

No. A155063

COURT OF APPEAL, STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

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**ERIC GRUBER,**  
*Plaintiff/Appellant*

v.

**YELP, INC.,**  
*Defendant/Respondent.*

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On Appeal From the Superior Court for the State of California,  
County of San Francisco, Case No. CGC16-554784  
Hon. Mary E. Wiss

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND  
PROPOSED *AMICI* BRIEF OF THE REPORTERS COMMITTEE  
FOR FREEDOM OF THE PRESS AND 17 MEDIA  
ORGANIZATIONS IN SUPPORT OF RESPONDENT**

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**  
**TO THE HONORABLE PRESIDING JUSTICE OF DIVISION THREE OF THE  
FIRST DISTRICT COURT OF APPEAL:**

Pursuant to California Rule of Court 8.200(c), the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, CalMatters, The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, MediaNews Group Inc., National Press Photographers Association, Online News Association, Radio Television Digital News Association, The Reporters Committee for Freedom of the Press, Society of Professional Journalists, and Tully Center for Free Speech (collectively, “*amici*”) respectfully request leave to file the attached brief as *amici curiae* in support of Yelp, Inc. *Amici* are news media organizations or organizations who advocate on behalf of journalists and the press. Lead *amicus* the Reporters Committee for Freedom of the Press provides *amicus curiae* support in cases across the country and in California that affect the news media, as do many of the other *amici*. (See, e.g., *National Lawyers Guild v. City of Hayward* (Cal. 2019) No. S252445; *Hassell v. Bird* (2018) 5 Cal.5th 522; *Croce v. N.Y. Times* (6th Cir. 2019) No. 18-4158, ECF No. 32-1.)

**INTEREST OF *AMICI CURIAE***

Plaintiff-Appellant Eric Gruber argues for an expansive reading of the term “record” in the California Invasion of Privacy Act (“CIPA”), Pen. Code § 632 and Pen.

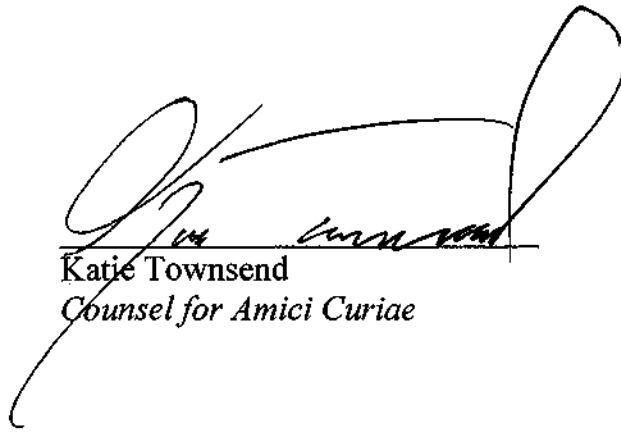
Code § 632.7. Plaintiff's proposed interpretation of CIPA to include any act that causes a communication to be registered in any reproduceable form without the consent of all parties to the communication threatens to criminalize notetaking, a routine practice of members of the news media that is often necessary to ensure accuracy in reporting. Though journalists are aware of laws requiring consent to audio record interviews and routinely ask for consent to do so when required by law, to interpret CIPA in such a way as to sweep notetaking into its ambit would be absurd and beyond what any reasonable journalist would understand the statute to mean.

As representatives of the news media, *amici* have an interest in ensuring CIPA is narrowly and correctly interpreted to ensure reporters will not face risk of criminal or civil liability simply for taking notes during telephone interviews. *Amici* urge the Court to narrowly interpret CIPA's use of the term "recording" and to make clear that notetaking, even without the consent of all parties to a covered communication, is not prohibited by the statute.

*Amici* respectfully request that this Court accept and file the attached *amici* brief. No party or counsel for any party, other than counsel for *amici*, authored this brief in whole or in part or funded its preparation.

Respectfully Submitted,

REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS  
Katie Townsend (SBN 254321)  
Bruce D. Brown\*\*  
Caitlin Vogus\*\*  
Lindsie Trego\*\*  
\*\**Of counsel*



Katie Townsend  
*Counsel for Amici Curiae*

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**AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR  
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## **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Pursuant to California Rule of Court 8.208(e)(1) and (2), *amici* the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, CalMatters, The E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., Investigative Reporting Program, Investigative Reporting Workshop at American University, The McClatchy Company, MediaNews Group Inc., National Press Photographers Association, Online News Association, Radio Television Digital News Association, The Reporters Committee for Freedom of the Press, Society of Professional Journalists, and Tully Center for Free Speech by and through their undersigned counsel, certify that the following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

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

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

The Associated Press Media Editors has no parent corporation and does not issue any stock.

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

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

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

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's stock.

The Investigative Reporting Program is a project of the University of California, Berkeley. It issues 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 American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

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

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.

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.

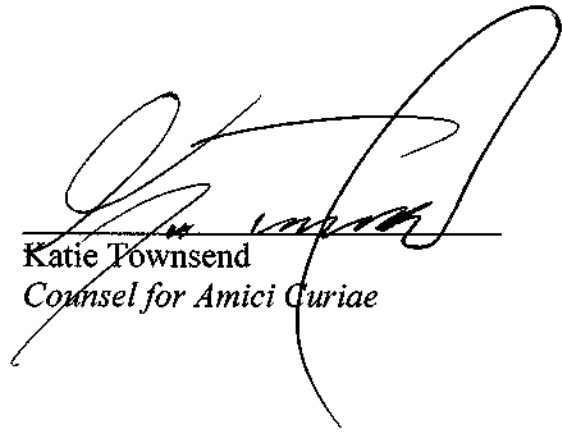
The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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.



Dated: July 29, 2019



Katie Townsend  
*Counsel for Amici Curiae*

Document received by the CA 1st District Court of Appeal.

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## INTRODUCTION & SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Eric Gruber alleges that Defendant-Appellee Yelp, Inc., violated the California Invasion of Privacy Act (“CIPA”), Pen. Code § 632 and Pen. Code § 632.7, by recording conversations between its employees and Plaintiff. Yelp contends it made only “one-way” recordings, in which it recorded the voice of the Yelp employee but not Plaintiff’s voice on the other side of the conversation. The district court granted summary judgment for Yelp in part on the ground that a one-way recording does not violate Penal Code §§ 632 and 632.7. (*Gruber v. Yelp*, Super. Ct. San Francisco County, 2018, No. CGC-16-554784.)

On appeal, Plaintiff urges this Court to adopt an expansive reading of CIPA. He argues that the plain meaning of the term “record” is “to cause (sound, visual images, data, etc.) to be registered on something . . . in reproducible form.” (Br. of Appellant at 31 (quotation omitted).) Further, Plaintiff contends that “recordings” under the statute include any and all “simultaneous *transcription* of the information or statements imparted by the recorded party.” (*Id.* at 32, italics added.)

Such an expansive reading of CIPA would risk criminalizing the common journalistic practice of notetaking, which reporters use to ensure

accuracy in published stories.<sup>1</sup> This Court should not adopt Plaintiff's interpretation of CIPA, which could criminalize an everyday activity in newsrooms across California. *Amici*<sup>2</sup> respectfully urge this Court to narrowly interpret CIPA so as not to sweep notetaking into the ambit of "recording" that the statute proscribes, even if done without the consent of all parties to the communication.<sup>3</sup>

### ARGUMENT

Plaintiff argues for an expansive interpretation of CIPA's use of the term "record" to include all simultaneously-created records of certain communications as long as they are registered in a "reproduceable form."<sup>4</sup>

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<sup>1</sup> CIPA creates both criminal liability and a civil cause of action for violations of the statute. (*See* Pen. Code §§ 632(a), 632.7(a), 637.2)

<sup>2</sup> A full description of *amici* is provided in Appendix A.

<sup>3</sup> On appeal, Plaintiff also argues that the district court erred in concluding that Yelp did not engage in "two-way" recording and that Pen. Code § 632.7 does not apply to calls recorded through Voice Over Internet Protocol, or VoIP. (Br. of Appellant at Sections III.C.1., D.) *Amici* do not address these arguments.

<sup>4</sup> Penal Code § 632 prohibits the electronic recording or eavesdropping on "a confidential communication" without the consent of all parties. (Pen. Code § 632(a).) Penal Code § 632.7 prohibits the intentional interception or receipt and recording of a communication "transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone" without the consent of all parties. (Pen. Code § 632.7(a).)

(Br. of Appellant at 30–36; *see also* Appellant’s Reply Br. at 24–25.)

Plaintiff emphasizes that whether his voice was recorded “is not relevant, much less dispositive.” (*Id.* at 33.) Taken to its absurd end, this broad reading of the statute could criminalize taking notes of telephone conversations, a regular practice of working journalists that ensures accuracy of news reports and helps protect reporters from defamation liability.

**I. Reporters regularly take notes during interviews, which they use to ensure the accuracy of their work.**

“Note-taking is part of journalism and almost certainly always will be.” (Hugh C. Sherwood, *The Journalistic Interview* 72 (1972).)

Journalists have long taken notes to help them organize their stories, to ensure the accuracy of their reporting, and to provide a safeguard in case of legal action against them. Reporters take notes during public events as well as during interviews with individuals, including telephone interviews.

Notetaking allows journalists to gather their thoughts on a subject and review what they have learned from sources. This assists reporters in devising well-organized stories for public consumption, allowing the reader to better understand what the reporter has learned from his investigation.

(*See* Janet Kolodzy, *Convergence Journalism* 119 (2006).)

Similarly, journalists use notes to protect themselves from legal liability related to their reporting. (*See* Chris Frost, *Reporting for*

Journalists (2010).) Journalists are often advised to keep diligent notes of their research and conversations with sources, in the event they are threatened with claims of defamation or other litigation arising from their reporting. (See, e.g., *Practical Tips for Avoiding Liability Associated with Harms to Reputation*, Digital Media Law Project, <https://perma.cc/S5K4-BDZE> (instructing journalists that “[i]n the case of a lawsuit, you will likely need to produce your notes, drafts, and copies of source materials”).) Especially in cases in which a source might be uncomfortable being audio recorded, a journalist’s simultaneous notes can provide the only evidence that a story reflected what was said in an interview.

Perhaps most importantly, “note-taking is an important attribute of a good journalist and is central to guaranteeing accuracy.” (Chris Frost, *Journalism Ethics and Regulations* 8 (2011).) Numerous publications about the practice of journalism describe notes as essential to ensuring that the stories that reach the public are free from errors. (See, e.g., *Scribbling with Purpose*, International Journalists Network (June 27, 2018), <https://perma.cc/ET7D-X87M>; *Handbook of Journalism: Accuracy*, Reuters, <https://bit.ly/2WTUlwV> (last visited July 10, 2019).)

In sum, notetaking is an important journalistic practice. It ensures the press can report important information to the public in an organized, accurate fashion and provides some protection against defamation liability.



**II. Reporters routinely follow recording consent laws, but an overly expansive interpretation of CIPA would make it difficult for reporters to recognize certain activity as violative of CIPA.**

Journalists often audio record interviews or other conversations with sources. Journalism schools and treatises regularly teach reporters that some states require them to obtain the consent of all parties to a conversation before audio recording it. (*See, e.g.*, Ashley Packard, *Digital Media Law* 220 (2010); Vincent Filak, *Dynamics of Media Writing: Adapt and Connect* 82 (2018).) Online resources regarding interview techniques repeat this advice. (*See, e.g.*, Wilson Liévano, *How to avoid attribution mistakes that could ruin your career*, Groundtruth Project (Mar. 20, 2019), <https://perma.cc/HYM3-H9PP>; Scott Nover, *My Tech Guide to Being a Freelance Journalist*, Medium (June 5, 2019), <https://perma.cc/FWA9-JADJ>.) *Amicus* the Reporters Committee maintains a state-by-state guide on wiretap and recording consent statutes that has received nearly 3000 pageviews in the past 6 months, demonstrating that journalists are interested in ensuring they follow applicable state law regarding getting consent for recordings. (*Reporters Recording Guide*, Reporters Comm. for Freedom of the Press (Summer 2012), <https://perma.cc/39CC-2BDR>.)

Journalists seek to abide by each state's wiretap laws and other privacy statutes by asking sources for consent to record when required to by law. In situations where sources are uncomfortable with the use of recording devices, especially in states in which all-party consent is

required, journalists may turn to notetaking as a meaningful alternative to ensure the accuracy of their work. In these situations, it is very unlikely to occur to a journalist that they may need to seek consent from the other party for the act of notetaking.

However, Plaintiff's expansive view of the definition of "record" in CIPA risks criminalizing the age-old practice of journalistic notetaking, creating a trap for the unwary, responsible journalist. Plaintiff argues that "record" as used in Pen. Code §§ 632 and 632.7 includes *all* simultaneous recording that causes sound, visual images, data, or other information "to be registered on something . . . in reproduceable form," even if a person's voice is not recorded. (Br. of Appellant at 31.) Under this definition, simultaneous notetaking, which may be done by hand or by computer, would be included in the activities proscribed by CIPA.<sup>5</sup> That is an absurd conclusion that, as Yelp notes (Resp.'s Br. at 41), does not follow any court's interpretation of CIPA or other similar statutes across the country.

As Yelp points out in its response brief, (Resp.'s Br. at 39), California courts have distinguished between the privacy invasion that

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<sup>5</sup> Plaintiff attempts to distinguish between the one-way audio recordings created by Yelp and written notes created after a phone call's conclusion. (Br. of Appellant at n.2.) However, Plaintiff's argument relies on the distinction between "a real-time recording" and after-the-fact notetaking. Plaintiff's interpretation of CIPA would apparently still apply to notes taken *simultaneously* with a conversation.

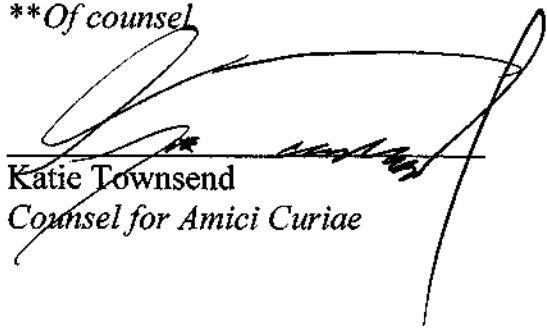
occurs when someone repeats an individual's statements secondhand and the privacy invasion that occurs when a person's statements are recorded by electronic monitoring that creates "an actual transcription of [one's] voice." (*Warden v. Melvin Kahn et al.* (1979) 99 Cal.App.3d 805, 813–14.) That distinction squarely applies to notetaking, which—even when done without the express consent of the speaker—does not enable the notetaker to disseminate an actual recording of the speaker's voice. Plaintiff's interpretation of CIPA, which ignores this distinction and leads to absurd results, should be rejected.

### CONCLUSION

For the foregoing reasons, *amici* urge this Court to narrowly interpret CIPA and to make clear that notetaking without the consent of all parties to a communication does not violate the statute.

Respectfully Submitted,

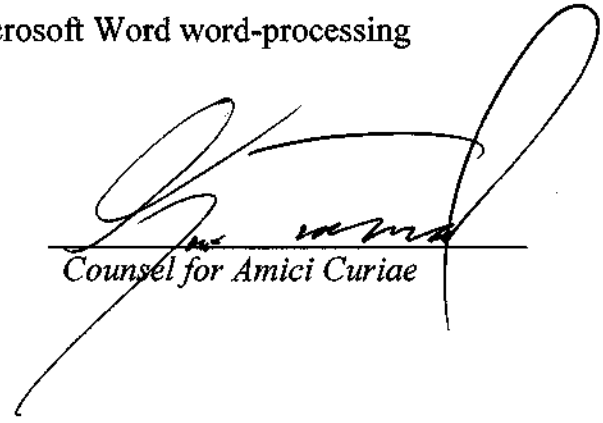
REPORTERS COMMITTEE FOR  
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**CERTIFICATE OF WORD COUNT**

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the attached *amicus curiae* brief was produced using 13-point Roman type, including footnotes, and contains 1,487 words. I have relied on the word-count function of the Microsoft Word word-processing program used to prepare this brief.

Dated: July 29, 2019



Counsel for Amici Curiae

Document received by the CA 1st District Court of Appeal.

## APPENDIX A: DESCRIPTION OF *AMICI*

**The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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.

**The Associated Press Media Editors** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism;

supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

**Association of Alternative Newsmedia** (“AAN”) is a not-for-profit trade association for approximately 110 alternative newspapers in North America. 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 California News Publishers Association** (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

**CalMatters** is a nonpartisan, nonprofit journalism organization based in Sacramento, California. It covers state policy and politics, helping Californians to better understand how their government works while serving the traditional journalistic mission of bringing accountability and transparency to the state's Capitol. The work of its veteran journalists is shared, at no cost, with more than 180 media partners throughout the state.

**The E.W. Scripps Company** serves audiences and businesses through local television, with 52 television stations in 36 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology

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

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

**Gannett Co., Inc.** is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

**The Investigative Reporting Program ("IRP")** at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship

and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as *Mother Jones*, *The New York Times*, *Los Angeles Times*, *Time* magazine and the *San Francisco Chronicle*, among others.

**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](http://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.



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

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

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

**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.

## APPENDIX B: ADDITIONAL COUNSEL

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## PROOF OF SERVICE

I, Lindsay Trego, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th St. NW, Suite 1020, Washington, DC 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On July 29, 2019, I served the foregoing documents: **Application for Leave to File *Amici Curiae* Brief; *Amici Curiae* Brief of The Reporters Committee for Freedom of the Press and 17 Media Organizations in Support of Respondent** as follows:

**[x] By TrueFiling eService:**

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*Counsel for Plaintiff and  
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**[x] By US Mail:**

Honorable Mary E. Wiss  
Judge, Department 305  
San Francisco County Superior  
Court  
Civic Center Courthouse  
400 McAllister Street  
San Francisco, CA 94102-4514

*Superior Court Judge*

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the July 29, 2019, at Washington, D.C.

By:



Lindsay Trego

Document received by the CA 1st District Court of Appeal.