

The Honorable James L. Robart

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

MICROSOFT CORPORATION,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT
OF JUSTICE, and LORETTA LYNCH, in
her official capacity as Attorney General of the
United States,

Defendants.

Case No. 2:16-cv-00538-JLR

**BRIEF OF AMICI CURIAE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, THE
SEATTLE TIMES COMPANY, THE
ASSOCIATED PRESS, FOX NEWS
NETWORK, LLC, NATIONAL
PUBLIC RADIO, INC., THE
WASHINGTON POST, ET AL.,* IN
SUPPORT OF PLAINTIFF'S
OPPOSITION TO THE
GOVERNMENT'S MOTION TO
DISMISS**

* A full list of the 30 media amici can be found in the addendum to this filing.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1, amicus curiae The Seattle Times Company states that The McClatchy Company owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

Pursuant to Local Rule 7.1, amicus curiae Fox News Network, LLC* states that it is wholly owned by Fox Television Stations, Inc., which is wholly owned by the publicly traded Twenty-First Century Fox, Inc. No other publicly held corporation owns ten percent or more of Fox News.

Pursuant to Local Rule 7.1, amicus curiae WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of Nash Holdings LLC. Nash Holdings LLC is privately held and does not have any outstanding securities in the hands of the public.

Pursuant to Local Rule 7.1, amicus curiae the Tully Center for Free Speech states that it is a subsidiary of Syracuse University.

Pursuant to Local Rule 7.1, amicus curiae The McClatchy Company states that it is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common stock of The McClatchy Company.

Pursuant to Local Rule 7.1, amicus curiae The Investigative Reporting Workshop states that it is a privately funded, nonprofit news organization affiliated with the American University School of Communication in Washington. It issues no stock.

Pursuant to Local Rule 7.1, amici curiae Reporters Committee for Freedom of the Press, The Associated Press*, National Public Radio, Inc., Freedom of the Press Foundation, Reporters Without Borders, Newspaper Association of America, Association of American Publishers, Inc.*, National Press Photographers Association, The National Press Club, International Documentary

* The starred organizations are only represented by Summit Law Group PLLC and The Reporters Committee for Freedom of the Press. All other organizations are jointly represented by Orrick, Herrington & Sutcliffe LLP, Summit Law Group PLLC, and The Reporters Committee for Freedom of the Press.

1 Association, First Look Media Works, Inc., First Amendment Coalition, American Society of
2 News Editors, Association of Alternative Newsmedia, National Association of Black Journalists,
3 Online News Association, California Newspaper Publishers Association, Radio Television Digital
4 News Association, E.W. Scripps Company, The Center for Investigative Reporting, Investigative
5 Reporters & Editors, MPA – The Association of Magazine Media, Society of Professional
6 Journalists, and The Media Institute state that no publicly held corporation owns 10% or more of
7 the stock of any of the parties listed above.
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

Page

1

2

3 CORPORATE DISCLOSURE STATEMENTi

4 TABLE OF AUTHORITIESiv

5 STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE.....1

6 INTRODUCTION AND SUMMARY.....1

7 ARGUMENT2

8 I. Section 2705(b) Gag Orders Are A Prior Restraint On Speech And Violate

9 The Right To Receive Information2

10 A. The § 2705(b) gag orders at issue here impose a prior restraint on

11 speech2

12 B. The gag orders also violate the First Amendment right to receive

13 newsworthy information from a willing speaker.....3

14 C. The speech at issue is core First Amendment speech3

15 II. The § 2705(b) Gag Orders Interfere With The Common-Law Right Of

16 Access.....5

17 III. Section 2705(b) Gag Orders Harm The Public Discourse By Threatening

18 The Confidential Relationships Of Reporters And Their Sources9

19 CONCLUSION..... 12

20 ADDENDUM

21 CERTIFICATE OF SERVICE

22

23

24

25

26

27

TABLE OF AUTHORITIES

Page(s)

Federal Cases

In re Application of N.Y. Times Co.,
585 F. Supp. 2d 83 (D.D.C. 2008).....6, 8

Balt. Sun Co. v. Goetz,
886 F.2d 60 (4th Cir. 1989).....6

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963).....2

Branzburg v. Hayes,
408 U.S. 665 (1972).....3

Butterworth v. Smith,
494 U.S. 624 (1990).....8

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975).....1, 4

Davis v. E. Baton Rouge Par. Sch. Bd.,
78 F.3d 920 (5th Cir. 1996).....3

In re EyeCare Physicians of Am.,
100 F.3d 514 (7th Cir. 1996).....6

Garrison v. Louisiana,
379 U.S. 64 (1964).....3

Globe Newspaper Co. v. Super. Ct.,
457 U.S. 596 (1982).....5

Kamakana v. City & Cty. of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 5, 6, 7

Kleindienst v. Mandel,
408 U.S. 753 (1972).....3

NLRB v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978).....3

Nat’l Archives & Records Admin. v. Favish,
541 U.S. 157 (2004).....3

1 *Near v. Minn. ex rel. Olson*,
 2 283 U.S. 697 (1931).....2

3 *Neb. Press Ass’n v. Stuart*,
 4 427 U.S. 539 (1976).....2, 12

5 *N.Y. Times Co. v. Sullivan*,
 6 376 U.S. 254 (1964).....4

7 *In re Newsday, Inc.*,
 8 895 F.2d 74 (2d Cir. 1990)6

9 *Nixon v. Warner Commc’ns Inc.*,
 10 435 U.S. 589 (1978).....5, 7

11 *Richmond Newspapers Inc. v. Virginia*,
 12 448 U.S. 555 (1980).....4, 7

13 *Riley v. California*,
 14 134 S. Ct. 2473 (2014)4

15 *In re Search Warrant for Secretarial Area Outside Office of Gunn*,
 16 855 F.2d 569 (8th Cir. 1988).....6

17 *Sheppard v. Maxwell*,
 18 384 U.S. 333 (1966).....8

19 *United States v. Bus. of Custer Battlefield Museum and Store*,
 20 658 F.3d 1188 (9th Cir. 2011)6, 8

21 *United States v. Wells Fargo Bank Account No. 7986104185*,
 22 643 F. Supp. 2d 577 (S.D.N.Y. 2009)6

23 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*,
 24 425 U.S. 748 (1976).....3

25 *In re Warrant to Search a Certain E-Mail Account Controlled &*
 26 *Maintained by Microsoft Corp.*,
 27 ___ F.3d ___, No. 14-2985, 2016 WL 3770056 (2d Cir. July 14, 2016)7

State Cases

Commonwealth v. Fenstermaker,
 530 A.2d 414 (Pa. 1987).....6

Federal Statutes

18 U.S.C. § 2703..... 1, 4, 5, 7, 8, 9, 11

1 18 U.S.C. § 2705(b).....1, 2, 3, 5, 6, 7, 8, 9, 10

2 **Regulations**

3 28 C.F.R. § 50.10..... 10

4 28 C.F.R. § 50.10(a)(2) 10, 11

5 28 C.F.R. § 50.10(a)(3) 10

6 28 C.F.R. § 50.10(e)(1)(i)..... 10

7 28 C.F.R. § 50.10(j) 10

8 **Other Authorities***

9

10 Colin Moynihan, *A New York City Settlement on Surveillance of Muslims*, *The New*
 Yorker, Jan. 7, 2016 5

11 David von Drehle, *FBI’s No. 2 Was ‘Deep Throat’: Mark Felt Ends 30-Year Mystery of*
 12 *The Post’s Watergate Source*, *Wash. Post* (June 1, 2005),
 http://tinyurl.com/Wash-Post-Watergate 11

13 Department of Justice, *Report on Review of News Media Policies*, July 12, 2013,
 14 http://tinyurl.com/News-Media-Report 10

15 J. Bentham, *Rationale of Judicial Evidence* (1827) 7

16 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *N.Y.*
 17 *Times* (Dec. 16, 2005), http://tinyurl.com/NSA-Wiretapping 11

18 Judson Berger, *DOJ Invoked Espionage Act in Calling Fox News Reporter Criminal ‘Co-*
 19 *Conspirator’*, *Fox News* (May 22, 2013), http://tinyurl.com/DOJ-Invokes-
 Espionage-Act 10

20 Mark Sherman, *Gov’t Obtains Wide AP Phone Records in Probe*, *A.P.* (May 13, 2013),
 21 http://tinyurl.com/AP-Phone-Records 9

22 Leonard Downie Jr. & Sara Rafsky, *The Obama Administration and the Press: Leak*
 23 *Investigation and Surveillance in Post-9/11 America*, *Comm. to Protect Journalists*
 (Oct. 10, 2013), http://tinyurl.com/Leak-Investigation 11, 12

24 *Papers of Thomas Jefferson* (J. Boyd ed. 1954) 12

25 President Bill Clinton’s *Remarks at a Blue Ribbon Schools Award Ceremony*,
 26 *2 Pub. Papers* 1900 (Oct. 28, 1999) 1

27 _____
 * All web sites last visited September 2, 2016.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Privacy and Civil Liberties Oversight Board, Report on the Telephone Records
Program Conducted under Section 215 of the USA PATRIOT Act and on the
Operations of the Foreign Intelligence Surveillance Court, Jan. 23, 2014,
<http://tinyurl.com/PCLOB-Report> 12

1 **STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

2 Amici are 30 news and media organizations that help keep the American people informed
3 and the government accountable. The government’s widespread use of 18 U.S.C. § 2705(b) gag
4 orders impedes amici from reporting on matters that should be the topic of a robust public
5 debate.¹ Amici are filing this brief with the consent of both parties.²

6 **INTRODUCTION AND SUMMARY**

7 Democracy depends on an informed population. As Thomas Jefferson recognized, “an
8 enlightened citizenry is indispensable for the proper functioning of a republic.”³ And “[i]n a
9 society in which each individual has but limited time and resources with which to observe at first
10 hand the operations of his government, he relies necessarily upon the press to bring to him in
11 convenient form the facts of those operations.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92
12 (1975). Accordingly, the First Amendment and our common-law traditions protect the flow of
13 information to the public by offering strong protections to the press to engage in newsgathering
14 and dissemination.

15 In the last two decades, dramatic technological developments have led to vast quantities of
16 formerly private information now being stored electronically in large computer data centers, often
17 referred to as “the cloud.” At the same time, the government has aggressively asserted its
18 surveillance powers over such electronically stored data and communications. Reporting about
19 the government’s use—and misuse—of its limited statutory power (pursuant to 18 U.S.C. § 2703)
20 to obtain electronically stored communications is critical to a robust public debate on the nature
21 and extent of government surveillance of private communications. This newsgathering and
22 reporting is impeded or curtailed completely, however, where the recipients of warrants are barred
23 by § 2705(b) gag orders from disclosing information about § 2703 searches. That harm is even

24 ¹ More information about individual amici is included in the motion for leave to file this brief.

25 ² Amici state that no counsel for the parties authored this brief in whole or in part, and no party,
26 party’s counsel, or person or entity other than amici curiae and their counsel contributed money
that was intended to fund the preparing or submitting of the brief.

27 ³ President Bill Clinton’s Remarks at a Blue Ribbon Schools Award Ceremony, 2 Pub. Papers
1900 (Oct. 28, 1999) (quoting Thomas Jefferson).

1 greater when those gag orders are indefinite. The government’s widespread use of these gag
 2 orders cuts off the flow of news at its source and undermines three core democratic principles:
 3 the rights of the press and the public to receive newsworthy information from a willing speaker;
 4 public scrutiny of the criminal justice system; and the freedom of the press to engage in
 5 newsgathering and protect private conversations with confidential sources.

6 ARGUMENT

7 **I. Section 2705(b) Gag Orders Are A Prior Restraint On Speech And Violate The** 8 **Right To Receive Information.**

9 The § 2705(b) gag orders at issue here impose prior restraints, often indefinite, on
 10 Microsoft’s speech. *See* First Amended Complaint (Compl.) ¶ 24 (Dkt. 28). Amici agree with
 11 Microsoft that these prior restraints threaten Microsoft’s First Amendment speech rights. In
 12 addition, they threaten the news media’s First Amendment right to receive newsworthy
 13 information. Moreover, the newsworthy information at issue here is core First Amendment
 14 speech.

15 **A. The § 2705(b) gag orders at issue here impose a prior restraint on speech.**

16 The Supreme Court has long recognized that a government ban on speech before it
 17 occurs is a prior restraint. *See, e.g., Near v. Minn. ex rel. Olson*, 283 U.S. 697 (1931). Equally well
 18 established is the rule that a prior restraint on speech bears a “heavy presumption against its
 19 constitutional validity.” *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Indeed, a
 20 prior restraint is “the most serious and the least tolerable infringement on First Amendment
 21 rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraints are particularly
 22 oppressive because they prevent the restricted information from being heard or published at all
 23 and are therefore the most direct attack on the marketplace of ideas. *See id.* Amici agree with
 24 Microsoft that the indefinite § 2705(b) gag orders at issue here impose a prior restraint on
 25 Microsoft. *See* Compl. ¶ 24. And these prior restraints are especially concerning because “[t]he
 26 damage can be particularly great when the prior restraint falls upon the communication of news
 27 and commentary on current events.” *See Neb. Press Ass’n*, 427 U.S. at 559.

1 **B. The gag orders also violate the First Amendment right to receive**
 2 **newsworthy information from a willing speaker.**

3 Where a speaker wishes to express information, First Amendment protections apply to
 4 both the speaker and the intended recipient of the speech. *See Va. State Bd. of Pharmacy v. Va.*
 5 *Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[T]he protection afforded [by the First
 6 Amendment] is to the communication, to its source and to its recipients both.”). In other words,
 7 freedom of speech “necessarily protects the right to receive.” *Kleindienst v. Mandel*, 408 U.S. 753,
 8 762-63 (1972). This right to receive information is a separate, independent corollary of the First
 9 Amendment speech and press freedoms. An “informed citizenry” is “vital to the functioning of a
 10 democratic society,” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and thus, “the
 11 First Amendment protects the news agencies right to receive protected speech.” *Davis v. E. Baton*
 12 *Rouge Par. Sch. Bd.*, 78 F.3d 920, 926 (5th Cir. 1996). Indeed, “without some protection for seeking
 13 out the news, freedom of the press could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681
 14 (1972).

15 That constitutional right is impaired by § 2705(b) gag orders, which by their nature stifle
 16 the flow of newsworthy information to media outlets. The result of those often indefinite orders
 17 is to leave the public uninformed and unable to scrutinize its government’s actions.

18 **C. The speech at issue is core First Amendment speech.**

19 The First Amendment right to communicate and the corresponding right to receive those
 20 communications are of the highest order where, as here, the communications concern the
 21 operations of government. The Supreme Court has consistently held that free discussion of
 22 governmental affairs is the core of expressive activity the First Amendment is intended to protect:
 23 “[S]peech concerning public affairs is more than self-expression; it is the essence of self-
 24 government,” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), because “a structural necessity in a
 25 real democracy” is the right of “citizens to know what their Government is up to.” *Nat’l Archives*
 26 *& Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks omitted). That
 27 is why a “core purpose” of the First Amendment is “assuring freedom of communication on

1 matters relating to the functioning of government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S.
2 555, 575 (1980). Those are precisely the matters at issue here.

3 The First Amendment’s “structural role” in our democracy includes not only “the
4 principle that debate on public issues should be uninhibited, robust, and wide-open,” but also the
5 antecedent assumption that valuable public debate ... must be informed.” *Richmond Newspapers*,
6 448 U.S. at 587 (Brennan, J., concurring) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270
7 (1964)). Here, Microsoft and the press seek to inform the public about government surveillance
8 of its citizens’ private communications. The public has grown increasingly concerned as some
9 information about the nature of our government’s surveillance of its own citizens has come to
10 light in the last decade. Such government’s surveillance is properly the subject of robust public
11 debate; such debate is not possible, however, when the public lacks the information to have that
12 debate and have their voices heard on the subject. *Cox*, 420 U.S. at 492 (“[w]ithout the
13 information provided by the press most of us and many of our representatives would be unable to
14 vote intelligently or to register opinions on the administration of government generally”).

15 If the press were allowed to report on § 2703 searches, that reporting would serve as a
16 catalyst for public debate on issues of governmental surveillance, prosecutorial discretion, judicial
17 administration, and proper investigative techniques. But more pressingly, perhaps, news reporting
18 on § 2703 searches would inform a public debate about an individual’s privacy interests in his or
19 her data stored in the cloud. As the Supreme Court has acknowledged, in this new digital age,
20 people typically carry a “cache of sensitive personal information with them” on their cell phones,
21 *Riley v. California*, 134 S. Ct. 2473, 2490 (2014), and increasingly, that information is also stored on
22 the cloud, *id.* at 2491. Only through reporting and public debate can society address the
23 important questions of whether and to what extent legal protections of the physical world apply to
24 the digital domain.

25 Public scrutiny would also help ensure that the government’s widespread use of § 2703 is
26 consistent with the First and Fourth Amendments, the Stored Communications Act, the Privacy
27 Protection Act, and other federal laws and regulations. The government argues that Microsoft

1 can talk generically about “the fact of receipt of a[] [§ 2705(b)] order, the time or place in which
 2 the order was received, or the total number of orders it receives.” *See* Government Brief (Gov’t
 3 Br.) at 16:13-14 (Dkt. 38). But that is not sufficient to shed light on how § 2703 is being used or
 4 misused. It is true that some reporting focuses on big picture stories, such as the sheer number of
 5 gag orders that Microsoft has received. But aggregate numbers tell only a limited part of the story.
 6 Some of the most important and influential reporting focuses on individual instances of
 7 governmental action to shed light on how a government program operates. If reporters cannot
 8 examine how warrants issued under § 2703 are being used in practice and whether, for example,
 9 advocacy groups are being surveilled, certain citizens or organizations are being unfairly or illegally
 10 kept under watch,⁴ or journalists or confidential sources are being targeted,⁵ then the public is
 11 denied one of the most important parts of the story.

12 **II. The § 2705(b) Gag Orders Interfere With The Common-Law Right Of Access.**

13 There is a long-standing American legal tradition that criminal proceedings are
 14 “presumptively open”; in fact, this “tradition of accessibility” was fundamental at common law.
 15 *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605 (1982) (internal quotation marks omitted).
 16 Accordingly, the Supreme Court has recognized a common-law right “to inspect and copy public
 17 records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns Inc.*,
 18 435 U.S. 589, 597 (1978). In recognizing this right, the Ninth Circuit has highlighted the
 19 important role that access plays in informing the public about its government’s actions on issues
 20 of fundamental concern. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)
 21 (“This right is justified by the interest of citizens in keep[ing] a watchful eye on the workings of
 22 _____

23 ⁴ For example, New York City recently settled two lawsuits over allegedly illegal targeted
 24 surveillance of Muslim communities and agreed to change its policy. Colin Moynihan, *A New*
 25 *York City Settlement on Surveillance of Muslims*, *The New Yorker*, Jan. 7, 2016. This surveillance came
 26 to light after a Pulitzer Prize winning story in the Associated Press, *see id.*; such a story could never
 have been written if the only information available to the press was the total number of
 surveillance operations conducted by the NYPD without information on who was being targeted.

27 ⁵ Aggregate numbers would never have revealed the story of the targeting of Associated Press
 reporters in 2013, discussed *infra* § III, which also helped lead to a change in the Department of
 Justice’s news media subpoena policies.

1 public agencies.”) (internal quotation marks omitted). And indeed, the Ninth Circuit has
 2 specifically recognized that “[s]uch vigilance is aided by the efforts of newspapers to publish
 3 information concerning the operation of government.” *Id.* (internal quotation marks omitted).
 4 The widespread use of § 2705(b) gag orders interferes with the common-law right of access and
 5 undermines the very principles upon which that right is based.

6 The right of access includes reasonable access to search warrant materials. In *United States*
 7 *v. Business of Custer Battlefield Museum and Store*, the Ninth Circuit held that “the public has a
 8 qualified common-law right of access to warrant materials after an investigation has been
 9 terminated.” 658 F.3d 1188, 1194 (9th Cir. 2011).⁶ The Court explained that this common-law
 10 right is based on several grounds. Each applies here and supports limiting the use of § 2705(b)
 11 gag orders.

12 First, the Court cited an established tradition of such access after an investigation is
 13 complete. *Id.* “This tradition of openness serves as a check on the judiciary because the public
 14 can ensure that judges are not merely serving as a rubber stamp for the police.” *Id.* (internal
 15 quotation marks omitted). Second, the Ninth Circuit explained, warrant materials are also “often
 16 used to adjudicate important constitutional rights such as the Fourth Amendment protection
 17 against unreasonable searches and seizures.” *Id.* (internal quotation marks omitted). And, finally,
 18 the Court cited the value of the information to the public: “public access to documents filed in
 19 support of search warrants is important to the public’s understanding of the function and
 20 operation of the judicial process and the criminal justice system and may operate as a curb on
 21 prosecutorial or judicial misconduct.” *Id.* (internal quotation marks omitted). This access is
 22 critical because “[p]eople in an open society do not demand infallibility from their institutions, but
 23

24 ⁶ In so holding, the Court joined numerous courts around the country that had recognized that
 25 right. *See, e.g., In re EyeCare Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996); *In re Newsday, Inc.*,
 26 895 F.2d 74, 79 (2d Cir. 1990); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989); *United States v.*
 27 *Wells Fargo Bank Account No. 7986104185*, 643 F. Supp. 2d 577, 583-84 (S.D.N.Y. 2009); *In re*
Application of N.Y. Times Co., 585 F. Supp. 2d 83, 92 (D.D.C. 2008); *Commonwealth v. Fenstermaker*,
 530 A.2d 414, 417-19 (Pa. 1987); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*,
 855 F.2d 569, 575-76 (8th Cir. 1988) (Bowman, J., concurring).

1 it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers*,
2 448 U.S. at 572.⁷

3 *Custer* is squarely applicable to § 2703 warrants and § 2705(b) gag orders. In establishing
4 the structure for issuance of § 2703 warrants and § 2705(b) gag orders, Congress “intended to
5 invoke the term ‘warrant’ with all of its traditional, domestic connotations.” *See In re Warrant to*
6 *Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, ___ F.3d ___, No. 14-2985,
7 2016 WL 3770056, at *11 (2d Cir. July 14, 2016). Indeed, the Government correctly recognizes in
8 its brief that the rules and standards that apply to warrants generally also apply to warrants issued
9 under § 2703. *See generally* Gov’t Br. at 1-25.

10 Thus, under *Custer*, there is a common-law right of press and public access to § 2703
11 warrant materials, at least after an investigation has ended. Because the common-law right of
12 access applies, a “strong presumption in favor of access is the starting point.” *Kamakana*, 447 F.3d
13 at 1178 (internal quotation marks omitted). And “[a] party seeking to seal a judicial record then
14 bears the burden of overcoming this strong presumption by ... articulat[ing] compelling reasons
15 ... that outweigh the general history of access and the public policies favoring disclosure.” *Id.* at
16 1178-79 (internal quotation marks omitted). The government cannot meet that burden here.

17 On one side of the balance, the public policies favoring disclosure here are exceptionally
18 strong: Where the press is constructively barred from accessing criminal proceedings and records
19 because of the gag on the party holding the records, the public, too, has no insight into the
20 workings of the judiciary and prosecutorial functions of government and no ability to scrutinize
21 those processes. *See Richmond Newspapers*, 448 U.S. at 569 (“Without publicity, all other checks are
22 insufficient: in comparison of publicity, all other checks are of small account.”) (quoting 1 J.
23 Bentham, *Rationale of Judicial Evidence* 524 (1827)). The news media’s access to criminal justice
24 information is particularly important in matters concerning government surveillance of individuals
25

26 ⁷ That is why, when the Court discussed this common-law right of access in *Nixon*, it explained
27 that the “interest necessary to support the issuance of a writ compelling access has been found,
for example ... in a newspaper publisher’s intention to publish information concerning the
operation of government.” 435 U.S. at 597-98.

1 who must be presumed innocent until proven guilty. Indeed, “[a] responsible press has always
 2 been regarded as the handmaiden of effective judicial administration, especially in the criminal
 3 field. Its function in this regard is documented by an impressive record of service over several
 4 centuries.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

5 On the other side of the balance, the government cannot come close to meeting its
 6 burden to overcome the strong presumption of disclosure. The government argues that gag
 7 orders are necessary to ensure that “the subject of the investigation does not flee, intimidate
 8 witnesses, threaten others, destroy evidence, or change his or her behavior to thwart the
 9 investigation.” Gov’t Br. at 18:3-4. But most of those justifications do not apply after an
 10 indictment has been returned. And none of them apply after an investigation has ended.⁸ *See*
 11 *Custer*, 658 F.3d at 1194 (finding that concerns such as destruction of evidence or fleeing the
 12 jurisdiction “are not as relevant once an investigation has been terminated”); *Butterworth v. Smith*,
 13 494 U.S. 624, 632 (1990) (“When an investigation ends, there is no longer a need to keep
 14 information from the targeted individual in order to prevent his escape.”). Yet, the statute does
 15 not limit the length of time § 2705(b) gag orders may be kept in place, and in practice, the vast
 16 majority of such orders remain in place indefinitely. Compl. ¶ 16.⁹ Especially after an
 17 investigation has been closed, there is no conceivable government interest to justify the gag orders
 18 that would override the history of access to warrant materials or the compelling benefit of press
 19 and public access to the § 2703 materials at issue here.¹⁰

20 ⁸ Any remaining confidentiality concerns are best addressed through redactions of warrant
 21 materials rather than indefinite gag orders. For example, protecting the identity of informants
 22 “can be accomplished by simply redacting the identity and personal identifiers of the informants.”
 23 *See, e.g., In re Application of N.Y. Times Co.*, 585 F. Supp. 2d at 91.

24 ⁹ In some cases, the warrant materials are sealed indefinitely in combination with an indefinite gag
 25 order. In other cases, the sealing order is lifted but the gag order remains in place indefinitely.
 26 With a gag order in place, the two parties that know about the warrant are Microsoft and the
 27 government. The government does not notify the press or the public about a § 2703 warrant
 when a gag order is in place. And Microsoft is prohibited from doing so. Thus, even if the
 warrant materials are unsealed, the gag order ensures that the information remains obscured from
 public view.

¹⁰ *Custer* reserved the question of whether the common-law right applied to warrants after an
 indictment had been returned but while the investigation was still ongoing. 658 F.3d at 1192 n.3.

1 **III. Section 2705(b) Gag Orders Harm The Public Discourse By Threatening The**
 2 **Confidential Relationships Of Reporters And Their Sources.**

3 Although little is known about § 2703 searches due to the widespread use of gag orders,
 4 Microsoft's experience, detailed in its complaint, indicates that they have a broad sweep. In a
 5 20-month period, the government made more than 6,000 demands on Microsoft alone to search
 6 customer information or data. Compl. ¶ 16. The use of § 2705(b) gag orders is also broad: more
 7 than half of those government demands were accompanied by gag orders. Compl. ¶ 16. Based
 8 on the broad sweep of these searches alone, there exists a real threat that the news media and its
 9 sources are under government surveillance. Sources are less willing to speak to a journalist when
 10 those sources fear that the government may have access to their records or the journalist's
 11 records. Quality reporting depends on interviews with willing and knowledgeable speakers, and as
 12 these sources dry up, journalists are less able to report on issues of public concern.

13 Section 2705(b) was never intended to have these broad detrimental effects. It was passed
 14 decades before cloud computing existed by a Congress that could not have contemplated that
 15 newsgathering would become so heavily dependent on secure communications through
 16 documents and information located in a virtual newsroom on the Internet. The web has become
 17 an increasingly important forum for private communications between reporters and their sources.
 18 Reporters also rely on the Internet and cloud storage services to maintain their contact lists, work
 19 product, and research history.

20 At the same time, the past decade has demonstrated the pernicious and growing reach of
 21 government surveillance of the media. For example, in 2013, the government secretly obtained
 22 the telephone records of more than 100 *Associated Press* reporters, including a list of incoming and
 23 outgoing calls, the duration of each call, and the work and personal phone numbers of individual
 24 reporters. See Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, A.P. (May 13, 2013),

25 _____
 26 That remains an open question in this Circuit. Nothing amici say here should be read to concede
 27 that the common-law right of access does not apply after an indictment has been returned but
 prior to the close of an investigation. Indeed, as noted above, many of the justifications the
 government cites to support its use of § 2705(b) gag orders do not apply after an indictment has
 been returned.

1 <http://tinyurl.com/AP-Phone-Records>. And in 2011, the government obtained a warrant for a
2 Fox News reporter's emails in an attempt to uncover the reporter's emails with a confidential
3 source; to do so, the government claimed that the reporter was an "aider, abettor, and/or co-
4 conspirator" with his source and used "one of the most serious wartime laws in America, the
5 Espionage Act." See Judson Berger, *DOJ Invoked Espionage Act in Calling Fox News Reporter Criminal*
6 *'Co-Conspirator'*, Fox News (May 22, 2013), <http://tinyurl.com/DOJ-Invokes-Espionage-Act>.

7 After the widespread concern about the surveillance of Associated Press and Fox News
8 reporters, the Department of Justice (DOJ) revised its guidelines on subpoenaing news media
9 records. The guidelines are self-imposed policy principles listed among other Departmental
10 "Statements of Policy." 28 C.F.R. § 50.10. The revised guidelines require the government to
11 postpone a search of media records in most cases until "after negotiations with the affected
12 member of the news media have been pursued and appropriate notice to the affected member of
13 the news media has been provided." 28 C.F.R. § 50.10(a)(3). In other words, the revised
14 guidelines "reverse[d]" the previous presumption against notice to the media and created a
15 "presumption of advance notice" to the media. Department of Justice, Report on Review of
16 News Media Policies, July 12, 2013, <http://tinyurl.com/News-Media-Report>, at 2.¹¹

17 The revised DOJ guidelines purport to recognize the importance of "safeguarding the
18 essential role of the free press in fostering government accountability and an open society."
19 28 C.F.R. § 50.10(a)(2). But critically the guidelines also explicitly state that they "do[] not[] create
20 any right or benefit ... enforceable at law or in equity." 28 C.F.R. § 50.10(j). Thus they are only
21 meaningful to the extent DOJ decides to follow them. With the § 2705(b) gag orders in place,
22 however, Microsoft is prohibited from telling its media customers when their data was sought, so
23 the press lacks any ability to police compliance with the guidelines. In other words, the
24 regulations are meaningless if the press never knows about the searches in the first place and thus
25 cannot hold DOJ to account for any failure to comply with its stated principles.

26 _____
27 ¹¹ Even in the extraordinary case where the reporter herself is a "subject or target" of the
investigation, and thus notice may be delayed, the Attorney General retains discretion to direct
that notice be provided. 28 C.F.R. § 50.10(e)(1)(i).

1 In addition, even if the media guidelines were being followed, they only address the use of
 2 law enforcement tools to “seek information from, or records of” the news media, *see*
 3 28 C.F.R. § 50.10(a)(2); they do not cover the records of confidential media sources. And this is
 4 critically important because confidential sources have been at the heart of some of the most
 5 significant news stories of the last two generations, from the Watergate scandal to reporting on
 6 National Security Agency (NSA) wiretapping.¹² And in Amici’s experience, the digital records of
 7 confidential sources often include communications from journalists, drafts of stories and other
 8 media work product, information about other potential leads, and thoughts on future stories.¹³
 9 Because of the gag orders, media and confidential sources alike cannot know if DOJ is searching
 10 the emails of confidential sources. And thus, there is no way to hold the government accountable
 11 to ensure that the rights of the media and its sources are protected.¹⁴

12 If confidential sources have no idea how widespread the surveillance is, they have little
 13 choice but to assume that their communications are being surveilled and to refrain from talking to
 14 reporters in order to protect themselves. And if the extent of the surveillance and whose records
 15 are being swept up remains under seal, journalists cannot discover whether their own records or
 16 the records of their sources are being targeted. Instead, journalists, too, must adjust their behavior
 17 in order to protect their sources. As veteran national security journalist R. Jeffrey Smith
 18 explained, “I worry now about calling somebody because the contact can be found out through a
 19 check of phone records or e-mails.” Leonard Downie Jr. & Sara Rafsky, *The Obama Administration*

20 ¹² See David von Drehle, *FBI’s No. 2 Was ‘Deep Throat’: Mark Felt Ends 30-Year Mystery of The Post’s*
 21 *Watergate Source*, Wash. Post (June 1, 2005), <http://tinyurl.com/Wash-Post-Watergate> (Watergate);
 22 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16,
 2005), <http://tinyurl.com/NSA-Wiretapping> (NSA Wiretapping).

23 ¹³ Even where the government seeks only non-content information such as “identifying
 24 information about individuals with whom a suspect is communicating,” *see* Gov’t Br. at 5:1-2, the
 25 identity of reporters’ sources can be revealed. To a reporter and her source, such non-content
 identifying information can be just as important as content information, and its disclosure just as
 damaging to the reporter-source relationship.

26 ¹⁴ Microsoft ordinarily does not know if the email account that is the subject of a § 2703 warrant
 27 belongs to a journalist or a confidential source. Nor, for example, does it know if the individual
 who is the subject of the warrant is engaged in advocacy speech. *See supra* § I. So Microsoft is not
 in a position to challenge the gag orders on those bases either.

1 *and the Press: Leak Investigation and Surveillance in Post-9/11 America*, Comm. to Protect Journalists
2 (Oct. 10, 2013), <http://tinyurl.com/Leak-Investigation>. And this change in behavior is not
3 limited to a few journalists or sources. The Privacy and Civil Liberties Oversight Board, an
4 executive branch body, recently found that reporters and their sources have shifted their behavior
5 in response to reports of widespread surveillance, even though it was unclear if their individual
6 records were being surveilled. The Board concluded that “such a shift in behavior is entirely
7 predictable and rational,” and that the results of this “chilling effect ... among them greater
8 hindrances to political activism and a less robust press—are real and will be detrimental to the
9 nation.” Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program
10 Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign
11 Intelligence Surveillance Court, Jan. 23, 2014, at 164, <http://tinyurl.com/PCLOB-Report>.

12 Amici have witnessed firsthand the real, substantive chilling effects on reporter-source
13 communications caused by fears of widespread unaccountable surveillance; these fears cannot be
14 dispelled or remedied while the gag orders remain in place. If the press is not able to adequately
15 perform its duties, then a vital driver of democratic self-government, the Fourth Estate, cannot
16 serve its critical function as a check on state power. As Thomas Jefferson wrote, “[o]ur liberty
17 depends on the freedom of the press, and that cannot be limited without being lost.” *Neb. Press*
18 *Ass’n*, 427 U.S. at 548 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954)). These gag
19 orders significantly limit the ability of the press to report on topics of public concern and,
20 accordingly, they threaten the liberty of the American people.

21 CONCLUSION

22 For the foregoing reasons, the Court should deny the government’s motion to dismiss.
23
24
25
26
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Respectfully submitted,

By: s/Philip S. McCune
By: s/Jessica L. Goldman
Philip S. McCune, WSBA # 21081
Jessica L. Goldman, WSBA # 21856
SUMMIT LAW GROUP PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
Telephone: (206) 676-7000
E-mail: philm@summitlaw.com
E-mail: jessicag@summitlaw.com

Bruce Brown**
Gregg Leslie
Selina MacLaren
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW
Suite 1250
Washington, DC 20005

Respectfully submitted,

By: s/Mark S. Parris
Mark S. Parris, WSBA # 13870
ORRICK, HERRINGTON &
SUTCLIFFE LLP
701 5th Avenue
Suite 5600
Seattle, WA 98104
Telephone: (206) 839-4300
Fax: (206) 839-4301
E-mail: mparris@orrick.com

Robert M. Loeb**
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Aaron W. Scherzer**
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 W. 52nd St
New York, NY 10019

***Pro Hac Vice Applications Will Be Filed Under Separate Cover*

*Counsel for Amici**

September 2, 2016

* The Associated Press, Fox News Network, LLC, and the Association of American Publishers, Inc. are only represented by Summit Law Group PLLC and The Reporters Committee for Freedom of the Press. All other organizations are jointly represented by Orrick, Herrington & Sutcliffe LLP, Summit Law Group PLLC, and The Reporters Committee for Freedom of the Press.

ADDENDUM

The individual Amici are:

- Reporters Committee for Freedom of the Press
- The Seattle Times Company
- The Associated Press*
- Fox News Network, LLC*
- National Public Radio, Inc.
- The Washington Post
- Association of Alternative Newsmedia
- American Society of News Editors
- Association of American Publishers, Inc.*
- First Amendment Coalition
- First Look Media Works, Inc.
- International Documentary Association
- Investigative Reporting Workshop at American University
- The McClatchy Company
- The Media Institute
- National Association of Black Journalists
- The National Press Club
- National Press Photographers Association
- Newspaper Association of America
- Reporters Without Borders
- Tully Center for Free Speech
- Freedom of the Press Foundation

* The starred organizations are only represented by Summit Law Group PLLC and The Reporters Committee for Freedom of the Press. All other organizations are jointly represented by Orrick, Herrington & Sutcliffe LLP, Summit Law Group PLLC, and The Reporters Committee for Freedom of the Press.

- 1 • California Newspaper Publishers Association
- 2 • The Center for Investigative Reporting
- 3 • Online News Association
- 4 • Radio Television Digital News Association
- 5 • The E.W. Scripps Company
- 6 • Investigative Reporters and Editors
- 7 • MPA – The Association of Magazine Media
- 8 • Society of Professional Journalist

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record. I further certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant:

Stephen P. Wallace
1116 Sheffer Road – Apt. F
Aurora, IL 60505

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: s/Mark S. Parris

Mark S. Parris, WSBA # 13870

ORRICK, HERRINGTON &

SUTCLIFFE LLP

701 5th Avenue

Suite 5600

Seattle, WA 98104

Telephone: (206) 839-4300

Fax: (206) 839-4301

E-mail: mparris@orrick.com

Counsel for Amici