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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER of an application by Fine Point Films Limited and Trevor Birney for Judicial Review
IN THE MATTER of an application by Barry McCaffrey for Judicial Review

AND IN THE MATTER of an application by the PSNI and Durham Constabulary for search warrants and the subsequent decision by His Honour Judge Rafferty QC to grant the warrants

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Skeleton argument on behalf of the Reporters Committee for Freedom of the Press (Intervener)

INTRODUCTION & FACTUAL BACKGROUND

1. On the 10th May, 2019, this Court granted leave to intervene in this matter to the Reporters Committee for Freedom of the Press (the "Reporters Committee" or "Intervener"). The Reporters Committee is acting for a coalition of U.S. media organizations, which includes: The Associated Press, Californians Aware, Committee to Protect Journalists, The E.W. Scripps Company, First Look Media Works, Inc., Freedom of the Press Foundation, International Documentary Assn., Investigative Reporting Program, Investigative Reporting Workshop at American University, The Media Institute, Media Law Resource Center, MPA – The Association of Magazine Media, National Press Photographers Association, The New York Times Company, Online News Association, POLITICO LLC, Reporters Without Borders, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech (collectively, the "Coalition"). The Coalition consist of media organizations, publishers, and groups dedicated to protecting press freedoms and the freedom-of-information interests of the media and the public. The attached Appendix A includes a statement of interest describing each member of the Coalition.

2. The Reporters Committee intervened in this case because the issues it presents raise serious concerns about the ability of journalists—both in the United Kingdom and the

United States—to report on information of public importance, free from harassment and retaliation by law enforcement.

3. Alex Gibney, an Academy Award-winning documentary filmmaker, U.S. citizen, and member of the Reporters Committee's Steering Committee, directed the film at issue in this case, *No Stone Unturned*. RCFP Steering Committee: Alex Gibney, https://www.rcfp.org/alex_gibney/. Alex Gibney made the film with Trevor Birney and Barry McCaffrey, two award-winning documentary filmmakers and the Applicants in this matter. Applicants' Skeleton Arg. ¶ 2. The film explores a long-unsolved massacre that took place in Loughinisland in Northern Ireland, ultimately revealing the likely suspects in the case and exposing a possible cover-up by authorities, who may have known about the planned shooting before it occurred. Patrick Radden Keefe, *Why Were a Filmmaker & a Journalist Arrested in Northern Ireland?*, New Yorker (Oct. 19, 2018), https://www.newyorker.com/news/daily-comment/why-were-a-filmmaker-and-a-journalist-arrested-in-northern-ireland.

4. In August 2018, almost a year after *No Stone Unturned* premiered at the New York Film Festival, police arrested Birney and McCaffrey in relation to the purported "theft" of an unpublished draft of a report by the Police Ombudsman for Northern Ireland ("PONI") that had been featured in the film and which had been sent to them anonymously. *Id.*; Applicants' Skeleton Arg. ¶ 2. Police also obtained a warrant to search the homes and offices of Birney and McCaffrey. Applicants' Skeleton Arg. ¶ 2. They seized millions of documents containing sensitive journalistic work product not only about *No Stone Unturned* but also unrelated investigations, potentially endangering the lives of many confidential sources. *Id.* ¶¶ 2–3, 40. Although Gibney is based in the United States, he has been informed that he, too, is a suspect in this case and could be arrested if he enters the United Kingdom. Radden, *supra*.

5. The Applicants filed an application for Judicial Review, contending that the actions of the police were in violation of U.K. law and/or Article 10 of the European Convention on Human Rights ("ECHR"). Applicants' Skeleton Arg. ¶ 4

6. The Reporters Committee submits this brief on behalf of the Coalition and in support of the Judicial Review application to underscore the need to protect the ability of journalists to freely investigate and report on government activity and to provide an overview of relevant U.S. law. The Honourable Court may find the U.S. legal landscape instructive,

since U.S. courts and State legislatures have addressed similar issues regarding the intersection of police powers and press freedom.

7. As set forth below, the U.S. Supreme Court has recognized that, under the First Amendment to the U.S. Constitution, journalists are free to report on newsworthy information that they lawfully acquire. In addition, the Privacy Protection Act of 1980 (42 U.S.C. §2000aa, *et seq*.) and federal guidelines governing when and how the Justice Department may investigate members of the news media place constraints on law enforcement's authority to search a journalist's office or home and seize journalistic work product. Lastly, a broad consensus has emerged in the United States, through the passage of state laws and the adoption of judicially-created privileges, establishing that journalists must be protected from compelled disclosure of their confidential sources, absent extraordinary circumstances.

8. The Intervener, on behalf of the Coalition, urges the Honourable Court to apply these principles here and to grant the reliefs requested by the Applicants.

SUBMISSIONS

I. U.S. law has long recognized the need to project journalists from punishment for publishing newsworthy information that they lawfully acquire.

9. Over the last half century, the U.S. Supreme Court has repeatedly affirmed the right of the media under the First Amendment to the U.S. Constitution to publish any material they lawfully acquire, even when it may have been unlawfully acquired by a source in the first instance. This is an essential American civil liberty and has led to a vast array of journalism in the public interest, particularly in national security matters where government secrecy is at its zenith.

10. The First Amendment prevents both federal and state governments from enacting any laws that "abridge" the freedom of speech and of the press. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). The First Amendment is expressed in stark terms, but it is submitted serves the same purposes as Article 11 of the Charter of Fundamental Rights of the European Union (the "Charter") and/or Art. 10 ECHR and/or the abolition of press licensing in the United Kingdom in 1695. That is, it ensures that the public has the information necessary "to vote intelligently [and] to register opinions on the administration of government." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Moreover, First Amendment protections

allow for "debate on public issues" that is "uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

11. Issues in relation to undue secrecy within the U.S. federal government have been well-documented, and controversy surrounds the federal classification system, which controls the disclosure of national security information, for encouraging "over-classification." *See* Elizabeth Goitein & David Shapiro, Brennan Ctr. for Justice, *Reducing Overclassification Through Accountability* (2011); Emerging Threats: Overclassification and Psuedo-Classification, Hearing Before the H. Comm. on Government Reform, Subcomm. on National Security, Emerging Threats and International Relations, 109th Cong. (2005) (Statement of Richard Ben-Veniste, Former Commissioner, Nat'l Comm. on Terrorist Attacks Upon the United States), https://perma.cc/PDN3-K7X3 ("Much more information needs to be declassified. A great deal of information should never be classified at all."). In fact, the solicitor general who argued for the Nixon administration during the Pentagon Papers case, Erwin N. Griswold, wrote a prominent op-ed in *The Washington Post* in 1989 shifting his views on classification and decrying over-classification. As discussed in paragraph 13, immediately below, the Pentagon Papers case is the most important historical example in the United States of the need for protections for the publication of government secrets by the press. *See* Erwin N. Griswold, *Secrets Not Worth Keeping*, Wash. Post (Feb. 15, 1989), https://perma.cc/CWH3-8RSY ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."); Eleanor Randolph, *Ex-Solicitor General Shifts View of 'Pentagon Papers*,' Wash. Post (Feb. 16, 1989), https://perma.cc/XDZ8-YFLE ("Griswold . . . decided to write the article because the government is once again arguing, this time in the Iran-contra trial of former White House aide Oliver L. North, that national security is threatened by release of classified documents.").

12. As a result, some of the most impactful national security stories of the past 50 years would not have been possible were it not for robust legal protections for the publication of information that has been lawfully acquired by a news organization but may have been disclosed illegally by a whistleblower or other source.

13. The most notable of these cases involved the "Pentagon Papers," a multi-volume classified history of the Vietnam War, which revealed, among other things, that the

Johnson administration had secretly enlarged the scope of the war and lied about it to the American public and Congress. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); R.W. Apple, *25 Years Later; Lessons from the Pentagon Papers*, N.Y. Times (June 23, 1996), https://perma.cc/WFR9-TPMP. Daniel Ellsberg, an employee at the RAND Corporation who had worked on the study, copied it and sent it to *The New York Times* and *The Washington Post*. Both papers planned to report or continue reporting stories based on the leaked documents.

14. The Nixon administration sought an injunction to prevent the publication of the Pentagon Papers, but the Supreme Court, in a landmark free press decision, declared that the government could not prevent publication of the material. *See N.Y. Times*, 403 U.S. at 714, 728 (Stewart, J., concurring) ([T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.").

15. Although the Pentagon Papers case concerned a "prior restraint," *i.e.*, an *ex ante* proscription on publication, subsequent cases have confirmed that the Supreme Court there established the broad right of the press "to publish information of great public concern obtained from documents stolen by a third party" so long as the news organization was not involved in the initial illegality, meaning that publication may not be restrained nor may it be punished after the fact. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001).

16. In the *Bartnicki* case, an unknown person illegally intercepted and recorded a telephone call between two union representatives in the middle of a teachers' strike and placed it in the mailbox of Jack Yocum, the head of a local taxpayers' group opposed to the teachers. *Id.* at 518–19. Yocum recognized the voices of the two union representatives, who had said: "[I]f they're not going to move for three percent, we're gonna have to go to their homes . . . . To blow off their front porches, we'll really have to do some work on those guys." *Id.*

17. Yocum gave the tape to Frederick Vopper, a local radio host, who aired the tape on a public affairs show. *Id.* at 519. The union representatives sued Vopper and other representatives of the media, alleging violations of federal and state wiretapping laws, which not only barred interception but also disclosure of the tape by a person who knows or has reason to know it had been intercepted illegally. *Id.* at 520–21.

18. The Supreme Court held that the wiretapping laws could not be applied to the defendants under the First Amendment because the conversation was about a matter of public concern and the defendants had played no part in the interception of the telephone call. *Id.* at 535.

19. Although the wiretapping statutes in *Bartnicki* did not prohibit the receipt of an illegally intercepted conversation, it is submitted that the Supreme Court's logic would apply perforce to a statute criminalizing, for instance, the receipt of classified national security information. Receipt is a necessary antecedent to publication, and if publication is privileged, receipt must be protected as well. *See* Brief of Amici Curiae the Knight First Amendment Institute at Columbia University, the Reporters Committee for Freedom of the Press, and the American Civil Liberties Union in Support of WikiLeaks' Motion to Dismiss at 4 n.3, *Democratic Nat'l Comm. v. Russian Fed.*, No. 18-cv-03501 (S.D.N.Y. March 13, 2019), https://perma.cc/2J5Y-AAVX.

20. *Bartnicki* capped a series of Supreme Court cases recognizing an expanding right to publish information that has been lawfully acquired regardless of its provenance.

21. In *Landmark Communications Inc. v. Virginia*, for instance, the Court held that the First Amendment protects the publication of the name of a state judge who was the subject of a disciplinary proceeding. 435 U.S. 829, 831 (1978). The disclosure of the judge's name was a crime under state law, but the newspaper had learned the name legally and decided that its publication was a matter of public interest. *Id.* at 832.

22. In *Florida Star v. B.J.F.*, the Supreme Court held that a newspaper's publication of the name of a rape victim, which had been posted publicly in the sheriff's press room, is protected by the First Amendment. 491 U.S. 524, 527 (1989). In that case, the police had violated a state statute barring disclosure of victims' names. *Id.* at 526 n.1.

23. The Court found that a rule protecting the publication of lawfully acquired information furthered the "overarching public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 533. This rule also avoids the "timidity and self-censorship" that would result from permitting the state to punish a member of the media for publishing truthful information. *Id.* at 535; *see also Smith v. Daily Mail*, 443 U.S. 97, 105-06 (1979) (barring prosecution of newspaper for publishing young offender's name learned through lawful monitoring of police band radio frequency).

24. More recently, in *Jean v. Massachusetts State Police*, a community activist posted a video of the warrantless search of a house, which had been illegally recorded using a "nanny cam." She had received the video from the individual who had been searched. 492 F.3d 24, 26 (1st Cir. 2007). The state police threatened to prosecute Jean under the wiretapping laws, much like *Bartnicki*. *Id.* And, like *Bartnicki*, the federal court of appeals in the First Circuit found that the First Amendment barred her prosecution under state wiretapping laws for publishing the video. *Id.* at 33; *see also Zerilli v. Evening News Assoc.*, 628 F.2d 217, 219 (D.C. Cir. 1980) (finding that the "values served by a free and vigilant press militate" against holding a newspaper liable for damages for publishing truthful information that was lawfully acquired).

25. Absent the *Bartnicki* rule, many of the most important news stories of the last half century or so—particularly regarding federal law enforcement, the U.S. Intelligence Community and the military—could have subjected journalists to severe prison sentences.

26. Some have argued that a World War I-era law passed to criminalize traditional spying, namely the Espionage Act of 1917 (as amended) (codified at 18 U.S.C. ch. 37), could apply by its terms to the receipt, retention or publication of national defense information, and there are a bevy of other federal statutes, regarding, for example, computer crimes or the receipt of stolen government property, that could also apply to newsgathering. *See, e.g.*, 18 U.S.C. §§ 793(e) (criminalizing the receipt and dissemination of national defense information that has been unlawfully disclosed); 798 (criminalizing the receipt and publication of communications intelligence information); 1030(a) (criminalizing hacking a computer to acquire classified information).

27. It appears that the Supreme Court has never had to rule on whether the Espionage Act or similar laws could be applied to the media consistent with the First Amendment. Though the government has tried unsuccessfully to block the publication of government secrets, in the Pentagon Papers case, there are no indications that it has ever brought to trial a prosecution of a journalist or media outlet under the Espionage Act to punish publication after the fact.

28. A brief overview of major news stories based on material that was illegally acquired by a source (in addition to the Pentagon Papers) showcases the power of the *Bartnicki* rule to promote an informed citizenry and thus democratic governance.

29. In 1971, for instance, the "Citizens Commission to Investigate the FBI," using the noise from the Muhammed Ali-Joe Frazier "fight of the century" as cover, broke into an FBI office in Media, Pennsylvania, and stole a series of documents disclosing an illegal government spying program called COINTELPRO. Short for "counter-intelligence program," COINTELPRO targeted anti-war activists, civil rights leaders (including the Black Panthers, an African-American rights organization) and other groups for surveillance and harassment. Perhaps most famously, the FBI tried to convince Rev. Dr. Martin Luther King Jr. to kill himself by threatening to publicly release evidence of infidelity. *See* Betty Medsger, *Remembering an Earlier Time When a Theft Unmasked Government Surveillance*, Wash. Post (Jan. 10, 2014), https://perma.cc/T85B-3UT6.

30. The reporting based on the stolen COINTELPRO documents led to the creation of permanent Congressional committees to oversee the intelligence agencies as well as passage of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978), which created a statutory framework and a special court for national security surveillance.

31. When the report of one of those Congressional committees, known as the "Pike Committee" after its chair Rep. Otis Pike (D-NY), leaked information to the New York-based *Village Voice*, the FBI may have investigated the Intervener, the Reporters Committee, under the Espionage Act because the admitted leaker, Daniel Schorr, had offered to donate any proceeds from publication to the Reporters Committee. See Emma Best, *The FBI Investigated the Village Voice and RCFP for Espionage in 1976*, Muckrock (Jan. 2, 2019), https://perma.cc/9APD-QYLR.

32. More recently, post-9/11 detainee torture, so-called CIA "black site" secret prisons overseas, warrantless wiretapping and a program to collect all telephone toll records (*i.e.*, who called whom and when) from all Americans were revealed through illegal leaks to the media. *See, e.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post (Nov. 2, 2005), https://perma.cc/ZV9V-7ZED (black sites); Neil A. Lewis and Eric Schmitt, *Inquiry Finds Abuses at Guantánamo Bay*, N.Y. Times (May 1, 2005), https://perma.cc/D579-MSJF (torture); Todd Richissin, *Soldiers' Warnings Ignored*, Balt. Sun (May 9, 2004), https://www.baltimoresun.com/news/bal-te.guard09may09-story.html (torture in Iraq War); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/UU4J-YE9U (warrantless wiretapping); Ellen Nakashima, *Congressional Action on NSA Is a Milestone in*

the Post 9/11 World, Wash. Post. (June 2, 2015), https://perma.cc/8RUV-EGZ5 (bulk telephone surveillance).

33. Finally, the *Bartnicki* rule is a crucial check on harassing lawsuits or prosecutions for reporting on corporate malfeasance. Unauthorized disclosures of government information by sources led to a quarter of a trillion dollar lawsuit against and settlement with "Big Tobacco" in the United States and, in the "Panama Papers" case, to the shuttering of Panamanian law firm Mossack Fonseca and the release of terabytes of firm data, including details on offshore tax havens for some of the world's wealthiest people. *See* Douglas Martin, *Merrell Williams Jr., Paralegal Who Bared Big Tobacco, Dies at 72*, N.Y. Times (Nov. 26, 2013), https://perma.cc/R5T4-BXBK; Frederick Obermaier, et al., *About the Panama Papers*, Süddeutsche Zeitung, https://perma.cc/P86A-7W5Y.

34. It is submitted that under U.S. law this case would present a clear-cut First Amendment violation. It is further submitted that the unredacted report on the Loughinisland massacre is squarely a matter of public interest and, indeed, is suggestive of police misconduct. Leaks about government waste, mismanagement, fraud and, crucially, illegality, are precisely the types of unauthorized disclosure protected by the U.S. Constitution and whistleblower laws. The Intervener respectfully submits that the search and arrest here, and the potential for the arrest of filmmaker Alex Gibney in the future, pose significant threats to fundamental human rights as recognized under international, U.K. and U.S. law.

II. U.S. law and guidelines from the U.S. Department of Justice generally prohibit the search of a journalist's office or home and seizure of journalistic work product.

35. The same considerations that underpin these extensive First Amendment protections for the press—namely, the paramount importance of truth and the promotion of an informed citizenry—have prompted both the United States Congress and the Executive Branch to create special protections for when and how police may investigate the press.

36. In the early 1970s, the U.S. Justice Department faced a backlash over attempts to use subpoenas to force reporters to disclose work product and the identity of confidential sources. In one of the most high-profile cases, which led to the creation of the Reporters Committee itself, *New York Times* reporter Earl Caldwell fought a subpoena ordering him to reveal information about the Black Panther Party, an African-American rights organization from Oakland, California. *See Branzburg v. Hayes*, 408 U.S. 665 (1972).

37. Those subpoena controversies led Attorney General John Mitchell to announce a set of voluntary guidelines at the Justice Department that would make it more difficult for federal prosecutors to subpoena members of the news media. *See* Speech by Attorney General John Mitchell to the American Bar Assoc. House of Delegates on "Free Press and a Fair Trial: The Subpoena Controversy" (Aug. 10, 1970), https://perma.cc/6D92-E97Q. Mitchell's hope was that the government's voluntary self-restraint would help salve the "seeds of suspicion and bad faith" created by the subpoenas and would prevent the news media from becoming a "quasi-governmental investigatory agency." *Id.*

38. The news media guidelines Mitchell created remain an important protection for the press today and have been amended over the years to limit federal prosecutors' use of search warrants, court orders or subpoenas against news organizations; subpoenas to third-party service providers for telecommunications and business records ("third-party subpoenas"); and questioning and arrests of members of the news media. *See* Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. § 50.10.

39. The news media guidelines do not apply to "foreign intelligence" search warrants or subpoenas, which operate under a different legal framework, but the Justice Department has separate rules governing such search warrants or subpoenas incorporating some of the same protections. *See* Gabe Rottman and Linda Moon, *How Foreign Intelligence Surveillance Law Applies to the News Media*, Reporters Committee for Freedom Press (Nov. 9, 2018), https://perma.cc/B3UG-YP35.

40. The news media guidelines include three key safeguards to prevent the press from becoming a quasi-governmental investigatory agency. First, most search warrants, court orders and subpoenas to a member of the news media or for news media records from a third-party vendor require personal approval by the attorney general. 28 C.F.R. § 50.10 (c)(1), (d)(1). Second, prosecutors must ensure that material or records cannot be acquired from a non-media source before they can seek a search warrant, court order or subpoena. *Id.* § (c)(4)(ii), (c)(5)(ii), (d)(3). And, third, with only limited exceptions, members of the news media must be notified before a third-party subpoena is issued to give the outlet time to challenge it in court. *Id.* § (e)(ii).

41. The Intervener and Coalition organizations have found that, despite being voluntary and subject to change at the discretion of the Justice Department, the news media guidelines

are both an effective check against prosecutorial abuses and significant help to the Justice Department in preventing "blowback" from such abuses. Indeed, the news media guidelines have been significantly revised twice, in 1980 and in 2013-2014, in direct response to ill-considered subpoenas hunting reporters' confidential sources. *See* Robert M. Press, *Seizure of Phone Records Raises Free Press Issue*, Christian Science Monitor (Sept. 23, 1980), https://perma.cc/K5F6-JMQY; *Strengthening and Preserving the Attorney General Guidelines for Media Subpoenas*, Reporters Committee for Freedom Press, https://perma.cc/T6Q4-RYEU.

42. The U.S. Congress has also passed laws explicitly protecting journalists' work product from law enforcement searches. In 1978, the Supreme Court decided *Zurcher v. Stanford Daily*, in which the Stanford University police had searched the newspaper's offices looking for photographs of a protest. 436 U.S. 547, 550-52 (1978). *The Daily* sued, arguing, in part, that the First Amendment barred the search. The Court held that the warrant was permissible. *Id.* at 565. It clarified, however, that when a search warrant could touch material protected by the First Amendment, like journalist work product, the process for obtaining a warrant must be applied with "scrupulous exactitude." *Id.*

43. In response, Congress passed the Privacy Protection Act of 1980 ("PPA"). Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. § 2000aa, *et seq*.). The PPA bars any federal or state law enforcement officer from searching for and seizing any journalist work product or other documentary material unless the reporter is suspected of a crime (arising out of something other than just receiving, communicating or retaining the material being searched for).

44. With few exceptions, including cases involving the unauthorized disclosure of national defense information and threats to life or limb, the PPA is a muscular defender of press freedom and, indeed, likely would have barred the searches and seizures in this case.

45. Journalists are particularly tempting targets for law enforcement because, among other things, police believe journalists will have easy access to evidence that may be difficult to secure otherwise and because they often report on embarrassing or potentially illegal conduct by the government. Both the DOJ news media guidelines and the PPA help ensure that news organizations are not coopted as "quasi-governmental investigatory agenc[ies]."

46. These protections again serve to promote the constitutional function of the press. The documentary filmmakers in this case received a document suggestive of government misconduct during a fraught historical period. In that sense, it is on all fours with the Pentagon Papers. As publication of the Pentagon Papers would be legally protected, so should the documentary film at issue in this case. And as a prosecution based on the use of the document in the documentary would be barred, the search of the journalists' offices, their arrest, and the threatened arrest of Alex Gibney were he to return to the United Kingdom, would all raise serious First Amendment concerns had they taken place in the United States.

III. There is a broad consensus under U.S. law that journalists must be protected from compelled disclosure of confidential sources.

47. U.S. courts have also recognized--consistent with U.K. law and decisions by the European Court of Human Rights, *see* Applicants' Skeleton Arg. at Part II—that compelling journalists to disclose information about their sources interferes with the integrity of the newsgathering and editorial process and threatens the media's independence, both real and perceived. *See Shoen v. Shoen*, 5 F.3d 1289, 1294–95 (9th Cir. 1992) (citing with approval *United States v. La Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988)). Indeed, a journalist's ability to foster and maintain confidential relationships with sources is essential to effective reporting. Journalists—including documentary filmmakers like the applicants[1]—often rely on confidential sources for information about sensitive and important issues. *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*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/.

48. Many sources require confidentiality before coming forward because they reasonably fear retribution if their identities are revealed, including the threat of criminal

[1] U.S. courts have recognized that documentary filmmakers are members of the press. For example, in *Silkwood v. Kerr-McGee Corp.*, the U.S. Court of Appeals for the Tenth Circuit determined that a filmmaker whose "mission . . . was to carry out investigative reporting for use in the preparation of a documentary film" was a journalist. 563 F.2d 433, 436 (10th Cir. 1977). Other courts have similarly adopted broad definitions of "journalist." *See, e.g.*, *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (holding that reporter's privilege applied to those who gather information with the intent to disseminate it to the public); *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998) (recognizing that a journalist is someone who "inten[ds] at the inception of the newsgathering process to disseminate investigative news to the public.").

prosecution, loss of employment, and even risk to their lives, as in this case. *See Introduction to the Reporter's Privilege Compendium*, *supra*. Thus, when police are permitted to indiscriminately seize journalistic records that disclose confidential sources, this has a chilling effect on journalism. It turns journalists into unwilling investigators for law enforcement[2] and discourages future whistle-blowers—who fear retaliation for speaking publicly—from coming forward. *See, e.g.*, *The Daily: Cracking Down on Leaks*, N.Y. Times (June 18, 2018), https://nyti.ms/2MzbJ6g (interview with Pulitzer Prize-winning journalist Matt Apuzzo at *The New York Times*, who explained that after it became public that the government had seized his records, sources advised him they could no longer talk to him).

49. When sources stop talking to media organizations because they fear reporters will not be able to protect their identities, the public loses out on valuable information. Numerous U.S. courts have recognized that discouraging confidential sources from speaking to the press stifles the vital flow of information to the public and thus undermines the people's ability to make informed political, social, and economic decisions and hold elected officials and others accountable. *See, e.g.*, *Zerilli*, 656 F.2d at 711 (explaining that protection of reporters' confidential sources serves the health of a democracy by ensuring that citizens have access to information needed to make informed choices); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) ("If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic."); *see also* Alexander M. Bickel, *The Morality of Consent* 84 (1975) ("Forcing reporters to divulge such confidences would dam 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.").

50. Experience in the United States has demonstrated that the role of confidential sources in the newsgathering process cannot be overstated. Through such sources, as discussed above, *see* Section I, *supra*, the public has learned about a myriad of government abuses and corruption through the decades—stories of profound national importance, like the

[2] 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*, 5 F.3d at 1294–95 (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. La Rouche Campaign*, 841 F.2d at 1182).

involvement of the Nixon administration in the Watergate break-in and subsequent cover-up, prisoner abuse in Iraqi prisons, the existence of CIA "black sites" abroad, including in Europe, the U.S. government's secret and warrantless wiretapping programs after the September 11th attacks, and the use of drones to kill suspects, including an American citizen.[3]

51. Reflecting the vital role that confidential sources play in informing the public, over the past fifty years, a national consensus has emerged in the United States that reporters should be protected from having to divulge these sources. Every state in the United States except two—Hawaii and Wyoming—recognizes legal protections for a journalist's confidential sources, providing a critical safeguard to the newsgathering process. *Reporters Privilege Compendium Map*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/reporters-privilege/. Most are legislatively-enacted "shield" laws, but some are judicially-recognized privileges grounded in First Amendment principles. *See id.*; *see, e.g.*, Brett Spain, *Reporters Privilege Compendium: Virginia*, Part II.C, Reporters Committee for Freedom of the Press, https://www.rcfp.org/privilege-compendium/virginia/#c-federal-constitutional-provision (explaining that the Virginia Supreme Court recognized a privilege under the First Amendment in *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (Va. 1974)).

52. These protections reflect a "'national referendum' attesting to [the United States'] sense of the critical role that a vibrant press plays in a free society." Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in "Reverse Federalism"*, 29 Cardozo L. Rev. 1423, 1429 (Mar. 2008). Indeed, states across the U.S. have found these laws necessary to protect the "paramount public interest" in maintaining "a vigorous, aggressive and independent press,"[4] and thus "essential to maintenance of our free and democratic society."[5] As the former governor of New York explained in approving his

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[3] See David Von Drehle, *FBI's No. 2 Was "Deep Throat": Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, Wash. Post (June 1, 2005), https://perma.cc/2QQV-U2AD; Todd Richissin, *Soldiers' Warnings Ignored*, Balt. Sun (May 9, 2004), https://www.baltimoresun.com/news/bal-te.guard09may09-story.html; Dana Priest, *CIA Holds Terror Suspects in Secret Prison*, Wash. Post (Nov. 2, 2005), https://perma.cc/ZV9V-7ZED; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/UU4J-YE9U; Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times (Apr. 6, 2010), https://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html.

[4] *People v. Silverstein*, 89 Ill. App. 3d 1039, 1043 (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)) (discussing the Illinois legislature's adoption of that state's shield law).

[5] *Holmes v. Winter*, 22 N.Y.3d 300, 303–09, 3 N.E.3d 694 (N.Y. 2013).

state's shield law: "A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news." *Holmes*, 22 N.Y.3d at 309. Likewise, the Illinois legislature passed its shield law to "preserve the autonomy of the press by allowing reporters to assure their sources of confidentiality, thereby permitting the public to receive complete, unfettered information." *In re Arya*, 226 Ill. App. 3d 848, 852 (Ill. App. Ct. 1992) (citing *Zerilli*, 656 F.2d at 710–11).

53. These laws provide a range of protections, but the general theme is clear: forcing a journalist to disclose a confidential source is only permissible in the rarest of circumstances, if at all.

54. Some states provide an absolute privilege for reporters' confidential sources, meaning that reporters cannot be compelled to reveal a confidential source for any reason. In New York (a global hub of media and communications activity), 16 other states, and Washington, D.C., the privilege for confidential sources is absolute and cannot be overcome. *See Reporters Privilege Compendium Map*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/reporters-privilege/; *see also Reporter's Privilege Compendium*, Part III.B, Reporters Committee for Freedom of the Press, https://www.rcfp.org/privilege-sections/b-absolute-or-qualified-privilege/ (comparing all jurisdictions and whether their protections are absolute or qualified).[6]

55. In the remaining states, the privilege is qualified, meaning it can be overcome, but typically only where the party seeking the information has satisfied a multi-factor test that focuses, among other things, on whether the information is relevant and material to the litigation, other sources have been exhausted, and disclosure is in the public interest. *See generally Reporter's Privilege Compendium*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/reporters-privilege/; *see, e.g.*, James B. Lake, et al., *Reporter's Privilege Compendium: Florida*, Part VI.B, Reporters Committee for Freedom of

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[6] A handful of these states make exceptions in criminal and/or defamation cases. *See, e.g.*, Kelli L. Sager & Rochelle L. Wilcox, *Reporter's Privilege Compendium: California*, Part II.B, Reporters Committee for Freedom of the Press, https://www.rcfp.org/privilege-compendium/california/#b-absolute-or-qualified-privilege (explaining that "in civil cases in which a reporter is not a party, the privilege provides essentially absolute protection, regardless of the type of information sought," but "[i]n criminal cases, the privilege must be balanced against the criminal defendant's right to a fair trial"); Thomas J. Cafferty, et al., *Reporter's Privilege Compendium: New Jersey*, Part II.B, Reporters Committee for Freedom of the Press https://www.rcfp.org/privilege-compendium/new-jersey/#b-absolute-or-qualified-privilege (noting that the privilege is "absolute in civil proceedings" but may be overcome "by a criminal defendant upon a showing of relevance, materiality, necessity, and unavailability from any other source").

the Press, https://www.rcfp.org/privilege-compendium/florida/#b-elements; Samuel Fifer & Gregory R. Naron, *Reporter's Privilege Compendium: Illinois*, Part VI.B, Reporters Committee for Freedom of the Press, https://www.rcfp.org/privilege-compendium/illinois/#b-elements. Those seeking disclosure of confidential sources rarely satisfy this stringent test. *See, e.g.*, *Mitchell v. Superior Court*, 690 P.2d 625, 634 (Cal. 1984) ("Compulsory disclosure of sources is the 'last resort,' permissible only when the party seeking disclosure has no other practical means of obtaining the information."); *Clampitt v. Thurston Cty.*, 658 P.2d 641, 643 (Wash. 1983) ("[T]he courts should do their utmost to avoid the need for reporter disclosure, ordering it only as a last resort."); *see also Zerilli*, 656 F.2d at 712 & n.45 (noting that "cases in which First Amendment rights [to protect sources] must yield are 'few in number'" and that the privilege must prevail "in all but the most exceptional cases," or else "its value will be substantially diminished") (citations omitted).

56. At the federal level, 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 Committee for Freedom of the Press, https://www.rcfp.org/privilege-sections/a-generally/. Some courts, like the First Circuit, recognize less protection in the criminal context, particularly where a foreign country seeks the information pursuant to a treaty with the United States. For example, in *In re Dolours Price*, the First Circuit upheld the denial of motions to quash subpoenas brought by the United Kingdom under the mutual legal assistance treaty between the United States and the United Kingdom, seeking recordings and other material related to confidential interviews conducted by academic researchers at Boston College with former members of the Irish Republican Army. 685 F.3d 1 (1st Cir. 2012). The court found persuasive the United States and United Kingdom's strong interest in not impeding criminal investigations, particularly since two branches of the U.S. government—the Executive and the Senate—had expressly decided to assume the relevant treaty obligations. *Id.* at 18. The following year, however, the First Circuit clarified that even in such criminal cases, courts must conduct a "balancing of First Amendment concerns." *In re Request from the United Kingdom*, 718 F.3d 13, 24 (1st Cir. 2013).

57. The Supreme Court has also recognized that while the First Amendment does not prevent reporters from having to provide testimony to a grand jury about criminal conduct they observed or have direct knowledge of, it does protect them from

government efforts to obtain their sources as a means of harassment—as has been argued here. *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972).

58. It is respectfully submitted that the Honourable Court have regard to the same principles when assessing the need to protect confidential sources under Article 10 of the European Convention on Human Rights. The search by the police of the Applicants' homes and offices and indiscriminate seizure of millions of documents that reveal confidential sources is a cause for considerable concern and must not be condoned. Applicants' Skeleton Arg. ¶ 2. As set forth above, such conduct harms not only the sources involved and the Applicants' ability to continue their newsgathering activities, but also discourages future whistle-blowers and other sources from coming forward, thus depriving the public of important information. Absent the Court's intervention, the actions of the police in this case may chill future investigative reporting on misconduct by law enforcement—a matter of paramount importance to the public—and impact journalists even outside the United Kingdom, such as Mr. Gibney.

CONCLUSION

59. For the reasons set out above, the Intervener, acting on behalf of the Coalition, urges the Honourable Court to grant the reliefs requests by the Applicants in their application for Judicial Review.

On behalf of the Reporters Committee

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Katie Townsend
Gabe Rottman
Caitlin Vogus
Sarah Matthews

Counsel for the Intervener

Eamonn Dornan B.L.
Instructed by Patricia Coyle
Harte, Coyle, Collins Solicitors

16th May 2019

ANNEX 1:

INTERVENER'S LIST OF AUTHORITIES

NAME OF PROCEEDINGS:

IN THE MATTER of an application by Fine Point Films Limited and Trevor Birney for Judicial Review

IN THE MATTER of an application by Barry McCaffrey for Judicial Review

AND IN THE MATTER of an application by the PSNI and Durham Constabulary for search warrants and the subsequent decision by His Honour Judge Rafferty QC to grant the warrants

PARTY PROVIDING THE LIST: Intervener, the Reporters Committee for Freedom of the Press, and a coalition of 20 U.S. media organizations

NAME OF COUNSEL:

On behalf of the Reporters Committee
Bruce D. Brown
Katie Townsend
Gabe Rottman
Caitlin Vogus
Sarah Matthews

Counsel for the Intervener
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2. **Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001)
3. **Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 831 (1978)
4. **Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981)
5. **Holmes v. Winter*, 22 N.Y.3d 300, 303–09, 3 N.E.3d 694 (N.Y. 2013)
6. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)
7. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)

8. *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989)

9. *Smith v. Daily Mail*, 443 U.S. 97, 105-06 (1979)

10. *Jean v. Massachusetts State Police*, 492 F.3d 24, 26 (1st Cir. 2007)

11. *Zerilli v. Evening News Assoc.*, 628 F.2d 217, 219 (D.C. Cir. 1980)

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13. *Zurcher v. Stanford Daily*, 436 U.S. 547, 550-52 (1978)

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19. *Baker v. F&F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)

20. *In re Arya*, 226 Ill. App. 3d 848, 852 (Ill. App. Ct. 1992)

21. *Mitchell v. Superior Court*, 690 P.2d 625, 634 (Cal. 1984)

22. *Clampitt v. Thurston Cty.*, 658 P.2d 641, 643 (Wash. 1983)

23. *In re Dolours Price*, 685 F.3d 1 (1st Cir. 2012)

24. *In re Request from the United Kingdom*, 718 F.3d 13, 24 (1st Cir. 2013)

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1. Article 10 of the European Convention on Human Rights

2. *U.S. Const. amend. I

3. *Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. § 50.10

4. *Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. § 2000aa, *et seq*.)

5. Article 11 of the European Charter of Fundamental Freedoms

6. Espionage Act of 1917 (codified at 18 U.S.C. ch. 37)

7. 18 U.S.C. § 793(e)

8. 18 U.S.C. § 798

9. 18 U.S.C. § 1030(a)

10. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978)

APPENDIX A: STATEMENT OF INTEREST OF MEDIA COALITION MEMBERS

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 United States' news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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.

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 Committee to Protect Journalists is an independent, nonprofit organization that promotes press freedom worldwide. We defend the right of journalists to report the news without fear of reprisal. CPJ is made up of about 40 experts around the world, with headquarters in New York City. A board of prominent journalists from around the world helps guide CPJ's activities.

The E.W. Scripps Company serves audiences and businesses through local television, with 52 television stations in 36 markets. Scripps also owns Newsy, the next-generation national news network; podcast industry leader Stitcher; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

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.

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.

The Media Institute is a nonprofit 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.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in

1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

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

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

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.

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 130 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 15 offices and sections worldwide.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

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.