No. 11-1025

IN THE
Supreme Court of the United States

JAMES R. CLAPPER, JR., DIRECTOR OF NATIONAL INTELLIGENCE, *ET AL.*,
Petitioners,
v.

AMNESTY INTERNATIONAL USA, *ET AL.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press ("the Reporters Committee" or "*amicus*") 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 representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

As advocates for the rights of the news media and others who gather and disseminate information to the public, *amicus* has a strong interest in ensuring that journalists' ability to credibly promise confidentiality to sources remains uninhibited. Without the use of these invaluable reporting tools, the news media's performance of their constitutionally protected duty to report on matters of significant public interest and concern is severely burdened. Thus, *amicus* respectfully requests that this Court affirm the decision below.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The government's broad powers under the FISA Amendments Act of 2008 ("the FAA" or "the Act"), which allows federal officials to monitor international electronic communications even if one party is in the United States, directly affect the ability of journalists to gather and report news stories and constitute a harm sufficient to create standing to challenge the Act. Oftentimes, a source's willingness to provide a journalist with truthful information about significant matters of public interest and concern is wholly dependent on an assurance that the source's identity will not be revealed, thereby exposing him or her to retaliation. The amendments at issue, however, hamper the formation of these important journalist-source relationships by eliminating journalists' ability to make good-faith promises of confidentiality to international sources.

And perhaps nowhere is the interest in ensuring the free flow of information from the news media to the public stronger than in the context of national security, where pervasive secrecy often prevents public accountability of government activity. In fact, it is only through journalists' reliance on confidential sources that many reports of government misconduct that otherwise would have remained shielded from public scrutiny have been revealed. As such, journalists — and by extension the public — are harmed by the government intrusion into their communications with international sources authorized by the Act. Thus, *amicus* respectfully requests that this Court affirm the decision below.

ARGUMENT

Unmonitored communications between journalists and their sources are vital to ensuring the free flow of information to the public.

The strong interest in ensuring journalists' ability to credibly promise confidentiality to sources is not one of mere convenience or privacy concerns. The ability to foster and maintain confidential relationships with sources is crucial to effective reporting. And when the story involves international sources, electronic communications become the only means of contact and so government monitoring under the FAA burdens journalists' ability to gather information in the very area where the need for freedom from government interference is arguably the strongest.

This nation's historical practice of respecting the confidentiality of journalists' communications with their sources has been vital to ensuring that the news media effectively perform their constitutionally protected role of disseminating information to the public, including information about the otherwise-secret conduct of our government in the name of protecting the national security. As Pulitzer Prize-winning investigative reporter Dana Priest, who has authored "hundreds of news articles on matters of national security" for *The Washington Post*, stated, because "the U.S. government has made secret nearly every aspect of its counterterrorism program, it would have been impossible to report even on the basic contours of [the government's] decisions, operations and programs without the help of confidential sources." Decl. of Da-

na Priest, *in* Ex. 18 to Mem. of Points and Authorities in Opp'n to the Government's Mot. *in Limine* and in Supp. of the Mot. of James Risen to Quash Subpoena and/or for Protective Order, *United States v. Sterling*, Case No. 1:10cr485, at ¶¶ 4, 5 (E.D. Va. June 21, 2011); *see also id.* at Ex. 14, ¶ 14 (decl. of Scott Armstrong) (explaining that in the context of national security policies and practices, most accurate information often is available only from confidential sources).

Similarly, *New York Times* intelligence and national security reporter James Risen has said his "major revelations of great public interest" — from the CIA's use of waterboarding in interrogations of terrorism suspects, to the government's pre-invasion knowledge that Iraq had abandoned its programs to develop weapons of mass destruction, to the Bush administration's use of records of banking transactions involving thousands of Americans to help detect financiers of terrorism — would likely have been impossible without the use of confidential sources. *Id.* ¶ 15, 51 (aff. of James Risen). And Risen's ability to rely on such sources to reveal this information is particularly critical in the context of national security, an interest the government regularly cites to "cover[] up its own wrongdoing or avoid[] embarrassment" and thereby evade public oversight. *Id.* ¶ 18. In explaining his refusal to comply with a subpoena for testimony in the trial of an ex-CIA official accused of disclosing classified information about a CIA operation to disrupt Iran's nuclear program, the two-time Pulitzer Prize winner described the "immediate[] and substantial[] harm" that occurs when journalists' con-

fidential communications with their sources are threatened:

> In my ongoing reporting and newsgathering, numerous sources of confidential information have told me that they are comfortable speaking to me in confidence specifically because I have shown that I will honor my word and maintain their confidence even in the face of Government efforts to force me to reveal their identities or information. The fact that I have not previously revealed my sources has allowed me to gain access to newsworthy information that I could not otherwise get.

Id. ¶ 64.

Perhaps more significantly, Risen testified that government interference with his confidential relationships would "imped[e] all other reporters' ability to gather and report the news in the future." *Id.* ¶ 52. Compelling journalists to reveal information they obtained during conversations with confidential sources would "seriously compromise journalists' integrity and independence, qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events." *Id.* ¶ 53.

Former *Washington Post* investigative reporter Carl Bernstein, who, along with then-fellow *Post* reporter Bob Woodward, relied on information from a confidential source to bring down a presidency, has

testified that Mark Felt "would not have agreed to be a source for our Watergate reporting had Mr. Woodward and I not been able to assure him total and absolute confidentiality." *Id.* at Ex. 15, ¶¶ 3–5 (decl. of Carl Bernstein). Anonymous sources were the basis for the information developed and contained in nearly all of the more than 150 articles Woodward and Bernstein authored in the ten months following the break-in at the Democratic National Committee's offices in Washington, D.C., Bernstein said, adding that no major sources of information were identified by name in any of those articles. *Id.* "Almost all of the articles I co-authored with Mr. Woodward on Watergate could not have been reported or published without the assistance of our confidential sources and without the ability to grant them anonymity, including the individual known as Deep Throat." *Id.*; *see also id.* at Ex. 17, ¶ 6 (aff. of the late Jack Nelson) (stating that without confidential sources, the *Los Angeles Times* would have been unable to report "numerous . . . stories involving corruption or governmental abuses in at least six [presidential] administrations").

Some of the most distinguished and honored news reporting in our history has necessarily relied on information from confidential sources, including in the following instances:

- Relying on confidential sources, *The New York Times* revealed that the National Security Agency — under a then-illegal secret wiretapping program that was the precursor to the FAA — had been monitoring phone calls and e-mail messages into and out of the United States involving suspected al-Qaida operatives

without seeking approval from federal courts. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

- Relying in part on information from confidential sources, *The New York Times* and other news organizations reported on the use of harsh interrogation tactics against terrorism suspects in U.S. custody. *See, e.g.*, Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1. Such news coverage precipitated a wide-ranging public debate that prompted Congress to prohibit certain interrogation tactics entirely and led to the promulgation of an executive order repudiating many of them. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–06, 119 Stat. 2680 (2005); Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

- *The Washington Post* relied on confidential sources inside and outside the federal government to report on the CIA's network of secret prisons, known as "black sites," for terrorism suspects. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1.

- CBS News and *New Yorker* contributor Seymour Hersh reported accounts of abuse of detainees at Abu Ghraib prison in Iraq. Relying on graphic photographs in the possession of U.S. Army officials and a classified report that

was "not meant for public release," CBS and Hersh documented the abusive conditions inside the Iraqi prison.[2] After these incidents became public, other military sources who had witnessed abuse came forward but often only "on the condition that they not be identified because of concern that their military careers would be ruined."[3]

- Journalist Walter Pincus of *The Washington Post* relied on confidential sources in reporting that President Carter planned to move forward with the development of a so-called "neutron bomb," a weapon that could inflict massive causalities through radiation without extensive destruction of property.[4] While the information disclosed to Pincus by his sources likely was classified, the public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon,

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[2] Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004, at 42, 43.

[3] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, Balt. Sun, May 9, 2004, at A1 (interviewing anonymous soldiers who witnessed abuse at Abu Ghraib); *see also* Miles Moffeit, *Brutal Interrogation in Iraq*, Denver Post, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and an interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

[4] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, Wash. Post, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy on Neutron Bomb Production*, Wash. Post, June 25, 1977, at A1.

and no administration since has tried to revive it.[5]

- The Pentagon's secret history of America's involvement in Vietnam, which famously became known as the "Pentagon Papers," was provided to the news media by a confidential source. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). In refusing to enjoin publication of the information, several justices suggested that the newspapers' sources may well have broken the law by turning over the materials. *Id.* at 754 (Harlan, J., dissenting). Nonetheless, "[i]n revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do," *id.* at 717 (Black, J., concurring), and there is now a broad consensus that no legitimate reason existed for concealing the Pentagon Papers from the public in the first place.[6]

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[5] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77* Post *Articles*, Wash. Post, Oct. 23, 1984, at A12 (quoting former Secretary of Defense Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

[6] Former U.S. Solicitor General Erwin N. Griswold, who argued the government's case in this Court, wrote nearly twenty years later that the publication posed no "trace of a threat" to national security. Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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