ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5088

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Juan Machado Amadis,

Plaintiff-Appellant,

v.

Department of Justice, *et al.*,

Defendants-Appellees.

Appeal from the U.S. District Court for the District of Columbia in *Machado Amadis v. Department of Justice*, No. 1:16-cv-02230-TNM

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 36 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.
Adam A. Marshall, Esq.
Daniel J. Jeon, Esq.
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
ktownsend@rcfp.org

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and *amici*

Parties to this case are Plaintiff-Appellant Juan Machado Amadis and Defendants-Appellees Department of Justice and Department of State. All *amici* to this brief are listed on Appendix A.

B. Rulings under review

Appellant seeks review of the Order issued by the District Court on January 31, 2019, ECF No. 46, in *Machado Amadis v. Department of Justice*, No. 1:16-cv-02230-TNM.

C. Related cases

Counsel for *amici* are not aware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, a statement identifying *amici*'s general nature and purpose is listed at Appendix A. *Amici* also report the following:

Advance Publications, Inc. ("Advance") certifies that it has no parent corporation, no publicly held corporation owns any of its stock, and its subsidiaries and affiliates are listed on the annexed Exhibit A.

American Society of News Editors is a private, non-stock corporation that has no parent.

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

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

Cable News Network, Inc. ("CNN") is a Delaware corporation that owns and operates numerous news platforms and services. CNN is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded corporation. AT&T Inc. has no

parent company and, to the best of CNN's knowledge, no publicly held company owns ten percent or more of AT&T Inc.'s stock.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

Californians Aware is a nonprofit organization with no parent corporation and no stock.

The Daily Beast Company LLC is owned by IAC/InterActiveCorp, a publicly traded company, and the Sidney Harman Trust, with IAC holding a controlling interest.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly-held corporation holds an interest of 10% or more in First Look Media Works, Inc.

The Foundation for National Progress is a non-profit, public benefit corporation. It has no publicly-held shares.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns 10 percent or more of Gannett's stock.

The Inter American Press Association (IAPA) is a not-for-profit organization with no corporate owners.

The International Documentary Association is an not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Program is a project of the University of California, Berkeley. It issues no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

The McClatchy Company is publicly traded on the New York Stock Exchange American under the ticker symbol MNI. Chatham Asset Management, LLC and Royce & Associates, LP both own 10% or more of the common stock of The McClatchy Company.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MPA – The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Guild – CWA is an unincorporated association. It has no parent and issues no stock.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock. PEN American Center, Inc. has no parent or affiliate corporation.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Pro Publica, Inc. ("ProPublica") is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

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

Reuters News & Media Inc. is a Delaware corporation whose parent is Thomson Reuters U.S. LLC, a Delaware limited liability company. Reuters News & Media Inc. and Thomson Reuters U.S. LLC are indirect and wholly owned subsidiaries of Thomson Reuters Corporation, a publicly-held corporation, which is traded on the New York Stock Exchange and Toronto Stock Exchange. There are no intermediate parent corporations or subsidiaries of Reuters News & Media Inc. or Thomson Reuters U.S. LLC that are publicly held, and there are no publicly-held companies that own 10% or more of Reuters News & Media Inc. or Thomson Reuters U.S. LLC shares.

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

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

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

Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & LEGISLATIVE MATERIALS

OTHER AUTHORITIES

SOURCE OF AUTHORITY TO FILE

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

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press and 36 members and representatives of the news media.[1] A full listing of the identity and interest of *amici* is included below as Appendix A.

Amici frequently rely on the Freedom of Information Act ("FOIA" or the "Act"), 5 U.S.C. § 552, to gather information and inform the public about government activities. As the Supreme Court has recognized, FOIA is a "structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). And it is an important tool used by the press in carrying out its role "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

This case presents, to *amici's* knowledge, the first opportunity for this Court to interpret FOIA's foreseeable harm provision, 5 U.S.C. § 552(a)(8), which was introduced by the FOIA Improvement Act of 2016, P.L. 114-185. Given FOIA's venue provision, 5 U.S.C. § 552(a)(4)(B), this Court has a unique role in interpreting the Act and ensuring agency compliance with its provisions. More

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *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.

FOIA cases are filed in the U.S. District Court for the District of Columbia than in any other federal district court, *see Geographic Distribution of FOIA Cases*, FOIA Project, http://foiaproject.org/foia-map/ (last accessed Aug. 6, 2019), and courts around the nation routinely look to this Court for guidance in interpreting FOIA and similar state public records laws. *See, e.g.*, *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014) (citing numerous cases from this Court); *Coleman v. Drug Enf't Admin.*, 714 F.3d 816, 823 (4th Cir. 2013) (citing *CREW v. FEC,* 711 F.3d 180 (D.C. Cir. 2013)); *Toensing v. Attorney Gen.*, 206 Vt. 1, 11 (2017) (citing *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016)); *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 621 (2017) (same). Because this case provides the Court with its first opportunity to provide guidance as to the proper application of the foreseeable harm standard, *amici* write to provide the Court with additional information about the history, purpose, and meaning of that provision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2016, Congress amended the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act") to significantly limit the circumstances in which agency records may be withheld from the public. The centerpiece of the FOIA Improvement Act of 2016, P.L. 114-185, was its addition of a foreseeable harm standard—a provision expressly prohibiting agencies from withholding information that falls within the scope of one of FOIA's exemptions unless (1) the agency reasonably foresees that disclosure of the record would harm an interest protected by the exemption, or (2) disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(i). Because this case presents, to *amici's* knowledge, the first opportunity for this Court to address FOIA's new foreseeable harm standard, *amici* write to provide additional background on the history, purpose, and significance of the 2016 amendments to the Act.

Congress's decision to substantively alter the standard for determining whether an agency may lawfully withhold information requested under FOIA was not made in a vacuum. Rather, it was made in response to a steady increase over the course of the last decade in the use (and abuse) of FOIA's discretionary exemptions by agencies across the federal government. Congress was particularly concerned with the overuse of Exemption 5, which incorporates the deliberative process privilege, and has become known to members of the press and the public

as the "withhold it because you want to" exemption.[2] Both the plain text and the legislative history of FOIA's foreseeable harm provision make clear that Congress intended it to prevent agencies from withholding stale, embarrassing, inconsequential, and politically inconvenient records, among others, from the public, even when those records fall within the scope of a FOIA exemption.

In the wake of the 2016 amendments, a court evaluating whether information may be properly withheld in response to a FOIA request does not look solely to whether or not that information falls within a FOIA exemption. For any information that falls within the scope of a discretionary exemption, courts must evaluate, *de novo*, whether the release of that specific information would harm an interest properly protected by the Act, taking into account the content, character and age of the specific information at issue. To enable the court's *de novo* review, an agency must make a sufficient showing as to each record or portion thereof it seeks to withhold, demonstrating that it is objectively reasonably foreseeable that disclosure would cause a harm that a FOIA exemption was meant to prevent. An agency cannot prevail by speculating that harm might result from disclosure, or by reciting generic rationales that could be applicable to broad categories of agency

[2] Josh Gerstein, *Senators Push Major FOIA Change*, POLITICO (June 24, 2014), https://perma.cc/QMT6-6ZH5.

records. If an agency fails to satisfy the foreseeable harm standard as to any particular record or portion thereof, the Act makes clear that it must be released.

Congress's recent amendments to FOIA "build on what our Founding Fathers recognized hundreds of years ago: that a truly democratic system depends on an informed citizenry to hold their leaders accountable." 114 Cong. Rec. S1496 (Mar. 15, 2016) (statement of Sen. Cornyn). This Court should ensure that the foreseeable harm standard is interpreted, applied, and enforced to effectuate that purpose.

ARGUMENT

I. Congress enacted the foreseeable harm standard to reverse the growing trend toward excessive government secrecy; Congress was concerned, in particular, with overuse of the deliberative process privilege.

In enacting FOIA in 1966, Congress sought to achieve a "workable balance" between the public's right to be informed and the government's legitimate interests in keeping some information secret. *See generally Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary (1974), 26–27, https://perma.cc/TFV9-JYNC. That balance was achieved through the codification of a general presumption of public access to agency records, limited by nine enumerated exemptions that could be invoked to withhold certain types of information. *See* 5 U.S.C. § 552(a)(3), (b)(1)–(b)(9).

In the Act's early years, the balance between secrecy and openness tipped largely in favor of disclosure to the public; government agencies reported denying fewer than 1 percent of all FOIA requests in full or in part. *See Freedom of Information Act and Amendments of 1974 (P. L. 93–502) Source Book: Legislative History, Texts, and Other Documents*, Joint Comm. Report (1975), 104–5, http://perma.cc/HAM4-Y8A9 (reporting 2,195 full or partial denials in response to 254,637 requests between July 1967 and July 1971). In the following decades, however, there was an explosion in the amount of information withheld by agencies. According to the Department of Justice, in fiscal year 2008 agencies asserted a FOIA exemption to deny, in part or in full, approximately 22 percent of all FOIA requests made to the federal government. *See* Department of Justice, *Data*, www.foia.gov/data.html (reporting 124,828 full or partial denials in fiscal year 2008, 21.59 percent of the 578,172 requests processed that year). By 2018 that percentage had doubled; agencies asserted a FOIA exemption to withhold information in response to *more than 43 percent* of all requests. *See id*. (reporting 358,427 full or partial denials in fiscal year 2018, 43.2 percent of the 830,060 requests processed that year). This massive increase in agency reliance on FOIA exemptions to withhold information has given rise to "widespread concern among journalists, academics, lawyers, and the general public that FOIA's 'workable balance' has tilted so far in favor of government secrecy that, like the 1946

[Administrative Procedure Act] provisions before it, the [A]ct is failing to serve its core purpose." Katie Townsend & Adam A. Marshall, *Striking the Right Balance: Weighing the Public Interest in Access to Agency Records under the Freedom of Information Act*, *in* Troubling Transparency 227 (David E. Pozen & Michael Schudson, eds., 2018).

In recent years, Congress has held hearings to examine the ever-increasing number of withholdings by agencies under FOIA, with members of both the House and Senate expressing bipartisan concern about the marked rise in government secrecy. In 2014, the Senate Judiciary Committee held a hearing on FOIA, during which Senator Patrick Leahy stated his "concern[] that the growing trend towards relying upon FOIA exemptions to withhold large swaths of government information is hindering the public's right to know." *Hearing on Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age*, 113th Cong., S. Hrg. 113-883 (2014), https://perma.cc/LDW4-WE5D.

In 2015, the House Committee on Oversight and Government Reform held a two-day hearing on problems with the FOIA process, including the overuse of exemptions. *See Ensuring Transparency through the Freedom of Information Act (FOIA): Hearing before the Committee on Oversight and Government Reform, House of Representatives*, 114th Cong. 114-80 (2015), https://perma.cc/S8RW-

GCE5. Thereafter, then-Chairman Jason Chaffetz released a report titled, simply, "FOIA Is Broken." Staff Report, U.S. House of Rep., Comm. On Oversight and Gov't Reform, *FOIA Is Broken: A Report* (Jan. 2016), https://perma.cc/5AMZ-Y9CA. The report found, among other things, that agencies "overuse and misapply exemptions, withholding information and records rightfully owed to FOIA requesters[,]" *id.* at iii, and noted that some "[m]embers of the media" had completely abandoned the FOIA process as a newsgathering tool "because delays and redactions made the request process wholly useless for reporting to the public[,]" *id.* at ii. According to the report, one freelance journalist who contacted the Committee stated: "I often describe the handling of my FOIA request as the single most disillusioning experience of my life." *Id.* at ii.

In 2016, Congress took action to combat the increase in improper and unnecessary withholding of government information from the public by Executive branch agencies. It amended FOIA through S.337, known as the FOIA Improvement Act of 2016, which was signed by the President in June 2016.[3] One of the primary goals of S.337 was to curtail the use of FOIA exemptions. *See*

[3] As noted in the Senate Report, a previous version of the bill passed the Senate in late 2014 but did not progress further. S. Rep. 114-4 at 6–7. S.337 was introduced in 2015 as the "FOIA Improvement Act of 2015," but did not become law until 2016, at which point it was called the "FOIA Improvement Act of 2016". *See Actions—S.337—114th Congress (2015–2016): FOIA Improvement Act of 2016*, Library of Congress, https://www.congress.gov/bill/114th-congress/senate-bill/337/all-actions (last visited July 21, 2019).

FOIA Improvement Act of 2015, S. Rep. 114-4, https://perma.cc/8QKW-86ED. As Senator Charles Grassley stated in support of the bill, S.337 was intended to address a "culture of government secrecy" that "has served to undermine FOIA's fundamental promise." 114 Cong. Rec. S1494 (Mar. 15, 2016), https://perma.cc/KQW7-655R (statement of Sen. Grassley).

The legislative history of S.337 makes clear that Congress was concerned, in particular, with agency overuse of FOIA Exemption 5 and, specifically, agency reliance on the deliberative process privilege. As the Senate Report states:

> There is a growing and troubling trend towards relying on these discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure. For example, according to the *OpenTheGovernment.org 2013 Secrecy Report*, Federal agencies used Exemption 5, which permits nondisclosure of information covered by litigation privileges such as the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege, more than 79,000 times in 2012—a 41% increase from the previous year.

Id. at 3 (italics in original). The House Report for H.R. 653, a parallel bill in the House of Representatives, likewise explained that

> Federal agencies most commonly invoke [Exemption 5] to withhold records protected by attorney client privilege, attorney work product privilege, and the deliberative process privilege. The deliberative process privilege is the most used privilege and the source of the most concern regarding overuse. . . . The deliberative process privilege has become the legal vehicle by which agencies continue to withhold information about government operations.

FOIA Oversight and Implementation Act of 2015, H.R. Rep. No. 114–391 at

10, https://perma.cc/A5UQ-CLJF.[4]

To curb agencies' increasing penchant for secrecy, S.337's centerpiece was the addition of the foreseeable harm standard. Under that provision:

> An agency shall—
> (i) withhold information under this subsection only if—
> (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
> (II) disclosure is prohibited by law; and
> (ii)
> (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
> (II) take reasonable steps necessary to segregate and release nonexempt information[.]

5 U.S.C. § 552(a)(8).

As the Senate Report accompanying S.337 notes, this new standard "mandates that an agency may withhold information *only if* it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law." S. Rep. 114-4 at 7–8 (emphasis added). Senator Leahy stated that the new standard was designed to "reduce the perfunctory withholding

[4] H.R. 653—the "FOIA Oversight and Implementation Act of 2016," was a similar effort by the House of Representatives to reform FOIA that passed that chamber but was eventually overtaken by S.337. *See All Actions H.R. 653*, https://www.congress.gov/bill/114th-congress/house-bill/653/all-actions. H.R. 653 contained a version of the foreseeable harm standard similar to what was eventually enacted through S.337. *See* H.R. Rep. No. 114–391, at 2.

of documents through the overuse of FOIA's exemptions." 114 Cong. Rec. S1496 (Mar. 15, 2016) (Statement of Sen. Leahy).

II. The foreseeable harm standard requires agencies to provide sufficient evidence for a court to determine that disclosure of a particular record, taking into account its age, content, and character, will harm an interest protected by an exemption.

A. The plain text of the Act requires agencies to make an additional showing to lawfully withhold information from the public.

Under FOIA, as amended, an agency must not only show that information falls within the scope of an exemption to lawfully withhold it from the public, but also must clear an *additional* hurdle: the agency must demonstrate that release of that specific information would harm an interest protected by that exemption or is prohibited by law. 5 U.S.C. § 552(a)(8)(i). If the foreseeable harm standard is not met, then "the document should be released." 114 Cong. Rec. S1496 (Mar. 15, 2016) (statement of Sen. Leahy).

Notwithstanding the plain language and intent of the foreseeable harm provision, the Department of Justice (the "Justice Department" or "DOJ") has argued in other litigation that it is essentially inconsequential. According to DOJ, enactment of the foreseeable harm provision did not significantly alter an agency's obligations under FOIA because it purportedly "simply codified existing government policy that had been in place for the better part of a decade." Dep't of Justice's Reply Br., ECF No. 81, at 51–52, *EPIC v. DOJ*, No. 19-cv-810 (D.D.C.

filed Jul. 15, 2019). While a memorandum issued by then-Attorney General Eric Holder in 2009, *see* S. Rep. 114-4 at 4, indeed preceded the FOIA Improvement Act of 2016, DOJ's reading of FOIA's foreseeable harm provision is at odds with basic rules of statutory interpretation.

Courts must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011) (citation omitted). Though Congress may have taken its cue from an existing Executive branch policy statement, it did *not* simply take the language of that policy and enact it into law. The Attorney General's 2009 memorandum sets forth the Justice Department's policy as to when it would "defend a denial of a FOIA request" for litigation purposes, and made clear that it was "not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, [or] agencies." Eric Holder, *Memorandum for Heads of Executive Departments and Agencies* 2–3 (Mar. 19, 2009), https://perma.cc/2JZY-CVC2. The Act's foreseeable harm provision, on the other hand, imposes mandatory requirements on the responding agency: "[*a*]*n agency shall* . . . withhold information under this subsection *only if* [foreseeable harm is shown]." 5 U.S.C. § 552(a)(8) (emphasis added). Moreover, FOIA's foreseeable harm standard is subject to judicial enforcement: a requester

may bring a lawsuit for the wrongful withholding of agency records and "the court shall determine the matter de novo[.]" 5 U.S.C. § 552(a)(4)(B). Thus, based on its plain language of the Act, the foreseeable harm provision clearly performs a different function than the litigation policy expressed in the Attorney General's 2009 memorandum.

The Justice Department's view is also at odds with another of the "most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (alteration in original); *see also Nielsen v. Preap*, 139 S. Ct. 954 (2019) (cannon against surplusage means that "every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence") (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 174 (2012)). There can be no question that Congress made a deliberate choice to meaningfully alter FOIA's text through the inclusion of the foreseeable harm standard, and Courts are required to give effect to that statutory language. 5 U.S.C. § 552(a)(8). As the U.S. District Court for the District of Columbia recently observed, the foreseeable harm standard's "text and purpose . . . both support a heightened standard for an agency's withholdings." *Judicial Watch, Inc. v. U.S. Dep't of*

Commerce, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (discussing foreseeable harm standard within the context of Exemption 5).

The Justice Department has also previously argued that the foreseeable harm standard "does not alter the scope of information that is covered under an exemption." Dep't of Justice's Reply Br., ECF No. 81, at 52, *EPIC v. DOJ*, No. 19-cv-810 (D.D.C. filed Jul. 15, 2019). This argument misses the point. The plain text of the foreseeable harm standard does not purport to alter the scope of any exemption. *See* 5 U.S.C. § 552(a)(8). Rather, it imposes a new, *additional* requirement that an agency must satisfy with respect to information it wishes to withhold from the public that falls within the scope of one of FOIA's exemptions. *Id.* In other words, "an agency must release a record—even if it falls within a FOIA exemption—if releasing the record would not reasonably harm an exemption-protected interest and if its disclosure is not prohibited by law." *Rosenberg v. U.S. Dep't of Defense*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018).

B. Agencies must provide sufficient evidence for courts to determine foreseeable harm *de novo*.

In amending FOIA through S.337, Congress did not merely require that an agency "foresee" that release of information would harm an interest protected by one of FOIA's exemptions; the agency must "*reasonably* foresee" that such harm would result from disclosure. 5 U.S.C. § 552(a)(8)(i)(I) (emphasis added). Congress's use of "reasonably," as this Court has noted in interpreting other

statutes, means the test is an objective one. *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001) (discussing "reasonably" in the context of 28 U.S.C. § 455(a)); *Angelex, Ltd. v. United States*, 907 F.3d 612, 621 (D.C. Cir. 2018), *cert. denied,* 139 S. Ct. 2013 (2019) ("unreasonable" for purposes of 33 U.S.C. § 1904(h) is evaluated under an objective standard); *accord Kentucky v. King*, 563 U.S. 452, 464 (2011) ("Legal tests based on reasonableness are generally objective[.]"). Accordingly, because the lawfulness of an agency's withholding of records or portions thereof under FOIA is subject to *de novo* review, 5 U.S.C. § 552(a)(4)(B), agencies seeking to demonstrate their compliance with the foreseeable harm standard as to specific records must present sufficient evidence for a court to evaluate whether, as an objective matter, the identified harm is foreseeable.

While a district court has the discretion to conduct an *in camera* review of withheld records to satisfy its *de novo* review obligation, 5 U.S.C. § 552(a)(4)(B), this Court has long recognized the importance of an agency providing public justifications for its withholdings to enable both a meaningful adversarial process and effective judicial review. *See, e.g.*, *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The well-established method for doing so, the *Vaughn* index, is a natural place for an agency to demonstrate its compliance with the foreseeable harm standard. As this Court has explained, a *Vaughn* index is a document "that

adequately describes each withheld record or deletion and sets forth the exemption claimed and why that exemption is relevant"; in essence, for each withholding the agency must "discuss the consequences of disclosing the sought-after information." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (citation omitted).

As discussed below, the foreseeable harm standard must be satisfied with respect to each record that the agency seeks to withhold. Agencies should, accordingly, be required to add another "column" to their *Vaughn* indices identifying evidence and argument as to why each withholding satisfies the standard. Such a showing would not only provide the plaintiff with "a realistic opportunity to challenge the agency's decision[,]" *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996), but also ensure that district and appellate courts have the necessary information to conduct the requisite *de novo* review of the lawfulness of the agency's withholding. 5 U.S.C. § 552(a)(b)(B).

C. The foreseeable harm standard requires an agency to make a specific showing with respect to each record it seeks to withhold.

Both the plain text of FOIA's foreseeable harm provision and its legislative history make clear that an agency must meet its requirements with respect to *each* record that it seeks to withhold under the Act. *See* 5 U.S.C. § 552(a)(8); S. Rep. 114-4. Beginning with the text of the statute, the wording of the foreseeable harm provision makes plain that it must be applied and satisfied with respect to

individual records. 5 U.S.C. § 552(a)(8). Subsection (a)(8), which was added by S.377, includes not only the harm standard in Section 552(a)(8)(i), but also an additional segregability requirement in Section 552(a)(8)(ii). Under that provision, an agency "shall" *also*:

> (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
> (II) take reasonable steps necessary to segregate and release nonexempt information[.]

Id. At first blush, these segregability provisions may appear to duplicate the already existing provision in Section 552(b) that requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, the inclusion of Section 552(a)(8)(ii) *within* the new Section 552(a)(8) makes clear that Congress intended to require that standard be satisfied on a record-by-record basis: subparagraph (ii) specifically requires agencies to evaluate and disclose information from "a requested record" not released in full. *Cf. King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) ("[A] statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context."); *Del. Dep't of Nat. Res. & Envtl. Control v. Envtl. Prot. Agency*, 895 F.3d 90, 97 (D.C. Cir. 2018) (explaining that courts must

examine "the language and design of the statute as a whole" (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988))).

The legislative history of S.337 also makes clear that Congress intended the foreseeable harm standard to be satisfied with respect to *each* record an agency seeks to withhold. According to the Senate Report,

> Under this standard, the content of a *particular record* should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing *that particular document*, given its age, content, and character, would harm an interest protected by the applicable exemption.

S. Rep. 114-4 at 8 (emphasis added); *accord* 114 Cong. Rec. S1496 (Mar. 15, 2016) (statement of Sen. Leahy) (noting that the foreseeable harm standard "requires agencies to consider whether the release of *particular documents* will cause any foreseeable harm to an interest the applicable exemption is meant to protect" (emphasis added)).

The need to satisfy the foreseeable harm standard is illustrated by the documents at issue in *Rosenberg v. United States Department of Defense*, which concerned a FOIA request for emails from General John F. Kelly, then-commander of the U.S. Southern Command, related to Joint Task Force Guantánamo. 342 F. Supp. 3d at 71. The substance of emails responsive to that request pertained to a wide range of topics, including the performance of personnel, housing and recreational opportunities for detainees, operational changes related to facilities

issues, possible changes to procedures for detainee communications, staffing issues, operational issues related to a possible new detention operation in the continental United States, detainee movements, and media coverage. *Id.* at 79. The Department of Defense sought to withhold *all* of the emails under the deliberative process privilege and provided only a single justification to purportedly satisfy the foreseeable harm standard, arguing that "because the responsive records 'are of the same type,' disclosing the information withheld from the records 'would yield the same kinds of harms,' consistently 'across the release.'" *Id.* at 78. The district court rightly rejected that argument, noting that it could

> [R]eadily see, for example, that disclosure of the internal deliberations between General Kelly and high-ranking DOD officials about "a possible new detention operation in the continental United States" could result in reasonably foreseeable harm to future "honest and frank communication within the agency." But, absent more detail from the agency, the court can less readily agree with the notion that disclosure of other, seemingly more benign, categories of withheld deliberative information—e.g., General Kelly's "opinions about the current state of facilities on base and recommendations and advice about maintenance issues,"—would reasonably result in the same level of harm to the exemption-protected interest.

Id. at 79 (internal citations omitted);[5] *see also Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, Memorandum Opinion & Order, No. 17-CV-5928, 2019 WL

[5] While the district court in *Rosenberg* properly rejected the agency's attempt to satisfy the foreseeable harm standard by asserting a single, blanket explanation

3338266 at *1 (S.D.N.Y. 2019) (agreeing with and adopting *Rosenberg* and *Judicial Watch* in rejecting agency withholding).

The U.S. District Court for the Northern District of California identified and explained the foreseeable harm standard's specificity requirement in *Ecological Rights Foundation v. Federal Emergency Management Agency*. In that case, the district court held that the agency had failed to satisfy the foreseeable harm standard in conjunction with the deliberative process privilege. As the district court observed:

> Absent a showing of foreseeable harm to an interest protected by the deliberative process exemption, the documents must be disclosed. In failing to provide basic information about the deliberative process at issue and the role played by *each specific document*, [the agency] does not meet its burden of supporting its withholdings with detailed information pursuant to the deliberative process privilege.

2017 WL 5972702 at *6 (N.D. Cal., Nov. 30, 2017) (emphasis added). This approach taken by the court in *Ecological Rights Foundation* is consistent with the text, purpose, and legislative history of the foreseeable harm standard.

---

for all withheld emails, it erred by going on to state that it did not "read the statutory 'foreseeable harm' requirement to go so far as to require the government to identify harm likely to result from disclosure of *each* of its Exemption 5 withholdings." *Id.* at 79 (emphasis in original). The plain language, legislative history, and purpose of the foreseeable harm provision make clear that the standard must be satisfied on a record-by-record basis.

D. The foreseeable harm standard requires agencies to demonstrate the harm that "would" result from disclosure of each record it seeks to withhold, taking into account its age, content, and character.

Under the plain language of the foreseeable harm provision, an agency must demonstrate that it reasonably foresees that disclosure of the information it seeks to withhold "*would*" harm an interest protected by an exemption. 5 U.S.C. § 552(a)(8)(i)(I) (emphasis added). There are at least three points concerning the nature and quantum of the evidence required for an agency to meet this standard that warrant attention: (1) the relationship between the foreseeable harm standard and particular exemptions, (2) the factors agencies and courts should consider in evaluating the information at issue and the potential harm that could result from its disclosure, and (3) the certainty of the link between the disclosure of the information and its potential harm to an interest protected by an exemption.

First, when read in the context of the Act as a whole, the foreseeable harm provision clearly requires a more substantial showing for certain exemptions. For example, if information is properly subject to a mandatory withholding statute under Exemption 3, an agency need not show that it is reasonably foreseeable that any harm would result from its disclosure. 5 U.S.C. § 552(a)(8)(i)(II). For the remainder of FOIA's exemptions, however, and particularly those that do not independently require a showing of harm—Exemptions 2, 4, 5, 8, and 9, *see* 5 U.S.C. § 552(b)(2), (4), (5), (8), (9)—the foreseeable harm standard has a

significant role to play. An agency asserting one of these exemptions to withhold requested information must make a robust showing to satisfy the foreseeable harm standard. And given Congress's particular concern with agencies' overuse of the deliberative process privilege under Exemption 5, *see supra* Section I, the foreseeable harm standard has an especially important role to play.

Second, in evaluating whether the foreseeable harm standard is satisfied, agencies and courts should consider the "age, content, and character" of each record to determine whether its disclosure would actually harm an interest protected by the Act. S. Rep. 114-4 at 8. With respect to "age," it is well-recognized that any harm that would result to an interest protected by a FOIA exemption will, as a general matter, diminish with the passage of time. *See, e.g.*, Exec. Order No. 13526, 32 C.F.R. § 2001.12 (2010) (establishing general presumption for declassification of records after 25 years); 5 U.S.C. § 552(b)(5) (placing 25-year sunset on invocation of the deliberative process privilege);[6] 44 U.S.C. § 2204 (limiting use of Exemption 5 under the Presidential Records Act to 12 years). And in evaluating the "content" and "character" of a record, an agency

[6] Congress made clear that the establishment of this 25-year sunset for the deliberative process privilege in the FOIA Improvement Act of 2016 was not intended in any way to suggest, by inference, that the privilege "is somehow heightened or strengthened as a basis for withholding before the 25-year sunset." 114 Cong. Rec. S1496 (Mar. 15, 2016) (statement of Sen. Cornyn); *accord id.* (statement of Sen. Leahy).

is not permitted to withhold information simply because it might cause embarrassment, because "errors and failures might be revealed," or to "protect the personal interests of Government officials at the expense of those they are supposed to serve." S. Rep. 114-4 at 8 (quoting President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009). In other words, the foreseeable harm standard is a fact-sensitive test that requires an evaluation not simply of whether or not a record falls within the scope of an exemption, but whether the purpose of the Act would be served by withholding the record from the public.

A FOIA case that came before this Court in 2016, prior to passage of the FOIA Improvement Act, illustrates this distinction. Judge Sentelle, in a concurring opinion joined by Judge Edwards, wrote that while the Justice Department's "Blue Book" indeed fell within the scope of the attorney work-product privilege under FOIA Exemption 5, as previously interpreted by the Court in *Schiller v. N.L.R.B.*, 964 F.2d 1205 (D.C. Cir. 1992), such a "broad" interpretation of the privilege did not serve its purpose, which is to provide "a litigating attorney a zone of privacy within which to think, plan, [and] weigh facts and evidence." *Nat'l Ass'n of Criminal Def. Lawyers v. Dep't of Justice Exec. Office for U.S. Attorneys*, 844 F.3d 246, 259 (D.C. Cir. 2016) ("*NACDL*") (internal quotations and citation omitted) (Sentelle, J., concurring). Thus, not only did the agency's invocation of Exemption

5 to withhold that record not serve the purpose of the attorney work-product privilege, but also, as Judge Sentelle observed, it was "inconsistent both with the statutory purpose of FOIA and the longstanding values of justice in the United States." *Id.*

While the Court in *NACDL* was bound to determine only whether the record at issue fell within the scope of the attorney work-product privilege under Exemption 5, as the Court had previously-articulated it in *Schiller*, under the Act, as amended, the Court's inquiry would not end there. If, taking into account the "content" and "character" of the Justice Department's "Blue Book," it is not reasonably foreseeable that its release would harm the interest sought to be protected by the attorney work-product privilege, the "Blue Book" would be required to be released under the Act's foreseeable harm standard, notwithstanding the fact that it falls within the scope of FOIA's Exemption 5. Such disclosure would, as intended by the 2016 amendments, serve the statutory purpose of FOIA. Indeed, as Judge Sentelle observed in his concurring opinion in *NACDL*, "[t]here is no area in which it is more important for the citizens to know what their government is up to than the activity of the Department of Justice in criminally investigating and prosecuting the people." *Id.*

Third, the foreseeable harm standard only permits the withholding of information if disclosure "would" harm an interest by a protection. 5 U.S.C. §

552(a)(8)(i)(I). The Supreme Court has observed that the use of the word "would" in the context of FOIA is a "stricter standard" than, for example, "could," and effect should be given to Congress's choice to use one word as opposed to the other. *See Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 756 n.9 (1989) (discussing Congress's amendment of Exemption 7). Accordingly, an agency does not satisfy its burden under the foreseeable harm standard simply by speculating that harm "might" result; it must show that it is reasonably foreseeable that release of the particular information it seeks to withhold *will* cause harm.

III. The foreseeable harm standard and the deliberative process privilege.

To satisfy the foreseeable harm standard, several criteria must be met for an agency to lawfully withhold a record under the deliberative process privilege in Exemption 5. First, the information must satisfy all the criteria to be withheld under the deliberative process privilege. Second, the agency must identify the interest the deliberative process privilege is designed to protect. 5 U.S.C. § 552(a)(8)(i)(I). Third, the agency must set forth sufficient evidence for a court to determine, *de novo*, that it is reasonably foreseeable that disclosure of the specific information in each record the agency seeks to withhold "would" harm that interest, *id.*, taking into account the "age, content, and character" of each record. S. Rep. 114-4 at 8. A record cannot be withheld simply because it would cause

embarrassment, because it would reveal errors or failures, or to protect the personal interests of government officials. *Id.*

With respect to the third step, it is not sufficient for an agency to merely recite the generic rationales that courts have identified as underpinning the deliberative process privilege. The agency must establish that the contents of the *particular* record at issue, if revealed, *will* harm "the quality of agency decisions." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *cf.* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 897–98 (1990) ("[T]he deliberative rationale rests on the conclusory and unverified assertions of interested parties and has never been supported by anything that might fairly be called evidence."). This point is well illustrated by the recent district court decision in *Judicial Watch, Inc. v. Department of Commerce*, where the agency attempted to justify its withholdings under the deliberative process privilege by submitting a declaration stating, *inter alia*, that:

- release of the information "could have a chilling effect on the discussion within the agency in the future" and "discourage a frank and open dialogue among agency employees";
- release of the information "could have a chilling effect on the discussions within the agency";

- the "deliberations are essential to ensuring that the right information is delivered to the public"; and
- failure "to have these frank deliberations could cause confusion if incorrect or misrepresented climate information remained in the public sphere."

375 F. Supp. 3d at 100 (brackets in original removed). The agency also submitted a *Vaughn* index stating, for each record at issue, that "release of the redacted material would have the foreseeable harm of discouraging a frank and open dialogue among interagency staff." *Id.* at 101. In ruling on the parties' cross-motions for summary judgment, the district court correctly held that this "boiler plate" language used by the agency did not satisfy the foreseeable harm standard:

> If the mere possibility that disclosure discourages a frank and open dialogue was enough for the exemption to apply, then Exemption 5 would apply whenever the deliberative process privilege was invoked regardless of whether disclosure of the information would harm an interest protected by the exemption.

Id. Thus, "[t]he question is not whether disclosure could chill speech, but rather if it is reasonably foreseeable that it will chill speech and, if so, what is the link between this harm and the specific information contained in the material withheld." *Id.* In other words, an agency cannot simply parrot the general rationale for the deliberative process privilege as evidence that disclosure of specific records would harm those interests.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to interpret the foreseeable harm standard in this case consistent with its text, history, and purpose, and to effectuate Congress's goal of curtailing Executive branch secrecy through the passage of the FOIA Improvement Act of 2016.

Dated: August 6, 2019

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.
Adam A. Marshall, Esq.
Daniel J. Jeon, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, DC 20005
(202) 795-9300
ktownsend@rcfp.org

APPENDIX A: STATEMENT OF INTEREST FOR *AMICI CURIAE*

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

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

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

countries. On any given day, AP's content can reach more than half of the world's population.

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.

Cable News Network, Inc. ("CNN"), a Delaware corporation, is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is ultimately a wholly-owned subsidiary of AT&T Inc., a publicly traded company. CNN is a portfolio of two dozen news and information services across cable, satellite, radio, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United

States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad; and CNN Digital is a top network for online news, mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world.

The **California News Publishers Association** ("CNPA") is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and news websites throughout California.

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

The Daily Beast delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop-culture, world news and more. Fiercely independent and armed with irreverent intelligence, The Daily Beast now reaches more than one million readers each day. John Avlon is Editor-in-Chief.

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.

The Foundation for National Progress is the award-winning publisher of Mother Jones magazine and MotherJones.com. It is known for ground-breaking investigative journalism and impact reporting on national issues.

Gannett Co., Inc. is a leading news and information company which publishes USA TODAY and more than 100 local media properties. Each month more than 125 million unique visitors access content from USA TODAY and Gannett's local media organizations, putting the company squarely in the Top 10 U.S. news and information category.

The **Inter American Press Association** (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

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

The **Investigative Reporting Program** (IRP) at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The **Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate

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

Los Angeles Times Communications LLC and **The San Diego Union-Tribune, LLC** are two of the largest daily newspapers in the United States. Their popular news and information websites, www.latimes.com and www.sduniontribune.com, attract audiences throughout California and across the nation.

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

The Media Institute is a nonprofit 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.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the editorial and

online departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

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.

PEN American Center ("PEN America") is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has

approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

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 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.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

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

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.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of

the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

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.

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

APPENDIX B: ADDITIONAL COUNSEL

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

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors

Karen Kaiser
General Counsel
The Associated Press
200 Liberty Street
20th Floor
New York, NY 10281

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for Association of Alternative Newsmedia

David C. Vigilante
Johnita P. Due
Cable News Network, Inc.
1 CNN Center
Atlanta, GA 30303

Jim Ewert, General Counsel
California News Publishers Association
2701 K St.
Sacramento, CA 95816

Terry Francke
General Counsel
Californians Aware
2218 Homewood Way
Carmichael, CA 95608

Neil Rosenhouse
The Daily Beast Company LLC
555 W. 18th St., 5th Floor
New York, NY 10011

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

James Chadwick
Sheppard Mullin Richter & Hampton LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600
Counsel for Foundation for National Progress, dba Mother Jones

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

Jeff Glasser
Vice President, Legal
Los Angeles Times Communications LLC & The San Diego Union-Tribune, LLC
2300 E. Imperial Highway
El Segundo, CA 90245

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

Kurt Wimmer
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
Counsel for The Media Institute

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY14202
Counsel for National Press Photographers Association

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

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
Counsel for The News Guild – CWA

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

Richard J. Tofel
President
ProPublica
155 Avenue of the Americas, 13th floor
New York, NY 10013

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Gail C. Gove
Chief Counsel, Reuters
Katharine Larsen
Associate General Counsel, Reuters
Reuters News & Media Inc.
3 Times Square, 20th Floor
New York, NY 10036

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

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

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

CERTIFICATE OF COMPLIANCE

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

1) the type-volume limitation of D.C. Cir. R. 29, Fed. R. App. P. 29(a)(5), and Fed. R. App. P. 32(e) because it contains 6,498 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 in 14-point Times New Roman.

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: August 6, 2019

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 District of Columbia Circuit using the appellate CM/ECF system on August 6, 2019.

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.

Dated: August 6, 2019

/s/ Bruce D. Brown

Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS