UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; NEW YORK CIVIL LIBERTIES UNION; and NEW YORK CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. JAMES R. CLAPPER, in his official capacity as Director of National Intelligence; KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; CHARLES T. HAGEL, in his official capacity as Secretary of Defense; ERIC H. HOLDER, in his official capacity as Attorney General of the United States; and ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation, Defendants.	No. 13-cv-03994 (WHP) **ECF CASE**

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 NEWS MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Milbank, Dana, *In AP, Rosen Investigations, Government Makes Criminals of Reporters*, Wash. Post, May 21, 2013, available at http://bit.ly/16gnFSE 11

Priest, Dana, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1, available at http://wapo.st/Ud8UD 8

Reilly, Ryan J., *NYT Reporter Seeks to Quash Subpoena; Says Gov't Tried to Intimidate Him*, Talking Points Memo TPMMuckraker Blog, June 22, 2011, available at http://bit.ly/l4N87v .. 7

Risen, James & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1, available at http://nyti.ms/neIMIB 7

Risen, James, *Lawmakers Question White House Account of an Internet Surveillance Program*, N.Y. Times, July 3, 2013, available at http://nyti.ms/16PNs0q 15

Robinson, Eugene, *Obama Administration Mistakes Journalism for Espionage*, Wash. Post, May 20, 2013, available at http://bit.ly/13RvZrc 9

Royce-Bartlett, Lindy, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN, June 19, 2013, available at http://bit.ly/11NGbOH 10

Savage, Charlie, et al., *U.S. Confirms That It Gathers Online Data Overseas*, N.Y. Times, June 6, 2013, available at http://nyti.ms/10SZXaO 13

Sensenbrenner, James, *This Abuse of the Patriot Act Must End*, The Guardian, June 9, 2013, available at http://bit.ly/1duGJjt 14

Shane, Scott, David Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1, available at http://nyti.ms/1dkyMgF 7

Sherman, Mark, *Gov't Obtains Wide AP Phone Records in Probe*, Associated Press, May 13, 2013, available at http://bit.ly/11zhUOg 9, 12

von Drehle, David, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, Wash. Post, June 1, 2005, available at http://wapo.st/JLlYvZ 6

Zalesin, Jeff, *AP Chief Points to Chilling Effect After Justice Investigation*, The Reporters Comm. for Freedom of the Press, June 19, 2013, available at http://rcfp.org/x?CSPl 10

STATEMENT OF INTEREST

As organizations that regularly engage in newsgathering or represent members who do, *amici* feel strongly that their constitutionally protected activities are threatened when the government collects and catalogues vast amounts of data about their private communications. *Amici* appear in this case to stress the importance of safeguarding those communications and to explain how their activities are affected by governmental monitoring. There is a long history in this country of news media reporting that has exposed abuses of official power, and when that power is brought to bear in a way that directly threatens the ability of journalists to gather news and to promise confidentiality to their sources, it is ultimately the public that suffers.

Amici in this case are The Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, Bloomberg L.P., Courthouse News Service, The Daily Beast Company LLC, The E.W. Scripps Company, Fox Television Stations, Inc., The McClatchy Company, The National Press Club, National Press Photographers Association, National Public Radio, Inc., The New Yorker, The Newspaper Guild - CWA, Online News Association, POLITICO LLC, Radio Television Digital News Association, Society of Professional Journalists, Tribune Company, and are more fully described in Appendix A.

SUMMARY OF ARGUMENT

As the Obama administration explained in an August 9, 2013 "white paper," the NSA collects logs of the time and duration of most telephone calls made or received in the United States with approval of the Foreign Intelligence Surveillance Court, a policy that has been in place for seven years. *See Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act* (Aug. 9, 2013), available at http://bit.ly/15ebL9k.

Plaintiffs present arguments for why a preliminary injunction is necessary to halt this program and explain the dangerous constitutional ground that mass call tracking occupies under

the Fourth and First Amendments. *Amici* write separately to emphasize the pernicious effect that the program has on the ability of the media to report on sensitive matters that command a high level of interest from the public.

Many of the most significant stories in the history of American journalism have relied heavily on confidential sources. When the risk of prosecution reaches such sources, quality reporting inevitably diminishes. The widespread government surveillance at issue here makes these sources increasingly wary of contacting journalists as they try to report meaningful, informative, and accurate news stories.

This indiscriminate and overbroad deployment of government power demands exacting scrutiny from this Court. The government has shown a willingness to negotiate with the media in individual cases regarding the investigation of leaks and the use of subpoena power against journalists. This cooperation is rendered entirely pointless when cast against the backdrop of total surveillance of domestic telephone calls. The government's efforts to police itself within the surveillance realm have proven insufficient, and accordingly, it is up to this Court to vindicate the well-established rights of the press and public.

ARGUMENT

I. The integrity of a confidential reporter-source relationship is critical to producing good journalism, and mass telephone call tracking compromises that relationship to the detriment of the public interest.

Wholesale government monitoring of telephone users leaves them uncertain of the privacy of their communications and thus unwilling to exchange information or participate in meaningful conversations. *Amici* are concerned that, if left unchecked, the mass call tracking at issue here will infringe on the newsgathering rights of journalists and harm the public interest in journalism of all types.

Government intrusion into private relationships, here manifested in the form of mass call tracking, frightens sources into silence. "When neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of [government] power, valuable information will not be published and the public dialogue will inevitably be impoverished." *Branzburg v. Hayes*, 408 U.S. 665, 732 (1972) (Stewart, J., dissenting). Although Justice Stewart was referring to the chilling effect of government subpoenas on the media-source relationship, the same considerations are implicated here in mass call tracking. And while the service of grand jury subpoenas provides notice to the media, the mass call tracking that has occurred here is carried out in secret, leaving both reporter and source vulnerable to government surveillance at every turn, notwithstanding any promise of confidentiality. The result will be that information from confidential sources will be suppressed and the public discourse will be harmed.

These concerns are not academic. Mass call tracking leaves anonymous sources on uncertain ground, especially considering how strong a journalist's interest is in promising and providing confidentiality to sources. When mass call tracking becomes the norm, the effect could be immeasurable, and commentators have presciently noted the difficulty in assigning a value to the void that develops:

> It is hard to quantify the importance of stories that don't get written and government wrongdoing and secrecy that go undisturbed — especially since some brave sources continue to slip information to journalists under the door. . . . But over time, it may be that the stories we don't see are the ones that will make the case that it is time for legislators and courts to take another look at legally protecting the journalist-source relationship.

Tony Mauro, *Summer Subpoenas Lead to Fall Chill*, The News Media and the Law, Fall 2004, available at http://rcfp.org/x?mYkE.

Confidential relationships between source and journalist are critical for effective reporting. Reporter-source relationships necessarily rely on telephone communications, and

government monitoring, in the form of mass call tracking, limits journalists' ability to gather information in the public interest free from government interference.

A. There is a long history of journalists breaking significant stories by relying on information from confidential sources.

Confidentiality has been essential to the news media's constitutionally protected duties of disseminating information to the public, including matters of political scandal, national security, and foreign affairs. Without respect for the confidentiality of journalists' communications with their sources, many history-altering news items would have never been reported.

In their Watergate reporting, *Washington Post* reporters Bob Woodward and Carl Bernstein relied heavily on anonymous sources. *See* David von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, Wash. Post, June 1, 2005, available at http://wapo.st/JLlYvZ. These sources were the foundation of the more than 150 articles Woodward and Bernstein wrote following the Watergate break-in. Bernstein has stated, "Almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat." David Kravets, *Reporters Challenge Bonds' Leak Subpoena*, Associated Press, May 31, 2006, available at http://wapo.st/1ff0UNS.

Other major stories have followed a similar trajectory. *The New York Times* relied on confidential sources to break the story that the National Security Agency was using an illegal wiretapping scheme to monitor phone calls and e-mail messages involving suspected terrorist operatives without the approval of federal courts. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1, available at

http://nyti.ms/neIMIB (referencing "[n]early a dozen current and former officials, who were granted anonymity because of the classified nature of the program").[1] The *Times* also used confidential sources to report on the harsh interrogations faced by terrorism suspects in custody in the United States. *See, e.g.*, Scott Shane, David Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1, available at http://nyti.ms/1dkyMgF. *The Washington Post* also used confidential government sources, among others, to break the story of the Central Intelligence Agency's use of so-called black sites, a network of secret prisons for terrorism suspects. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1, available at http://wapo.st/Ud8UD.

These are but a few examples of the important contributions to public knowledge that come from anonymous sources speaking to journalists. The mass call tracking at issue here compromises the ability of the news media to cultivate these sources.

B. Recent developments highlight the link between mass call tracking and a chill on reporter-source communications.

The recent cases involving Fox News and the Associated Press demonstrate the fear that is bred when government investigation tactics are brought to bear directly on the news media.

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[1] Risen has testified to the efficacy and necessity of anonymous sources:

> In my ongoing reporting and news gathering, numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information. The fact that I have not previously revealed my sources has allowed me to gain access to newsworthy information that I could not otherwise get.

See First Motion to Quash Subpoena, Attachment #2, Affidavit of James Risen at ¶ 64, *United States v. Sterling*, 818 F. Supp. 2d 945 (E.D. Va. 2011) (No. 10-485); *see also* Ryan J. Reilly, *NYT Reporter Seeks to Quash Subpoena; Says Gov't Tried to Intimidate Him*, Talking Points Memo TPMMuckraker Blog, June 22, 2011, available at http://bit.ly/l4N87v.

Fox News journalist James Rosen was named a "co-conspirator" by the FBI in court documents when the bureau sought a search warrant for Rosen's e-mail account relating to the criminal investigation of his source. *See Application for Search Warrant for E-mail Account [redacted]@gmail.com*, No. 1:10-mj-00291-AK (D.D.C., Affidavit in support of application for search warrant, unsealed Nov. 7, 2011). When the government resorts to broad, invasive tactics that target journalists, the confidential link between reporter and source is severed.

Many commentators have explored the connection between the Rosen case and an overall chill on sources' willingness to come forward. "With the decision to label a Fox News television reporter a possible 'co-conspirator' in a criminal investigation of a news leak, the Obama administration has moved beyond protecting government secrets to threatening fundamental freedoms of the press to gather news." Editorial, *Another Chilling Leak Investigation*, N.Y. Times, May 21, 2013, available at http://nyti.ms/14vjDl5. "An unseasonable chill has settled over the American public's right to know and the ability of the press to tell citizens what their government is up to. The source of that chill is the Obama administration." Editorial, *Justice Department Run Amok on Journalists' Sources*, S.F. Chron., May 23, 2013, available at http://bit.ly/18hcqsZ. "The Obama administration has no business rummaging through journalists' phone records, perusing their emails and tracking their movements in an attempt to keep them from gathering news. This heavy-handed business isn't chilling, it's just plain cold." Eugene Robinson, *Obama Administration Mistakes Journalism for Espionage*, Wash. Post, May 20, 2013, available at http://bit.ly/13RvZrc.

The public also learned this May that the Department of Justice "secretly obtained two months of telephone records of reporters and editors for the Associated Press" for more than twenty separate telephone lines in April and May 2012. *See* Mark Sherman, *Gov't Obtains Wide*

AP Phone Records in Probe, Associated Press, May 13, 2013, available at http://bit.ly/11zhUOg. The records in the AP case contained so-called metadata, similar to the data being collected in the mass call tracking program here. *See id.* ("The records obtained by the Justice Department listed outgoing calls for the work and personal phone numbers of individual reporters" for several AP offices.).

Predictably, this seizure has made sources less willing to talk to Associated Press reporters, according to AP President and CEO Gary Pruitt. He said that "[s]ome of our longtime trusted sources have become nervous and anxious about talking to us, even on stories that aren't about national security." Jeff Zalesin, *AP Chief Points to Chilling Effect After Justice Investigation*, The Reporters Comm. for Freedom of the Press, June 19, 2013, available at http://rcfp.org/x?CSPl. Pruitt also stated that "this chilling effect is not just at AP. Journalists at other news organizations have personally told me it has intimidated sources from speaking to them." *Id.* "In some cases, government employees that we once checked in with regularly will no longer speak to us by phone and some are reluctant to meet in person," Pruitt added. *See* Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN, June 19, 2013, available at http://bit.ly/11NGbOH.

Together, the Rosen and AP cases show the danger to the flow of information to the public when the news media is subject to invasive investigations. "To treat a reporter as a criminal for doing his job – seeking out information the government doesn't want made public – deprives Americans of the First Amendment freedom on which all other constitutional rights are based." Dana Milbank, *In AP, Rosen Investigations, Government Makes Criminals of Reporters*, Wash. Post, May 21, 2013, available at http://bit.ly/16gnFSE. "With the Fox News search following the AP subpoenas, we now have evidence of a pattern of anti-media behavior. The

suspicion has to be that maybe these 'leak' investigations are less about deterring leakers and more about intimidating the press." Editorial, *A Journalist 'Co-Conspirator'*, Wall St. J., May 20, 2013, available at http://on.wsj.com/10K5nV7.

The mass call tracking here has the very same effect. When widespread surveillance is a standard practice, source intimidation is inevitable, leading to a less robust media:

> Reporters on the national security beat say it's not the fear of being prosecuted by the DOJ that worries them — it's the frightened silence of past trusted sources that could undermine . . . investigative journalism[.] Some formerly forthcoming sources have grown reluctant to return phone calls, even on unclassified matters, and, when they do talk, prefer in-person conversations that leave no phone logs, no emails, and no records of entering and leaving buildings[.]

Dylan Byers, *Reporters Say There's a Chill in the Air*, POLITICO, June 8, 2013, available at http://politi.co/11znRrJ. As one reporter said, "Over the last two to three years, there has been a real fear . . . . Sources will go quiet for months, or stop talking altogether[.]" *Id.* "The reporters who work for the *Times* in Washington have told me many of their sources are petrified even to return calls," Jill Abramson, the executive editor of *The New York Times*, said on CBS's *Face The Nation*, adding that "[i]t has a real practical effect that is important." *Face the Nation Transcripts*, June 2, 2013, CBS News, available at http://cbsn.ws/1aGmeyd.

One consequence of the disclosures about the AP and Fox News seizures was the decision by the Department of Justice to revisit its rules for issuing subpoenas to members of the media. *See generally* Department of Justice, *Report on Review of News Media Policies*, July 12, 2013, available at http://1.usa.gov/12mkn9B. The report proposes that the news media always be given advance notice of a subpoena, except in rare cases where notice poses a clear and substantial threat to the investigation, risks grave harm to national security, or presents an imminent risk of death or bodily harm. *Id.* at 2. This proposal of notice and negotiation is made

so that "members of the news media [have] the opportunity to engage with the Department regarding the proposed use of investigative tools to obtain communications or business records[.]" *Id.* at 2. The proposal also recommends a News Media Review Committee to provide oversight of media-related investigations, *see id.* at 4, and that journalists would not be considered suspects for "ordinary newsgathering activities," *see id.* at 3 – unlike what happened in the Rosen case.

With these proposed revisions to its practices, the government has professed an interest in handling investigations affecting journalistic rights on a case-by-case basis. The government has seemingly committed to negotiation in individual cases, with meaningful analysis based on the particular set of circumstances. This commitment, however, is entirely meaningless if rampant mass call tracking continues unabated. Such tracking instead demonstrates a desire for inherently overbroad leeway in investigating and monitoring communications in all cases.

II. The mass telephone call tracking program is an inherently overboard, impermissible system of monitoring and investigation.

Criminal investigations depend on monitoring the communications of suspects without running afoul of those suspects' constitutional rights. This strategy is vastly different from the mass call tracking at issue here. There is a significant distinction between monitoring specific communications, based on a particularized suspicion of wrongdoing, and the implementation of a widespread system of mass call tracking that stores information about every call made by the subscribers of a particular telephone service provider over a defined yet renewed time period. *See* Charlie Savage, et al., *U.S. Confirms That It Gathers Online Data Overseas*, N.Y. Times, June 6, 2013, available at http://nyti.ms/10SZXaO (indicating that the monitoring under the 90-day order at issue here had taken place for "seven years").

The protections built into these enormous databases cannot prevent overstepping in all cases.[2] *See* Barton Gellman, NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds, Wash. Post, Aug. 15, 2013, available at http://wapo.st/16SWco2 ("The National Security Agency has broken privacy rules or overstepped its legal authority thousands of times each year since Congress granted the agency broad new powers in 2008[.]"). These "infractions involve unauthorized surveillance of Americans or foreign intelligence targets in the United States, both of which are restricted by statute and executive order." *Id.* Tellingly, the violations "include unauthorized access to intercepted communications, the distribution of protected content[,] and the use of automated systems without built-in safeguards to prevent unlawful surveillance." *Id.* This kind of documented failure to comport with internal protections casts doubt on the monitoring agency's ability to police itself and curate and implement such a far-reaching mass call-tracking program.

Furthermore, the public equivocations by national security leaders illuminate the need for judicial involvement to protect the important rights at stake. In response to a direct question at a Senate Committee hearing in March from U.S. Senator Ron Wyden asking "Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?" Defendant Clapper said, "No, sir." Glenn Kessler, *James Clapper's 'Least Untruthful' Statement to the Senate*, Wash. Post, June 12, 2013, available at http://wapo.st/170VVSu. After the disclosure of the "vast Internet surveillance program run by the National Security Agency," Defendant

[2] The government's actions have been questioned under the USA PATRIOT Act, Public Law 107-56, 115 Stat. 272 (2001), as well. The act's author, Rep. James Sensenbrenner (R-Wis.), spoke out against using Section 215 of the Patriot Act to justify such a broad program: "The administration claims authority to sift through details of our private lives because the Patriot Act says that it can. I disagree. I authored the Patriot Act, and this is an abuse of that law." James Sensenbrenner, *This Abuse of the Patriot Act Must End*, The Guardian, June 9, 2013, available at http://bit.ly/1duGJjt.

Clapper released a "letter of apology" to Congress that the statements to the Senate were "clearly erroneous." James Risen, *Lawmakers Question White House Account of an Internet Surveillance Program*, N.Y. Times, July 3, 2013, available at http://nyti.ms/16PNs0q. Without judicial oversight, these equivocations could continue. This Court has the opportunity to step in and vindicate well-established rights of the media and public under the First Amendment.

Respectfully submitted,

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