

No. 18-15292

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenor-Plaintiff-Appellee,
KQED, INC.,
Intervenor-Appellee,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of
California, et al.,
Defendants-Appellees,
and
DENNIS HOLLINGSWORTH, et al.,
Intervenors-Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of California
Civil Case No. 09-CV-2292 WHO (Honorable William Orrick)

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS AND 35 MEDIA ORGANIZATIONS IN
SUPPORT OF INTERVENOR-APPELLEE KQED, INC. URGING
AFFIRMANCE**

[Caption continued on next page]

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, Bay Area News Group, Boston Globe Media Partners, LLC, Cable News Network, Inc., California News Publishers Association, Californians Aware, The Center for Investigative Reporting, Dow Jones & Company, Inc., The E.W. Scripps Company, First Amendment Coalition, First Look Media Works, Inc., Fox Television Stations, LLC, Gannett Co., Inc., GateHouse Media, LLC, Hearst Corporation, International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders, The Seattle Times Company, Society of Professional Journalists, Tully Center for Free Speech, and Univision Communications Inc. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

Amici file this brief in support of Intervenor-Appellee KQED, Inc. (“KQED”). *Amici* are members of the news media or organizations that advocate

on the news media's behalf. *Amici* have a strong interest in protecting the right of access to court records and proceedings, which is critical to journalists' ability to inform the public about important court cases. Here, KQED seeks access to videotape recordings of the 12-day trial before the U.S. District Court for the Northern District of California over the constitutionality of Proposition 8, a ballot measure that denied same-sex couples the right to marry in California. The Proposition 8 trial was and remains an event of great public interest and importance. Access to the audio-visual recordings of the trial will allow members of the media to more completely and accurately inform the vast number of people who did not attend the trial itself about what occurred in the courtroom. *Amici* write in support KQED to emphasize the important interests at stake in this case for the news media more broadly, and for the public.

SOURCE OF AUTHORITY TO FILE

Counsel for Intervenor-Appellee KQED, Inc., Plaintiffs-Appellees Kristin Perry, et al., Intervenor-Plaintiff-Appellee the City and County of San Francisco, and Interveners-Defendants-Appellees Dennis Hollingsworth, et al. have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

In 2008, California voters adopted Proposition 8, a state constitutional amendment denying same-sex couples the right to marry. The ballot measure was challenged on constitutional grounds in the U.S. District Court for the Northern District of California. The 12-day bench trial that took place January 2010 was videotaped. *Amici* write to urge this Court to uphold the district court's most recent decision that the videotape recordings of the trial be released in 2020, unless, at that time, the proponents of sealing can show a compelling reason, narrowly-tailored, that would justify keeping them under seal. Order on Mot. to Unseal Videotaped Trial Records at 15, *Perry v. Brown*, No. 09-2292 (Jan. 17, 2018), ECF No. 878 ("Order").

The district court correctly concluded that the common law right of access applies to the recordings. Disclosure, moreover, would advance the purposes that underlie both the common law and First Amendment rights of access: encouraging fair judicial proceedings and fostering informed civic engagement on matters of public importance. Even today, the trial to determine the constitutionality of Proposition 8 remains newsworthy. Though transcripts are available, the recordings provide the best and most accurate depiction of the trial. There is a stark difference between cold transcripts and the recordings at issue, which convey the body language, inflection, tone of voice of witnesses and lawyers, and the

emotional tenor of the trial. This additional information is particularly important for broadcast journalists who depend on audio and video to effectively report the news. Disclosure of the recordings would allow for more accurate reporting and provide a safeguard against inaccurate or misleading portrayals of the trial.

ARGUMENT

I. Public release of the audio-visual recordings of this historic trial would serve the interests advanced by the common law and First Amendment rights of access.

The First Amendment affords the public a qualified right of access to judicial proceedings, and both the First Amendment and common law provide presumptive rights of access to judicial documents. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Circ. 2014); *Nixon v. Warner Commc 'ns, Inc.*, 435 U.S. 589, 598 (1978). Although the First Amendment and common law presumptions of access originally arose in the context of criminal trials, they apply to civil cases and records as well. *Courthouse News Serv.*, 750 F.3d at 786. These constitutional and common law rights are grounded in the understanding that public access is necessary for informed civil discourse, and they serve to ensure the proper functioning of the judicial system. Access to the recordings at issue here would advance these important interests.

“The Supreme Court has repeatedly held that access to public proceedings and records is an indispensable predicate to free expression about the workings of

government.” *Id.* at 785. The First Amendment right of access is rooted in a “common understanding that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted). “By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Id.*

The Supreme Court has also recognized that government, and courts in particular, function better with transparency. *See Nixon*, 435 U.S. at 598 (finding a common law right of access to judicial records and documents based on “the citizen’s desire to keep a watchful eye on the workings of public agencies, and . . . a newspaper publisher’s intention to publish information concerning the operation of government” (citations omitted)); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (finding a First Amendment right of access when a judicial process has traditionally been open to the public and where public access “plays a significant positive role in the functioning of the particular process in question.”). For that reason, public access to judicial proceedings has long been recognized as “one of the essential qualities of a court of justice.” *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 556 (1980) (plurality opinion) (describing how the presumption of access to criminal proceedings traces to Colonial times and English

history) (internal quotation marks omitted). Openness provides citizens with “assurance that the proceedings were conducted fairly to all concerned” and actually enhances fairness by exposing participants to public scrutiny. *Id.* at 569.

The district court correctly concluded that the common law right of access applies to the videotape recordings at issue in this case, and while it did not expressly apply the First Amendment right of access to those recordings, it noted that its “analysis would be no different if [it] applied a First Amendment right of access instead of the common-law right of access.” Order at 10, 12, 14.

Disclosure of the recordings would serve the purposes of both the First Amendment and common law presumptions of access. Public access to the recordings would bolster confidence in the judicial process by allowing citizens, including the large numbers who could not attend this historic trial in person, to observe the workings of the judicial system. *See Richmond Newspapers*, 448 U.S. at 572; *see also In re Nat’l Broad. Co. Inc. (Criden)*, 648 F.2d 814, 822 (3rd Cir. 1981) (holding that the news media may copy tapes introduced into evidence at trial in part because “the public forum values emphasized in [*Richmond Newspapers*] can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person”). In addition, as discussed in more detail in Section II, below,

the audio-visual recordings themselves are a better, more accurate source of information about what actually occurred during the trial.

II. Public access to the videotape recordings will enhance the completeness and accuracy of news reports about the trial.

A. An audio-visual recording conveys more information than a cold transcript.

Proponents of indefinite sealing contend that, because a written transcript of the trial is available, there is no need to release the audio-visual recordings. *See* Br. for Intervenors-Defs.-Appellants at 33. However, a cold transcript is far from an adequate substitute for an audio-visual recording where one exists. Video provides the media and the public with a far more informative depiction of a trial than even a perfect transcription of the same proceeding. A recording, unlike a transcript, conveys body language, inflection, tone of voice, and other contextual information vital to a complete understanding of a courtroom proceeding. Access to the recordings at issue here would give the public a richer, more fulsome account of the witness testimony and legal arguments in a high-profile case that has remained a matter of great public interest since its inception more than eight years ago. *See* *The Case Against 8* (HBO 2014) (documentary about the legal battle over Proposition 8 in California).

Numerous courts have recognized that a cold transcript conveys far less information than an audio-visual or audio recording. *See In re Nat'l Broad. Co.*,

Inc. (Myers), 635 F.2d 945, 953 (2d Cir. 1980) (“[S]eeing the tapes on television will create a stronger impression of the events among those who already have been exposed to news accounts of their contents”); *In re NBC Universal, Inc.*, 426 F. Supp. 2d 49, 58 (E.D.N.Y. 2006) (“Television indubitably has a much greater potential impact on jurors than print media”); *State v. WBAL-TV*, 975 A.2d 909, 926 (Md. Ct. Spec. App. 2009) (“[A] transcript ordinarily reflects only the words spoken, and not how they were said or the physical actions and reactions of the participants present.”). With only a written record, “[i]mportant, sometimes vital, parts of the trial, including the appearance, demeanor, expression, gestures[,] intonations, hesitations, inflections, and tone of voice of witnesses, of counsel, and of the judge are not there.” *Criden*, 648 F.2d at 824 (quoting *Oxnard Publ’g Co. v. Superior Court*, 68 Cal. Rptr. 83, 95 (Ct. App. 1968)). Providing the press and public with only a cold transcript deprives them of access to these “vital” parts of the trial; without access to the recordings, “a substantial part of the real record of the proceeding will have been permanently lost to public scrutiny.” *Id.*

Federal appellate courts that have weighed whether to grant the press and public access to audio and videotapes submitted in evidence have recognized that “actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by second-hand reports.” *Id.* (granting media access to copy and rebroadcast videotaped evidence in criminal trial of public officials); *see also In re*

Application of CBS, Inc., 828 F.2d 958, 960 (2d Cir. 1987) (granting the news media the ability to copy a videotaped deposition and noting that “[t]ranscripts lack a tone of voice, frequently misreport words and often contain distorting ambiguities as to where sentences begin and end”). For example, the U.S. Court of Appeals for the Third Circuit stated that “[t]he hackneyed expression, ‘one picture is worth a thousand words’ fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader.” *United States v. Martin*, 746 F.2d 964, 971–72 (3d Cir. 1984) (quoting *United States v. Criden*, 501 F. Supp. 854, 859–60 (E.D. Pa. 1980)). Providing access to a video recording allows a viewer to become “virtually a participant in the events portrayed,” *id.* at 972, amplifying the impact of the information conveyed.

B. Video and audio recordings are crucial to the work of broadcast journalists who use them to convey context and information to the public.

Courts have long recognized that the news media acts as a surrogate for the public in monitoring trials. *See Richmond Newspapers* 448 U.S. at 573. As surrogates for the public, the news media have a responsibility to provide accurate and thorough accounts of judicial events; the news media’s ability to fulfill this responsibility is enhanced when members of the media have access to audio-visual recordings of trials.

1. Video recordings allow the news media to provide more complete depictions of judicial proceedings to the public.

Recordings serve as powerful storytelling tools to journalists who work in aural or visual mediums, including documentarians and reporters working on television and radio news programs. For example, filmmaker David Sutcliffe was recently granted access to recordings of a defendant played at a recent criminal trial in federal court in Tennessee for use in a documentary. Order Granting Mot. of Non-Party David F. Sutcliffe for Access to Certain Trial Exs., *U.S. v. Doggart*, No. 1:15-CR-39 (E.D. Tenn. Oct. 30, 2017). In the audio Sutcliffe sought and obtained, a criminal defendant and failed Congressional candidate describes his plans to attack a predominately Muslim town in New York with various weaponry. Sutcliffe makes use of this recording in his film detailing the defendant's violent plot, his arrest, and a community's efforts to draw national attention to the incident. David Felix Sutcliffe, *White Fright trailer*, Vimeo (Feb. 22, 2018), <https://bit.ly/2FYOm35> (audio recording used at the 38-second mark of the film trailer).

Courtroom footage has served as an important component of several other investigative documentaries. In the critically-acclaimed documentary *Paradise Lost: The Child Murders at Robin Hood Hills*, which covers the trials of three teenage boys accused of murder in Arkansas, documentarians Joe Berlinger and Bruce Sinofsky made use of a "fair amount of footage from the original trial[s]."

Mike D'Angelo, *Paradise Lost Shows that Charisma Doesn't Need Movie-Star Looks*, AV Club (May 23), <https://perma.cc/HGZ8-7RBH> (featuring a defendant's testimony). Berlinger and Sinofsky used the footage to paint a vivid picture of the defendants that would not have been possible based on a transcript alone.

Describing a visual recording of one of the defendants' testimony, one critic observed, "[W]hat comes across in this footage—and in all of *Paradise Lost's* trial footage—is how earnest, polite, and cooperative Echols is." *Id.* The documentary is credited with bringing national attention to the case, which remained in the national conversation until the men were freed in 2011. *See* Campbell Robertson, *Deal Free 'West Memphis Three' in Arkansas*, N.Y. Times (Aug. 19, 2011), <https://nyti.ms/2MIkV7E>.

Similarly, the documentary series *Making a Murderer*, which is about the arrests and trials for murder of Wisconsin men Steven Avery and Brendan Dassey, included video recordings of depositions and trial testimony. *See Making a Murderer: Eighteen Years Lost*, at 5:05 (Netflix 2015) (featuring one of the many instances in which documentarian used video footage of depositions of family members of the defendants). The series initiated a national conversation around the case and particularly around constitutional concerns relating to Dassey's confession. *See* Ariane de Vogue and Eli Watkins, *Supreme Court Won't Take up 'Making a Murderer' Case*, CNN (June 25, 2018), <https://perma.cc/CQ22-768F>.

2. Public access to recordings of judicial proceedings improves accuracy in news reports.

Access to recordings of judicial proceedings also leads to more accurate journalism. Armed with a recording, a reporter can provide a fuller picture to his or her audience, and journalists and the broader public can also more easily disprove inaccurate and misleading portrayals with ready access to primary source material. *Katzmann v. Victoria's Secret Catalogue (in re Courtroom TV)*, 923 F. Supp. 580, 587 (S.D.N.Y. 1996) (reporting on judicial proceedings “frequently is *more* accurate and comprehensive when cameras are present”) (emphasis added)); *In re Application of CBS, Inc.*, 828 F.2d at 960 (“Because the videotape may in fact be more accurate evidence than a transcript . . . it’s availability to the media may enhance the accurate reporting of trials.”).

This principle is highlighted by the differences of interpretation that can occur when journalists lack access to tapes from judicial proceedings. For example, *The New York Times* in 2014 posted a video re-enactment of a deposition from an Ohio public-records case based on a transcript. Brett Weiner, *Verbatim: What is a Photocopier?*, New York Times Op-Docs: Season 3 (Apr. 27, 2014), <https://nyti.ms/2EOKLIT>. The dramatization shows a heated, emotional argument between the lawyer, David Marburger, and the witness; but, in fact, the deposition was calm, according to Marburger. Michael K. McIntyre, *Cleveland Lawyer Whose Deposition Now is a New York Times Dramatization Says They Got the*

Dialogue Right, but the Emotions Wrong, Cleveland Plain Dealer (Apr. 29, 2014), <https://bit.ly/2K6yT6c>.

Similarly, during the recent criminal trial of comedian Bill Cosby, observers had differing recollections of what Cosby said when a prosecutor accused him of being a flight risk. Mensah M. Dean, *Why are Cameras Still out of Order in Pa. Courts*, Philadelphia Inquirer (July 15, 2018), <https://perma.cc/8XUD-AG98> (“[T]he discrepancy couldn’t be resolved definitively because cameras and recording devices are not permitted in Pennsylvania trial courtrooms, even though most states green-lighted the use of such technology in courts years ago.”) Some but not all publications reported that Cosby referred to himself in the third person while responding to the prosecutor’s statement that he owned a plane. *Id.* (“Most journalists reported that he’d spoken of himself in the third person: ‘He doesn’t have a plane, you a——!’”); *Bill Cosby Found Guilty in Sexual Assault Trial*, CNN Newsroom (Apr. 26, 2018), <https://perma.cc/Y8BB-MQ8G> (“You were in the courtroom when . . . one of the prosecutors said [Cosby] has a plane, [and] he shouted, ‘I don’t have a plane.’”). In these and other instances, audio and video recordings offer clues and information that give the public and the press more information and act as a primary resource against which misleading portrayals can be checked against.

III. Speculative concerns about the misleading editing of a recording should not factor in the analysis over its sealing.

Proponents urge this Court to consider that the video recording at issue could hypothetically be edited to mislead viewers. *See* Br. for Intervenors-Defendants-Appellants at 43–44. However, courts that have considered concerns about accuracy in reporting when weighing the sealing of recordings have rejected such concerns as a basis for sealing. In *United States v. Guzzino*, the Seventh Circuit reversed a lower court decision to restrict access to audio tapes admitted into evidence in a criminal trial in part because the district court was concerned that the “tapes could be . . . inaccurately reported upon by the news media.” 766 F.2d 302, 304 (7th Cir. 1985). The Court stated that “[w]hether the news media would have accurately reported or whether the public would have understood the content of the tapes should have been of no concern to the trial judge.” *Id.* The trial judge had a duty to weigh the rights of the parties, including the defendant’s right to a fair trial, against the media right of access, but had “no duty to assure that the news media would do its job properly” once the recording was released, the Seventh Circuit said. *Id.*

Many district courts that have addressed this issue have reached the same conclusion. *See, e.g., In re Application of WFMJ Broadcasting Co.*, 566 F.Supp. 1036, 1043 (N.D. Ohio 1983) (“Confidence in the responsibility of the media must prevail until reason is given to find likewise.”); *United States v. Andreas*, 1998 WL

417768, at *4, *6 (N.D. Ill. July 16, 1998) (granting access to audio and videotapes admitted into evidence and rejecting as speculative the argument that disclosure would create a “substantial likelihood that the media will present out of context ‘soundbites’ or salacious excerpts from the tapes”); *Katzmann*, 923 F. Supp. at 587 (granting television channel access to videotape a trial and rejecting speculation about “editorialization and the selective use of ‘soundbites’ from the footage of courtroom broadcasts”). To the contrary, as discussed above, access to recordings fosters accurate reporting and concerns about editing are alleviated when *all* citizens have access to recordings and the full context of an interaction.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the district court’s order holding that the recordings shall be released to Movants on August 12, 2020, absent a further order at that time that compelling reasons, narrowly-tailored, exist to keep them under seal.

Respectfully submitted,

/s/ Bruce D. Brown

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Dated: August 8, 2018
Washington, D.C.

CERTIFICATE OF COMPLIANCE WITH RULE 32(G)

I, Bruce D. Brown, do hereby certify that the foregoing brief of *amici curiae*:

- 1) Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,004 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
- 2) 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 Office Word in 14-point, Times New Roman font.

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Dated: August 8, 2018
Washington, D.C.

APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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 (“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.

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

Bay Area News Group is operated by MediaNews Group, one of the largest newspaper companies in the United States with newspapers throughout California and the nation. The Bay Area News Group includes *The Oakland Tribune*, *The Daily Review*, *The Argus*, *San Jose Mercury News*, *Contra Costa Times*, *Marin Independent Journal*, *West County Times*, *Valley Times*, *East County Times*, *Tri-Valley Herald*, *Santa Cruz Sentinel*, *San Mateo County Times*, *Vallejo Times-Herald* and *Vacaville Reporter*, all in California.

Boston Globe Media Partners, LLC publishes *The Boston Globe*, the largest daily newspaper in New England.

Cable News Network, Inc. ("CNN"), a Delaware corporation, is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded company. CNN is a

portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

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.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The **Center for Investigative Reporting (CIR)**, founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its <https://www.revealnews.org/> website, the Reveal national public radio show and podcast, and various documentary projects - often 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.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

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 110 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.

GateHouse Media is one of the largest publishers of locally-based media in the United States. As of August 2018, we publish 145 daily newspapers, 340 community publications and more than 570 local market websites that reach more than 23 million people each week.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, Calif., which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

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

The Investigative Reporting 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 about government and corporate

accountability, ranging widely from the environment and health to national security and the economy.

Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation.

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

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919,

represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

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

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of 30 million people who listen to NPR programming and newscasts each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated

entities. In addition, NPR is reaching an expanding audience via its digital properties, including podcasts (which see about 19 million unique users each month), social media, mobile applications, and NPR.org (which sees about 37 million unique visitors each month).

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

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

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a

circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

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.

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

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

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.

Univision Communications Inc. (UCI) is the leading media company serving Hispanic America. UCI is a leading content creator in the U.S. and includes the Univision Network, UniMás and Univision Cable Networks. UCI also includes the Fusion Media Group, a division that serves young, diverse audiences, which includes cable networks and a collection of leading digital news sites including Gizmodo, Deadspin, The Root, Splinter and Jezebel.

APPENDIX B

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CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on August 8, 2018.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number _____

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) separately represented parties; (2) a party or parties filing a single brief in response to multiple briefs; or (3) a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated . The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or
Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)