No. 21-1017

IN THE
Supreme Court of the United States

CAROLYN JEWEL, TASH HEPTING, ERIK KNUTZEN, YOUNG BOON HICKS (AS EXECUTRIX OF THE ESTATE OF GREGORY HICKS), AND JOICE WALTON,

Petitioners,

v.

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Reporters Committee for Freedom of the Press ("the Reporters Committee" or "amicus"), an unincorporated nonprofit association of reporters and editors that works to safeguard the rights of a free press. The Reporters Committee has often participated as amicus curiae before this Court to underline the impact of government surveillance authorities on the confidential reporter-source contacts that underpin so much essential journalism. *See, e.g.*, Brief Amicus Curiae of the Reporters Committee for Freedom of the Press, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (No. 11-1025); Brief Amici Curiae of the Reporters Committee for Freedom of the Press and 19 Media Organizations, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

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[1] Pursuant to Supreme Court Rule 37, counsel for amicus curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amicus curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; counsel of record for all parties were given timely notice of the intent to file this brief; and counsel of record for all parties have provided written consent to the filing of the brief.

SUMMARY OF THE ARGUMENT

The government's mass collection of communications records has a substantial impact on the integrity of the newsgathering process, and therefore on the freedom of the press. Journalists regularly rely on communications with confidential sources to inform their reporting. These sources often need anonymity to confide in journalists without fear that they may—if their identities are revealed—risk prosecution, loss of employment, and even threats to their lives. *See Introduction to the Reporter's Privilege Compendium*, Reporters Comm. for Freedom of the Press, https://perma.cc/BNT4-HHPY (last updated Nov. 5, 2021). When the threat of surveillance intrudes on those confidential relationships, it dams the free flow of information, leaving the public with less essential information on the critical issues of the day.

The importance of protecting reporter-source communications is reflected throughout our laws. It is demonstrated, for one, by the recognition of some species of reporter's privilege in almost every state and federal jurisdiction in the country that protects reporters' sources and source materials from compelled disclosure. *Introduction to the Reporter's Privilege Compendium, supra*. And the Department of Justice itself recognizes the threat that unchecked surveillance power poses to newsgathering, having recently strengthened its internal guidelines to prohibit the use of compulsory process for reporters' communications, with only narrow exceptions. *See* Memorandum from the Att'y Gen. Regarding Use of Compulsory Process to Obtain Information From, or

Records of, Members of the News Media (July 19, 2021), https://perma.cc/428V-FX24 (hereinafter "the Garland Memorandum"). But the programs at issue here can undermine all of those carefully drawn safeguards—along with the constitutional values they reflect. *Cf. Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring) (emphasizing that "the right to associate anonymously" is an essential component of "the freedom of the press").

Amicus writes to underscore the corrosive effect of dragnet foreign intelligence surveillance on confidential reporter-source relationships. And by highlighting the fundamental role confidential sources play in the newsgathering process, amicus emphasizes the value of the journalism lost when the chilling effect of surveillance undermines newsgathering. That concern is especially acute given the government's increased willingness to pursue "leak" prosecutions in recent years, an uptick in previous administrations that has heightened concerns that indiscriminate surveillance can be misused to punish disclosures to the press of information in the public interest.

For these reasons, amicus urges this Court to consider that the programs challenged here threaten the freedom of the press and to recognize that, for that reason too, they should be reviewed. The petition should be granted.

ARGUMENT

I. The surveillance programs at issue in this case threaten reporter-source relationships vital to newsgathering.

a. Existing legal protections reflect the important role that reporter-source confidentiality plays in the free flow of information to the public.

Courts have widely embraced the importance of a reporter's ability to cultivate and protect relationships with confidential sources. *See Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("[J]ournalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."); *see also Introduction to the Reporter's Privilege Compendium*, *supra*. Forcing a reporter to disclose the identity of a source "significantly interfere[s] with this news gathering ability," resulting in a less informed electorate. *Zerilli*, 656 F.2d at 711. And dragnet surveillance can commandeer the press as an unwilling arm of law enforcement, deterring sources from disclosing newsworthy information to reporters.[2]

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[2] A number of courts have recognized the dangers associated with using journalists as unwilling arms of law enforcement by protecting even non-confidential journalistic work product. *See, e.g.*, *Shoen v. Shoen*, 5 F.3d 1289, 1294–95 (9th Cir. 1993) (extending a qualified reporter's privilege to non-confidential information, recognizing "the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party" (quoting *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988))).

As Pulitzer Prize winner Matt Apuzzo explained, after it became public that the government had seized his records, sources advised him that they could no longer speak with him. *See* Michael Barbaro, *Cracking Down on Leaks*, N.Y. Times: The Daily (June 18, 2018), https://perma.cc/8NGU-4STS.

Similarly, after the government notified the Associated Press in 2013 that investigators had secretly seized the records of more than 20 telephone lines used by more than 100 Associated Press reporters and editors, AP President and CEO Gary Pruitt reported that "[s]ome of our longtime trusted sources have become nervous and anxious about talking to us, even on stories that aren't about national security." *AP Chief Points to Chilling Effect After Justice Investigation*, Reporters Comm. for Freedom of the Press (June 19, 2013), https://perma.cc/4PDV-R76V; *see also* Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN (June 19, 2013), https://perma.cc/C6AC-SSHM.

More recently, revelations that the government had seized years' worth of New York Times reporter Ali Watkins's phone and email records triggered similar concerns that such an intrusion would chill sources that reporters need to report on the government. Michael M. Grynbaum, *Press Groups Criticize the Seizing of a Times Reporter's Records*, N.Y. Times (June 8, 2018), https://perma.cc/7QWG-3CDB. Watkins had been further targeted by an agent in a Customs and Border Protection unit created to identify national security threats post-9/11, who was running checks in a database to investigate

journalists and the identity of their sources. Jana Winter, *Operation Whistle Pig: Inside the Secret CBP Unit with No Rules that Investigates Americans*, Yahoo News (Dec. 11, 2021), https://perma.cc/44JA-MF7U. Watkins said of the investigation into her journalistic sources that it was "chilling then, and it remains chilling now." *Id.*

Improper surveillance of journalists and their sources leads to a broader harm than just interference with individual reporter-source relationships. As this Court has observed, "[t]he press was protected so that it could bare the secrets of government and inform the people." *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). However, if sources do not feel that reporters can credibly keep their identity confidential, that insecurity broadly limits the flow of newsworthy information to the public and impedes the media's ability to provide the public with the information needed to "make informed political, social, and economic choices." *See, e.g.*, *Zerilli*, 656 F.2d at 711. The loss to public knowledge that results from this intrusion on reporter-source confidentiality "dam[s] the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source." *See* Alexander M. Bickel, The Morality of Consent 84 (1975).

Reporters have relied on communications with confidential sources for decades to break major stories to the public. Historically consequential journalistic work like Washington Post reporters Carl Bernstein and Bob Woodward's reporting on the Nixon

administration's involvement in the break-in at the Watergate and subsequent cover-up led to the impeachment and resignation of a U.S. President. According to Bernstein: "Almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat." David Kravets, *Reporters Challenge Bonds' Leak Subpoena*, Associated Press (May 31, 2006), https://perma.cc/2JS6-5N7C. The shadow of government surveillance haunted reporter-source relationships even then, leading Woodward to rely on a system of coded signals to set up in-person meetings with Deep Throat to avoid talking by phone. *See* Carl Bernstein & Bob Woodward, All the President's Men 71 (1974); Andrew Buncombe, *How Woodward Met Deep Throat*, Independent (June 3, 2005), https://bit.ly/3uUcOOw.

Countless ground-breaking stories revealing government misconduct have relied on confidential sources. In 2005, long before the scope of the government's post-9/11 foreign intelligence surveillance programs came to light, the New York Times relied on confidential sources to initially break news of the government's wiretapping of individuals with suspected ties to terrorism without court review or a warrant. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/P649-27JF. Confidential sources have informed reporting from revelations of the enhanced interrogation techniques utilized by U.S. personnel on terrorism suspects

abroad, *see* David Johnston et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times (Oct. 4, 2007), https://perma.cc/Z922-C84R, to the U.S. government's lethal use of drones in its targeted killing program, *see* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times (Apr. 6, 2010), https://perma.cc/8HZP-JEFS.

Confidential sources have played an important role in fueling investigative reporting on private sector misconduct as well. In a notable recent example, confidential sources transmitted 11.9 million records from 14 offshore financial firms to a consortium of investigative journalists around the world, revealing that 35 current and former world leaders and over 300 politicians and public officials in 92 countries were hiding their money and assets in an extensive international shadow economy. *Pandora Papers: Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, Int'l Consortium of Investigative Journalists (Oct. 3. 2021), https://perma.cc/7ZHA-UTCT. The records, culminating in a report dubbed the Pandora Papers, resulted in reforms including U.S. sanctions on international leaders and numerous countries' promising tougher laws, public hearings, and investigations into the reporting. Michael Hudson & Will Fitzgibbon, *Pandora Papers Caps Off 2021 With Consequences Felt Around the Globe*, Int'l Consortium of Investigative Journalists (Dec. 21, 2021), https://perma.cc/4LJA-KNW6. In an earlier reporting project by the consortium called the Panama Papers, leaked documents from a former Panamanian law firm revealed significant international tax avoidance schemes. *Panama Papers: Exposing the Rogue*

Offshore Finance Industry, Int'l Consortium of Investigative Journalists, https://perma.cc/TD77-QXBQ (last visited Feb. 14, 2022). The reporting has had dramatic effects globally over the last five years, including the resignation of world leaders and U.S. federal prosecutions for tax fraud. *See* Will Fitzgibbon & Michael Hudson, *Five Years Later, Panama Papers Still Having a Big Impact*, Int'l Consortium of Investigative Journalists (Apr. 3, 2021), https://perma.cc/5Y4V-82H8.

None of this reporting would be possible without reporters' ability to protect the anonymity of sources. In recognition of this important interest, a near-universal consensus has emerged over the last 50 years that reporters should be afforded legal protection from having to divulge their sources. Almost every state in the United States recognizes legal protections for a journalist's confidential sources, providing a critical safeguard to the newsgathering process. *Reporter's Privilege Compendium*, Reporters Comm. for Freedom of the Press, https://perma.cc/78JD-P5DZ (last visited Jan. 26, 2022). Many of these protections are statutory "shield" laws, but others are judicially recognized privileges. *See id.*; *see also* Brett Spain & Bethany Fogerty, *Reporter's Privilege Compendium: Virginia*, Part II.C, Reporters Comm. for Freedom of the Press, https://perma.cc/FJ99-THVW (last visited Jan. 26, 2022) (explaining that the Virginia Supreme Court recognized a privilege under the First Amendment in *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974)). In addition, the U.S. Department of Justice itself has promulgated internal guidelines that now effectively block the use of compulsory process to secure

journalists' records or communications under criminal surveillance authorities, and has put restrictions in place for foreign intelligence surveillance. *See infra* Sections I.b., II.

These laws and policies reflect a "'national referendum' attesting to [the United States'] sense of the critical role that a vibrant press plays in a free society." *See* Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism,"* 29 Cardozo L. Rev. 1423, 1429 (2008). States across the country have enacted these laws to protect the "paramount public interest" in maintaining a "vigorous, aggressive and independent press." *People ex rel. Scott v. Silverstein*, 412 N.E.2d 692, 695 (Ill. App. Ct. 1980), *rev'd on other grounds*, 429 N.E.2d 483 (Ill. 1981) (quoting *Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)). And all but two federal courts of appeals have recognized some form of a qualified privilege under the First Amendment or common law. *See Reporter's Privilege Compendium*, Part III.A, Reporters Comm. for Freedom of the Press, https://perma.cc/8UBB-VTSZ (last visited Jan. 26, 2022).

While these laws, court rulings, and policies provide a range of protections, collectively they stand for the proposition that forcing a reporter to disclose confidential sources is only permissible if the government has satisfied a set of stringent protections—such as the centrality of the material to the matter and the inability of investigators to acquire the information from a non-media source.

Dragnet foreign intelligence surveillance can circumvent these protections and compromise the media's ability to protect the confidentiality of its sources, which threatens the integrity of newsgathering and ultimately weakens our democracy. As evidenced above, all three branches of government, at both the federal and state levels, have affirmed the importance of these protections for the free press to "assure[] the maintenance of our political system and an open society." *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

b. Since 2009, the federal government's increased willingness to prosecute disclosures of newsworthy government secrets has compounded the chilling effect foreign intelligence surveillance can have on sources.

That foreign intelligence surveillance could affect confidential sources' willingness to speak to reporters must also be considered in light of the government's demonstrated willingness to prosecute government employees or contractors who have disclosed classified (or otherwise restricted) information to the news media. Starting in 2009, President Barack Obama's administration brought 11 cases against "leakers," more than all previous administrations combined.[3] *See* Gabe Rottman,

[3] While some lists of leak prosecutions under the Obama administration omit those of David Petraeus, former CIA Director and four-star commander of allied forces in Afghanistan, and Navy contractor James Hitselberger, amicus includes both in its tally as they involved the use of criminal laws to investigate and prosecute the disclosure of classified

Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present, Reporters Comm. for Freedom of the Press, https://perma.cc/XJJ6-UB7T (last visited Jan. 31, 2022); *see also* Gabe Rottman, *A Typology of Federal News Media "Leak" Cases*, 93 Tul. L. Rev. 1147, 1157–58 (2019).

That trend continued under President Donald Trump, whose Justice Department had obtained eight leak indictments as of January 2021. Anthony L. Fargo, *The End of the Affair: Can the Relationship Between Journalists and Sources Survive Mass Surveillance and Aggressive Leak Prosecutions?*, 26 Commc'n L. & Pol'y 187, 198 (2021). These prosecutions included the two longest prison sentences for leak cases in American history—63 months for former NSA contractor Reality Winner, and 48 months for former FBI special agent Terry Albury. *See* Gabe Rottman, *Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present*, *supra*.[4]

The Trump administration also secured an indictment against WikiLeaks founder Julian Assange that, in another historical first, included

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information to members of the press or public. *See* Gabe Rottman, *A Typology of Federal News Media "Leak" Cases*, 93 Tul. L. Rev. 1147, 1157–58, n.31 (2019).

[4] These cases stand in stark contrast to that of Samuel Loring Morison, the Navy intelligence analyst successfully prosecuted under the Espionage Act for leaking during the Reagan administration. President Bill Clinton pardoned Morison in 2001 precisely because his case was, at the time, so singular. Rottman, *supra* note 3, at 1176.

three charges that seek to explicitly criminalize the sole act of publishing classified information. Megan Specia & Charlie Savage, *Julian Assange Can Appeal Decision to Extradite Him to U.S., U.K. Court Rules*, N.Y. Times (Jan. 25, 2022), https://perma.cc/L7NW-BGFC; *see also* Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, Lawfare (May 24, 2019), https://perma.cc/L6DE-A8VZ (explaining that three of the 17 counts "focus . . . on Assange's having posted the documents on the internet" and not "on some other action, such as encouraging the leak or receiving the information").

In addition to the ongoing prosecution of Assange, the Biden administration in 2021 did not immediately drop demands authorized under the Trump administration for the phone and email records of eight journalists from three news outlets: CNN, the New York Times, and the Washington Post. The Justice Department continued to enforce gag orders in two of the cases and pursued one demand for months into the Biden administration before finally dropping it. *See* Bruce D. Brown & Gabe Rottman, *Everything We Know About the Trump-Era Records Demands from the Press*, Lawfare (July 6, 2021), https://perma.cc/D86M-GZ7K. The Biden administration did eventually end these efforts, and Attorney General Merrick Garland replaced the balancing test in the Justice Department's existing guidelines with a bright-line restriction on the use of compulsory process to demand reporters' records, with only narrow exceptions. Matt Zapotosky & Devlin Barrett, *Biden Justice Dept. Releases More Details on Secret Seizures of Journalists' Records*, Wash. Post (Sept. 1, 2021), https://perma.cc/5CXN-KVVH; *see*

also infra Section II. The Biden administration's rule-change is a historic shift that reflects what journalists and press freedom advocates have long known—that the chill on newsgathering that results from efforts by the government to uncover the identity of confidential sources is simply unacceptable. *See* Charlie Savage & Katie Benner, *U.S. Waged Secret Legal Battle to Obtain Emails of 4 Times Reporters*, N.Y. Times (June 9, 2021), https://perma.cc/CKN3-QZEF.

Further, this trend of aggressive leak-hunting has demonstrably affected newsgathering. *See* Avi Asher-Schapiro, *Leak Prosecutions under Trump Chill National Security Beat*, Comm. to Protect Journalists (Mar. 6, 2019), https://perma.cc/GU3H-G224; *see also* Editorial, *A Journalist 'Co-Conspirator*,' Wall St. J. (May 20, 2013), https://perma.cc/W43C-4JYP (discussing the Justice Department's seizure of phone records of AP reporters and editors and Fox News reporter James Rosen's emails, and observing that "[t]he suspicion has to be that maybe these 'leak' investigations are less about deterring leakers and more about intimidating the press"). Additionally, and importantly, while Espionage Act leak investigations are criminal in nature, information gathered in the course of the surveillance programs at issue in this case could also find its way into criminal leak investigations.

For instance, material collected under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act, Pub. L. No. 110-261, 122 Stat. 2436 (2008), codified at 50 U.S.C. § 1881a (the "FISA Amendments Act"), will be transmitted to the FBI—the agency responsible for investigating national

security leaks—if it includes selectors associated with a full investigation. *See* Asha Rangappa, *Don't Fall for the Hype: How the FBI's Use of Section 702 Surveillance Data Really Works*, Just Security (Nov. 29, 2017), https://perma.cc/H9L6-P43F. That information will then be included in the FBI's Data Integration and Visualization System, or DIVS, which permits one search term to access multiple FBI databases. *Id.* A DIVS search is one of the first investigative steps the FBI will conduct at the assessment stage of a matter. *Id.* And, while Section 702 material is not immediately accessible to an uncleared investigator, it may be accessible at some point to cleared FBI agents. *Id.* In other words, this system—often referred to as the FBI "backdoor"—permits U.S. person selectors to form the basis of a Section 702 search and for Section 702 material to be used in criminal investigations. *Id.*; *see also* Selina MacLaren, *How Do Leak Investigations Work?*, Lawfare (May 16, 2017), https://perma.cc/GT85-ALJH (explaining how a "preliminary inquiry" at an intelligence agency leads to a Justice Department leak investigation).

c. The surveillance programs at issue in this case can be especially damaging to journalism because they target content as well as metadata.

Mass surveillance programs that permit the collection of communications metadata and content present "serious repercussions today for the freedom of the press" as they permit the government to secretly peer into the operations of the newsroom. The President's Review Grp. on Intel. and Commc'ns

Techs., Liberty and Security in a Changing World 1, 127 (2013), https://perma.cc/4MEZ-FTXX. Legislatures, the courts, and law enforcement agencies themselves have recognized this distinction by granting more protection to the content of electronic communications than to metadata. Numerous laws, including the section of the Electronic Communications Privacy Act ("ECPA") known as the Wiretap Act, 18 U.S.C. § 2518, and the Stored Communications Act, 18 U.S.C. § 2703, require that the government meet a heightened evidentiary bar before it can access communications content.

To be clear, amicus maintains that the indiscriminate collection of metadata harms reporter-source relationships and the newsgathering process and may do so to a greater degree than content collection in some cases. *See* Br. Amici Curiae of the Reporters Comm. for Freedom of the Press and 19 Media Orgs. in Supp. of Pet'r, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (explaining that while content can be coded or encrypted, metadata is harder to obscure). However, it is especially important for journalists that the content of electronic communications remains private because those communications form the background for and basis of investigative articles. *See, e.g.*, Norman Pearlstine, PBS Frontline Interview, PBS (Feb. 13, 2007), https://perma.cc/JF9Z-U224 (interviewing a former editor-in-chief of Time Magazine and executive editor of the Los Angeles Times who describes information from anonymous sources as part of the "fabric of American journalism").

Further, communications content can include not just messages between reporters and sources, but also journalistic work product, which has similarly received special protections under the laws of most states and through federal legislation such as the Privacy Protection Act. *See* 42 U.S.C. § 2000aa. Therefore, the additional protections that legislators have given to the substantive content of electronic communications described above only showcase the importance of protections for reporter-source confidentiality with respect to the surveillance programs challenged by Petitioners.

II. The mass surveillance programs at issue in this case can circumvent the government's own safeguards protecting reporter-source confidentiality and press freedom.

As discussed above, despite existing internal guidelines intended to keep the press from becoming a "quasi-governmental investigatory agency," John N. Mitchell, Att'y Gen., Address Before the House of Delegates, American Bar Association: "Free Press and Fair Trial: The Subpoena Controversy" (Aug. 10, 1970), https://perma.cc/WF64-QVDQ, it was disclosed in May and June 2021 that the Justice Department had, in 2020, authorized the use of compulsory process to secretly demand months' worth of phone and email metadata from eight reporters across three outlets in 2017 as part of national security leak investigations into their sources. Savage & Benner, *supra*. The revelations prompted Attorney General Garland to issue a memorandum barring the Justice Department from using compulsory process for reporters' records,

with only narrow exceptions for, *inter alia*, journalists who are themselves suspected of criminal activity. *See* Garland Memorandum, *supra* pp. 2–3.

The new guidance imposed a full prohibition on seeking reporter records through compulsory process from reporters themselves, publishers, or third-party service providers, dispensing with the previous balancing test whereby the department would internally weigh the investigative interest in a particular seizure against press rights. *Id.* The Garland Memorandum confirms that the policy applies to all types of compulsory process covered by current regulations, including subpoenas, warrants, court orders for electronic communications records under 18 U.S.C. § 2703(d), pen register and trap and trace court orders under 18 U.S.C. § 3123, and civil investigative demands. *Id.* The memo recognized that the former balancing test "may fail to properly weigh[] the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government." *Id.*

In addition to the updated news media policy strengthening protections against federal criminal investigative tactics, several memoranda released by the Justice Department through Freedom of Information Act litigation reveal special procedures to be followed by members of the department in any investigation "targeting known media entities or known members of the media" using investigative tools under the original Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783

(1978), and the FISA Amendments Act. *See* Memorandum from the Att'y Gen. to the Nat'l Sec. Div. Regarding Procedures for Processing Foreign Intelligence Surveillance Act ("FISA") Applications Targeting Known Media Entities or Known Members of the Media (Mar. 19, 2015), https://perma.cc/9D77-6HZD (requiring attorney general or deputy attorney general review of FISA applications targeting members of the news media); Memorandum from the Deputy Att'y Gen. to the Nat'l Sec. Div. Regarding Guidance for Processing Foreign Intelligence Surveillance Act ("FISA") Applications Targeting Known Media Entities or Known Members of the Media (Jan. 8, 2015), https://perma.cc/4R6H-DS5C. These memoranda reveal that the Justice Department has procedures in place for high-level review of any FISA applications targeting members of the news media. These additional internal policies underscore that the agency itself is cognizant of the chilling effect foreign intelligence surveillance can have on newsgathering and the free flow of information to the public about government affairs.

However, as explained above, these safeguards only come into play if the department is seeking information relating to a specific journalist. The concern with the programs at issue in this case is that they permit the indiscriminate, bulk collection of communications records. Therefore, by its nature, dragnet surveillance can result in the collection of journalists' records without the oversight and checks and balances imposed by these internal policies. These policies reflect a commitment to handling criminal and foreign intelligence investigations

impinging on the independence of the press in a careful and deliberate manner.

The collection of journalistic work product and reporter-source communications or metadata through the mass surveillance programs at issue in this case would circumvent these protections and therefore contribute to the chill that surveillance places on sources and newsgathering. It is essential for a free and independent press that foreign intelligence surveillance activity be subject to proper oversight, by all branches of government.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the Court to grant Petitioners' petition for certiorari.

Respectfully submitted,

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