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**New York Supreme Court  
Appellate Division—First Department**

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Index No. 100580/2013

In the Matter of the Application of

**MICHAEL GRABELL,**

*Petitioner-Appellee,*

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

— against —

**NEW YORK CITY POLICE DEPARTMENT,**

**RECEIVED**  
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**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS AND 21 MEDIA ORGANIZATIONS\* IN SUPPORT OF  
RESPONDENT**

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**OTHER AUTHORITIES**

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## IDENTITY OF AMICI CURIAE<sup>1</sup>

*Amici curiae* are the Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Associated Press, BuzzFeed, The Center for Investigative Reporting, The Daily Beast Company LLC, Daily News, LP, First Look Media, Inc., Gannett Co., Inc., Gawker Media LLC, Investigative Reporting Workshop at American University, MediaNews Group, Inc., MPA – The Association of Magazine Media, National Press Photographers Association, National Public Radio, Inc., NBCUniversal Media, LLC, including WNBC New York, The New York Times Company, North Jersey Media Group Inc., Online News Association, The Seattle Times Company, Society of Professional Journalists, and the Tully Center for Free Speech. *Amici* are described in more detail in Appendix A.

As representatives and members of the news media, *amici* frequently rely on state and federal freedom of information laws, including New York’s Freedom of Information Law (“FOIL”), to gather information about the government and report on matters of vital public concern. *Amici* thus have a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability.

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<sup>1</sup> All parties to the appeal have consented to the filing of this brief.

The Supreme Court, below, correctly interpreted FOIL as requiring the New York Police Department (“NYPD”) to release public records requested by Appellee in response to a FOIL request. *Amici* urge this Court to affirm the Supreme Court’s decision for the reasons set forth in Appellee’s brief, and write separately (1) to provide the Court with additional information about the nature and extent of the media’s reporting on law enforcement use of backscatter x-ray technology, and (2) to emphasize the public’s powerful interest in access to records and information concerning the NYPD’s use of such technology, as well as the importance of access to state law enforcement records generally.

## INTRODUCTION AND SUMMARY OF ARGUMENT

By this appeal, the New York Police Department (“NYPD”) asks this Court to set aside a decision of the Supreme Court requiring it to release to journalist Michael Grabell (“Appellee”) public records concerning the NYPD’s use of Z Backscatter Vans, a controversial x-ray technology, under New York’s Freedom of Information Law, N.Y. Pub. Off. Law §§ 84–90 (“FOIL”). The decision below amounts to a straightforward application of FOIL’s requirements, and the Supreme Court below correctly found that “repeated, conclusory statements” made by the NYPD, without any factual support, failed to justify its refusal to comply with its statutory obligations. *Grabell v. New York City Police Dep’t*, 47 Misc.3d 203, 214 (Sup. Ct. N.Y. Cnty. 2014). For all the reasons set forth in Appellee’s brief, this Court should affirm the Supreme Court’s decision. *Amici* write separately to provide the Court with additional background concerning the information that has already been made public by the news media and others concerning backscatter x-ray technology, and to emphasize the public interest in access to state law enforcement records generally and, specifically, the records at issue here.

FOIL exists to facilitate public access to government information and ensure public oversight of government agencies and officials. *See, e.g.*, FOIL § 84 (“The more open a government is with its citizenry, the greater the understanding and participation of the public in government.”). In order to make government



information accessible to the public, a government agency in receipt of a request for public records under FOIL must produce requested records, if they exist, unless a specific statutory exemption applies authorizing the agency to withhold the requested records or the portions thereof that are exempt from disclosure under applicable law. *See* FOIL § 87(2). FOIL’s “exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government.” *Matter of Data Tree, LLC v. Romaine*, 9 N.Y. 3d 454, 462 (2007). This requirement that FOIL’s exemptions be interpreted narrowly is particularly important when the records sought implicate government activity of public interest and concern.

Members of the news media routinely rely on FOIL in order to gather news and information about the government, including law enforcement agencies like the NYPD, for the benefit of the public. Here, the NYPD denied the request of Appellee, a journalist, by asserting broad, generalized claims of a purported need for absolute secrecy despite the fact that numerous articles and publicly available documents discuss, in detail, technical and other information about Z Backscatter Vans. The nature and scope of reporting on these vans, as well as on other forms of backscatter x-ray technology, belie any claim by the NYPD that release of the records at issue in this case—which relate to policies regarding use of the vans, their cost, and the health risks they may pose to the public—would jeopardize

public safety or reveal criminal investigative techniques. To the contrary, the information already available to the public, and the news media's reporting on this technology, only highlight the public's strong interest in access to these records.

"The premise of FOIL is that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."

*Newsday, Inc. v. State DOT*, 5 N.Y.3d 84, 88 (2005) (citations and quotations omitted). The Supreme Court's decision, below, properly interpreted FOIL and, for the reasons set forth herein and in Appellee's brief, this Court should affirm.

### ARGUMENT

#### **I. The NYPD's use of the Z Backscatter Van is a matter of significant public interest, and has been the subject of extensive reporting.**

Access to public records concerning the NYPD's use of the Z Backscatter Van is necessary for journalists to keep the citizens of New York informed about an important matter of public interest and concern. Law enforcement use of backscatter x-ray technology has been the subject of widespread and extensive reporting in the media, which has, in turn, provoked public debate nationwide and abroad, and prompted some jurisdictions and law enforcement agencies to establish new or different rules governing the use of such technology. The Supreme Court, below, correctly rejected the NYPD's broad assertions that the records requested by Appellee are exempt from disclosure under FOIL. Not only do the NYPD's arguments ignore the significant amount of information that is already publicly

available regarding backscatter x-ray technology—including detailed technical and operational information—they fail to take into account the public’s strong interest in obtaining information about, among other things, the health risks associated with use of the Z Backscatter Van.

**A. Technical information about the Z Backscatter Van is widely available.**

While the NYPD asserts, without explanation, that the release of *any* information about the Z Backscatter Van would purportedly “create enormous vulnerability for its counterterrorism program,” Appellant’s Brief, p. 5, detailed technical information about backscatter x-ray technology, including the Z Backscatter Van, is already available to the public. Indeed, as discussed in more detail below, members of the news media, as well as American Science & Engineering (AS&E), the manufacturer of the Z Backscatter Van, have published extensive, technical information about the operations, vulnerabilities, and health risks of the technology at issue here. *See, e.g.*, AS&E, Mobile | ZBV (2015), <http://bit.ly/1JyYCHC> (stating that the van creates “easy-to-read image[s]” that “quickly and clearly reveal[] threats like explosives, drugs, currency, and trade-fraud items such as alcohol and cigarettes”). The nature and extent of this publicly available information belies the NYPD’s claims that all information concerning its

use of the Z Backscatter Van is exempt from disclosure under FOIL because its release may increase the risk of a terrorist attack.<sup>2</sup>

First, the amount of highly technical information already publicly available about the Z Backscatter Van, and similar technologies, undermines the NYPD's assertion that "disclosing the capacity of the vans' x-rays would expose the limitations of the technology." Appellant's Brief, p. 32. AS&E has published extensive information regarding its Z Backscatter Van technology. *See, e.g.*, AS&E, Mobile | ZBV (2015), <http://bit.ly/1JyYCHC>. Its application for a patent for that technology contains significant information about its technical aspects and limitations. For example, the patent application acknowledges that "it can sometimes be difficult to image organic materials when they are placed within or behind significant amounts of high-Z material, such as steel. An example of this might be a small quantity of explosive concealed in the trunk of a vehicle." U.S. Patent Application No. 20130343520 ¶ 10 (filed Aug. 27, 2013). AS&E's patent application also contains detailed images of the features of the van and explains, among other things, that: "The source of penetrating radiation may include . . . an x-ray tube emitting radiation at energies below approximately 250 keV. The

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<sup>2</sup> The NYPD's exclusive focus on purported "counterterrorism" concerns also ignores the fact that, as AS&E's documentation regarding the Z Backscatter Van technology makes clear, the technology can and is used for routine, non-terrorism-related criminal investigations. *Id.*; *see also* Appellant's Brief, p. 6 ("The Z-backscatter van is a mobile x-ray unit used to scan vehicles or buildings for evidence of explosives, drugs, or other organic or nonorganic material.").

source of penetrating radiation may include a rotating chopper wheel emitting radiation to one or both sides of the enclosed conveyance.” *Id.*

In addition, members of the news media have reported on “glaring vulnerabilities” in the backscatter x-ray body scanners that were previously deployed in airports, which use the same technology as the Z Backscatter Vans. Andy Greenberg, *Researchers Easily Slipped Weapons Past TSA’s X-Ray Body Scanners*, *Wired* (Aug. 20, 2014), <http://wrd.cm/1thh4AC>. And stories published in the press and in scientific publications have discussed other aspects, including limitations, of the Z Backscatter Van technology in detail. *See, e.g.*, Alex Chalmers, *Abstract: three applications of backscatter x-ray imaging technology to homeland defense*, *Proc. SPIE 5778*, 989 (Aug. 5, 2005), available at <http://bit.ly/1LY719s> (“An overview of the x-ray imaging subsystems is provided as well as sample images from each system. Key features such as x-ray safety, throughput and detection are discussed.”); Andy Greenberg, *Full-Body Scan Technology Deployed In Street-Roving Vans*, *Forbes* (Aug. 24, 2010, 12:00 PM), <http://onforb.es/1LYa0yx> (“[T]he ZBV scans don’t capture nearly as much detail of human bodies as their airport counterparts.”); Diane Macedo, *X-Ray Vans: Security Measure, or Invasion of Privacy?* *Fox News* (Oct. 22, 2010), <http://fxn.ws/1O52gkw> (“Once equipped, the van—which looks like a standard delivery van—takes less than 15 seconds to scan a vehicle; it can be operated

remotely from more than 1,500 feet and can be equipped with optional technology to identify radioactivity as well.”).

In 2013, *Popular Mechanics* published a report that detailed many of the operational features of the Z Backscatter Van. The article pointed out that “[o]rganic materials such as hidden drugs, even if hidden beneath false floors or in barrels, show up as bright shapes on a screen in the cabin.” Kiona Smith-Strickland, *The Border Patrol’s Go-To Gadgets*, *Popular Mechanics* (Oct. 25, 2013, 8:00 AM), <http://bit.ly/1jrGoD9>. *Popular Mechanics* also reported that the Z Backscatter Vans used by the Border Patrol were equipped with radar and monitors that “display[] a map of the area, flecked with green dots where the radar detects movement.” *Id.* A Border Patrol agent reportedly told *Popular Mechanics* “that based on the location and size of the dots, he can usually tell whether movement is caused by a vehicle or foot traffic.” *Id.*

In short, NYPD’s assertion that release of the records would enable criminals and terrorists to circumvent NYPD’s surveillance efforts ignores the large amount of detailed, publicly available information about the Z Backscatter Van’s operational specifications and vulnerabilities. NYPD’s argument that all the records at issue here are necessarily exempt under FOIL should be scrutinized in light of the information about that technology that is already in the public domain.

**B. The health risks of backscatter x-ray technology generally, and of the Z Backscatter Van in particular, have been widely reported on, and are of substantial public interest and concern.**

Backscatter x-ray technology has long been controversial because of the potential health risks related to exposure to ionizing radiation. In 2010, several news outlets reported that a number of scientists disagreed with the United States government's assessment that backscatter x-ray body scanners deployed in airports were safe, contending that the technology posed unacceptable public health risks. Marnie Hunter, *Airport body-scan radiation under scrutiny*, CNN (Nov. 12, 2010, 11:19 AM), <http://cnn.it/1RcfZEv>; *see also* Richard Knox, *Scientists Question Safety Of New Airport Scanners*, NPR (May 17, 2010, 9:00 AM), <http://n.pr/1LKVkXS>; Rebecca Boyle, *New X-Ray Security Scanners Present Radiation Risk, Scientists Say*, Popular Science (May 17, 2010), <http://bit.ly/1MC0YKr>. And, in 2011, CNN reported on disagreement within the medical community regarding the safety of the body scanners. Elizabeth Cohen, *Airport security scans: What would your doctor do?*, CNN (Mar. 31, 2011, 11:23 AM), <http://cnn.it/1QJdoRA>.

Public concern over the potential health risks associated with the use of backscatter x-ray technology was raised again in 2011 when the union representing Transportation Security Administration (TSA) workers at Boston's Logan Airport complained about a potential "cancer cluster" among airport workers, and asked to

be allowed to wear radiation-monitoring devices. Frances Romero, *Did Airport Scanners Give Boston TSA Agents Cancer?* Time (June 30, 2011), <http://ti.me/1FxZBx3>. Shortly thereafter, the European Commission prohibited the use of airport security scanners that utilized backscatter x-ray technology “[i]n order not to risk jeopardising citizens’ health and safety.” European Commission, *Aviation security: Commission adopts new rules on the use of security scanners at European airports* (Nov. 14, 2011), <http://bit.ly/1O51nYZ>.

The following year, a Marquette University study based on data made available by the TSA estimated that the radiation doses from backscatter x-ray airport scanners reached organs below the skin, but were below recommended health standards. *Marquette University study shows radiation from airport scanners extends into organs*, Milwaukee Business Journal (June 11, 2012, 10:51 AM), <http://bit.ly/1Jza329>. Approximately two months later, *The New York Times* reported that the TSA did not regularly conduct radiation safety surveys in response to service calls concerning mechanical problems with the body scanners. Roni Caryn Rabin, *X-Ray Scans at Airports Leave Lingering Worries*, N.Y. Times (Aug. 6, 2012, 5:26 PM), <http://nyti.ms/1Jz9IMH>.

Technical information about the health risks of x-ray backscatters in airports is widely available. In 2012, the journal *Medical Physics* published a dialogue between two scientists arguing for and against the proposition that “[b]ackscatter



x-ray machines at airports are safe.” Elif Hindié, David J. Brenner, *Point/Counterpoint: Backscatter X-Ray Machines at Airports Are Safe*, 39 Med. Phys. 4649 (Aug. 2012) (estimating, based on publicly available data, that a single body scan is “associated with a range of roughly 0.015–0.1” Sieverts).

AS&E’s patent for its “X-Ray Backscatter Detection System” also contains a detailed discussion of “the conflicting requirements of image quality and health risk,” and note that “the optimum X-ray flux and size of the scanning X-ray beam can be derived” from the optimum radiation dose. U.S. Patent No. 5,181,234 (Jan. 19, 1993). Furthermore, AS&E’s own patent application for the Z Backscatter Van acknowledges that radiation doses depend on how the technology is used. X-Ray Backscatter Mobile Inspection Van, U.S. Patent Application No. 20130343520 (filed Aug. 27, 2013) (“That exposure time is typically in the range of microseconds, *depending on the design and the application*, and yields an entrance exposure to the scanned object that constitutes a low dose to the object also means that there is little radiation available to scatter into the environment, so the doses to operators and other bystanders is correspondingly low.”) (emphasis added).

Backscatter x-ray body scanners were removed from U.S. airports in 2013, but a recent study found that the scanners complied with applicable standards regarding exposure to radiation. National Materials and Manufacturing Board and Nuclear and Radiation Studies Board, *Airport Passenger Screening Using*

*Backscatter X-Ray Machines: Compliance With Standards 2* (2015), available at <http://www.nap.edu/21710>. The study also notes that “TSA is currently evaluating second-generation X-ray backscatter AITs [“advanced imaging technology”] manufactured by [AS&E],” manufacturer of the Z Backscatter Van. *Id.* at 1. The study’s safety findings have garnered attention from the press and the public. *See, e.g.,* Bart Jansen, *Scientists: TSA scanners didn’t zap travelers with too much radiation*, USA Today (Sept. 29, 2015, 1:21 PM), <http://usat.ly/1FAuj8O>; Julia Appleby, *Airports’ Backscatter Scanners Met Radiation Standards, Panel Says*, NPR (Sept. 29, 2015, 1:35 PM), <http://n.pr/1WvCLKq>.

National news outlets have also reported on the health risks posed by Z Backscatter Vans in particular. *See, e.g.,* Curt Prendergast, *Feds to fly in radiation expert*, Nogales International (Sept. 12, 2014), <http://bit.ly/1FG4DHT>; Macedo, *supra* (discussing potential health hazards of the Vans). And the records at issue in this case will permit Appellee to report further on the issues of radiation exposure and health risks related to backscatter x-ray technology that have drawn so much public attention. *See* Michael Grabell, *Judge Orders NYPD to Release Records on X-ray Vans*, ProPublica (Jan. 9, 2015, 1:38 PM), <http://bit.ly/1tSXybm>. As Richard Tofel, president of ProPublica, reportedly stated to Appellee, the records at issue in this case contain “information that could affect public health and that has certainly cost taxpayers a lot of money.” *Id.*

Against this background, NYPD's contention that any release of information concerning potential health risks of the Z Backscatter Van could "allow potential terrorists to exploit any limitations in the van's x-ray capabilities creating a danger to life and safety" must be viewed in light of the information that is already publicly available.

**II. FOIL is an important tool for keeping the public informed about the activities of state and local law enforcement agencies.**

Journalists frequently use FOIL to gather news and report on matters of significant importance to the citizens of New York. *See* FOIL § 84 (stating that "government is the public's business and [] the public, individually and collectively and *represented by a free press*, should have access to the records of government in accordance with the provisions of this article") (emphasis added). Controversial law enforcement technologies and techniques are precisely the type of issue about which the public requires "sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities." *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). While, for all the reasons set forth above, the public has a strong interest in the particular records at issue in this case, the citizens of New York also generally have a strong interest in access to information about the NYPD's activities.<sup>3</sup>

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<sup>3</sup> Transparency is particularly beneficial with respect to the NYPD, the largest municipal police force in the United States. The NYPD has a history of failing to comply with its obligations under FOIL. *See* James Barron, *Times Sues City Police, Saying Information Has Been Illegally Withheld*, N.Y. Times (Dec. 21, 2010) ("The Times said

Time and time again, FOIL has proven itself to be an invaluable tool for ensuring that the citizens of this State are informed, through the news media, about the actions of law enforcement agencies and officers. For example, in 2014 a reporter used FOIL requests to gain access to information about a disciplinary trial of a NYPD officer that shed light on the use of chokeholds, and the role of the Civilian Complaint Review Board. Jon Campbell, *'I was choked by the NYPD': New York's Chokehold Problem Isn't Going Away*, The Village Voice (Sept. 23, 2014), <http://perma.cc/JZ53-7FYH>. FOIL played a particularly important role in that reporting, as most other information about the prevalence of chokeholds is not available to the public. *Id.*

FOIL was also recently used to obtain records showing that New York City paid more than \$428,000,000 to settle more than 10,000 civil rights lawsuits brought against the NYPD since 2009. Caroline Bankoff, *The City Has Paid Almost Half a Billion Dollars in NYPD-Related Settlements Over the Past 5 years*, N.Y. Magazine (Oct. 12, 2014), <http://perma.cc/B65G-G2NM>. And records released under FOIL showed that seven of the top ten most-sued officers were assigned to a Staten Island narcotics unit that covers the same area where Eric Garner died. Barry Baddock, Rocco Parascandola, Sarah Ryley, & Dareh

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the [NYPD's] handling of the requests reflected a pattern and practice by which the police avoided providing material that the State Freedom of Information Law said must be released."); *see also* CJ Ciaramella, *Secrets of the NYPD*, Salon.com (May 8, 2013), <http://perma.cc/27KH-9TPN> (reporting that the NYPD routinely ignores a third of all FOIL requests it receives).

Gregorian, *Staten Island, borough where Eric Garner died, has highest number of most-sued NYPD officers*, N.Y. Daily News (Jul. 28, 2014), <http://perma.cc/223K-PURV>. Such information is invaluable for the citizens of New York, who can use it to knowledgeably participate in the democratic process. *See, e.g.*, Marc Santora, *Mayor de Blasio Announces Retraining of New York Police*, N.Y. Times (Dec. 4, 2014), <http://nyti.ms/1FUsvDa> (noting that “[w]hen Mr. de Blasio was running for mayor, he promised sweeping reforms of the Police Department . . .”).

FOIL has also been an important tool for obtaining information that allows the public to understand and oversee how the NYPD trains its officers and interacts with the public. For example, a FOIL request submitted by a reporter in 2012 revealed that the NYPD showed a racist anti-Muslim film to almost 1,500 police officers as part of their training. Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. Times (Jan. 23, 2012), <http://nyti.ms/1mOC8IV>. When news first broke that the NYPD had been screening that film for trainees, a top official said it had been “mistakenly screened ‘a couple of times’.” *Id.* But documents obtained under FOIL told a different story: The NYPD had run the film “on a continuous loop” for between three months and one year of training. *Id.*

Reporters have also used FOIL to report valuable information about the shift of military equipment from federal to state and local police forces. FOIL requests revealed, for example, that New York law enforcement agencies have received

nearly 300 assault rifles through the Pentagon's 1033 program, as well as three tracked armored vehicles, two cargo planes, six helicopters, and more than 150 military trucks and Humvees. Shawn Musgrave, *New data provides first detailed look at military gear held by New York law enforcement agencies*, The N.Y. World (Oct. 14, 2014), <http://perma.cc/2L97-6FHR>. The NYPD in particular obtained four armored trucks valued at \$65,000 each, and two "armored mortar carriers" valued at more than \$200,000 each. *Id.* As a result of public scrutiny of these kinds of military equipment transfers to local law enforcement agencies, President Obama recently announced that the Pentagon would limit the types of military equipment that can be obtained by local law enforcement. Radley Balko, *Obama moves to demilitarize America's police*, The Wash. Post (May 18, 2015), <http://perma.cc/9NJL-6BLS>.

These stories represent only a handful of examples from the countless pieces of important journalism that FOIL has made possible. From raising questions about the accuracy of criminal convictions,<sup>4</sup> to showing the inefficiency of Cooper's Law,<sup>5</sup> to revealing information about the NYPD's massive video surveillance network,<sup>6</sup> to forcing the NYPD to release information about civilian

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<sup>4</sup> Jeff Morganteen, *The NYPD's secrecy weapon*, The N.Y. World (Aug. 2, 2013), <http://perma.cc/R79B-BR3S>.

<sup>5</sup> Daniel Fitzsimmons, *The Flaws in Cooper's Law*, StrausMedia (Jun. 10, 2015), <http://perma.cc/WC76-6WBL>.

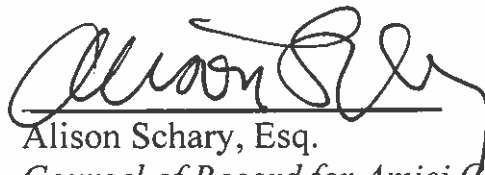
<sup>6</sup> Ali Winston, *Secrecy Shrouds NYPD's Anti-Terror Camera System*, CityLimits.org (Apr. 26, 2010), <http://perma.cc/SW5D-G4MK>.

shootings,<sup>7</sup> the list of what FOIL has brought to light for the public goes on<sup>8</sup> and on.<sup>9</sup> *Amici* and the citizens of New York have a compelling interest in ensuring that any exemptions from disclosure under FOIL asserted by law enforcement entities are, as the statute requires, interpreted narrowly.

### CONCLUSION

For the reasons stated herein and in Appellee's brief, this Court should affirm the decision of the Supreme Court.

Respectfully submitted,



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<sup>7</sup> Al Baker, *Judge Orders City to Release Reports on Shots Fired by Police at Civilians Since 1997*, N.Y. Times (Feb. 22, 2011), <http://www.nytimes.com/2011/02/23/nyregion/23shootings.html>.

<sup>8</sup> Shawn Musgrave, *NYPD Social Media Policy Allows Catfishing—With the Proper Paperwork*, The Daily Beast (Feb. 5, 2015), <http://perma.cc/YVL6-PC7A>.

<sup>9</sup> Patience Haggin, *Law School Study Alleges NYPD Overstepped its Power during Occupy Protests*, Time (Jul. 30, 2012), <http://perma.cc/9B3Z-Z93T>.

## PRINTING SPECIFICATION STATEMENT

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## APPENDIX A: DESCRIPTIONS OF *AMICI*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

The Daily Beast was founded in 2008 as the vision of Tina Brown and IAC Chairman Barry Diller. Curated to avoid information overload, the site is dedicated to breaking news and sharp commentary. Tina Brown, former editor of Tatler, Vanity Fair, The New Yorker & Talk, author of the 2007 NY Times best-seller The Diana Chronicles and founder of the annual Women in the World summit, serves as editor-in-chief of the site which regularly attracts over 16 million unique online visitors a month and is the winner of two consecutive Webby awards for 'best news' site.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the sixth-largest paper

in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 22 million unique visitors each month.

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

Gannett Co., Inc. is an international news and information company that publishes 93 daily newspapers in the United States, including The El Paso Times and USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of 9 million readers and the websites associated with the company's publications serve online content to 95 million unique visitors each month.

Gawker Media LLC is the publisher of some of the web's best-loved brands and communities, including the eponymous Gawker, the gadget sensation Gizmodo, and the popular sports site Deadspin. Founded in 2002, Gawker's sites reach over 100 million readers around the world each month. Gawker Media LLC is privately held and wholly owned by privately held Gawker Media Group, Inc. No publicly held corporation holds an interest of 10% or more in Gawker Media LLC.

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](http://investigativereportingworkshop.org) about government and corporate

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

MediaNews Group's more than 800 multi-platform products reach 61 million Americans each month across 18 states.

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 politics, religion, sports, industry, 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 approximately 7,000 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.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

NBCUniversal Media, LLC is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming, including WNBC New York. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline NBC" and "Meet the Press."

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

North Jersey Media Group Inc. (“NJMG”) is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state’s second-largest newspaper, and the *Herald News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County’s premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Online News Association (“ONA”) is the world’s largest association of online journalists. ONA’s mission is to inspire innovation and excellence among journalists to better serve the public. ONA’s more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

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

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