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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
NEW YORK KADA 8601.0 12 1957678 01. N

NATIONAL SECURITY AGENCY and CHIEF OF THE CENTRAL SECURITY SERVICE, ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, CHARLES T. HAGEL, in his official capacity as SECRETARY OF DEFENSE, ROBERT S. MUELLER, III, in his official capacity as DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICUS CURIAE* PEN AMERICAN CENTER, INC.
IN SUPPORT OF APPELLANTS**

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

AMERICAN CIVIL LIBERTIES
UNION;
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION; NEW YORK CIVIL
LIBERTIES UNION; and NEW YORK
CIVIL LIBERTIES UNION
FOUNDATION,

Appellants,

- against -

JAMES CLAPPER, in his official
capacity as Director of National
Intelligence; KEITH B. ALEXANDER,
in his official capacity as Director of the
National Security Agency and Chief of
the Central Security Service; CHARLES
T. HAGEL, in his official capacity as
Secretary of Defense; ERIC H. HOLDER,
in his official capacity as Attorney
General of the United States; and
ROBERT S. MUELLER III, in his
official capacity as Director of the Federal
Bureau of Investigation,

Appellees.

No. 14-42-cv

(District Court Docket
No. 13 Civ. 3994 (WBP))

**PEN AMERICAN CENTER,
INC.'S RULE 26.1
CORPORATE DISCLOSURE
STATEMENT**

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate
Procedure, counsel for *Amicus Curiae* PEN American Center, Inc. hereby certifies
as follows: PEN American Center, Inc. is a private non-governmental not-for-

profit corporate party, with no parent corporation. No publicly held company owns stock in PEN American Center, Inc.

Dated: March 13, 2014

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INTEREST OF AMICUS CURIAE

call made or received in the United States intrudes upon a personal zone of privacy that is essential to freedom of expression and association. The District Court's decision dramatically undervalues individuals' expectations of privacy and misses the impact that the mass collection of such detailed, highly personal information can have – and does have – on freedom of expression.

A recent survey of writers commissioned by PEN confirms that the impact of this intrusion is far from hypothetical: writers have changed their behavior because they know the government is recording information about all their calls. Writers are curtailing communication with sources and colleagues; they are avoiding writing about certain topics; and they are not pursuing research they otherwise would. *See* Section II. B. 3. below.

Over the last century, American writers have been the targets of government surveillance and even persecution, often in the name of national security. Abuses have occurred not only during the McCarthy era and J. Edgar Hoover's reign at the FBI, but in every administration through the present day. That history deepens the apprehensions of writers at the NSA's mass recording of telephone metadata.

The expectation of privacy that permits the free flow of ideas is essential to

for persecution and the fear of reprisals. When known, surveillance fosters a climate of self-censorship that further harms free expression.

The Declaration then sets out the implications of this principle for governments around the world:

b. As a general rule, governments should not seek to access digital communications between or among private individuals, nor should they monitor individual use of digital media, track the movements of individuals through digital media, alter the expression of individuals, or generally surveil individuals.

c. When governments do conduct surveillance – in exceptional circumstances and in connection with legitimate law enforcement or national security investigations – any surveillance of individuals and monitoring of communications via digital media must meet international due process laws and standards that apply to lawful searches, such as obtaining a warrant by a court order.

d. Full freedom of expression entails a right to privacy; all existing international laws and standards of privacy apply to digital media, and new laws and standards and protections may be required.

e. Government gathering and retention of data and other

II. THE IMPACT OF MASS GOVERNMENT SURVEILLANCE ON THE CRITICAL ZONE OF PRIVACY NEEDED FOR FREE EXPRESSION

To make original contributions to public discourse, writers must be confident that they are protected by a zone of privacy. The Constitution protects that zone of privacy. As the Foreign Intelligence Surveillance Court (“FISC”) that issued the Order at issue in this case has explained, “[a] person’s ‘papers’ are among the four items that are specifically listed in the Fourth Amendment as subject to protection against unreasonable search and seizure. Whether they are transmitted by letter, telephone or email, a person’s private communications are akin to personal papers.” *See* Memorandum Opinion of the United States Foreign Intelligence Surveillance Court at 16 n.14 (Oct. 3, 2011) (“FISC Opinion”), at 74-75.³ The freedom to communicate with whomever one chooses, away from the prying eyes of the state, is an essential condition for creativity and critical writing, and especially for the expression of dissent.

Our Fourth Amendment rights to freedom from intrusion are bound closely to our rights under the First Amendment to freedom of association and freedom of expression. *See, e.g., Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 314 (1972) (“The price of lawful public dissent must not be a dread of subjection to an

³ Available at <http://www.scribd.com/doc/162016974/fisa-court-opinion-with-exemptions/>.

unchecked surveillance power.”). Justice Sotomayor recently echoed this concern: “[a]wareness that the Government may be watching chills associational and expressive freedoms.” *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (concurrency).

Philosopher Kwame Anthony Appiah, a former president of PEN, has elucidated some of the dangers that surveillance threatens for writers and society:

Great moral advances begin often as radical ideas, ideas that would lead those who have them to be subjected to obloquy or even to violence. Serious thinking is done by writing and by exchanges of ideas with others. In a society that lived through the abuses of state power against Dr. Martin Luther King Jr. we cannot think that we will only be endangered if we are in the wrong. I have sometimes thought, myself, as I reflected on issues about the morality of terrorism and our responses to it, that I must censor myself in my most private writings because I cannot be sure that my writings will not be spied upon, misconstrued, used against me.

PEN, *Two Views on How Surveillance Harms Writers* (Sept. 3, 2013).⁴

Though it is often difficult to discern and quantify, the harm of self-censorship is real. Writers have experienced it before (*see* Section II. A., below). Writers also have used the tools of their trade to illustrate how surveillance inhibits their thought and freedom and, more broadly, how such monitoring affects all citizens (*see* Section II. B. 1., below). And writers have now

⁴ Available at <http://www.pen.org/blog/two-views-how-surveillance-harms-writers>.

confirmed through PEN's survey that the NSA's mass data collection is already having a concrete impact (*see* Section II. B. 3., below).

A. The History of Abuses of Surveillance

Throughout history, writers, artists, and public intellectuals have been particularly susceptible to intrusive surveillance and scrutiny. During the twentieth century, the FBI maintained active surveillance and investigation files on more than 150 writers, including James Baldwin, Truman Capote, Willa Cather, T.S. Eliot, William Faulkner, F. Scott Fitzgerald, Lillian Hellman, Ernest Hemingway, Sinclair Lewis, Henry Miller, Dorothy Parker, Gertrude Stein, John Steinbeck, Tennessee Williams, and Richard Wright. *See* Natalie Robins, *Alien Ink* (1992). As PEN member Natalie Robins concluded, although this practice was often the result of a combination of “paranoia,” “conspiracy,” “monumental bureaucratic overkill” and agents “simply doing their job,” “one thing is certain: most of the writers were watched because of what they thought.” *Id.* at 17.

Such abuses have been especially frequent during times of heightened national security concerns. During the McCarthy era, for example, writers and artists suspected of having Communist leanings were interrogated by Congress and the FBI and blacklisted if they did not inform on their colleagues. Writers were visited frequently by the FBI. Their neighbors were interviewed and their garbage examined. They masked their identities to find work. *See* Larry Siems, *A*

Blacklisted Screenwriter on American Surveillance (Aug. 30, 2013);⁵ *see also* Victor Navasky, *Naming Names* (1980).

The FISC itself was established in response to the repeated abuse by law enforcement and intelligence agencies of their surveillance powers and the misuse of information obtained for otherwise lawful purposes. Reports of the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the “Church Committee”) detailed “intelligence excesses” found in every presidential administration and described, for instance, how the FBI under J. Edgar Hoover “targeted Dr. Martin Luther King, Jr., in an effort to ‘neutralize’ him as a civil rights leader.” *See* Brief of Former Church Committee Members and Staff as *Amici Curiae* Supporting Respondents and Affirmance at 4, 9-13, *Clapper v. Amnesty Int’l*, 133 S.Ct. 1138 (2013) (No. 11-1025).

The Church Committee specifically recognized that the NSA had the “potential to violate the privacy of American citizens [that was] unmatched by any other intelligence agency.” *Intelligence Activities and the Rights of Americans* (Book II), S. Rep. No. 94-755, at 202 (1976).⁶ Senator Frank Church, the chair of the Committee, observed in 1975:

[The National Security Agency’s] capability at any time could be turned around on the American people, and no American would have any privacy left, such is the

⁵ Available at <http://www.pen.org/blacklisted-screenwriter-american-surveillance>.

⁶ Available at http://www.intelligence.senate.gov/pdfs94th/94755_II.pdf.

capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide.

Robert O'Harrow, *No Place to Hide* 10 (2006). The Committee found the record of NSA so troubling that, as scholar James Bamford recounts, its draft report highlighted "the Agency's long record of privacy violations." *The Puzzle Palace: Inside the National Security Agency, America's Most Secret Intelligence Organization*, 387 (1982).

The NSA's ability – and tendency – to engage in mass warrantless surveillance of innocent Americans has only grown since then. See James Bamford, *The Shadow Factory: The NSA from 9/11 to the Eavesdropping on America* (2008). Today, it is engaged in surveillance on a scale and to a degree previously unimagined and has evaded legal safeguards established to protect privacy. In 2011, the FISC found that the NSA had been collecting information for years knowing that its authorization was based on a false understanding by the court, and that that was "the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program." FISC Opinion at 16 n.14.

In light of this history, writers have every reason to worry about the government's voracious collection of so much sensitive information.

B. Self-Censorship, Communication, and Creativity

The very collection of telephone metadata interferes with the work of writers – whether or not they are directly intimidated and whether or not the information the government collects on any one writer is ever analyzed. The mere knowledge that the information is being gathered and stored inhibits communications and suppresses expression in insidious ways that writers have richly illuminated, in fiction and non-fiction, through the years.

1. Government Surveillance as a Curb on Creative Thought and Expression

As PEN member David K. Shipler has written:

Privacy is like a poem, a painting, a piece of music. It is precious in itself. Government snooping destroys the inherent poetry of privacy, leaving in its absence the artless potential for oppression. At the least, if the collected information is merely filed away for safekeeping, a weapon is placed in the hands of the state. If it is utilized, acute consequences may damage personal lives. Even where government is benign and well-meaning – a novelty that neither James Madison nor Tom Paine imagined – the use of everyday information about someone’s past to predict his behavior can lead to obtrusive mistakes

The Rights of the People: How Our Search for Safety Invades Our Liberties 294-95 (2011).

Social scientists have confirmed that the awareness of surveillance reduces the variety of ideas people entertain and express:

observed, when we discuss surveillance and privacy, “we speak a language borrowed from fiction.” *On Fiction and Surveillance* (Introduction to PEN World Voices Festival panel: “Life in the Panopticon: Thoughts on Freedom in an Era of Pervasive Surveillance”) (May 14, 2012).⁷

The most common literary reference point for state surveillance is, of course, George Orwell’s dystopian novel, *1984* (1949). See, e.g., William O. Douglas, *Points of Rebellion* 29 (1969) (“Big Brother ... will pile the records high with reasons why privacy should give way to national security, to law and order, to efficiency of operation, to scientific advancement and the like.”). By depicting a totalitarian society ruled by an omniscient regime, Orwell vividly illustrated the dangers of a powerful surveillance state.

Other writers have explored the power of surveillance alone, even without Orwellian government repression. The title of the PEN World Voices Festival panel noted above refers to the “Panopticon” devised by British philosopher Jeremy Bentham –a circular prison with a central observation tower to permit guards to see inmates in their cells at all times without letting the inmates ever know whether they were being watched. Bentham called it “a new mode of obtaining power of mind over mind, in a quantity hitherto without example.” Jeremy Bentham, *The Panopticon Writings* (Miran Bozovic, ed., 1995). The

⁷ Available at <http://www.pen.org/nonfiction/julian-sanchez-fiction-and-surveillance>.

Panopticon aptly illustrates how the comprehensive collection of telephone call data affects society, even if we never know whether any particular record is actually examined.

The philosopher Michel Foucault used the concept of the Panopticon as a metaphor to analyze modern structures of power in his work *Discipline and Punish*

fruitless quest to understand the charges against him and who brought them. The “Kafka-esque” danger of surveillance data is not necessarily that agencies will be “led by corrupt and abusive leaders,” but rather that mass collection of data “shift[s] power toward a bureaucratic machinery that is poorly regulated and susceptible to abuse.” *Id.* at 178.

History has shown that the NSA is, in fact, poorly regulated and vulnerable to abuse (*see* Section II. A., above), but even if the information the NSA gathers were never misused, the mere possibility of being persecuted for exploring ideas

providers can suggest certain medical conditions. Calls to businesses say something about a person's interests and lifestyle. Calls to friends reveal associations, potentially pointing to someone's political, religious or philosophical beliefs.

Daniel J. Solove, *Five Myths About Privacy*, Washington Post (June 13, 2013)

(warning of the possibility of tracking “the entire country’s social and professional connections.”); *see also* Jane Mayer, *Verizon and the N.S.A.: The Problem With Metadata*, New Yorker (June 6, 2013) (metadata may reveal impending corporate takeovers, sensitive political information such as whether and where opposition leaders may meet, and who is romantically involved with whom).⁸

In many ways, telephone metadata can be likened to GPS tracking data that law enforcement officers have sought to use. As the D.C. Circuit explained in a decision that was ultimately affirmed by the Supreme Court in *Smith v. Maryland*, “[a] person’s 458.8.8So.841ea

person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future." *United States v. Jones*, 132 S. Ct. 945, 955-56 (2012) (Sotomayor, J., concurring).

The District Court's decision in this case rests on the premise that, notwithstanding these concerns, people simply have no expectation of privacy in this information because it is, as a technical matter, shared with the private companies that carry the telephone calls. The decision relies primarily on the Supreme Court's conclusion more than 30 years ago, in *Smith v. Maryland*, 442 U.S. 735, 742 (1979), that a "pen register" on the telephone of a criminal suspect did not amount to an unconstitutional search because the information it collected was already being shared with the phone company: "*Smith's* bedrock holding is that an individual has no legitimate expectation of privacy in information provided to third parties." *ACLU v. Clapper*, No. 13 Civ. 3994, 2013 WL 6819708, at *20 (S.D.N.Y. Dec. 27, 2013).

But this is not an accurate characterization of the Supreme Court's wider jurisprudence in the field, as Appellants' brief outlines. Further, Justice Sotomayor's concurrence in *Jones* rightfully questioned the premise, especially in the digital world. 132 S. Ct. at 957. She explained:

This approach is ill suited to the digital age, in which people reveal a great deal of information about

themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

Id.

The notion that an individual has no legitimate expectation of privacy in information provided to third parties is unsustainable in the modern world and, not

<http://www.ala.org/offices/oif/ifgroups/stateifcchairs/stateifcinaction/stateprivacy>.

Congress likewise recognized the legitimate privacy of video rental information and passed the Video Privacy Protection Act, 18 U.S.C. §2710. Every user of a smart phone, app, or EZ-Pass provides extensive information to third parties regarding their whereabouts and personal affairs. In the digital age, a constitutional doctrine that excludes any information provided to a third party from Fourth Amendment protection would gut the safeguards for our “papers” envisioned by the founders.

These vital concerns were captured by the district court for the District of Columbia when it held unconstitutional the same telephone metadata collection program at issue in this case. As Judge Leon recognized, “the evolutions in the Government’s surveillance capabilities, citizens’ phone habits, and the relationship between the NSA and telecom companies” make the circumstances at issue in this case “thoroughly unlike those considered by the Supreme Court thirty-four years ago” in *Smith v. Maryland*. *Klayman v. Obama*, No. 13-0851, 2013 WL 6571596, at *18 (Dist. D.C. Dec. 16, 2013). Harkening to the original and enduring aims of the Fourth Amendment, Judge Leon concluded: “I cannot imagine a more ‘indiscriminate’ and ‘arbitrary invasion’ than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval.” *Id.* at *24.

The government's mass collection of this type of information has a particular impact on writers and hence on freedom of expression. Writers of non-fiction often depend on confidential sources to inform their work. Not only whistleblowers, but anyone who fears physical harm or other retribution may wish to remain anonymous. When it was discovered recently that the Department of Justice had sought calling information for the phones of several employees of the Associated Press (the "AP"), Gary Pruitt, President and CEO of the AP, wrote to Attorney General Holder stating, "These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations and disclose information about AP's activities and operations that the government has no conceivable right to know." Letter from Gary Pruitt to Attorney General Eric Holder (May 13, 2013).⁹ Sources are far less likely to talk to authors if they know data on their phone conversations is being collected and stored.

The prospect that telephone metadata can reveal to the government the entire web of a writer's associations and interactions – and the contacts of all the writer's contacts – inevitably limits and deters valuable interactions. Writers in the United States who support human rights or communicate with human rights activists, for

⁹ Available at http://www.ap.org/Images/Letter-to-Eric-Holder_tcm28-12896.pdf.

instance, are acutely aware of the dangers. The government's records of calling activity may permit reprisals or sanctions against writers, or people with whom they speak, or those people's families and friends, here and in other countries where they may be more vulnerable. Writers develop ideas through conversations, including conversations with radicals, dissidents, pariahs, victims of violence, and others who may be endangered if their communications become known. Chilling their exchanges impoverishes thought.

3. The Impact on Writers: The PEN Writers Survey

A survey of PEN's members conducted during October 2013 shows how government surveillance is already affecting writers and their work. The survey canvassed writers to learn their specific concerns about government surveillance, including "their sense of whether their own communications are being monitored, and the extent to which they are moderating their behavior as a result." PEN American Center, *The Impact of US Government Surveillance on Writers: Findings From a Survey of PEN Membership* (October 31, 2013) ("PEN Survey"),¹⁰ at 1. An accompanying report¹⁰ summarizes the Survey's findings and includes narrative responses describing writers' experiences and concerns. PEN

¹⁰ Available at http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf, at 1-10.

American Center, *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor* (November 12, 2013) (“PEN Report”).¹¹

The results are sobering. As reported in the *New York Times*, the Survey shows that a large majority of PEN respondents are “deeply concerned about recent revelations regarding the extent of government surveillance of email and phone records, with more than a quarter saying that they have avoided, or are seriously considering avoiding, controversial topics in their work.” Noam Cohen, *Surveillance Leaves Writers Wary*, *New York Times* (November 11, 2013). The Survey reveals that 76% of respondents believe increased government surveillance is particularly harmful to writers because it impinges on the privacy they need to

The message is clear: writers are restricting their activities and censoring their own work, in ways that are already damaging creative expression. As PEN’s Executive Director Suzanne Nossel stated upon release of the Survey, “[w]riters are kind of the canary in the coal mine in that they depend on free expression for their craft and livelihood.” *See* Cohen, *Surveillance*. The harm for writers is immediate and direct, but the threat to freedom reaches far beyond them. Our society depends on the freedom of writers and others to gather information, exchange ideas, and openly express their views. Inhibiting writers deprives the public discourse of necessary voices and undermines democracy. It is impossible to measure the harm we suffer from the loss of stories that writers do not write.

III. BALANCING FREEDOM AND SECURITY

The type of surveillance the Orde

dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting).

For writers, the effects of mass monitoring of electronic communications are not only practical and direct, but also subtle and indirect – because the sense of privacy essential to free expression and association is so compromised. Writers have now spoken clearly. The “insidious encroachment” predicted by Justice Brandeis by zealous and well-meaning protectors of our national security is being felt. Our pursuit of security must not blind us to the costs of sacrificing the liberty we seek to protect.

CONCLUSION

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,756 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman Font Style and 14 Point Size for the body of the brief and for the footnotes.

By: s/Edward J. Davis
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