No. 20-1653,

No. 20-3945 (CON)

IN THE

United States Court of Appeals for the Second Circuit

MICROSOFT CORP.,
Appellant,
v.
UNITED STATES,
Appellee,

On Appeal From The United States District Court For The Eastern District Of New York

AMICI CURIAE BRIEF FOR AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF MICROSOFT CORP.

Bruce D. Brown
Katie Townsend
The Reporters Committee for
Freedom of the Press
1156 15th Street NW, Suite 1020
Washington, DC 20005
(202) 795-9300

Counsel for Amici Curiae

Robert M. Loeb
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Katherine E. Munyan
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Counsel for Amici Curiae other than the Hearst Corporation

CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

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

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

Hearst Corporation is privately held and no publicly held corporation owns 10% or more of Hearst Corporation.

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

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

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

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

National Newspaper Association is a non-stock nonprofit Florida corporation. It has no parent corporation and no subsidiaries.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

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

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

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

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

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

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

The Seattle Times Company: The McClatchy Company, LLC owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

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

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

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

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

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

Dated: December 21, 2020 ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/Robert M. Loeb
Robert M. Loeb
Counsel for Amici Curiae other than the Hearst Corporation

The Reporters Committee for Freedom of the Press

/s/Bruce D. Brown
Bruce D. Brown
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the Reporters Committee for Freedom of the Press, The Associated Press, The E.W. Scripps Company, First Look Media Works, Inc., Gannett Co., Inc., Hearst Corporation, International Documentary Association, Investigative Reporting Workshop at American University, The Media Institute, MPA – The Association of Magazine Media, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, The New York Times Company, News Media Alliance, Online News Association, POLITICO LLC, Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post.[2]

Amici are members of the news media and organizations that advocate on behalf of the First Amendment rights of the press and the

---

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or any person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

[2] A supplemental statement concerning amici curiae identity is attached as Appendix A.

public. Many news media organizations and reporters, including those represented by *amici*, routinely rely on third-party providers' technology, including email and cloud-based storage services, to communicate and store confidential information as they investigate matters of public importance. Accordingly, *amici* have a strong interest in ensuring that the government's use of surveillance tools to access cloud-based data is consistent with the First Amendment, particularly where that surveillance is executed covertly pursuant to a non-disclosure order like the one at issue here. Because they inherently chill newsgathering and harm the public's right to be informed, such non-disclosure orders are properly subject to strict scrutiny. *Amici* urge this Court to clarify that such scrutiny in this context requires consideration of whether disclosure to the affected organization's general counsel, or to another person in the organization who can effectively raise challenges to the search, would be a less restrictive alternative than a blanket non-disclosure order.

INTRODUCTION AND SUMMARY OF ARGUMENT

Washington Post reporters Carl Bernstein and Bob Woodward famously relied upon a secret high-level government source, dubbed

"Deep Throat," while reporting on the Watergate scandal that would bring down the Nixon Presidency. When Nixon's reelection committee, desperate to get at the source of the leak, subpoenaed Woodward and Bernstein for their notes, the *Post*'s publisher, executive editor, and lawyers gathered in the newsroom to strategize, putting the full weight of the longstanding news organization behind protecting its reporters' confidential materials. *See Interview Carl Bernstein*, PBS Frontline (Feb. 13, 2007), http://to.pbs.org/3axLjjR; David K. Shipler, *Publisher, Editor And 10 Reporters Are Subpoenaed*, N.Y. Times (Feb. 27, 1973), https://nyti.ms/3r7LoAf. Deep Throat's identity would remain a secret for over three decades. *See Interview Carl Bernstein*, *supra*.

Today, if the government wished to identify the source of the leak, it could seek to obtain the reporters' notes without the reporters, or anyone at the newsroom, finding out about the search. Since Watergate, "cloud computing"—the use of remote computer servers—has transformed newsrooms from physical spaces to virtual ones. Reporters and editors no longer store their communications, research and notes in physical files at an office, but on remote cloud servers typically administered by a third-party provider, like Microsoft.

These virtual newsrooms present easier targets for covert government surveillance. The Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, permits the government to seek information in cloud storage, including emails, documents, text messages, browsing histories, and metadata, directly from cloud-service providers like Microsoft. *See* 18 U.S.C. § 2703(b)-(c). If acting pursuant to a warrant, the government is not required to notify the cloud-provider's customer, the actual target of the search, before executing it. *See id*. § 2703(b). And, by obtaining a non-disclosure order pursuant to § 2705(b), like the one at issue in this litigation, the government can bar the provider from itself notifying its subscriber about the search.

Whether or not the cloud-services subscriber at issue here is a news media organization, the Court's treatment of government efforts to obtain non-disclosure orders will necessarily impact all users of cloud-based platforms, including many journalists like those employed and represented by *amici*. The press needs timely notice of searches in order to challenge an improper warrant and take any action necessary to protect sources. Section 2705(b) non-disclosure orders prevent the press from taking these essential steps, and therefore risk chilling

source cooperation with journalists and, more broadly, newsgathering on issues of vital public importance. Relying on the government to self-police its non-disclosure requests or third-party providers to raise subscriber claims is insufficient to protect the significant press and public interests implicated by government searches.

Amici therefore urge that this Court hold that courts must apply strict scrutiny to government requests for § 2705(b) non-disclosure orders, which must include vigorous consideration of whether there are less restrictive alternatives to a blanket non-disclosure order preventing disclosure even to limited persons at the client organization other than the search target, such as the organization's general counsel, absent a showing that the organization itself was part of the criminal investigation. Without demanding judicial scrutiny of the government's non-disclosure requests, there is a serious risk that government searches will have a chilling effect on reporter-source communications and that the flow of vital information to the public will be substantially impaired.

ARGUMENT

I. Journalists Must Be Able To Protect The Confidentiality Of Reporting Materials In The Cloud, Today's Virtual Newsroom

The legal regime governing the security of cloud-based data fundamentally impacts the ability of journalists and news organizations to report on matters of public interest. Members of the news media routinely rely on cloud-based computer services, provided by companies like Microsoft, to store and process data, from research notes to internal emails. Because effective reporting requires that much of this data be kept confidential as stories develop, news organizations have an acute interest in maintaining the confidentiality of data on the cloud. A legal regime that creates the perception that newsrooms may not be able to maintain confidentiality inherently chills newsgathering to the public's detriment.

A. The modern news media increasingly relies upon third-party providers' cloud storage services.

Gathering and publishing the news requires the ability to process, store, and share large amounts of data. Cloud computing services provide "vast amounts of cheap, redundant storage" and allow customers "to instantly access their data from a web-connected computer anywhere in the world." *Hately v. Watts*, 917 F.3d 770, 792

(4th Cir. 2019) (quotation marks omitted). Like the rest of the modern world, today's newsrooms have become increasingly reliant on cloud computing. Journalists use email to communicate with sources, editors, and other journalists around the world, and cloud-based storage to preserve those emails. Journalists store story ideas, notes, research files, and draft articles on the cloud, where the information can be easily accessed and shared. In many ways, cloud technologies have transformed the newsroom from a physical space to a virtual one, with accompanying benefits of ease of collaboration and ability to bring news to the public at a faster pace. *See, e.g.*, Mel Bunce et al., *'Our Newsroom in the Cloud:' Slack, Virtual Newsrooms, and Journalistic Practice*, 20 News Media & Soc'y 3381 (Dec. 31, 2017), https://bit.ly/34lHrhV; Tim Schmitt, *Remote locations? Here's how Google Drive can bring newsrooms together*, Gatehouse Newsroom (Sept. 22, 2016), https://perma.cc/YE9G-PZAJ.

The virtual newsroom has provided great benefits to the quality of reporting, facilitating unprecedented reporter collaborations on investigations of global public importance. For example, reporters from over one hundred different news organizations around the world used

cloud tools to work together in secret for over a year investigating the "Panama Papers," a cache of documents about offshore financial havens leaked by an anonymous whistleblower. Katie Van Syckle, *Panama Papers Explained: How Reporters Dug Through 11.5 Million Documents to Investigate Offshore Deals*, Variety (Apr. 5, 2016), https://perma.cc/TY95-C95S. The International Consortium of Investigative Journalists (ICIJ), the hub of this transnational reporting team, tallied the global total of fines and taxes resulting from this reporting as exceeding one billion dollars. *See* Douglas Dalby & Amy Wilson-Chapman, *Panama Papers Helps Recover More Than $1.2 Billion Around the World*, Int'l Consortium of Investigative Journalists (Apr. 3, 2019), http://bit.ly/3r7p2za.

Cloud technologies made this worldwide collaboration possible. As one ICIJ reporter described, "[a] leak this size could not have been analyzed or hosted by computers until very recently, let alone made searchable, shareable and made available to journalists from Iceland to Kenya" and "allow[ing] 400 journalists to communicate certainly takes us far and beyond the world of email." Van Syckle, *supra* __. Cloud-based cooperation between journalists also occurs regularly on a smaller

scale. *See* Brief Amici Curiae of Reporters Comm. et al. in Support of Respondent at 4-5, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2), https://bit.ly/34d4qcb.

Increasingly, newsrooms use cloud-based platforms operated by third-party providers, such as Microsoft, rather than hosting their own servers. *See* Ashkan Soltani (@ashk4n), Twitter (Mar. 24, 2014, 7:32 AM), https://perma.cc/AQ4T-UGVB (showing that nearly half of 25 news sites evaluated used Google or Microsoft to host their email).

B. Maintaining critical reporter-source relationships requires protecting the virtual newsroom from government surveillance.

Some of the most sensitive data housed in media organizations' cloud-computer storage includes communications with sources whose participation depends on strict confidentiality. Like many email users, reporters store years of emails, with their numerous attachments, in cloud-based email accounts. A government § 2703 search of a third-party provider for those accounts can reveal the identity of confidential sources. The records recovered by such a search could also reveal potential leads and thoughts on future stories.

Similar concerns also apply where the government seeks only metadata and not the communications' content. Metadata identifies information like the sender and recipient computers, their locations, and the time of transmission. Such data can be just as sensitive as content, and its disclosure just as damaging to the reporter-source relationship.

Enabling journalists to protect their sources' confidentiality is essential to reporting on significant issues of public interest. Confidential sources have been the foundation for critical reporting on the government for many of the biggest news stories of the last half century, from the *Washington Post*'s reporting on Watergate to the *New York Times*' 2005 reporting on the NSA's "warrantless wiretapping" program and 2007 coverage of the CIA's harsh interrogations of terrorism suspects. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), https://perma.cc/QP56-C4AL; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times (Oct. 4, 2007), https://perma.cc/ESP3-RWCG. The ICIJ's Panama Papers reporting in 2016, which implicated politicians around the world, similarly began

with an anonymous whistleblower. Will Fitzgibbon, *Panama Papers FAQ: All You Need to Know About the 2016 Investigation*, Int'l Consortium of Investigative Journalists (Aug. 21, 2019), https://bit.ly/335gkET.

Without anonymous sources, these important stories, and many others like them, would never have been reported to the public. While journalists often prefer on-the-record sources, "[a]nonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, fulfilling the journalistic missions of watchdog on the government and informant to the citizens." Michael Farrell, *Anonymous Sources*, Soc'y of Pro. Journalists, https://perma.cc/5BQBSRA3 (last visited Dec. 17, 2020). This is particularly true when reporting on government affairs. Journalists rely on internal government sources, who do not have official authorization to speak on the government's behalf and therefore typically insist upon confidentiality in providing details and insight into what is happening behind the official line of government communication. *See Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("[J]ournalists frequently depend on informants to gather news, and confidentiality is often

essential to establishing a relationship with an informant."); *Introduction to the Reporter's Privilege Compendium*, Reporters Comm. for Freedom of the Press, https://bit.ly/2BVdXJ4 (last visited Dec. 11, 2020) ("[Reporters] must be able to promise confidentiality in order to obtain information on matters of public importance."). Without such sources, journalists "would be relying on the official side of the story, and the official side of a story isn't always the whole side." Lana Sweeten-Shults, *Anonymous sources vital to journalism*, USA Today (Feb. 27, 2017), https://perma.cc/AV7V-Z4K8.

C. Perceived risks of government surveillance chill source cooperation and newsgathering to the public's detriment.

Confidential sources, particularly those within the government, are highly aware of the risks of working with journalists and sensitive to the possibility of government surveillance. In 2014, a study by Human Rights Watch and the American Civil Liberties Union found that increased government surveillance cuts "away at the ability of government officials to remain anonymous in their interactions with the press, as any interaction—any email, any phone call—risks leaving a digital trace that could subsequently be used against them." G. Alex

Sinha, *With Liberty to Monitor All,* Human Rights Watch 1, 3 (2014), https://perma.cc/ 6L9T-NZHK. Sources know that a reporter's promise of confidentiality means little if the government could be reading the reporter's emails and notes without the knowledge of the reporter or the news organization employing the reporter.

A 2014 report by the Privacy and Civil Liberties Oversight Board found that reporters and their sources had shifted their behavior in response to reports of expansive foreign intelligence metadata collection. *See* Privacy and Civil Liberties Oversight Bd., 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 163-64 (2014), https://bit.ly/3al4rRH. The report concluded that "such a shift in behavior is entirely predictable and rational," and that the results of this "chilling effect"—including "greater hindrances to political activism and a less robust press"— "are real and will be detrimental to the nation." *Id.* at 164. And yet another report found that aggressive leak prosecutions and revelations of broad foreign intelligence surveillance programs under the Obama administration deterred sources from speaking to journalists. Leonard

Downie, Jr. & Sara Rafsky, *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America,* Comm. to Protect Journalists 1 (Oct. 10, 2013), https://perma.cc/GR88-C8FG. These studies show that knowledge of possible surveillance and the uncertainty as to whether a source's communications have been compromised deters sources with sensitive information from coming forward.

Members of the press have confirmed the chill on newsgathering related to fears of overly intrusive government surveillance. As former *Washington Post* national security reporter Rajiv Chandrasekaran put it: "[O]ne of the most pernicious effects" of government surveillance "is the chilling effect created across [would-be sources in the] government on matters that are less sensitive but certainly in the public interest as a check on government and elected officials." Downie & Rafsky, *supra.* Pulitzer Prize-winning journalist Matt Apuzzo explained that after news broke of the government seizing his AP phone records, sources unconnected to the leak story, but nevertheless on the other end of those phone logs, advised him they could no longer talk to him. Michael Barbaro, *The Daily: Cracking Down on Leaks,* N.Y. Times (June 18,

2018), https://perma.cc/7ZP5-C2BL. And AP president Gary Pruitt noted that the mass phone-records seizure made official sources "reluctant to talk to [the AP]" for "fear that they w[ould] be monitored by the government." Aamer Madhani & Kevin Johnson, *Journalism Advocates Call Leak Investigations Chilling,* USA Today (May 21, 2013), https://perma.cc/ KZ85-ESWE.

This documented chilling effect means that enabling reporters to protect source confidentiality is critical to preserving the role of the press as a "vital source of public information." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). Just as "'[a] free press is indispensable to the workings of our democratic society,'" "confidential sources are essential to the workings of the press." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1183 (D.C. Cir. 2006) (Tatel, J., concurring) (quoting *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring)). Because they risk surreptitiously disclosing the identity of confidential sources among other sensitive information, government searches of cloud providers, with gag orders barring notice to the reporter or the news organization employing the reporter, have a chilling effect on cooperation with reporters that

undermines reporters' ability to inform the public on matters of public interest.

II. Strict Scrutiny Of Applications For § 2705(b) Non-Disclosure Orders Is Necessary To Protect The Critical First Amendment Interests Raised By Searches Of The Virtual Newsroom

In the pre-cloud era, investigators would execute a subpoena or search warrant by physically searching the newsroom and its local computers. The news organization would necessarily have notice of the search and could assert various constitutional claims under the First and Fourth Amendments, and any applicable legal privileges. It could take steps to protect sources' identities—possibly gleaned from the records or communications obtained—and inform sources of the search so that they too could vindicate their rights.

Now, however, the government can seek information from the cloud-service provider with a gag order barring notice to the news organization or the reporter. The Justice Department even has the ability to enforce theoretically indefinite non-disclosure orders against the provider, meaning that an affected reporter and news organization may never find out that their communications and metadata had been seized. *See* 18 U.S.C. § 2705(b). In the instant case, the non-disclosure

order has been extended for years. *See* JA4-13 (district court docket). Judicial strict scrutiny of government requests for such orders is necessary to protect the critical press freedoms implicated.

A. Internal government policies and third-party provider efforts to protect users are insufficient to protect news organizations' interests.

Because of the gag order in place in this case, whether the subscriber in the instant litigation is a news organization is unknown to *amici*. But the rules and standards adopted by this Court in this case will have serious ramifications for reporters, new organizations, and, more broadly, the public's ability to be informed. Those risks are not hypothetical. Reporter-source communications have been the target of secret government surveillance, directed at news organizations and journalists, in recent years. For example, in 2013, the government surreptitiously acquired both work and personal telephone records for more than 100 Associated Press (AP) reporters while investigating unauthorized disclosures of classified information. *See Gov't Obtains Wide AP Phone Records in Probe*, Associated Press (May 13, 2013), https://perma.cc/K3EZ-AXV6. That same year, reports surfaced that the government had obtained an SCA warrant to seize the contents of

Fox News reporter James Rosen's emails from his personal account in connection with another leak investigation. *See* Ann E. Marimow, *Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, Wash. Post. (May 20, 2013), https://perma.cc/L3G4-F5VA. Rosen was unaware of the existence of the warrant until it was reported in the *Washington Post*. Ryan Lizza, *How Prosecutors Fought to Keep Rosen's Warrant Secret*, New Yorker (May 24, 2013), https://perma.cc/EH2R-V5JJ.

Recognizing the serious constitutional concerns raised by its actions, the Department of Justice has adopted internal media-specific search policies, *see* 28 C.F.R. § 50.10, but these measures, while helpful, cannot replace searching court review of government non-disclosure orders as an essential protection for the interests at stake. In the wake of public backlash over the AP records seizure and the Rosen email warrant, the Department extended these internal policies governing subpoenas to the media and their third-party telephone providers to cover newsgathering records held by all third parties, whether sought

through subpoena, search warrant, or court order.[3] *See DOJ Issues New Guidelines on Reporter Subpoenas Following Dialogue with Reporters Committee and Other News Media Representatives*, Reporters Comm. for Freedom of the Press (Jan. 14, 2015), https://bit.ly/31sOssS. The revised news media guidelines require the government, in most cases, to first pursue "negotiations with the affected member of the news media" and provide them with "appropriate notice" before seeking their data or metadata through legal process. 28 C.F.R. § 50.10(a)(3).

Notwithstanding the updated guidelines' commitment to "strike[] the appropriate balance" between law enforcement interests and "safeguard[] the essential role of a free press in fostering government accountability and an open society," Dep't of Justice, Report on Review of News Media Policies 1 (2013), https://bit.ly/1TTieSt, they only reach so far. The Attorney General retains discretion in deciding whether advance notice is appropriate. *See* 28 C.F.R. § 50.10(a)(4), (e); *see also,*

[3] While the SCA's text and structure do not clearly answer whether all forms of process—warrants, court orders, and subpoenas—are properly subject to § 2705(b) non-disclosure orders, the Justice Department has sought them for all of these tools. *See* Memorandum for Heads of Dep't Law Enf't Components, et al., from Rod J. Rosenstein, Deputy Att'y Gen., *Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)* (Oct. 19, 2017), https://bit.ly/2Wbwiuu.

e.g., Adam Goldman et al., *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized,* N.Y. Times (June 7, 2018), https://perma.cc/2B25-V2M7 (reporting that a *New York Times* national security reporter was notified only in February 2018 that her phone and email records had been seized at some point the previous year).

Furthermore, the news media guidelines do not apply when the government seeks the records of persons other than reporters, such as those it believes to be media sources. *See* 28 C.F.R. § 50.10(a)(2) (addressing only circumstances where law enforcement "seek[s] information from, or records of" the "news media"). Where the government seizure of a non-media target's records reveals other media contacts, however, the principles animating the news media guidelines necessitate that the affected journalists be notified of that seizure so they may challenge it or take other appropriate steps to protect confidential information.

Accordingly, these guidelines are no substitute for robust enforcement of the First Amendment rights implicated here. Similarly, regularly relying upon providers, such as Microsoft, to object to searches of their subscribers' data is insufficient to protect the interests at stake

here. *See* Lauren Kirchner, *Old Law, New Tricks: Can We Modernize the Electronic Communications Privacy Act?*, Colum. Journalism Rev., http://bit.ly/37tR7sB (last visited Dec. 17, 2020) (noting that different providers have different track records on attempting to protect client information from disclosure). Even if the provider has the commitment and resources to pursue litigation rather than complying with the government, the provider will not have the familiarity with the content of the underlying data, its context, and any constitutional concerns implicated by its seizure to articulate and protect its customer's interests – and the public interest – where confidential media information is at stake. Absent some notice to the cloud-service customers, such as a news organization's general counsel, there is no means for the press to make timely and meaningful First Amendment and other challenges to a content or data seizure, and assert important privileges.

B. Tensions between law enforcement and press freedom should be evaluated in a public forum.

The concerns with overbroad non-disclosure orders extend beyond the problems of any single data demand by the government. Relaxing the government's burden will encourage it to seek more of these overly

strict non-disclosure orders, shroud even more government surveillance in secrecy, and increase fears of investigatory overreach, leading sources to decline to cooperate with journalists and impairing the flow of information to the public. Ultimately, the interests at stake here are not just those of the press, but those of the public concerned both with effective law enforcement and protection of a vibrant free press.

Non-disclosure orders are additionally problematic because they remove from the public sphere consideration of how to balance those interests where they appear to conflict, which they do on occasion. *See, e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (observing that "the struggle from which the Fourth Amendment emerged 'is largely a history of conflict between the Crown and the press'"). Where such conflict occurs, it is in the public's interest that there be a full public debate where government policies can be scrutinized, and new legal regimes developed when necessary.

Branzburg v. Hayes, the Supreme Court's landmark 1972 ruling on First Amendment press protections and grand jury subpoenas, and its aftermath offers one example of how reporters' ability to challenge governmental searches promotes public debate and important legal

developments beyond a single case. In *Branzburg*, the Court considered several consolidated cases in which reporters filed motions to quash grand jury subpoenas, asserting a First Amendment privilege to avoid identifying their sources. 408 U.S. at 667-79. The Court's opinion acknowledged the potential for such subpoenas to have a chilling effect on newsgathering, *id*. at 693-95, but found that in that case it was outweighed by the state's interest in enforcing its criminal laws, requiring the reporters to testify, *id*. at 700. Justice Powell wrote separately to emphasize, however, that the Court's holding did not mean that reporters "are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id*. at 709 (Powell, J., concurring). Justice Powell's concurrence stressed that courts were the forum to vindicate these rights, stating that "[t]he balance of … vital constitutional and societal interests" raised by reporter subpoenas was properly adjudicated "on a case-by-case basis" by reporters filing motions to quash. *Id*. at 710. In other words, the subpoenas to reporters were permissible because reporters would have notice and an opportunity to raise constitutional claims in court – exactly what a § 2705(b) non-disclosure order takes away from reporters

and news organizations when their emails and files are searched without any notice.

Branzburg not only shows the importance of notice, that it allows access to a judicial forum to adjudicate individual constitutional claims, it demonstrates the necessity that the public know about efforts by the government to compel the production of reporters' records to aid in the development of the laws that protect reporters and, ultimately, the public's right to be informed. Justice Potter Stewart dissented in *Branzburg*, arguing that the government should be required to make a heightened showing before subpoenaing a reporter. *Id*. at 743. The *Branzburg* majority noted that state legislatures were "free, within First Amendment limitations, to fashion their own standards" for protecting reporters from subpoena disclosure obligations. *Id*. at 706. Seventeen states already had shield laws in place at that time. *Id*. at 689 n.27. After *Branzburg*, many states adopted press shield laws that incorporated the multi-part test proposed by Justice Potter Stewart. *See* Jane E. Kirtley, *Shield Laws*, Free Speech Ctr. at Middle Tenn. State Univ. (last visited Dec. 11, 2020), http://bit.ly/3almSpv. "As of 2018, 49 states and the District of Columbia had … some form of shield

law." *Id.* This progression underscores how notice to journalists and news organizations, and the ability to challenge improper government requests for their records, is central not only to the resolution of individual constitutional claims, but to societal debate about the protections to be offered to reporters and their sources.

The Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), offers another example. In that case, a city police department had used a warrant to search the newsroom of a student paper at Stanford University, looking for photos of a violent confrontation between police and protestors in order to identify the protestors. *Id.* at 550-52. The Supreme Court rejected the *Stanford Daily*'s challenge to the search, ruling that the First Amendment grants journalists no special protection from properly executed search warrants. *Id.* at 565. Two years after the Supreme Court's decision, Congress passed the Privacy Protection Act (PPA), a federal law limiting the ability of law enforcement to search or seize a journalist's documentary materials and work product pursuant to a search warrant rather than a subpoena that enables journalists to challenge the search in advance. 42 U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7; *see* Jonathan

Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, Colum. Journalism Rev. (Aug. 22, 2016), http://bit.ly/3r6EzPs.

The vast technological changes that have taken place in journalism since *Branzburg* and *Zurcher* necessitate new debates over the appropriate balancing of government surveillance and press protections in today's virtual newsroom. Many of the press shield laws passed after *Branzburg* are now outdated because they predate the unique problems posed by the digital age. *See* Camille Fassett, *An Increasing Number of Journalists Have Recently Faced Subpoenas*, Freedom of the Press Found. (Mar. 8, 2018), http://bit.ly/3pfgG6T. Few state legislatures or courts have addressed the appropriate protections for media organizations where subpoenas are issued to third-party technology providers in an attempt to identify a reporter's source. *See Third-Party Subpoenas*, *Reporter's Privilege Compendium,* Reporters Comm. for Freedom of the Press, http://bit.ly/2KBGFX3 (last visited Dec. 11, 2020). And the application of the Privacy Protection Act, passed in 1980, to today's cloud tools is unclear. *See* Jonathan Peters, *Updating the Privacy Protection Act for the Digital Era*, Colum.

Journalism Rev. (Jan. 30, 2012), http://bit.ly/2LMZxCY. How these protections should be updated to apply to the modern virtual newsroom and cloud technology is a debate that should occur in the public sphere. And that debate has been hampered by the use of overly broad gag orders.

C. Strict scrutiny of § 2705(b) non-disclosure requests is necessary to protect press and public interests.

Because non-disclosure orders eliminate effective access to a public forum to challenge overbroad government searches that harm the press and the public, courts should apply strict scrutiny to government requests for nondisclosure orders. Non-disclosure orders are content-based prior restraints on speech that "bear[] a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). In barring speech about invasive government searches, § 2705(b) orders infringe upon the core expressive activity that the First Amendment is intended to protect—the free discussion of government activities. *See Garrison v. Louisiana*, 379 U.S. 64, 74 (1965). As the Supreme Court has explained, the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y.*

Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964). Speech regarding government activity "is entitled to special protection" because it rests on "the 'highest rung of the h[ie]rarchy of First Amendment values.'" *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations and quotations omitted). Non-disclosure orders prevent third-party providers from speaking out about government data collection and impede vital public discussion concerning its appropriateness.

Amici therefore urge that this court hold that a § 2705(b) non-disclosure order, as a content-based prior restraint on speech, must be narrowly tailored to serve a compelling government interest, and must be the least restrictive means of serving that interest. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000); *see also In re Search Warrant for [redacted].com*, 248 F. Supp. 3d 970, 980 (C.D. Cal. 2017) (collecting cases requiring § 2705(b) orders to satisfy strict scrutiny).

For a non-disclosure order to be the least restrictive means of serving any government interest, the court must carefully assess and reject any narrower remedies. This entails full consideration of alternatives to a complete bar on disclosure, such as notification to the

enterprise customer's general counsel (such as the news organization's general counsel, when the government is seeking access to the emails and attachments of one its reporters), and requiring that the government use less-restrictive alternatives unless the government can show that any such alternatives are ineffective to protect the government's interests. *Playboy Entm't Grp., Inc.*, 529 U.S. at 816. Dismissing alternatives as "not as effective" or more "burdensome" to the government, as the district court did here, is a misapplication of the strict scrutiny test. *See* JA93-94. Moreover, such an approach effectively frees the government from its obligation to pursue a less-restrictive alternative to a complete gag order, as crafting a more-targeted order would always require more effort and offer a narrower relief.

Notably, media organizations' general counsel and executives are experts in handling government disclosure requests and identifying and asserting potential overbreadth or constitutional problems. Where a court finds that disclosure of a cloud search to a specific reporter whose information is the target would be inappropriate, it should consider whether to permit disclosure to the news organization's general counsel

or another executive. Those executives, unlike personnel at a third-party technology company, have the expertise to identify and assert First Amendment considerations that are essential to protect the free flow of information to the public.

CONCLUSION

For the foregoing reasons, the government's request for a non-disclosure order is properly subject to strict scrutiny, and this Court should clarify that such scrutiny in this context requires consideration of whether disclosure to the affected organization's general counsel, or to another person in the organization who can effectively raise challenges to the search, would be a less restrictive alternative than a blanket non-disclosure order.

December 21, 2020

Respectfully submitted,

/s/Bruce D. Brown
Bruce D. Brown*
Katie Townsend
The Reporters Committee for
Freedom of the Press
1156 15th Street NW, Suite 1020
Washington, DC 20005
(202) 795-9300

/s/Robert M. Loeb
Robert M. Loeb*
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400

Katherine E. Munyan
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Counsel for Amici

December 21, 2020

* Hearst Corporation is represented in this case only by the Reporters Committee for Freedom of the Press. The other listed amici are represented by Orrick, Herrington & Sutcliffe LLP.

APPENDIX A:

Supplemental Statement Of Amici Curiae Identity

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

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

The E.W. Scripps Company serves audiences and businesses through local television, with 60 television stations in 42 markets.

Scripps also owns Newsy, the next-generation national news network; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

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

Gannett Co., Inc. is the largest local newspaper company in the United States. Its 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

Hearst is one of the nation's largest diversified media, information and services companies with more than 360 businesses. Its

major interests include ownership of 15 daily and more than 30 weekly newspapers, including the San Francisco Chronicle, Houston Chronicle, and Albany Times Union; hundreds of magazines around the world, including Cosmopolitan, Good Housekeeping, ELLE, Harper's BAZAAR and O, The Oprah Magazine; 31 television stations such as KCRA-TV in Sacramento, Calif. and KSBW-TV in Monterey/Salinas, CA, which reach a combined 19 percent of U.S. viewers; ownership in leading cable television networks such as A&E, HISTORY, Lifetime and ESPN; global ratings agency Fitch Group; Hearst Health; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

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

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit,

professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

National Newspaper Association is a 2,000 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Photographers Association (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

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

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The Online News Association (ONA) is the world's largest association of digital journalists. ONA's mission is to inspire innovation

and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

POLITICO LLC is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

Radio Television Digital News Association (RTDNA) is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with the *Yakima Herald-Republic* and *Walla Walla Union-Bulletin*, 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 Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

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

The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes *The Washington Post* newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won Pulitzer Prizes for its journalism, including the award in 2020 for explanatory reporting.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 32.1(a)(4) because this brief contains 6799 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

Dated: December 21, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/Robert M. Loeb
Robert M. Loeb
Counsel for Amici