.esquire.com/news-politics/a40126/phil-eil-dea-lawsuit/. Especially when viewed in light of the increased use of Exemption 7(E) by agencies in general, and the DEA in particular, in recent years, the DEA's criticism of the searching review conducted by the district court in this case is sorely misplaced. *De novo* and *in camera* review of such exemption claims by district courts—review of the kind undertaken by Judge Amon below—is needed now perhaps more than ever to ensure agency compliance with FOIA's mandate of openness.

CONCLUSION

For the foregoing reasons and for those set forth in the brief of Appellee, *amici* respectfully urge this Court to affirm the district court's decision.

Respectfully submitted,

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Dated: September 29, 2016
Washington, D.C.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 3,238 words, excluding the parts of the brief exempted Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Time New Roman font.

/s/ Bruce D. Brown
Bruce Brown, Esq.
Counsel of Record

Dated: September 29, 2016
Washington, D.C.

APPENDIX A:

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

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

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

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP

members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

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

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

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the

company's publications serve online content to more than 100 million unique visitors each month.

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

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

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

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

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

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

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

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

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, including WNBC in New York, 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," "Rock Center with Brian Williams" and "Meet the Press" and operates NBCNews.com.

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

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

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and

administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

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.

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

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

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

WNYC is New York's public radio station, broadcasting and streaming award-winning journalism, groundbreaking audio programming and essential talk radio to the city and beyond. WNYC is a leading member station of NPR and also broadcasts programs from the BBC World Service, along with a roster of WNYC-produced local programs that champion the stories and spirit of New York City and the surrounding region. WNYC broadcasts on 93.9 FM and AM 820 to listeners in New York and the tri-state area, and is available to audiences everywhere at WNYC.org, the WNYC app and through major digital radio services.

APPENDIX B:

CORPORATE DISCLOSURE STATEMENTS OF *AMICI CURIAE*

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

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

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

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

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

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

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

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

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

The Media Consortium has no parent corporation and no stock.

The Media Law Resource Center has no parent corporation and issues no stock.

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

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

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

Comcast Corporation and its consolidated subsidiaries own 100% of the common equity interests of NBCUniversal Media, LLC.

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

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

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

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

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

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

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

WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

WNYC is part of New York Public Radio, a privately supported, not-for-profit organization that has no parent company and issues no stock.

APPENDIX C:

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CERTIFICATE OF SERVICE

I, Bruce D. Brown, hereby certify that on September 29, 2016, I electronically filed the foregoing brief of *amici curiae* with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Bruce D. Brown
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