18-2265

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

American Civil Liberties Union and American Civil Liberties Union Foundation,

Plaintiffs-Appellees,

v.

Central Intelligence Agency,

Defendant-Appellant.

United States Department of Defense, United States Department of State, United States Department of Justice, including its components The Office of Legal Counsel and Office of Information Policy,

Defendants.

Appeal from the U.S. District Court for the Southern District of New York in *ACLU et al. v. Department of Defense et al.*, No. 1:15-cv-09317-AKH

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 22 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE

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

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

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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, Associated Press Media Editors, Association of Alternative Newsmedia, Courthouse News Service, The E.W. Scripps Company, First Look Media Works, Inc., Freedom of the Press Foundation, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The McClatchy Company, The Media Institute, MPA – The Association of Magazine Media, National Press Photographers Association, The New York Times Company, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, Reporters Without Borders, Society of Professional Journalists, and Tully Center for Free Speech.[1]

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

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local Rule 29.1(b), *amici* state that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.

amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. A supplemental statement of identity and interest of *amici* is included below as Appendix A.

Amici file this brief in support of Plaintiffs-Appellees American Civil Liberties Union and American Civil Liberties Union Foundation ("ACLU"). As members of the news media, *amici* frequently rely on the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to gather information about the government's activities and report on matters of vital public concern. *Amici* thus have a strong interest in ensuring FOIA is interpreted by courts in a manner that facilitates public access to government records and assures government accountability.

SOURCE OF AUTHORITY TO FILE

Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this appeal, the Central Intelligence Agency ("CIA") argues that once it unilaterally asserts that release of records could result in "potential harms to national security" the judiciary has effectively no further role under the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or "the Act"), and must defer to the agency. *See* Br. of Appellant at 1. That position is contrary to Congress's intent—made explicitly clear when it amended FOIA in 1974—that courts can and must conduct a *de novo* review of all claims of exemptions under FOIA, *including* those premised on national security. *See* S. Rep. 93-854, at 183 (1974).

The CIA's argument—that the district court "improperly failed to defer to the CIA's" assessments, Br. of Appellant at 1—amounts to little more than a claim that the district court should have abdicated its independent role in the FOIA process and permitted the CIA to withhold records no matter how flimsy its showing. While courts can and do take account of the government's unique informational position in matters of national security, "deference is not equivalent to acquiescence[.]" *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999). Here, the district court properly discharged is obligations under the Act by conducting a careful and thorough review, giving the CIA every opportunity to support its position. It ultimately concluded that some of

the agency's withholdings were valid and others were not, as routinely happens in FOIA litigation. Its judicious ruling should not be disturbed on appeal.

Amici agree with the reasons set forth in Plaintiff-Appellee ACLU's brief that the records at issue were properly ordered to be disclosed and write separately to (1) provide this Court with additional information regarding the history and importance of independent judicial review of agency withholdings under FOIA; (2) underscore the importance of *de novo* review of Exemption 1 assertions in the context of government incentives favoring overclassification; and (3) emphasize the consistency of the district court's review with congressional intent.

ARGUMENT

I. Congress intended courts to conduct meaningful, independent, de novo review of agency exemption claims under FOIA, including exemption claims premised on national security.

In enacting the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"), Congress sought to "open agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989). The Act's purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To facilitate that purpose, FOIA's exemptions are narrowly construed, *Milner v. Dep't of Navy*, 562 U.S 562, 565 (2011), and "[t]he burden is on the agency to demonstrate, not the requester to

disprove, that the materials sought" may be withheld from disclosure. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citation omitted); *see also Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (stating same standards).

Courts play a central role in enforcing the Act's mandate of disclosure. FOIA requires that, in any lawsuit brought to challenge an agency's withholding, the court must "determine the matter de novo[.]" 5 U.S.C. § 552(a)(4)(B). Further, courts "may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld" under any of the Act's nine enumerated exemptions. *Id.*

As originally enacted in 1966, FOIA required courts to evaluate claims of exemptions by agencies *de novo*, but did not explicitly provide for district courts' discretionary ability to review records *in camera* to facilitate that independent evaluation. *See* Pub. L. 89-487 (July 4, 1966). Nevertheless, *in camera* review of records withheld in whole or in part was common in FOIA's early years. *See, e.g.*, *Soucie v. David*, 448 F.2d 1067, 1079 (D.C. Cir 1971) ("The court can most effectively undertake the statutory *de novo* evaluation of the Government's claim by examining the [record] *in camera*."). The reason was simple: *in camera* review affords the court with additional—sometimes necessary—information to facilitate its evaluation of an agency's exemption claims when the court is "not prepared to

make a responsible *de novo* determination" on the basis of agency affidavits alone. *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

In 1973, the scope of district courts' authority to conduct *in camera* review in FOIA cases was called into question by the U.S. Supreme Court's decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) ("*Mink*"). The Court in *Mink* held that *in camera* review was unavailable to courts evaluating the propriety of an agency's withholding of records the Executive Branch claimed were classified and within the scope of Exemption 1. *See id*. at 93. The majority opinion in *Mink* relied heavily on the legislative history of FOIA to reach its conclusion that the judicial branch should not second guess judgments made by the executive branch when it comes to classifying information. *See id.* at 81–91. But as Justice Douglas's dissent notes, the decision appeared to be motivated at least in part by a belief, asserted by the agency in that case, that judges are simply unable to adequately evaluate whether certain information is exempt from disclosure:

> The Government is aghast at a federal judge's even looking at the secret files and views with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying 'secrets,' that judges are not familiar with the stuff with which these 'Top Secret' or 'Secret' documents deal.

Id. at 109 (Douglas, J., dissenting).

Following the Supreme Court's decision in *Mink*, Congress amended the Act to make explicitly clear that courts are entirely capable of—and, in fact, must—conduct a *de novo* review of all agency withholdings, including information

claimed to fall within Exemption 1. S. Rep. 93-854, at 180 (1974) ("This change is responsive to the invitation of the Supreme Court in the *Mink* case . . . that Congress clearly state its intentions concerning judicial review and *in camera* inspection of records claimed exempt by virtue of statute or executive order under section 552(b)(1)."). The Senate moved swiftly to remove any doubt that courts have both the authority and the responsibility to conduct a *de novo* review of *all* withholdings, and may use *in camera* review to fulfill that obligation. *Id.* at 182 (explaining that the amendment "will necessitate a court to inquire during a *de novo* review not only into the superficial evidence—a "Secret" stamp on a document or set of records—but also into the inherent justification for the use of such a stamp"). It explained that "[i]t is essential . . . to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch," and federal courts, with careful advisement and review, "are the only forums now available which such review can properly be conducted." *Id.* The House similarly introduced a bill amending FOIA to make clear that courts may (1) conduct *in camera* review of agency records and (2) "look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order." H.R. Rep. No. 93-876, at 6273 (1974).

In amending the Act, Congress noted the particular danger that the executive branch will continuously withhold information, even if it is no longer relevant to national security. S. Rep. 93-854, at 182. It therefore empowered courts to assess

whether classification of records is "in accordance with the standards set forth in the applicable executive order" and to decide "whether or not a classification imposed some time in the past *continues to be justified*." *Id.* (emphasis added).

The 1974 amendments to FOIA were fiercely opposed by the executive branch. *See* Dan Lopez et al., *Veto Battle 30 Years Ago Set Freedom of Information Norms*, National Security Archive (Nov. 23, 2004), *archived at* https://perma.cc/K5DD-AWHM. One of the principal arguments against the amendments was that "[j]udges lack the knowledge and expertise to evaluate the effects of releasing allegedly sensitive documents." *Ray*, 587 F.2d at 1211 (summarizing opposition to 1974 reforms); *cf.* Br. of Appellant at 6 ("[T]he district court improperly failed to defer to the CIA's logical and plausible assessment of the potential harms to national security that can reasonably be expected to result from disclosure.").

Congress responded to this concern in two ways. First, it stated that a court can and should make its determination with the benefit of an agency's opinion expressed in the form of an affidavit, including, if necessary, an *in camera* affidavit. *See Ray*, 587 F.2d at 1211. Second, and more fundamentally, Congress expressly rejected the notion that judges lack the capacity to properly evaluate the propriety of an agency's withholding of government records requested under FOIA. Senator Edmund S. Muskie stated:

> The conflict on this particular point boils down to one basic concern[:] trust in the judicial system to handle highly sensitive material. * * * I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy. As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

Id. at 1209 n.35 (citation omitted); *see also id.* at 1193–94 ("Those who prevailed in the legislature . . . stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security.").

So firm was Congress's support for independent, impartial judicial review of Exemption 1 claims involving national security that it overrode President Ford's veto, bringing into the Act many of the provisions that govern FOIA cases today. *Id.* at 1190. Under those standards, a court's power to conduct an *in camera* review—in conjunction with the use of *Vaughn* indices and application of FOIA's segregability requirement—"forecloses the possibility that an agency's sweeping claim of blanket exemption for any record or group of records will escape intensive court scrutiny." *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 320 (D.C. Cir. 1982).

District courts in this Circuit routinely assess claims of national security and their interaction with FOIA as Congress intended. For instance, in *Hetzler v. Record/Information Dissemination Section, Federal Bureau of Investigation*, the FBI withheld several records in full under Exemption 1, claiming that they included details about investigative techniques and sources that, if released, would harm national security. 896 F.Supp.2d 207, 211–15 (W.D.N.Y. 2012). There, the district court reviewed the FBI's *Vaughn* index as well as the documents *in camera*. *See id.* Following that review the court ordered the release of some portions of the documents, noting it was "not persuaded that Defendants have carried their burden of showing that disclosure of this information could cause serious damage to national security . . . ." *Id.* at 213. Other withholdings, however, such as those involving the names of targets of foreign intelligence activities, were found to be proper invocations of Exemption 1. *Id.* at 214.

In sum, Congress fully intended district courts to conduct meaningful *de novo* review of all claims of exemptions by the executive branch, including in the realm of national security. District courts can and do exercise their authority and responsibility under FOIA, requiring the government to provide sufficient information for an evaluation of exemption claims and ordering the release of information where agencies cannot satisfy their burden.

II. *De novo* and *in camera* review are particularly critical in the context of Exemption 1 given the government's temptation to overclassify.

Robust judicial oversight over the executive branch's assertions of secrecy for "national security" is particularly important in light of the ever-increasing number of government records deemed "classified," which are often withheld from the public without reason and for unwarranted periods of time. Notwithstanding FOIA's mandate of openness, the incentives for government personnel are to err on the side of classifying too much information, rather than too little. *See, e.g.*, Elizabeth Goitein & J. William Leonard, *America's Unnecessary Secrets*, N.Y. TIMES (Nov. 7, 2011), https://nyti.ms/2Ej8UFy (noting that "even the most security-minded government officials . . . have said that far too much information is classified"). This has led to an array of questionable government redactions, from redacting a portion General Augusto Pinochet's biography which states that he "[d]rinks scotch and pisco sours; smokes cigarettes; likes parties" to denying a FOIA request in 2010 for documents about "Poodle Blanket," a 60-year old contingency plan for a potential conflict with the Soviet Union over West Berlin. *See* ELIZABETH GOITEIN & DAVID SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 2 (2011).

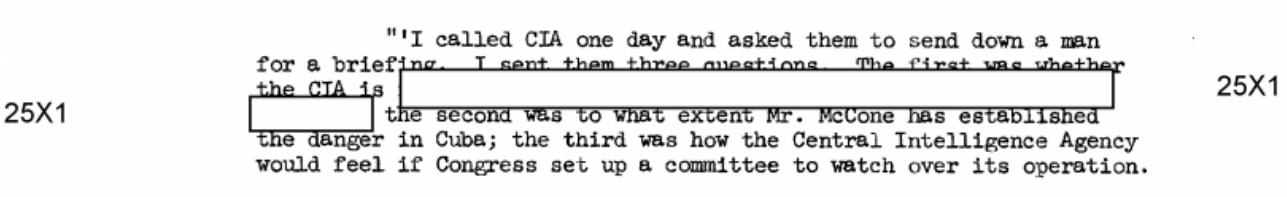
These are not anomalies: examples of overclassification by the executive branch in general, and the CIA in particular, abound, including examples of information that is withheld for purported "national security" reasons despite being publicly released or having no relation to national security. For instance, earlier

this year, the CIA approved numerous "President's Daily Briefs" from the 1960s for release. *See* John Prados, *New Tet Documents? Not So Much.*, UNREDACTED (Aug. 7, 2018), https://perma.cc/2767-S4PJ. However, in releasing those records in 2018 the CIA redacted numerous paragraphs that had *already* been publicly released, at some points even redacting *entire pages* that had been released years ago. *See id.* (noting that the November 14, 1967, President's Daily Brief was fully released in 2015, but fully redacted in 2018).

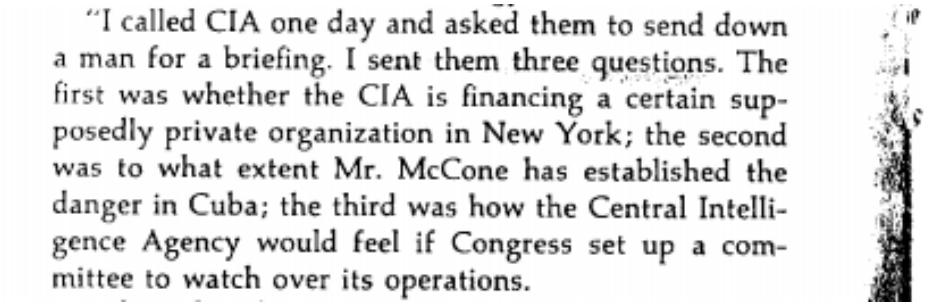
Another example from the CIA concerns a collection of formerly entirely classified records on "Congressional Relations" that were partially released in 2003. CENTRAL INTELLIGENCE AGENCY, CONGRESSIONAL RELATIONS (May 23, 2003), *available at* https://perma.cc/G6H3-LL24. Included among those records is a formerly "classified" memorandum for the CIA's Director that contains passages from a 1963 *New Republic* article. *Id.* at 3. Even setting aside the questionable initial decision of the CIA to "classify" information entirely in the public sphere, the CIA *continues* to withhold part of an excerpt from that 1963 magazine article under the designation 25X1, *id.*, an exemption from automatic declassification after a certain period of time if disclosure will

> reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a non-human intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development[.]

Declassification Frequently Asked Questions, United States Department of Justice, *archived at* https://perma.cc/R94V-723Q. And if that continued withholding were not enough, the *same 2003 release* by the CIA includes the actual *New Republic* article containing the quote that is redacted in the same documents:



(withheld information in CIA memo)


"I called CIA one day and asked them to send down a man for a briefing. I sent them three questions. The first was whether the CIA is financing a certain supposedly private organization in New York; the second was to what extent Mr. McCone has established the danger in Cuba; the third was how the Central Intelligence Agency would feel if Congress set up a committee to watch over its operations.

(from *New Republic* article released by CIA in same document collection)

See also, *e.g.*, CENTRAL INTELLIGENCE AGENCY, HORSE LOVERS STAND UP HORSES, (May 23, 2003), *available at* https://perma.cc/J9W4-PV4F (CIA copy of 1958 Washington Post article on the Washington Horse Show Ball the agency kept "classified" for 50 years).

Government agencies and officials themselves have recognized that the executive branch has an unfortunate tendency to overclassify information, to the detriment of the public and government alike. In its 2017 Annual Report, the

Information Security Oversight Office ("ISOO"), the lead agency that informs the president on government-wide security classification, stated that "[t]oo much classification impedes the proper sharing of information necessary to respond to security threats, while too little declassification undermines the trust of the American people in their Government," and recommended adopting "strategies that increase the precision and decrease the permissiveness of security classification decisions." INFORMATION SECURITY OVERSIGHT OFFICE, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, 2017 REPORT TO THE PRESIDENT 3 (2018), https://perma.cc/R7LW-KVDH (noting that both government officials and the public have noted that the current framework of classifying and maintain information is "unsustainable").

The ISOO's 2017 Annual Report also provides data illustrating the growing mountain of classified government data that is outside the public's view. *Id.* at 41–47. Since 2009, the government has made between 50 to 95 million decisions to classify information annually. *Id.* at 41–45. In contrast, the government has never declassified more than 46 million pages in one year. *Id.* at 46–47 (reporting declassification since 2013); *see also* PUBLIC INTEREST DECLASSIFICATION BOARD, TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM 3 (2012), https://perma.cc/Q6PS-V5MX ("Without dramatic improvement in the declassification process, the rate at which classified records are being created will

drive an exponential growth in the archival backlog of classified records awaiting declassification, and public access to the nation's history will deteriorate further.").

Numerous high-level experts and officials within government have also pointed to persistent problems created by overclassification:

> when Rep. Christopher Shays (R-CT) asked Secretary of Defense Donald Rumsfeld's deputy for counterintelligence and security how much government information was overclassified, her answer was 50%. After the 9/11 Commission reviewed the government's most sensitive records about Osama bin Laden and Al-Qaeda, the co-chair of that commission, former Governor of New Jersey Tom Kean, commented that "three-quarters of what I read that was classified shouldn't have been" – a 75% judgment. President Reagan's National Security Council secretary Rodney McDaniel estimated in 1991 that only 10% of classification was for "legitimate protection of secrets" – so 90% unwarranted.

Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing before the H. Comm. on the Judiciary, 111th Cong. 84 (2010) (statement of Thomas Blanton, Director, National Security Archive); *see also* Marisa Taylor, *Too Many Secret Government Documents, Former DOJ Official Says*, McClatchy DC (Oct. 9, 2013) (quoting first appointee to the National Security Division of the Department of Justice, Kenneth Wainstein, as saying "[t]here's no question that overclassification is a problem.").

III. The district court conducted a careful *de novo* review of the CIA's exemption claims, just as Congress intended.

In this case, the district court did exactly as Congress intended when it amended the Act in 1974. The CIA had initially sought to withhold the entirety of

the OMS Report, save one paragraph, by redacting the entirety of each page with no explanation other than "Page Denied." JA-166, 173. The district court conducted an *in camera* review of the OMS Report before any public oral arguments were held. JA-55, 95. Later, following public oral arguments, the district court reviewed numerous other records *in camera*. JA-140. It made preliminary rulings as to a number of records, but reserved judgment on the OMS Report, noting that it needed more time to carefully review the document and relevant caselaw. JA-140, 166. The court later concluded that the CIA failed to identify or describe the damage to national security that would occur if the report were disclosed. JA-174. During this process, the agency had supplemented its submission to the court several times. JA-189.

Rather than immediately ordering disclosure, the district court allowed the CIA to once again argue that the OMS Report should be exempt from public scrutiny. *Id.* The district court noted that the defendant "has not made a sufficient showing to warrant reconsideration under well-settled case-law," but that it was allowing the government another bite at the apple "in the interest of justice." *Id.* (citing *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013)).

Thereafter, the government made a classified, *ex parte* submission to the district court, submitted an amended supplemental declaration, and appeared before the district court to defend its withholdings in an *in camera*, *ex parte*

hearing. JA-191–93. The district court then went through the OMS Report sentence by sentence, reconsidering the agency's arguments. JA-207. The redacted transcript reveals that on numerous occasions the court had rejected the CIA's assertions based on how old the information was. *See, e.g.*, JA-209 ("This is so old now, there is no harm that could flow from this."); JA-210 ("It's [redacted] years ago, no relationship between what was and what came after that."). This was not, as the CIA makes it out to be, the district court going through and simply disregarding the agency's assertions. To the contrary, the court frequently credited the CIA's assertions. *See* JA-213 (upholding a redaction because of the CIA's assertion that the capture location of Abu Zubaydah is not public knowledge); JA-216–17 (upholding redaction, though expressing disbelief that a particular intelligence technique is not well known). At the end of this line-by-line process, the district court amended its ruling to redact only certain portions of the OMS Report.

This careful review of the agency's claimed exemptions is precisely the type of review that Congress had in mind when it enacted the 1974 amendments to the Act. The CIA had numerous opportunities to explain why the report should be exempt, and the district court, after conducting a careful and thorough *de novo* review, found the agency's reasons lacking. Moreover, while the government criticizes the district court for determining that the information "is too old and too ordinary," the 1974 amendments make clear that Congress empowered the

judiciary to do just that—to serve in the public's stead and ensure that the executive is not withholding information that should be released: "Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives." *Soucie*, 448 F.2d at 1080.

District courts faced with agency claims of FOIA exemptions are required to "determine the matter de novo"—not simply rubber stamp whatever position the government has taken. 5 U.S.C. § 552(a)(4)(B). The district court's review in this case exemplifies the intent of Congress. *See* S. Rep. 93-854, at 182. Guarding ordinary or expired information does nothing to protect the nation's security and only chips away at the public's trust in a representative government.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the district court.

Dated: December 21, 2018

Respectfully submitted,

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APPENDIX A

STATEMENT OF INTEREST FOR *AMICI CURIAE*

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

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 Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

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 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 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 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.

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 news, culture, sports, lifestyle 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 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in

all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The 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.

ProPublica is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won four Pulitzer Prizes, most recently the 2017 Pulitzer gold medal for public service. ProPublica is supported primarily by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica's first regional operation, ProPublica Illinois, began publishing in late 2017, and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting.

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.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism

organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of *amici curiae* complies with:

1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,439 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) 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 2010 in 14-point Times New Roman.

/s/ Bruce D. Brown
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Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: December 21, 2018

CERTIFICATE OF SERVICE

I 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 Second Circuit using the appellate CM/ECF system on December 21, 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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