

No. 18-5276

**United States Court of Appeals
for the District of Columbia Circuit**

JASON LEOPOLD AND
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:13-mc-00712 (Howell, C.J.)

**BRIEF OF *AMICI CURIAE* MEDIA ORGANIZATIONS
IN SUPPORT OF APPELLANTS**

Laura R. Handman
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue NW
Suite 800
Washington, D.C. 20006-3402
(202) 973-4200
laurahandman@dwt.com

Selina MacLaren
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street
Suite 2400
Los Angeles, C.A. 90017-2566
(213) 633-8617
selinamaclaren@dwt.com

Counsel for Amici Curiae Media Organizations

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* media organizations represents that both parties have been sent notice of the filing of this brief and have consented to the filing.¹

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary to provide the perspective of media organizations and reporters whose reporting depends on access to court records. Access to such records allows the press to inform the public about the judiciary, the criminal justice system, surveillance trends, and local crime. Access to the type of surveillance-related records sought here would also inform the press about when the government targets journalists for surveillance and how existing press protections, which shield journalistic work product from intrusive government surveillance, apply to journalists' electronic data. *Amici* are thus particularly well-situated to provide the Court with insight into the public interest value of unsealing court records, generally, and the surveillance-related court records requested here, in particular. No other *amici* have addressed the unique interests of the news media in accessing the records sought here.

¹ Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1(a), *amici curiae* state that:

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The Associated Press (“AP”) is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

Reveal from The Center for Investigative Reporting is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Dow Jones is a Delaware corporation with its principal place of business in New York. News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones. Ruby Newco, LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company directly owns 10% or more of the stock of Dow Jones.

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.

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. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's 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.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

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

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

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns approximately 10 percent of The New York Times Company's stock.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Appellees hereby certify:

(A) Parties and *Amici*

Except for the following *amici*, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Petitioners-Appellants: Advance Publications, Inc.; Associated Press; Reveal from The Center for Investigative Reporting; Dow Jones; E.W. Scripps Company; First Amendment Coalition; First Look Media Works, Inc.; Gannett; McClatchy Company; News Media Alliance; Reporters Without Borders (RSF); Society of Professional Journalists; The New York Times; The Washington Post; Tully Center for Free Speech at Syracuse University.

(B) Rulings Under Review

Reference to the ruling under review appears in the Brief for Petitioners-Appellants.

(C) Related Cases

Reference to any related cases pending before this Court appears in the Brief for Petitioners-Appellants.

Dated: January 25, 2019

By: /s/ Laura R. Handman
Laura R. Handman
Counsel for *Amici Curiae*

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING	i
CORPORATE DISCLOSURE STATEMENT	ii
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	v
TABLE OF AUTHORITIES	viii
GLOSSARY	1
STATUTES AND REGULATIONS	2
INTEREST OF <i>AMICI CURIAE</i>	3
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. The right of access to court records stems from the First Amendment’s protection of newsgathering.	9
II. Records such as those at issue here are among the most important primary sources for reporting in the public interest.	13
A. Access to court records, including search warrants, is crucial to today’s news reporting.....	13
B. The public has an interest in understanding government surveillance, including the searches and data acquisitions reflected in the requested records.	22
III. Press protections are jeopardized when electronic surveillance records are kept under seal indefinitely.....	27
A. The press has an interest in knowing when it is the subject of government surveillance.....	27

B. Disclosure of the requested records will ensure that existing press
protections are enforced.....30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	9
* <i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982).....	10, 11, 25
* <i>In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records</i> , 585 F. Supp. 2d 83 (D.D.C. 2008).....	10, 11, 12
<i>In re Application of WP Co. LLC</i> , 201 F. Supp. 3d 109 (D.D.C. 2016).....	6
<i>In re Reporters Comm. for Freedom of the Press</i> , 773 F.2d 1325 (D.C. Cir. 1985).....	25
* <i>Matter of the Application of WP Co. LLC</i> , No. 16-mc-351 (BAH), 2016 WL 1604976 (D.D.C. Apr. 1, 2016)	10
<i>Matter of Leopold to Unseal Certain Elec. Surveillance Applications & Orders</i> , 300 F. Supp. 3d 61 (D.D.C. 2018).....	5, 6, 10, 32
* <i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980).....	3, 9, 10, 11
<i>Riley v. California</i> , 134 S. Ct. 2473 (2014).....	25
<i>United States v. El-Sayegh</i> , 131 F.3d 158 (D.C. Cir. 1997).....	24
<i>Wash. Post v. Robinson</i> , 935 F.2d 282 (D.C. Cir. 1991).....	9, 11
Statutes and Regulations	
18 U.S.C. §§ 2701-2712	1, 6
18 U.S.C. §§ 3121-3127	1, 6
42 U.S.C. § 2000aa	31
28 C.F.R. § 50.10.....	32, 33

S. Rep. No. 96-874 (1980).....	31
Other Authorities	
<i>7 Days, 8 Steps Forward for New York Times Lawsuits Against Secrecy</i> , N.Y. Times (Nov. 7, 2018).....	18
Allie Johnson, <i>Search warrant: Paynesville murders had ‘something to do with a drug debt,’</i> Fox 9 (Mar. 29, 2018).....	19
Amy Friedenberger, <i>Search warrants: Woman found dead in Franklin County in May died of blunt force trauma</i> , The Roanoke Times (Aug. 8, 2017).....	21
Ann E. Marimow, <i>Justice Department’s scrutiny of Fox News reporter James Rosen in leak case draws fire</i> , Wash. Post (May 20, 2013).....	29
Ann E. Marimow, <i>Sentencing hearing delayed for ‘shadow campaign’ donor Jeffrey E. Thompson</i> , Wash. Post (May 27, 2016).....	17, 20
Appl. of the United States for an Order Pursuant to 18 U.S.C. § 2703(d) ¶ 31, <i>In re Appl. of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)</i> , No. 13-mc-460 (D.D.C. May 7, 2013), ECF No. 1.....	28
Barton Gellman and Ashkan Soltano, <i>NSA tracking cellphone locations worldwide, Snowden documents show</i> , Wash. Post (Dec. 4, 2013).....	22
Brittany Boyer, <i>Homicide Search Warrants</i> , WNEP (Aug. 6, 2013).....	19
Charlie Savage, <i>Reined-In N.S.A. Still Collected 151 Million Phone Records in 16</i> , N.Y. Times (May 2, 2017).....	23
Colin Moynihan, <i>A New York City Settlement on Surveillance of Muslims</i> , The New Yorker, Jan. 7, 2016.....	26
Daniel Lippman, <i>State-sponsored hackers targeting prominent journalists, Google warns</i> , Politico (Feb. 10, 2017).....	28
Department of Justice, <i>Report on Review of News Media Policies</i> , July 12, 2013.....	32
Emma Best, <i>The U.S. Government Has Amassed Terabytes of Internal Wikileaks Data</i> , Gizmodo (Jan. 12, 2019).....	24
Halle Parker, <i>Court documents lay out last day family, friends saw Martinsville man</i> , GoDanRiver (Jul. 13, 2018).....	21
James Risen, <i>Donald Trump’s Surveillance of New York Times Reporter Is a True Declaration of War Against the Press</i> , The Intercept (Jun. 8, 2018).....	30

Jeremy Wagstaff, <i>Journalists, media under attack from hackers: Google researchers</i> , Reuters (Mar. 28, 2014)	28
John Hinton, <i>UNCC student arrested on charge he made false report of mass violence at school</i> , Winston-Salem Journal (Mar. 21, 2018).....	20
John Solomon, <i>Rosenstein, DOJ exploring ways to more easily spy on journalists</i> , The Hill (Jan. 14, 2019)	33
Josh Gerstein, <i>Unsealed documents detail tactics in Clinton email probe</i> , Politico (Jun. 30, 2016)	17
<i>Judge asked to unseal FBI warrants in Cohen search</i> , Associated Press (Oct. 12, 2018)	18
Judson Berger, <i>DOJ Invoked Espionage Act in Calling Fox News Reporter Criminal ‘Co-Conspirator’</i> , Fox News (May 22, 2013).....	29
Karen Turner, <i>Feds use search warrants to get into fingerprint-locked phones</i> , Wash. Post (Oct. 18, 2016)	23
Katelyn Polantz, <i>CNN request spurs court to unseal Starr investigation docs</i> , CNN (Feb. 12, 2018)	21
Mark Sherman, <i>Gov’t Obtains Wide AP Phone Records in Probe</i> , A.P. (May 13, 2013)	28
Pamela K. Brown and Catherine Herridge, <i>Circuit court remands terrorism case on grounds FBI withheld info of al-Awlaki investigation</i> , Fox News (Sep. 26, 2015)	27
Peter J. Henning, <i>Digital Privacy to Come Under Supreme Court’s Scrutiny</i> , N.Y. Times (Jul. 10, 2017)	23
Philip Bump, <i>To search Michael Cohen’s home and office, the FBI has to clear a higher-than-normal bar</i> , Wash. Post (Apr. 9, 2018)	18
The Pulitzer Prizes, The 2014 Pulitzer Prize Winner in Investigative Reporting: Chris Hamby of <i>The Center for Public Integrity</i> , Washington, DC	15
The Pulitzer Prizes, The 2015 Pulitzer Prize Winner in Investigative Reporting: Eric Lipton of <i>The New York Times</i>	15
The Pulitzer Prizes, The 2015 Pulitzer Prize Winner in Investigative Reporting: The Wall Street Journal Staff.....	15

The Pulitzer Prizes, The 2016 Pulitzer Prize Winner in Investigative Reporting: Leonora LaPeter Anton and Anthony Cormier of the Tampa Bay Times and Michael Braga of the Sarasota Herald-Tribune	14
The Pulitzer Prizes, The 2017 Pulitzer Prize Winner in Investigative Reporting: Eric Eyre of <i>Charleston Gazette-Mail</i> , Charleston, WV	14
The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Feature Writing: Rachel Kaadzi Ghansah, freelance report, GQ	16
The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Investigative Reporting: Staff of The Washington Post	14
The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Local Reporting: Staff of The Cincinnati Enquirer	16
The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Public Service: The New York Times, for reporting led by Jodi Kantor and Megan Twohey, and The New Yorker, for reporting by Ronan Farrow	16
Ray Sanchez and Rosa Flores, <i>Search warrant at Texas archdiocese seeks ‘secret archives’ of priest accused of sex abuse</i> , CNN (Nov. 28, 2018)	20
Ryan Lizza, <i>How Prosecutors Fought to Keep Rosen’s Warrant Secret</i> , The New Yorker (May 24, 2013)	29
Sam Thielman, <i>TL;DR: Spies (do not) like us</i> , Columbia Journalism Review Tow Center (Jan. 4, 2019)	30
Sarah Rafique, <i>Murder-for-hire suspect argued with mom over \$30K the week father was killed</i> , KXAN (Jul. 24, 2018)	19
Spencer S. Hsu and Ann E. Marimow, <i>Senior Gray adviser sentenced to six months for 2010 mayoral ‘shadow’ campaign</i> , Wash. Post (May 10, 2016)	17
Spencer S. Hsu, <i>This Judge Just Released 200 Secret Government Surveillance Requests</i> , Wash. Post (Oct. 24, 2016)	23
Tom McCarthy, <i>James Rosen: Fox News reporter targeted as ‘co-conspirator’ in spying case</i> , The Guardian (May 21, 2013)	12
U.S. Dep’t of Justice, Computer Crime and Intellectual Property Section, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, Chapter 2 § F(1) (3d ed. 2009)	31
U.S. Law Enforcement Obtaining Warrants to Search Facebook Profiles, Reuters (Jul. 12, 2011)	23

WRAL, Search Warrant Coverage19

* Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

PRA	Pen Register Act, 18 U.S.C. §§ 3121-3127
SCA	Stored Communications Act, 18 U.S.C. §§ 2701-2712
SCA Search Warrant Materials	Search warrants issued under the Stored Communications Act, and related court records, including applications, affidavits, and docketing information
PR/TT Materials	Court orders authorizing the use of pen register/trap and trace devices under the Pen Register Act, and related court records, including applications, affidavits, and docketing information
Section 2703(d) Materials	Court orders authorizing the government to obtain electronic communications, records, or other information under Section 2703(d) of the Stored Communications Act, and related court records, including applications, affidavits, and docketing information

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to Petitioners-Appellants' Brief filed with this Court on January 18, 2019.

INTEREST OF AMICI CURIAE

Amici are media organizations who report on current events in the public interest, including criminal prosecutions, law enforcement efforts, and court proceedings. Access to public records, including court records, is often central to these stories. Representing a wide cross-section of the media from for-profit to nonprofit, local to national, television to print *amici* are familiar with the ways access to court records can enhance the accuracy and detail of news stories, providing the public with a deeper understanding of the criminal justice system.

The types of records sought here would allow the press to report on government searches of electronic data in the course of criminal investigations, after those investigations have ended. Indeed, as recognized by Justice Brennan in his concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, “[a]s a practical matter, [] the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals.” 448 U.S. 555, 586 n.2 (1980). *Amici*, as chief proponents and users of the access right invoked by Petitioners-Appellants here, have a focused interest in the requested records to bring this information to the public.

There is a second reason *amici* are interested in the requested records: The records may provide information about government surveillance of the press. In

recognition of the First Amendment value of shielding the newsgathering process from government interference, longstanding legal and policy guidelines provide protections to journalistic work product subject to law enforcement searches. With the apparent growth in electronic data searches and the news media's transition to storing the majority of journalistic work product electronically, *amici* have a pressing interest in understanding when reporters' data may be subject to government search and when these press protections come into play. The requested records would help *amici* gain this understanding.

A full listing of *amici* appears in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

The stories that *amici* tell, the videos they post, and the news they report depend heavily on court records, which bolster accuracy and ensure that the public is getting the fullest view of the conduct of its officials. Nearly every news story can benefit in some way from access to court records. Journalists who write and report content for *amici* state that court records, including criminal records such as search warrants like those requested here, are a primary source of information for their most in-depth and critical reporting.

Accordingly, the news media and, in turn, the public stand to benefit from the laudable changes that have already been implemented in the District Court in response to this case. Those changes include reports generated by the Clerk reflecting “the total number of PR/TT, § 2703(d), and SCA warrant applications filed by the [United States Attorney’s Office for the District of Columbia], the number and type of accounts that such applications target, the names of providers to which these applications are directed, and the primary offense under investigation for these applications.” *Matter of Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 300 F. Supp. 3d 61, 108 (D.D.C. 2018). *Amici* are optimistic that the District Court’s disclosure of this information will stand as an example for other courts across the country.

This Court now has the opportunity to take those changes a step further in recognition of the public's right of access, which historically has extended broadly to include criminal court records, including post-investigation warrants and real-time docketing information. Although the District Court recognized that the public has traditionally enjoyed access to "post-execution search warrant materials," *id.* at 87, it found that the constitutional right of access does not extend to the court records related to electronic data searches sought here, specifically, search warrants and court orders under the Stored Communications Act ("SCA") ("SCA Search Warrant Materials" and "Section 2703(d) Materials," respectively), and pen register/trap and trace ("PR/TT") devices under the Pen Register Act ("PRA") ("PR/TT Materials"), *id.* at 89-91. The First Amendment creates a vigorous presumption of access above and beyond that guaranteed under the common law, and imposes a higher burden on the party seeking secrecy. *See In re Application of WP Co. LLC*, 201 F. Supp. 3d 109, 118 (D.D.C. 2016) (noting that the common law access right is "broader, but weaker" than the constitutional right) (citation omitted). *Amici* urge this Court to enforce the higher constitutional burden, as well as the common law right, reversing closure of the court records here and reiterating that the constitutional and common law rights of access apply broadly to most court records, including records related

to the government's requests to seize and/or search individuals' — and journalists' electronic data.²

Access to the PR/TT, Section 2703(d), and SCA Search Warrant Materials requested here would allow *amici* to inform the public about topics of tremendous public interest: crime and public safety, criminal justice, and electronic surveillance. Direct access to court records in general, and search warrants in particular, forms the basis of an overwhelming volume of today's most important and influential news reporting on crime and criminal justice. Reporting on court records promotes public confidence in the judiciary, provokes potential witnesses to come forward with evidence in ongoing investigations, and encourages self-governance by an engaged citizenry. In addition, the public has an independent and growing interest in understanding government electronic surveillance. Previous reporting on government surveillance has checked abuses of surveillance powers and led to policy change. Today's reporting, however, is impeded by the secrecy that surrounds electronic searches.

Understanding government acquisitions of electronic data is also important to sustaining longstanding press protections. In recognition of the First Amendment

² Specifically, Petitioners-Appellants seek access to court orders, applications, affidavits, and dockets related to law enforcement requests for: judicial authorization to use PR/TT devices pursuant to the PRA, 18 U.S.C. §§ 3121-3127 (“PR/TT Materials”); search warrants issued under the SCA, 18 U.S.C. §§ 2701-2712 (“SCA Search Warrant Materials”); and court orders authorizing surveillance under Section 2703(d) of the SCA (“Section 2703(d) Materials”). This request is limited to records in closed investigations, with the exception of docketing information, which Petitioners-Appellants seek to have disclosed upon docketing. *Amici* contend that the common law and constitutional rights of access apply to all such records and should be implemented on a prospective basis.

value of guarding the newsgathering process from government intrusion, newsrooms and newsgathering materials are protected from certain types of government searches. These press protections require, in most instances, that the government inform the affected member of the news media before searching his or her journalistic records. The requested records would allow media organizations to confirm that such media targets of surveillance are, in fact, receiving notice, and would further allow the media organizations to determine whether the government is taking positions in judicial records that conflict with these press protections.

The continued nondisclosure of a large and growing volume of court records hampers the press's ability to report on the criminal justice system. There is nothing about court-authorized acquisition of electronic data that makes those searches and acquisitions any less important, from a public access standpoint, than physical searches. The press's and public's interest in understanding the government's ability to obtain citizens' and journalists' electronic data is, if anything, *greater* than the interest in accessing more "conventional" search warrants. Given the realities of modern criminal investigations, public access limited to physical search warrants tells an incomplete and somewhat outdated story.

ARGUMENT

I. The right of access to court records stems from the First Amendment's protection of newsgathering.

Newsgathering is central to the origins of the constitutional right of access. Although the First Amendment does not expressly grant a right of access to judicial proceedings and records, the Supreme Court nearly half a century ago in *Branzburg v. Hayes* found such a right implicit in the First Amendment's broader protections of the press. 408 U.S. 665 (1972). In finding this implicit constitutional right of access, the Court noted that “news gathering does . . . qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681; *see also Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (finding that the First Amendment generally guarantees the press and the public a right of access to court documents). Accordingly, the First Amendment “prohibit[s] government from limiting the stock of information from which members of the public may draw.” *See Richmond Newspapers, Inc.*, 448 U.S. at 576 (internal quotations and citation omitted).

The right of access extends to criminal proceedings and records. As the Supreme Court has recognized, “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Id.* at 573. Accordingly, the press and the public enjoy a qualified constitutional right of access that extends beyond access to criminal proceedings, *see id.* at 580, to include access to records

related to those proceedings. Courts, including the District Court, have held that when a criminal investigation ends, the public has a qualified right under the First Amendment to access the search warrant materials connected to the investigation. *See Matter of the Application of WP Co. LLC*, No. 16-mc-351 (BAH), 2016 WL 1604976, at *2 (D.D.C. Apr. 1, 2016) (Chief Judge Howell finding that the public has a constitutional right of access to post-investigation warrant materials); *In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008) (then-Chief Judge Lamberth holding the same).

The right of access, however, is not boundless. A key consideration in determining whether the First Amendment right of access should apply to a particular record or proceeding is whether “public access plays a significant positive role in the functioning of the proceeding.” *Matter of Leopold*, 300 F. Supp. 3d at 81 (quoting *United States v. Brice*, 649 F.3d 793, 795 (D.C. Cir. 2011)). Stated differently, the right depends on whether public access will promote self-government. *See, e.g., Richmond Newspapers, Inc.*, 448 U.S. at 589, 592 (Brennan, J., concurring) (“Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (considering whether access will “contribute to our republican system of self-

government” by informing the public); accord *In re N.Y. Times*, 585 F. Supp. 2d at 90 (“with respect to warrants, openness plays a significant positive role in the functioning of the criminal justice system, at least at the post-investigation stage”).

The press plays a pivotal role in promoting self-government and, in turn, justifying access to certain records. See *Richmond Newspapers, Inc.*, 448 U.S. at 593 (“[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice”) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975)). Specifically, openness facilitates the monitoring of prosecutorial or judicial misconduct, the fairness of the criminal proceeding, and the promotion of public confidence in the judicial system benefits that are possible only through public scrutiny, aided by the press. See *Globe Newspaper Co.*, 457 U.S. at 606 (noting that openness promotes the integrity of judicial proceedings and public respect for those proceedings); *Wash. Post*, 935 F.2d at 288 (in evaluating the First Amendment right of access to plea agreements, considering whether access would monitor official misconduct and promote public confidence in the system). Public access to the records at issue here would “play[] a significant positive role in the functioning of the criminal justice system, at least at the post-investigation stage,” “serv[ing] as a check on the judiciary because the

public can ensure that judges are not merely serving as a rubber stamp for the police.” *In re N.Y. Times*, 585 F. Supp. 2d at 90.

Even if the right attaches to a record or proceeding, it is not absolute and can be overcome by countervailing interests in nondisclosure. The countervailing interests against disclosure of court records regarding an electronic data investigation, however, are diminished once the investigation and related criminal proceeding are complete. Petitioners-Appellants seek only the underlying court records for PR/TT, Section 2703(d), and SCA Search Warrant Materials in closed investigations. At that point, typically, law enforcement techniques, the identities of suspects and victims, and similar sensitive details about the ongoing investigation have been disclosed in the courtroom. To the extent they have not — such as where an individual is investigated but not indicted — the government can redact sensitive information on a case-by-case basis. Those redactions should be sufficiently narrow to inform the public that the surveillance occurred because the fact of surveillance itself, *particularly* in such a case where an individual is investigated but not indicted, triggers a need for public scrutiny of government activity. *See, e.g.*, Tom McCarthy, *James Rosen: Fox News reporter targeted as ‘co-conspirator’ in spying case*, *The Guardian* (May 21, 2013), <https://www.theguardian.com/world/2013/may/20/fox-news-reporter-targeted-us-government> (discussing surveillance of Fox News reporter James Rosen in a case that resulted in an indictment of his alleged source).

In addition, the delay in access to these court records would ensure that law enforcement can complete the investigation before the press reports details from the underlying court records. Delayed access to the records would still accomplish many of the above-listed benefits by reflecting surveillance trends, monitoring official misconduct, and promoting public faith in the judiciary.

In sum, courts have long recognized a presumption of openness for the category of records that shed light on criminal proceedings, and there is nothing about the records at issue here that place them outside that category. The pervasive secrecy surrounding these court records limits the stock of information on which the press may report and leaves the public in the dark about some of the most pressing issues of our time: criminal justice, criminal activity, and the privacy of our online lives. Access to the PR/TT, Section 2703(d), and SCA Search Warrant Materials, however, would protect newsgathering and promote self-government by shedding light on three increasingly common methods of law enforcement investigation, consistent with the foundational principles of the constitutional right.

II. Records such as those at issue here are among the most important primary sources for reporting in the public interest.

A. Access to court records, including search warrants, is crucial to today's news reporting.

Since the Supreme Court first articulated the constitutional access right nearly half a century ago, its lofty reasons for recognizing that right informing

the public, promoting self-government, rooting out official misconduct have been vindicated by the sheer volume of reporting possible only through access to judicial proceedings and records. Beneath the biggest headlines today ranging from the opioid crisis, to campaign finance fraud investigations, to sexual abuse allegations against leaders in entertainment, media, churches, and politics lie court records that can confirm and elaborate on the details of these stories. Indeed, one is hard-pressed to find investigative journalism today that does not rely in some way on court records. Four of the projects that won the Pulitzer Prize for Investigative Reporting in the past six years would not have been possible without court records and all of the winners reference court records. *See* The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Investigative Reporting: Staff of The Washington Post, <https://www.pulitzer.org/winners/staff-80> (reporting on Roy Moore sexual assault referenced court records to describe alleged victim); The Pulitzer Prizes, The 2017 Pulitzer Prize Winner in Investigative Reporting: Eric Eyre of *Charleston Gazette-Mail*, Charleston, WV, <https://www.pulitzer.org/winners/eric-eyre> (reporting on the opioid crisis in West Virginia's smallest towns and poorest counties relied on court records the companies had sought to keep secret for more than a year"); The Pulitzer Prizes, The 2016 Pulitzer Prize Winner in Investigative Reporting: Leonora LaPeter Anton and Anthony Cormier of the Tampa Bay Times and Michael Braga of the Sarasota

Herald-Tribune, <https://www.pulitzer.org/winners/leonora-lapeter-anton-and-anthony-cormier-tampa-bay-times-and-michael-braga-sarasota-herald> (reporting on Florida’s mental hospitals based on “court case files and criminal records for thousands of defendants deemed incompetent to stand trial over the past decade”); The Pulitzer Prizes, The 2015 Pulitzer Prize Winner in Investigative Reporting: The Wall Street Journal Staff, <https://www.pulitzer.org/winners/wall-street-journal-staff> (reporting that gave Americans unprecedented access to previously confidential data on the motivations and practices of their health care providers” briefly referenced court filings in which a lab denied allegations of stealing business); The Pulitzer Prizes, The 2015 Pulitzer Prize Winner in Investigative Reporting: Eric Lipton of *The New York Times*, <https://www.pulitzer.org/winners/eric-lipton> (reporting on lobbyists’ influence on congressional leaders and state attorneys general based in part on court documents showing that “corporate representatives and attorneys general are coordinating legal strategy and other efforts to fight federal regulations,” and referencing a state court docket); The Pulitzer Prizes, The 2014 Pulitzer Prize Winner in Investigative Reporting: Chris Hamby of *The Center for Public Integrity*, Washington, DC, <https://www.pulitzer.org/winners/chris-hamby> (reporting on systematic denials of benefits to coal miners stricken with black lung disease arose from opening up previously-secret court files in black lung cases).

Non-investigative journalism, too, routinely relies on access to court proceedings or court records. In the last year alone, court records were crucial to the reporting projects that won the Pulitzer Prize for Feature Writing, Public Service, and Local Reporting. *See, e.g.*, The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Feature Writing: Rachel Kaadzi Ghansah, freelance report, GQ, <https://www.pulitzer.org/winners/rachel-kaadzi-ghansah-freelance-reporter-gq> (a portrait of murderer Dylann Roof, using reportage on courtroom proceedings); The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Public Service: The New York Times, for reporting led by Jodi Kantor and Megan Twohey, and The New Yorker, for reporting by Ronan Farrow, <https://www.pulitzer.org/winners/new-york-times-reporting-led-jodi-kantor-and-megan-twohey-and-new-yorker-reporting-ronan> (“explosive, impactful journalism that exposed powerful and wealthy sexual predators” included the Times examining “more than 100 pages of documents and court filings”); The Pulitzer Prizes, The 2018 Pulitzer Prize Winner in Local Reporting: Staff of The Cincinnati Enquirer, <https://www.pulitzer.org/winners/staff-cincinnati-enquirer> (a narrative and video documenting Cincinnati’s heroin epidemic involved placing staff throughout courtrooms and reviewing court dockets for felony cases related to heroin).

Specifically, search warrants in closed investigations lie at the center of major national stories. Indeed, one of the best examples of the news reporting and public

oversight that can result from unsealing search warrants comes from District Court Chief Judge Beryl Howell, who authored the decision on appeal. In 2016, in response to a request by The Washington Post, Chief Judge Howell unsealed hundreds of pages of records related to a campaign finance investigation into the 2010 District of Columbia mayoral campaign. *See* Ann E. Marimow, *Sentencing hearing delayed for 'shadow campaign' donor Jeffrey E. Thompson*, Wash. Post (May 27, 2016), https://www.washingtonpost.com/local/public-safety/sentencing-hearing-delayed-for-shadow-campaign-donor-jeffrey-e-thompson/2016/05/27/1209a91e-2416-11e6-9e7f-57890b612299_story.html. This involved many months of reporting that allowed the public to scrutinize the integrity of the local electoral process. *See, e.g.*, Spencer S. Hsu and Ann E. Marimow, *Senior Gray adviser sentenced to six months for 2010 mayoral 'shadow' campaign*, Wash. Post (May 10, 2016), https://www.washingtonpost.com/local/public-safety/gray-aide-sentencing-tuesday-to-spotlight-alleged-10000-payment-to-gray-relative/2016/05/10/6240bfe2-1608-11e6-9e16-2e5a123aac62_story.html.

Similarly, last year, nearly 100 pages of court records, including SCA Search Warrants and Section 2703(d) applications, related to the FBI's investigation into Hillary Clinton's private email account were unsealed, which led to reporting that helped the public better understand the probe into the former presidential candidate. *See* Josh Gerstein, *Unsealed documents detail tactics in Clinton email probe*,

Politico (Jun. 30, 2016), <https://www.politico.com/blogs/under-the-radar/2018/06/30/unsealed-documents-depict-thoroughness-of-clinton-email-probe-673171> (reporting on “a combination of search warrants and other court orders” to provide a detailed explanation of the probe). In addition, search warrants and related records are central to reporting on the investigation of Michael Cohen, the attorney for the Trump Organization, even though those records remain under seal. Indeed, to better inform their reporting, the news media continues to seek access to them. See Philip Bump, *To search Michael Cohen’s home and office, the FBI has to clear a higher-than-normal bar*, Wash. Post (Apr. 9, 2018), https://www.washingtonpost.com/news/politics/wp/2018/04/09/to-search-michael-cohens-home-and-office-the-fbi-had-to-clear-a-higher-than-normal-bar/?utm_term=.1dd9d0544f10 (analyzing the conditions the U.S. attorney would have had to meet to obtain a search warrant for Cohen’s office and communications with his client); *Judge asked to unseal FBI warrants in Cohen search*, Associated Press (Oct. 12, 2018), <https://apnews.com/2fc850c04f094aae80a7094904e09c7d>; *7 Days, 8 Steps Forward for New York Times Lawsuits Against Secrecy*, N.Y. Times (Nov. 7, 2018), <https://nyti.ms/2yV7Pzw> (discussing numerous motions to unseal court records important to news reporting, including a motion to access affidavits used by the FBI to obtain search warrants in the Cohen matter).

Search warrants are also particularly important to local crime reporting. *See, e.g., Sarah Rafique, Murder-for-hire suspect argued with mom over \$30K the week father was killed, KXAN* (Jul. 24, 2018) (Austin-based reporting derived from search warrants executed as part of an investigation into a possible murder-for-hire), <https://www.kxan.com/news/crime/search-warrant-details-financial-difficulties-of-murder-for-hire-suspects/1320715349>; Brittany Boyer, *Homicide Search Warrants, WNEP* (Aug. 6, 2013) (Pennsylvania-based reporting derived from five search warrants used in an investigation of a homicide), <https://wnep.com/2013/08/06/homicide-search-warrants/>. Search warrants are so important to local news organizations that some maintain archives of articles derived entirely from review of search warrants. *See, e.g., WRAL, Search Warrant Coverage, https://www.wral.com/search-warrant/17644245/* (archive of reporting derived from search warrants).

Reporting on search warrants can help the public better understand important details of local crimes that might not otherwise be disclosed in law enforcement press releases, such as the suspected motivation behind murders. *See, e.g., Allie Johnson, Search warrant: Paynesville murders had 'something to do with a drug debt, Fox 9* (Mar. 29, 2018), <http://www.fox9.com/news/search-warrant-paynesville-murders-had-something-to-do-with-a-drug-debt> (discussing potential motivation for a murder, derived from search warrant). Search warrant coverage can

also warn the public about ongoing threats to the community. *See, e.g.,* Ray Sanchez and Rosa Flores, *Search warrant at Texas archdiocese seeks 'secret archives' of priest accused of sex abuse*, CNN (Nov. 28, 2018), <https://www.cnn.com/2018/11/28/us/archdiocese-galveston-houston-abuse-raid/index.html> (reporting on a search warrant executed as part of an investigation into abuse allegations against a church leader); John Hinton, *UNCC student arrested on charge he made false report of mass violence at school*, Winston-Salem Journal (Mar. 21, 2018), https://www.independenttribune.com/news/local/uncc-student-arrested-on-charge-he-made-false-report-of/article_059f6784-f810-539c-9440-8f6e01371824.html (reporting on search warrants related to a student who was accused of making threats against his university).

In addition, search warrants can allow for scrutiny of campaigns and public officials. *See* Marimow, *Sentencing hearing delayed for 'shadow campaign' donor Jeffrey E. Thompson, supra* (noting that District Court Chief Judge Beryl Howell, in response to a request from *The Washington Post*, unsealed hundreds of pages of records from a campaign finance investigation in connection with the 2010 District of Columbia mayoral election).

Reporting on search warrants and affidavits can also inform the public of the details of unsolved crimes, which may serve the function of community catharsis, prompt witnesses to come forward with information leading to an arrest, and allow

for scrutiny of the adequacy of law enforcement efforts. *See, e.g.*, Halle Parker, *Court documents lay out last day family, friends saw Martinsville man*, GoDanRiver (Jul. 13, 2018), https://www.godanriver.com/news/court-documents-lay-out-last-day-family-friends-saw-martinsville/article_95fbc7d0-86f6-11e8-ab31-47ba575591a3.html (reporting on warrant affidavits to describe in detail the events leading up to a local man's disappearance).

Finally, search warrant coverage also helps promote public faith in the investigative process and the judiciary—the very goals articulated by the Supreme Court in recognizing the right of access to the courtroom. *See, e.g.*, Amy Friedenberger, *Search warrants: Woman found dead in Franklin County in May died of blunt force trauma*, The Roanoke Times (Aug. 8, 2017) (stating that “[s]eventeen search warrants in Franklin County illustrate how meticulous and methodical investigators have been with the case”), https://www.roanoke.com/news/crime/roanoke/search-warrants-woman-found-dead-in-franklin-county-in-may/article_e56ef406-b5d3-5e9f-9634-7555932f3fab.html. These goals, however, can go unmet for decades unless an interested third party—often the media—intervenes to request access to the court records. *See, e.g.*, Katelyn Polantz, *CNN request spurs court to unseal Starr investigation docs*, CNN (Feb. 12, 2018), <https://www.cnn.com/2018/02/12/politics/starr-clinton-documents-cnn/index.html>

(reporting that after two decades of secrecy, documents from independent counsel Ken Starr's investigation of then-president Bill Clinton were unsealed by District Court Chief Judge Beryl Howell, who noted in the opinion that some of the documents "should have been made publicly available" earlier).

Just as with other court records, the PR/TT, Section 2703(d), and SCA Search Warrant Materials have the potential to result in countless news stories critical to the public interest.

B. The public has an interest in understanding government surveillance, including the searches and data acquisitions reflected in the requested records.

PR/TT, Section 2703(d), and SCA Search Warrant Materials differ from the search warrants discussed above only in that they exclusively seek electronically-stored data. This difference makes the requested records more, not less, important to the public. The press has an acute interest in understanding electronic surveillance and data acquisition by the government a topic of growing public interest and discussion.

Several highly publicized revelations regarding the extent of state-sanctioned electronic surveillance in the past decade have Americans increasingly concerned about government overreach in that area. *See, e.g.,* Barton Gellman and Ashkan Soltano, *NSA tracking cellphone locations worldwide, Snowden documents show*, Wash. Post (Dec. 4, 2013), <https://www.washingtonpost.com/world/national->

security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html. The public's interest in surveillance encompasses not only foreign intelligence tools, but also criminal tools that permit the government to obtain electronic data from ordinary citizens as part of important law enforcement efforts. As such, stories about court records authorizing electronic surveillance in general and indeed, this case in particular have captured the attention of the public and the press. See Spencer S. Hsu, *This Judge Just Released 200 Secret Government Surveillance Requests*, Wash. Post (Oct. 24, 2016) (discussing this case), <https://perma.cc/4USXU87S>; Peter J. Henning, *Digital Privacy to Come Under Supreme Court's Scrutiny*, N.Y. Times (Jul. 10, 2017) (discussing cases addressing the scope of the surveillance authority under the SCA), <https://nyti.ms/2u13MAk>; Charlie Savage, *Reined-In N.S.A. Still Collected 151 Million Phone Records in '16*, N.Y. Times (May 2, 2017) (discussing PR/TT devices in the foreign intelligence context), <https://nyti.ms/2qvcthR>.

Reporting on search warrants has led to revelations that law enforcement can use warrants to obtain access to users' social media accounts, see *U.S. Law Enforcement Obtaining Warrants to Search Facebook Profiles*, Reuters (Jul. 12, 2011), <https://www.foxnews.com/tech/u-s-law-enforcement-obtaining-warrants-to-search-facebook-profiles>, get into fingerprint-locked phones, see Karen Turner,

Feds use search warrants to get into fingerprint-locked phones, Wash. Post (Oct. 18, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/10/18/feds-use-search-warrants-to-get-into-fingerprint-locked-phones/>, and amass terabytes of data as part of its criminal investigations, see Emma Best, *The U.S. Government Has Amassed Terabytes of Internal Wikileaks Data*, Gizmodo (Jan. 12, 2019), <https://gizmodo.com/the-u-s-government-has-amassed-terabytes-of-internal-w-1831640212>.

SCA Search Warrants are one such type of court record that reflect judicial evaluation and authorization of requests for electronic surveillance, but PR/TT and Section 2703(d) Materials should be treated the same. These materials, like search warrants, require court oversight of law enforcement surveillance of private citizens. Like search warrants, they present potential risks of prosecutorial misconduct and abuse of First Amendment and privacy rights. Like search warrants, their disclosure would promote public faith in the judiciary. And, importantly, like search warrants, they are the subject of public interest and cannot be known by the public without press access. Indeed, whether these tools function more like a traditional search warrant or a subpoena is a question that has more bearing on the party being searched than on the public's interest and right of access to the materials. *United States v. El-Sayegh*, 131 F. 3d 158, 161 (D.C. Cir. 1997) (“[a] new procedure that substituted for an older one” is “evaluated by the tradition of access to the older procedure”). When

a government official must obtain authorization from a court to conduct electronic surveillance as part of a criminal investigation, the public has a particularly compelling interest in understanding those proceedings and records. The test for First Amendment access is a “functional” one “whether information *of the sort at issue here*” was “traditionally open to public scrutiny.” *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985). That functional test is clearly met here, whether the search is physical or electronic.

Moreover, the public interest in electronic surveillance records is likely to increase over time. Cell phones contain a “cache of sensitive personal information,” *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). As technology advances, the volume of data held by service providers and thereby retrievable by law enforcement through PR/TT orders, Section 2703(d) orders, and SCA Search Warrants grows exponentially, both increasing the risk of surveillance abuse and decreasing the necessity of physical searches. Eventually, the right of access to physical search warrants will be less relevant: if the public cannot inspect how law enforcement is using electronic surveillance, it will not have a picture of law enforcement investigations at all. An expansive constitutional right of access that allows the press to report on electronic surveillance records, on the other hand, “enhances the quality and safeguards the integrity” of the judicial process. *Globe Newspaper Co.*, 457 U.S. at 606.

The reports that will be released periodically by the District Court will help add valuable information to this public discussion by disclosing, among other things, the total number of PR/TT, Section 2703(d), and SCA Search Warrant applications filed by the government. Those reports alone, however, are not sufficient to shed light on how the PRA or the SCA is being used or misused. Although some reporting focuses on big picture stories and will doubtless use the District Court's reports, aggregate numbers tell only a limited story. Some of the most influential reporting focuses on individual instances of government action to reveal how a law enforcement program operates including whether law enforcement is unlawfully or unfairly targeting, for example, advocacy groups, certain citizens or organizations based on their religious affiliations, or journalists and their confidential sources.

For example, in 2016 it was reported that New York City had settled two lawsuits over allegedly illegal targeted surveillance of Muslim communities. Colin Moynihan, *A New York City Settlement on Surveillance of Muslims*, *The New Yorker*, Jan. 7, 2016, <https://www.newyorker.com/news/news-desk/a-new-york-city-settlement-on-surveillance-of-muslims>. This surveillance came to light after a Pulitzer Prize winning story in the Associated Press, after which the NYPD changed its policy. *See id.* Such a story was only possible through access to information about surveillance operations conducted by the NYPD, including pivotal details about whom the NYPD was targeting.

Similarly, a 2010 press investigation that focused on an arrest warrant led to the revelation that the FBI, in a post 9/11 terrorism probe, had withheld evidence and key details from the defense team and the court. *See* Pamela K. Brown and Catherine Herridge, *Circuit court remands terrorism case on grounds FBI withheld info of al-Awlaki investigation*, Fox News (Sep. 26, 2015), <https://www.foxnews.com/politics/circuit-court-remands-terrorism-case-on-grounds-fbi-withheld-info-of-al-awlaki-investigation>. The Fourth Circuit remanded that case. *Id.*

These examples illustrate that when it comes to rooting out surveillance abuse and prosecutorial misconduct, no court-generated report can substitute for the value of press access to the underlying court record itself.

III. Press protections are jeopardized when electronic surveillance records are kept under seal indefinitely.

A. The press has an interest in knowing when it is the subject of government surveillance.

In addition to its usefulness for news reporting in the public interest, surveillance data is important to the news media for an additional reason: such data informs the press and the public when the government is conducting surveillance of reporters themselves, including their newsgathering techniques and confidential source communications.

Because of the press's institutional role as a check on government, reporters are particularly vulnerable to government-sanctioned surveillance. *See, e.g.*, Daniel Lippman, *State-sponsored hackers targeting prominent journalists, Google warns*, Politico (Feb. 10, 2017), <https://perma.cc/3SGX-ZHG3> (reporting that several journalists were targets of state-sponsored hacking); Jeremy Wagstaff, *Journalists, media under attack from hackers: Google researchers*, Reuters (Mar. 28, 2014), <http://reut.rs/119SpbW> (“Twenty-one of the world's top-25 news organizations have been the target of likely state-sponsored hacking attacks.”). PR/TT devices, Section 2703(d) orders, and SCA Search Warrants have the potential to expand government surveillance of the media's data, which has already risen in the past decade. *Accord In re Appl. of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d)*, No. 13-mc-460 (D.D.C. May 7, 2013), ECF No. 1, ¶ 31 (showing that, in 2013, the government obtained a Section 2703(d) order for a reporter's email records).

For instance, in 2013, media outlets reported that the government had obtained the telephone records of more than 100 Associated Press reporters, including a list of incoming and outgoing calls, the duration of each call, and the work and personal phone numbers of individual reporters. *See* Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, A.P. (May 13, 2013), <https://www.ap.org/ap-in-the-news/2013/govt-obtains-wide-ap-phone-records-in-probe>. Although the

government had sought reporters' telephone records before, the sweep of the seizure was largely unprecedented. *Id.*

The same year, media outlets reported that the FBI, in 2010, had executed an SCA Search Warrant demanding that Google disclose the personal emails of a Fox News reporter in connection with an investigation of unauthorized disclosure by a source. *See* Ann E. Marimow, *Justice Department's scrutiny of Fox News reporter James Rosen in leak case draws fire*, Wash. Post (May 20, 2013), https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44_story.html?utm_term=.1e7ec3c5ba81. In court records seeking the search warrant, the government claimed that the reporter was an "aider, abettor, and/or co-conspirator with his source and used "one of the most serious wartime laws in America, the Espionage Act," to justify the search. *See* Judson Berger, *DOJ Invoked Espionage Act in Calling Fox News Reporter Criminal 'Co-Conspirator'*, Fox News (May 22, 2013), <https://www.foxnews.com/politics/doj-invoked-espionage-act-in-calling-fox-news-reporter-criminal-co-conspirator>. The reporter did not learn about the acquisition of his personal emails until it was reported by the Post. Ryan Lizza, *How Prosecutors Fought to Keep Rosen's Warrant Secret*, The New Yorker (May 24, 2013),

<https://www.newyorker.com/news/news-desk/how-prosecutors-fought-to-keep-rosens-warrant-secret>.

Concerns about surveillance of journalists continue to grow. Recently, a heavily redacted document from the Justice Department revealed that the FBI last year established a unit dedicated to unmasking journalists' government sources. *See* Sam Thielman, *TL;DR: Spies (do not) like us*, Columbia Journalism Review Tow Center (Jan. 4, 2019), https://www.cjr.org/tow_center/tow-column-tldr-spies.php. As the current administration has prioritized rooting out unauthorized disclosures to the media, journalists' data have been swept up in criminal investigations. *See* James Risén, *Donald Trump's Surveillance of New York Times Reporter Is a True Declaration of War Against the Press*, *The Intercept* (Jun. 8, 2018), <https://theintercept.com/2018/06/08/donald-trump-new-york-times-reporter-leak-investigation/>. The administration's agenda and stance toward the press heightens the urgency of public access to the information requested here.

B. Disclosure of the requested records will ensure that existing press protections are enforced.

Disclosure of the requested records would inform the public about the strength and scope of existing protections granted to the press. Because the press's institutional role as a check on the government makes it vulnerable to retaliatory surveillance, Congress and the Justice Department, recognizing the value of an unfettered press, have put in place safeguards generally requiring notice to the news

media before the government collects newsgathering material as part of a criminal investigation.

One such protection for the press against government surveillance is the Privacy Protection Act of 1980 (the “PPA”), 42 U.S.C. § 2000aa, which requires that the government provide members of the news media notice before executing a warrant for newsgathering materials. According to the government’s own guidance, the PPA “was intended to grant publishers certain statutory rights to discourage law enforcement officers from targeting publishers simply because they often gathered ‘mere evidence’ of crime.” U.S. Dep’t of Justice, Computer Crime and Intellectual Property Section, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Chapter 2 § F(1) (3d ed. 2009), <https://perma.cc/LV7C-84W5>. The statute was enacted in response to a U.S. Supreme Court decision permitting the execution of a search warrant on the newsroom of a student newspaper, *see* S. Rep. No. 96-874, at 4 (1980) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)), and was intended to give newsgatherers protections for their work product against government searches above and beyond those provided by the Fourth Amendment.

Importantly, the PPA distinguishes between a “warrant” and a “subpoena” in delineating the requirements law enforcement must satisfy before obtaining journalistic material. That distinction between warrants and subpoenas is pivotal to

the statute's requirements. The decision below, however, calls into question that distinction by stating that "SCA orders, even SCA warrants, are functionally unlike traditional search warrants and more akin to subpoenas, to which no recognized First Amendment right of access attaches, in two significant respects . . ." *Matter of Leopold*, 300 F. Supp. 3d at 88. Although *amici* understand the PPA's search warrant requirements to apply when the government executes an SCA Search Warrant for electronically stored newsgathering material, just as they would for a warrant to search a newsroom, the decision below casts doubt on that assumption. Accordingly, access to the requested records is even more crucial for understanding surveillance of the press.

In addition to the PPA, Justice Department policy guidelines, initially adopted in the post-Watergate era, also recognize the importance of shielding media records from intrusive government surveillance. In the aftermath of widespread reporting critical of the surveillance of the Associated Press and Fox News reporters, discussed in Part III.A, *supra*, the Justice Department revised its guidelines regarding obtaining and searching records from the news media. *See* 28 C.F.R. § 50.10. The revised guidelines usually require the government to postpone a search of media records, including electronic records held by third-party providers, until after the affected member of the news media has been notified of the search. Department of Justice,

Report on Review of News Media Policies, Jul. 12, 2013, <https://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf>.

Although these guidelines do not create an enforceable right, they recognize the importance of “safeguarding the essential role of the free press in fostering government accountability and an open society.” 28 C.F.R. § 50.10(a)(2). The guidelines, however, are now reportedly being revised within the Justice Department, which further heightens the need for information about government surveillance of reporters. *See* John Solomon, *Rosenstein, DOJ exploring ways to more easily spy on journalists*, The Hill (Jan. 14, 2019), <https://thehill.com/opinion/judiciary/425189-rosenstein-doj-exploring-ways-to-more-easily-spy-on-journalists> (discussing the revision process, which “has the potential to touch off a First Amendment debate with a press corps that already has high degrees of distrust of and disfunction with the Trump administration”). Access to the PR/TT, Section 2703(d), and SCA Search Warrant Materials will shed light on whether the principles underlying these guidelines continue to be upheld in the context of electronic data in other words, whether the press continues to be notified before its records are obtained by law enforcement from third-party providers.

The requested disclosure of PR/TT, Section 2703(d), and SCA Search Warrant Materials would allow the press to ensure that protections such as the PPA

and Justice Departments guidelines are enforced, allowing the press to confirm that they are learning about government searches of newsgathering materials before they occur.

CONCLUSION

Amici urge this Court to hold that the constitutional right of access applies to PR/TT, Section 2703(d), and SCA Search Warrant Materials. As with other court records, these records are critical to press's role in informing the public about crime and the judiciary, checking abuses of power, and promoting self-government.

Dated: January 25, 2019

Respectfully submitted,

/s/ Laura R. Handman

By: Laura R. Handman
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue N.W., Suite 800
Washington, D.C. 20006-3402
(202) 973-4200
laurahandman@dwt.com

-and-

Selina MacLaren
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street
Suite 2400
Los Angeles, C.A. 90017-2566
(213) 633-8617
selinamaclaren@dwt.com

Counsel for Media Amici

**Additional counsel listed in Appendix B*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,472 words, excluding the parts of the brief exempted by Circuit Rule 32(a)(1), as determined by the word-counting feature of Microsoft Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: January 25, 2019

/s/ Laura R. Handman

Laura R. Handman

CERTIFICATE OF SERVICE

I hereby certify under Circuit Rule 25(c), that on this 25th day of January, 2019, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANTS** with the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: January 25, 2019

/s/ Laura R. Handman

Laura R. Handman

ADDENDUM

APPENDIX A

Descriptions of *amici*:

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

Dow Jones & Company, Inc., is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

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 33 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 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.

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 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 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 News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Reporters Without Borders/Reporters Sans Frontières (“RSF”) is an international non-profit, non-governmental organization that has been promoting and defending freedom of information and freedom of the press since 1985. RSF has a long and active history of involvement in issues concerning the free expression rights of journalists and the media, and in the promotion and protection of independent news reporting. RSF has joined with other press freedom organizations to support many cases involving free expression rights before courts in the United States. RSF’s activities are carried out on five continents through its network of correspondents in 130 countries, 13 national offices, close collaboration with local and regional press freedom groups, and consultative status at the United Nations and UNESCO.

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

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes The Washington Post newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

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**Of counsel:**

Richard A. Bernstein
Vice President and Deputy General Counsel
Advance Publications, Inc.
One World Trade Center
New York, NY 10007

Karen Kaiser
General Counsel
The Associated Press
450 W. 33rd Street
New York, NY 10001

D. Victoria Baranetsky
General Counsel
Reveal from The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Jason P. Conti
Jacob P. Goldstein
Dow Jones & Company, Inc.
1211 Avenue of the Americas
New York, NY 10036
Counsel for Dow Jones & Company, Inc.

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

David Snyder
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
850 10th Street NW
Washington, DC 20001
Counsel for the News Media Alliance

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

John B. Kennedy
James A. McLaughlin
Kalea S. Clark
The Washington Post
One Franklin Square
Washington, D.C. 20071
Tel: (202) 334-6000
Fax: (202) 334-5075