

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

MICROSOFT CORPORATION,

Plaintiff,

v.

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

Defendants.

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

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

**NOTE ON MOTION CALENDAR:
SEPT. 2, 2016**

Amici curiae Reporters Committee for Freedom of the Press, The Seattle Times
Company, The Associated Press*, Fox News Network, LLC*, National Public Radio, Inc., The
Washington Post, Association of American Publishers, Inc.*, Association of Alternative

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

1 Newsmedia, American Society of News Editors, First Amendment Coalition, First Look Media
 2 Works, Inc., International Documentary Association, Investigative Reporting Workshop at
 3 American University, The McClatchy Company, The Media Institute, National Association of
 4 Black Journalists, The National Press Club, National Press Photographers Association,
 5 Newspaper Association of America, Reporters Without Borders, Tully Center for Free Speech,
 6 Freedom of the Press Foundation, California Newspaper Publishers Association, The Center for
 7 Investigative Reporting, Online News Association, Radio Television Digital News Association,
 8 The E.W. Scripps Company, Investigative Reporters and Editors, MPA – The Association of
 9 Magazine Media, and the Society of Professional Journalists respectfully request leave to file the
 10 attached brief as amici curiae in support of Microsoft’s opposition to the government’s motion to
 11 dismiss. Both parties consent to the filing of this proposed amicus brief. A copy of the proposed
 12 brief is attached as Exhibit A to this motion.

13 ARGUMENT

14 “District courts may consider amicus briefs from non-parties ‘concerning legal issues that
 15 have potential ramifications beyond the parties directly involved or if the amicus has unique
 16 information or perspective that can help the court beyond the help the lawyers for the parties are
 17 able to provide.’” *Skobomish Indian Tribe v. Goldmark*, 2013 WL 5720053, at *1 (W.D. Wash. Oct.
 18 21, 2013) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067
 19 (N.D. Cal. 2005)). The Court has “broad discretion to appoint amicus curiae.” *Id.* at *1

20 Amici have extensive expertise and a significant interest in the important questions
 21 presented in this case. Amici are news organizations that help keep the American people
 22 informed and the government accountable. The government’s widespread use of 18 U.S.C.
 23 § 2705(b) gag orders impedes amici from reporting on matters that should be the topic of a robust
 24 public debate. Amici are uniquely situated to discuss 1) the critical role that a free press plays in
 25 ensuring an enlightened citizenry; 2) the importance of comprehensive reporting on the
 26 government’s use of 18 U.S.C. § 2703 to obtain electronically stored information; and 3) the ways
 27 that newsgathering and reporting are impeded when the recipients of § 2703 warrants are barred

1 by gag orders from disclosing information about those warrants. In addition, amici's brief
2 presents essential arguments not fully addressed by the parties including a full discussion of the
3 right to receive information, the common-law right of access to documents, and the threat that
4 these gag orders pose to journalists' relationships with their confidential sources.

5 The individual Amici are:

- 6 • Amicus the **Reporters Committee for Freedom of the Press** is a voluntary,
7 unincorporated association of reporters and editors that works to defend the First
8 Amendment rights and freedom of information interests of the news media. The
9 Reporters Committee has provided assistance and research in First Amendment and
10 Freedom of Information Act litigation since 1970.
- 11 • Amicus **The Seattle Times Company**, locally owned since 1896, publishes the daily
12 newspaper The Seattle Times, together with The Issaquah Press, Yakima Herald-Republic,
13 Walla Walla Union-Bulletin, Sammamish Review and Newcastle-News, all in Washington
14 state.
- 15 • Amicus **The Associated Press (AP)** is a news cooperative organized under the Not-for-
16 Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members.
17 The AP's members and subscribers include the nation's newspapers, magazines,
18 broadcasters, cable news services and Internet content providers. The AP operates from
19 300 locations in more than 100 countries. On any given day, AP's content can reach more
20 than half of the world's population.
- 21 • Amicus **Fox News Network, LLC** (Fox News) owns and operates the Fox News
22 Channel, the top rated 24/7 all news national cable channel, and the Fox Business
23 Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.
- 24 • Amicus **National Public Radio, Inc.** (NPR) is an award-winning producer and
25 distributor of noncommercial news, information, and cultural programming. A privately
26 supported, not-for-profit membership organization, NPR serves an audience of more than
27 26 million listeners each week via more than 1000 noncommercial, independently operated

1 radio stations, licensed to more than 260 NPR Members and numerous other NPR-
2 affiliated entities. In addition, NPR is reaching an expanding audience via its digital
3 properties, including NPR.org and NPR's applications, which see more than 30 million
4 unique visitors each month.

- 5 • Amicus WP Company LLC (d/b/a **The Washington Post**) publishes one of the nation's
6 most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is
7 read by an average of more than 20 million unique visitors per month.
- 8 • Amicus the **National Association of Black Journalists** (NABJ) is an organization of
9 journalists, students and media-related professionals that provides quality programs and
10 services to and advocates on behalf of black journalists worldwide. Founded by 44 men
11 and women on December 12, 1975 in Washington, D.C., NABJ is the largest organization
12 of journalists of color in the nation.
- 13 • Amicus **Freedom of the Press Foundation** is a non-profit organization that supports
14 and defends public-interest journalism focused on transparency and accountability. The
15 organization works to preserve and strengthen First and Fourth Amendment rights
16 guaranteed to the press through a variety of avenues, including public advocacy, legal
17 advocacy, the promotion of digital security tools, and crowd-funding.
- 18 • Amicus the **Association of American Publishers, Inc.** (AAP) is the national trade
19 association of the U.S. book publishing industry. AAP's members include most of the
20 major commercial book publishers in the United States, as well as smaller and nonprofit
21 publishers, university presses and scholarly societies. AAP members publish hardcover
22 and paperback books in every field, educational materials for the elementary, secondary,
23 postsecondary and professional markets, scholarly journals, computer software and
24 electronic products and services. The Association represents an industry whose very
25 existence depends upon the free exercise of rights guaranteed by the First Amendment.
- 26 • Amicus **First Amendment Coalition** is a nonprofit public interest organization dedicated
27 to defending free speech, free press and open government rights in order to make

1 government, at all levels, more accountable to the people. The Coalition's mission
2 assumes that government transparency and an informed electorate are essential to a self-
3 governing democracy. To that end, we resist excessive government secrecy (while
4 recognizing the need to protect legitimate state secrets) and censorship of all kinds.

- 5 • Amicus **First Look Media Works, Inc.** is a new non-profit digital media venture that
6 produces The Intercept, a digital magazine focused on national security reporting.
- 7 • Amicus the **International Documentary Association (IDA)** is dedicated to building and
8 serving the needs of a thriving documentary culture. Through its programs, the IDA
9 provides resources, creates community, and defends rights and freedoms for documentary
10 artists, activists, and journalists.
- 11 • Amicus the **Investigative Reporting Workshop**, a project of the School of
12 Communication (SOC) at American University, is a nonprofit, professional newsroom.
13 The Workshop publishes in-depth stories at investigativereportingworkshop.org about
14 government and corporate accountability, ranging widely from the environment and
15 health to national security and the economy.
- 16 • Amicus **The McClatchy Company** is a 21st century news and information leader,
17 publisher of iconic brands such as the Miami Herald, The Kansas City Star, The
18 Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the
19 (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in
20 14 states, providing each of its communities with high-quality news and advertising
21 services in a wide array of digital and print formats. McClatchy is headquartered in
22 Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.
- 23 • Amicus **The Media Institute** is a nonprofit research foundation specializing in
24 communications policy issues founded in 1979. The Media Institute exists to foster three
25 goals: freedom of speech, a competitive media and communications industry, and
26 excellence in journalism. Its program agenda encompasses all sectors of the media, from
27 print and broadcast outlets to cable, satellite, and online services.

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- Amicus **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.
 - Amicus the **National Press Photographers Association** (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.
 - Amicus **Newspaper Association of America** (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.
 - Amicus **Reporters Without Borders** has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.
 - Amicus 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.

- 1 • With some 500 members, amicus **American Society of News Editors** (ASNE) is an
2 organization that includes directing editors of daily newspapers throughout the Americas.
3 ASNE changed its name in April 2009 to American Society of News Editors and
4 approved broadening its membership to editors of online news providers and academic
5 leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a
6 number of areas of interest to top editors with priorities on improving freedom of
7 information, diversity, readership and the credibility of newspapers.
- 8 • Amicus **Association of Alternative Newsmedia** (AAN) is a not-for-profit trade
9 association for 130 alternative newspapers in North America, including weekly papers like
10 The Village Voice and Washington City Paper. AAN newspapers and their websites
11 provide an editorial alternative to the mainstream press. AAN members have a total
12 weekly circulation of seven million and a reach of over 25 million readers.
- 13 • Amicus the **California Newspaper Publishers Association** (CNPA) is a nonprofit trade
14 association representing the interests of over 1300 daily, weekly and student newspapers
15 and newspaper websites throughout California.
- 16 • Amicus **The Center for Investigative Reporting** (CIR) believes journalism that moves
17 citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly
18 pursued and revealed injustices that otherwise would remain hidden from the public eye.
19 Today, we're upholding this legacy and looking forward, working at the forefront of
20 journalistic innovation to produce important stories that make a difference and engage
21 you, our audience, across the aisle, coast to coast and worldwide.
- 22 • Amicus **Online News Association** (ONA) is the world's largest association of online
23 journalists. ONA's mission is to inspire innovation and excellence among journalists to
24 better serve the public. ONA's more than 2,000 members include news writers,
25 producers, designers, editors, bloggers, technologists, photographers, academics, students
26 and others who produce news for the Internet or other digital delivery systems. ONA
27 hosts the annual Online News Association conference and administers the Online

1 Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and
2 the public generally by encouraging editorial integrity and independence, journalistic
3 excellence and freedom of expression and access.

- 4 • Amicus **Radio Television Digital News Association** (RTDNA) is the world's largest
5 and only professional organization devoted exclusively to electronic journalism. RTDNA
6 is made up of news directors, news associates, educators and students in radio, television,
7 cable and electronic media in more than 30 countries. RTDNA is committed to
8 encouraging excellence in the electronic journalism industry and upholding First
9 Amendment freedoms.
- 10 • Amicus **The E.W. Scripps Company** serves audiences and businesses through television,
11 radio and digital media brands, with 33 television stations in 24 markets. Scripps also
12 owns 34 radio stations in eight markets, as well as local and national digital journalism and
13 information businesses, including mobile video news service Newsy and weather app
14 developer WeatherSphere. Scripps owns and operates an award-winning investigative
15 reporting newsroom in Washington, D.C. and serves as the long-time steward of the
16 nation's largest, most successful and longest-running educational program, the Scripps
17 National Spelling Bee.
- 18 • Amicus **Investigative Reporters and Editors, Inc.** is a grassroots nonprofit
19 organization dedicated to improving the quality of investigative reporting. IRE was
20 formed in 1975 to create a forum in which journalists throughout the world could help
21 each other by sharing story ideas, newsgathering techniques and news sources.
- 22 • Amicus **MPA – The Association of Magazine Media**, (MPA) is the largest industry
23 association for magazine publishers. The MPA, established in 1919, represents over 175
24 domestic magazine media companies with more than 900 magazine titles. The MPA
25 represents the interests of weekly, monthly and quarterly publications that produce titles
26 on topics that cover politics, religion, sports, industry, and virtually every other interest,
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1 avocation or pastime enjoyed by Americans. The MPA has a long history of advocating
2 on First Amendment issues.

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

10 Amici respectfully submit that their views will be helpful to this Court in this case. For the
11 foregoing reasons, Amici request that the Court exercise its discretion to allow them to file the
12 attached amicus brief.

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Respectfully submitted,

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

*Counsel for Amici**

September 2, 2016

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

CERTIFICATE OF SERVICE

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

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