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11
12 IN THE UNITED STATES DISTRICT COURT
13 THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 FIRST UNITARIAN CHURCH OF LOS) Case No. 3:13-CV-03287 JSW
16 ANGELES, *et al.*,)
)
17 Plaintiffs,) **MOTION OF NON-PARTY PEN**
) **AMERICAN CENTER FOR LEAVE TO**
) **FILE BRIEF AS AMICUS CURIAE IN**
18 - against -) **SUPPORT OF PLAINTIFFS**
)
19 NATIONAL SECURITY AGENCY, *et al.*,)
)
20 Defendants.)
)
21 _____)

22 Non-party PEN American Center (“PEN”) hereby moves the Court for leave to file the
23 accompanying brief as *amicus curiae* in the above-captioned case, in support of Plaintiffs. Both
24 Plaintiffs and Defendants have consented to the filing of this brief.

25 PEN is a non-profit association of writers that includes poets, playwrights, essayists,
26 novelists, editors, screenwriters, journalists, literary agents and translators. PEN has
27 approximately 3,700 members and is affiliated with PEN International, the global writers’
28 organization with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and

1 the Americas. PEN International was founded in 1921, in the aftermath of the first World War, by
2 leading European and American writers who believed that the international exchange of ideas was
3 the only way to prevent disastrous conflicts born of isolation and extreme nationalism. Today,
4 PEN works along with the other chapters of PEN International to advance literature, protect
5 freedom of expression, and advocate for writers all over the world who are persecuted because of
6 their work.

7 PEN submits the accompanying brief to highlight for the Court the ways in which the
8 government's comprehensive collection of telephone call information particularly harms writers
9 by endangering the privacy that is necessary for the free exploration and exchange of ideas, and
10 the freedom of association and expression the Constitution protects.

11 *Amicus curiae* submissions are generally accepted by district courts where they concern
12 "legal issues that have potential ramifications beyond the parties directly involved" or where "the
13 amicus has 'unique information or perspective that can help the court beyond the help that the
14 lawyers for the parties are able to provide.'" *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*,
15 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F.Supp.2d 59, 62
16 (D.D.C.2003)); see also *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th
17 Cir. 1997) (Posner, J.) ("An amicus brief should normally be allowed . . . when the amicus has
18 unique information or perspective that can help the court beyond the help that the lawyers for the
19 parties are able to provide."). As then-Judge Alito explained in another case,

20 [s]ome friends of the court are entities with particular expertise not
21 possessed by any party to the case. Others argue points deemed too
22 far-reaching for emphasis by a party intent on winning a particular
23 case. Still others explain the impact a potential holding might have
24 on an industry or other group.

25 *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.).

26 PEN aims to assist in all these ways. The parties will naturally focus their arguments on
27 the effects the collection of phone records by the National Security Agency ("NSA") has on the
28 plaintiffs and their communications with their members, staff and other individuals and groups.
As the accompanying brief shows, PEN is particularly qualified to provide the Court with

1 perspectives on the broader impact such government surveillance has on writers and on First
 2 Amendment interests, drawing on the experience and research of its members and PEN's own
 3 research and advocacy, including a recently-published independent survey of its membership
 4 commissioned by PEN. PEN and its members are acutely aware of the inhibiting effect that the
 5 NSA's routine, comprehensive surveillance can have, not only on individual writers but on the
 6 evolution of thought and ideas generally, which depend crucially on privacy – the freedom to
 7 make connections, communicate with one another, and experiment and create that the Constitution
 8 has long protected. Indeed, PEN's recent member survey demonstrates that the NSA's mass
 9 surveillance is already affecting writers' behavior, causing many to censor themselves and restrict
 10 their research, communications, and writings. The perspectives offered by PEN's members in the
 11 proposed brief thus provide views of the issues and the stakes in this case beyond those the parties
 12 are likely to provide in their submissions.

13 For these reasons, PEN respectfully requests that the Court grant this motion for leave to
 14 file the accompanying brief.

15 Dated: November 18, 2013

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke

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 American Center*

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16 FIRST UNITARIAN CHURCH OF LOS) Case No. 3:13-CV-03287 JSW
17 ANGELES, *et al.*,)
18 Plaintiffs,) **BRIEF OF *AMICUS CURIAE* PEN**
19 - against -) **AMERICAN CENTER IN SUPPORT OF**
20 NATIONAL SECURITY AGENCY, *et al.*,) **PLAINTIFFS' MOTION FOR PARTIAL**
21 Defendants.) **SUMMARY JUDGMENT**
22)
23) Date: February 7, 2014
24) Time: 9:00 a.m.
25) Hon. Jeffrey S. White
26) Courtroom 11 - 19th Floor
27)
28)

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1 **INTEREST OF AMICUS CURIAE**

2 PEN American Center is a non-profit association of writers with approximately 3,700
 3 members, including poets, playwrights, essayists, novelists, editors, screenwriters, journalists,
 4 literary agents, and translators (“PEN”). PEN is affiliated with PEN International, a global
 5 writers’ organization with 144 centers in more than 100 countries, which was founded in the
 6 aftermath of the first World War by leading writers who believed that the international exchange
 7 of ideas was the only way to prevent disastrous conflicts born of isolation and extreme
 8 nationalism. Today, PEN works with the other chapters of PEN International to advance literature
 9 and protect freedom expression wherever it is imperiled. PEN advocates for writers all over the
 10 world who are persecuted because of their work. The interest of PEN in this case is in ensuring
 11 that the rights of writers in the United States under the First and Fourth amendments are upheld.

12 **SUMMARY OF ARGUMENT**

13 The aim of this *amicus* brief is to highlight for the Court the profound effect on writers of
 14 the comprehensive nationwide collection of telephone call records by the National Security
 15 Agency (“NSA”). The government’s collection of data on every phone call made or received in
 16 the United States intrudes upon a personal zone of privacy essential to freedom of expression and
 17 association. A recent, groundbreaking survey of writers commissioned by PEN confirms that the
 18 impact of this intrusion is far from hypothetical: writers have changed their behavior because they
 19 know the government is recording information about all their calls. Writers are avoiding
 20 communicating with sources, colleagues, and friends; they are avoiding writing about certain
 21 topics; and writers are not pursuing research they otherwise would. The survey reveals that a vast
 22 majority believe increased government surveillance is especially harmful to writers; nearly all are
 23 concerned about the NSA’s program to collect and analyze metadata from all our telephone calls;
 24 and most expect the data to be retained and susceptible to misuse for years.

25 The significance of these findings cannot be overstated. History demonstrates that writers
 26 must be secure in their privacy and personal freedom to continue to play their critical role in our
 27 democracy as thinkers, investigators, dissenters, and advocates for change. Their work depends on
 28 exchanging ideas with others. The collection of “metadata” enables the government to compile

1 detailed pictures of our private lives, our work, and our associations. Writers and other public
 2 intellectuals and their sources and contacts who espouse unpopular ideas or challenge government
 3 action are especially vulnerable to reprisals or suppression if their communications are tracked.

4 Over the last century, American writers – especially writers whose views challenge those
 5 in power – have been the targets of government surveillance, intimidation, and even persecution,
 6 very often in the name of security. Abuses have occurred not only during the McCarthy era and J.
 7 Edgar Hoover’s reign at the FBI, but in every administration through the present day. Against this
 8 historical backdrop, the NSA’s accumulation of records of every telephone call poses a real and
 9 present danger to freedom of association and freedom of expression. PEN’s survey reveals that
 10 virtually all writers believe that personal data collected by the government will be vulnerable to
 11 abuse for many years. Many writers suspect that they have been subject to surveillance
 12 themselves, and some know that they have been.

13 The expectation of privacy that permits the free flow of information and ideas is essential
 14 to democracy, and it is eroded by the government’s collection of records of all our
 15 communications. As writers have warned for generations, people who are aware that every move
 16 they make is being recorded by a government bureaucracy – even an ostensibly benign one –
 17 inevitably censor themselves. PEN’s survey confirms that the self-censorship has begun. PEN is
 18 profoundly concerned that, because of the NSA’s metadata collection, our private communications
 19 will become cramped, our associations will become more limited, the scope of thought will shrink,
 20 and our democracy will be debased.

21 ARGUMENT

22 I. THE PEN DECLARATION ON DIGITAL FREEDOM

23 Since its founding, PEN has campaigned to counter the inhibiting effects that government
 24 actions can have upon free expression. Section 4 of the PEN International Charter professes:

25 PEN stands for the principle of unhampered transmission of thought
 26 within each nation and between all nations, and members pledge
 27 themselves to oppose any form of suppression of freedom of
 28 expression in the country and community to which they belong, as
 well as throughout the world wherever this is possible.¹

¹ Available at <http://www.pen-international.org/pen-charter/>.

1
2 PEN has become increasingly concerned by the dramatic expansion of government
3 surveillance in the digital age. In September 2012, the PEN Assembly of Delegates, representing
4 20,000 writers, adopted the PEN Declaration on Digital Freedom (the “PEN Declaration”).² One
5 of the four principles enshrined therein directly addresses government surveillance:

6 **All persons have the right to be free from government**
7 **surveillance of digital media.**

8 The PEN Declaration explains that freedom from government surveillance is crucial because
9 surveillance “chills speech by establishing the potential for persecution and the fear of reprisals.”
10 Just knowing that surveillance is in place “fosters a climate of self-censorship that further harms
11 free expression.”

12 The PEN Declaration therefore calls for governments around the world: (1) generally not
13 to seek access to digital communications between or among private individuals, monitor
14 individual use of digital media, track the movements of individuals through digital media, alter the
15 expression of individuals, or generally surveil individuals; (2) to conduct surveillance only in
16 exceptional circumstances and in connection with legitimate law enforcement or national security
17 investigations, and to comply with international due process standards; (3) to ensure that all
18 existing international laws and standards of privacy apply to digital media, and recognize that new
19 laws and standards and protections may be required; and (4) to ensure that international laws and
20 standards of privacy are honored if governments gather and retain information generated by digital
21 media. PEN Declaration ¶ 3.

22 PEN submits this brief to amplify these principles in light of the mass collection of
23 telephone data by the government, which violates each one of them. PEN’s survey of writers
24 confirms that the surveillance is already having the impact the PEN Declaration sought to avoid.
25 Writers are deeply concerned and are censoring themselves and curtailing some of their activities,
26 to protect their sources and contacts and to keep their thoughts and ideas to themselves.

27
28 ² Available at <http://www.pen-international.org/pen-declaration-on-digital-freedom/declaration-on-digital-freedom-english/>.

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

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

13 More than 80 years ago, Justice Brandeis eloquently explained the connection between
 14 freedom from government intrusion and freedom of thought and expression:

15 The makers of our Constitution undertook to secure conditions
 16 favorable to the pursuit of happiness. . . . They sought to protect
 17 Americans in their beliefs, their thoughts, their emotions and their
 18 sensations. They conferred, as against the Government, the right to
 19 be let alone – the most comprehensive of rights and the right most
 20 valued by civilized men. To protect that right, every unjustifiable
 21 intrusion by the Government upon the privacy of the individual,
 22 whatever the means employed, must be deemed a violation of the
 23 Fourth Amendment.

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

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

1 Philosopher Kwame Anthony Appiah, a former president of PEN, has illustrated how the
2 possibility of surveillance impedes the free exchange necessary for the development of ideas:

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

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

14 Though it is often difficult to discern and quantify – there is no database of thoughts that
15 have not been shared or ideas that have not been exchanged – the harm of self-censorship is real.
16 Writers have experienced it before (*see* II. A., below). Writers have used the tools of their trade to
17 illustrate how surveillance inhibits their thought and freedom and, more broadly, how such
18 monitoring affects all citizens (*see* II. B. 1., below). And writers have now revealed, through
19 PEN’s survey, that the NSA’s mass data collection is already inhibiting them; it is having a
20 concrete impact, reducing communication and inducing self-censorship, causing grave concern
21 (*see* II. B. 3., below).

22 A. **The History of Abuses of Surveillance**

23 Throughout history, writers, artists, and public intellectuals have been particularly
24 susceptible to intrusive surveillance and scrutiny. During the twentieth century, the FBI
25 maintained active surveillance and investigation files on more than 150 writers, including James
26 Baldwin, Truman Capote, Willa Cather, T.S. Eliot, William Faulkner, F. Scott Fitzgerald, Lillian
27 Hellman, Ernest Hemingway, Sinclair Lewis, Henry Miller, Dorothy Parker, Gertrude Stein, John
28 Steinbeck, Tennessee Williams, and Richard Wright. *See* Natalie Robins, *Alien Ink* (1992).
Although this practice was often the result of a combination of “paranoia,” “conspiracy,”

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

1 “monumental bureaucratic overkill” and agents “simply doing their job,” “one thing is certain:
2 most of the writers were watched because of what they thought.” *Id.* at 17.

3 Such abuses have been especially acute during times of heightened national security
4 concerns. In the United States during the McCarthy era, for example, writers and artists suspected
5 of having Communist leanings were interrogated by Congress and the FBI and blacklisted if they
6 did not inform on their colleagues. Writers were visited frequently by the FBI. Their neighbors
7 were interviewed and their garbage examined. They masked their identities to find work. *See*
8 Larry Siems, *A Blacklisted Screenwriter on American Surveillance* (Aug. 30, 2013) (“Bernstein
9 Interview”);⁵ *see also generally* Victor Navasky, *Naming Names* (1980).

10 The FISC was itself established in response to the repeated abuse by law enforcement and
11 intelligence agencies of their surveillance powers and the misuse of information obtained for
12 otherwise lawful purposes. Reports of the United States Senate Select Committee to Study
13 Governmental Operations with Respect to Intelligence Activities (the “Church Committee”)
14 detailed how “intelligence excesses” had been found in every presidential administration and
15 described, for instance, how the FBI under J. Edgar Hoover “targeted Dr. Martin Luther King, Jr.,
16 in an effort to ‘neutralize’ him as a civil rights leader.” *See generally* Brief of Former Church
17 Committee Members and Staff as *Amici Curiae* Supporting Respondents and Affirmance at 4, 9-
18 13, *Clapper v. Amnesty Int’l*, 133 S.Ct. 1138 (2013) (No. 11-1025). PEN members can attest that
19 writers need to be able to communicate with leaders and thinkers who may be viewed by some as
20 subversive.

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

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

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

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

1 telephone conversations, telegrams, it doesn't matter. There would
2 be no place to hide.

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

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

15 In light of the history and the abuses that continue today, writers have every reason to
16 worry about the government's voracious collection of so much sensitive information.

17 **B. Self-Censorship, Communication, and Creativity**

18
19 Even if writers are not directly intimidated or suppressed, and even if information collected
20 by the government is never used, the very collection of telephone metadata interferes with the
21 work of writers. The knowledge that so much information is being gathered and stored is enough
22 to inhibit the free exploration and exchange of ideas. Through the years, writers have richly
23 illuminated the insidious ways surveillance affects the ability to write and can thereby limit
24 thinking. The dangers these writers have predicted are manifesting themselves now, as the results
25 of the recent PEN survey of writers chillingly confirm.

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

3 Creativity requires breathing room to flourish, and we have benefitted as a people from the
 4 freedom our Constitution protects. Describing the creative process, poet and PEN member
 5 Adrienne Rich has emphasized the importance of a sense of freedom to consider the unorthodox:

6 For a poem to coalesce, for a character or an action to take shape,
 7 there has to be an imaginative transformation of reality which is in
 8 no way passive. *And a certain freedom of mind is needed*
 9 Moreover, if the imagination is to transcend and transform
 experience, it has to question, to challenge, to conceive of
 alternatives, perhaps to the very life you are living at that moment.

10 Adrienne Rich, *Arts of the Possible* 20-21 (1971) (emphasis added). PEN member David K.
 11 Shipler has explained how the mere collection of information by the government necessarily
 12 creates dangers for thinkers and restricts the freedom of mind:

13 Privacy is like a poem, a painting, a piece of music. It is precious in
 14 itself. Government snooping destroys the inherent poetry of
 15 privacy, leaving in its absence the artless potential for oppression.
 16 At the least, if the collected information is merely filed away for
 17 safekeeping, a weapon is placed in the hands of the state. If it is
 18 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

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

20 Walter Bernstein, a screenwriter who lived through harassment and blacklisting in the
 21 1950s, believes the NSA’s mass surveillance today creates a climate of fear today: “It’s not an
 22 atmosphere that helps create creativity or lets the mind run free. You’re always in danger of self-
 23 censorship....” Bernstein Interview. Government surveillance can destroy the sense of privacy
 24 that is essential to the freedom to create, even without active harassment. Given the long history
 25 of abuse, the mere knowledge that private information is being collected inhibits communications
 26 and suppresses expression that relies on the free exchange of thoughts.

27 The repressive effect of mass surveillance is not limited to those whose profession depends
 28 directly upon research and writing. Authors have often created fictional worlds more extreme than

1 reality to warn the public at large about the prying eyes of a powerful state and to underscore the
 2 critical importance of privacy to human creativity and freedom. The author Julian Sanchez has
 3 observed that, when we discuss surveillance and privacy, “we speak a language borrowed from
 4 fiction.” *On Fiction and Surveillance* (Introduction to PEN World Voices Festival panel: “Life in
 5 the Panopticon: Thoughts on Freedom in an Era of Pervasive Surveillance”) (May 14, 2012).⁷

6 The most common literary reference point for state surveillance is, of course, George
 7 Orwell’s dystopian novel, *1984* (1949). See, e.g., William O. Douglas, *Points of Rebellion* 29
 8 (1969) (“Big Brother . . . will pile the records high with reasons why privacy should give way to
 9 national security, to law and order, to efficiency of operation, to scientific advancement and the
 10 like.”). By depicting a totalitarian society ruled by an omniscient regime, Orwell vividly
 11 illustrated the dangers of a powerful surveillance state. Other writers have explored the power of
 12 surveillance alone, without Orwellian government repression. For example, the title of the PEN
 13 World Voices Festival panel noted above refers to the “Panopticon” devised by British
 14 philosopher Jeremy Bentham—a circular prison with a central observation tower to permit guards
 15 to see inmates in their cells at all times without letting the inmates ever know whether they were
 16 being watched. Jeremy Bentham, *The Panopticon Writings* (Miran Bozovic, ed., 1995). The
 17 Panopticon aptly illustrates how the NSA’s comprehensive collection of telephone call data affects
 18 society, even if we never know whether any particular record is actually examined. Philosopher
 19 Michel Foucault recognized that the mere knowledge that one *could* be watched is sufficient to
 20 achieve the desired effect of control, because the constraints become “internalized.” *Discipline*
 21 *and Punish* (“*Surveiller et Punir*” in the original French) (1975), at 201-03.

22 Another vivid literary illustration of the impact of government surveillance is found in the
 23 work of Franz Kafka. In *The Trial* (1925), Joseph K. is arrested without explanation and discovers
 24 that “[a] vast bureaucratic court has apparently scrutinized his life and assembled a dossier on him.
 25 The Court is clandestine and mysterious, and court records are ‘inaccessible to the accused.’”
 26 Daniel J. Solove, *The Digital Person* 27-55, 36 (2004). He engages in a maddening and largely
 27 fruitless quest to understand the charges against him and who brought them. The “Kafka-esque”

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

1 danger of surveillance data is not necessarily that agencies will be “led by corrupt and abusive
2 leaders,” but rather that mass collection of data “shift[s] power toward a bureaucratic machinery
3 that is poorly regulated and susceptible to abuse.” *Id.* at 178.

4 History has shown that the NSA is, in fact, poorly regulated and vulnerable to abuse (*see*
5 II. A., above), but even if the information the NSA gathers were never misused, the mere
6 possibility of being persecuted or discriminated against for exploring ideas that may be deemed
7 dangerous – or for communicating with people who are deemed dangerous – raises the stakes for
8 writers and hampers the free thought that is so necessary to creative expression.

9 2. The High Sensitivity of Telephone Metadata

10 Under the Order here, the NSA is authorized only to collect “telephony metadata,” but,
11 when aggregated, such data can reveal private information that is particularly sensitive for writers.
12 The context of our communications is a window into the content, and more. As a former general
13 counsel of the NSA has stated, “Metadata absolutely tells you everything about somebody’s life. If
14 you have enough metadata you don’t really need content.... [It’s] sort of embarrassing how
15 predictable we are as human beings.” Alan Rusbridger, *The Snowden Leaks and the Public*, *The*
16 *New York Review of Books*, Nov. 21, 2103 (quoting Stewart Baker). Metadata can reveal
17 extremely private facts and provide a map of personal associations across the country and the
18 world:

19 Whom someone is talking to may be just as sensitive as what’s
20 being said. Calls to doctors or health-care providers can suggest
21 certain medical conditions. Calls to businesses say something about
22 a person’s interests and lifestyle. Calls to friends reveal associations,
potentially pointing to someone’s political, religious or
philosophical beliefs.

23 Daniel J. Solove, *Five Myths About Privacy*, *Washington Post* (June 13, 2013) (warning of the
24 possibility of tracking “the entire country’s social and professional connections.”); *see also*
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1 Jane Mayer, *Verizon and the N.S.A.: The Problem With Metadata*, New Yorker (June 6, 2013)
2 (metadata may reveal impending corporate takeovers, sensitive political information such as
3 whether and where opposition leaders may meet, and who is romantically involved with whom).⁸

4 Under the Order, every telephone customer, like Joseph K. in *The Trial*, knows there is a
5 detailed dossier containing highly personal information about him in the hands of a vast, secretive
6 government bureaucracy. Although it may be that no one has bothered to assemble that dossier for
7 a given individual, the potential is always present. If such surveillance becomes the norm, our
8 tolerance for intrusions will naturally rise, and the zone of privacy will shrink further as people
9 become accustomed to it. Ideas will not be aired and tested. Culture will contract, and the
10 conditions that allow democracy to thrive will be eroded.

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

23 The prospect that telephone metadata can reveal the entire web of a writer's associations
24 and interactions – and the contacts of all the writer's contacts – inevitably limits and deters
25 valuable interactions. Writers in the United States who support human rights or communicate
26 with human rights activists, for instance, are acutely aware of the dangers that comprehensive

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28 ⁸ Available at <http://www.newyorker.com/online/blogs/newsdesk/2013/06/verizon-nsa-metadata-surveillance-problem.html>.

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

1 telephone metadata may create. The government's records of calling activity may permit reprisals
 2 or sanctions against writers, or people with whom they speak, or those people's families and
 3 friends, here and in other countries where they may be more vulnerable. Writers develop ideas
 4 through conversations, including conversations with radicals, dissidents, pariahs, victims of
 5 violence, and others who may be endangered if their communications become known. Chilling
 6 their exchanges impoverishes thought.

7 3. The Impact on Writers: The PEN Writers Survey

8 A survey of PEN's members conducted during October 2013 shows how government
 9 surveillance is already affecting writers and their work. The Survey canvassed writers to learn
 10 their specific concerns about government surveillance, including "their sense of whether their own
 11 communications are being monitored, and the extent to which they are moderating their behavior
 12 as a result." *The Impact of US Government Surveillance on Writers: Findings From a Survey of*
 13 *PEN Membership* (October 31, 2013) ("PEN Survey"),¹⁰ at 1. An accompanying report
 14 summarizes the Survey's findings and includes narrative responses describing writers' experiences
 15 and concerns. *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor* (November
 16 12, 2013) ("PEN Report").¹¹

17 The results are sobering. As reported in the *New York Times*, the Survey shows that a large
 18 majority of PEN respondents are "deeply concerned about recent revelations regarding the extent
 19 of government surveillance of email and phone records, with more than a quarter saying that they
 20 have avoided, or are seriously considering avoiding, controversial topics in their work." Noam
 21 Cohen, *Surveillance Leaves Writers Wary* (November 11, 2013). Digging deeper, the Survey
 22 reveals that 76% of respondents believe increased government surveillance is particularly harmful
 23 to writers because it impinges on the privacy they need to create freely. PEN Survey, at 1-3.
 24 Nearly 90% are concerned about the NSA's program to collect and analyze metadata, and writers
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27 ¹⁰ Available at http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf,
 at 1-10.

28 ¹¹ Available at http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf,
 at 12-26.

1 now assume that their communications are monitored. *Id.*, at 2, 5. A large majority believe that
2 the gathered data may be mismanaged or abused for years to come. *Id.*, at 1, 4.

3 These beliefs are changing writers' behavior. Many writers reveal that they have avoided
4 discussing or writing about controversial topics as result of the presumed monitoring. They have
5 curtailed certain types of research; they have taken extra steps to mask their identities and the
6 identities of sources; they have avoided contacting people if those people could be endangered if it
7 became known that they were speaking to a writer; and some have even declined to meet with
8 people who might be seen as security threats. *Id.*, at 3. Their narrative comments provide insight
9 into the reasons for this changing behavior, and they reflect the precise dangers predicted by PEN
10 writers and others. One writer, without mentioning Bentham, describes a future in which a
11 panoptic state becomes our collective framework for communicating:

12 The codification of surveillance as a new 'norm'—with all different
13 forms and layers—is changing the world in ways I think I fail to
14 grasp still. And one of the things I've learned through repeat visits to
15 another country with a strong police/military presence is what it
16 feels like to not know whether or exactly how you are being
17 watched due to some categorization you might not even know about.
18 This is of great concern to me, the sense that this condition is
19 spreading so rapidly in different nations now—or perhaps more
20 accurately: that the foundations are being laid and reinforced so that
21 by the time we fully realize that we live in this condition, it will be
22 too late to alter the infrastructure patterns.

23 PEN Report, at 5.

24 Other writers describe a “climate of self-censorship that further harms free expression” –
25 precisely what the PEN Declaration warns against and writers such as Walter Bernstein recall
26 from earlier episodes of government surveillance. One writer notes having already “dropped
27 stories ... and avoided research on the company telephone due to concerns over wiretapping or
28 eavesdropping.” *Id.*, at 6. Another indicates that “the writers who feel most chilled, who are
being most cautious, are friends and colleagues who write about the Middle East.” *Id.* The self-
censorship extends not just to writing and speaking but to other activities essential to creative and
productive thought and expression, as writers limit their research, steer clear of certain topics, and
avoid communicating with sources and colleagues. PEN Report App'x.

1 I was considering researching a book about civil defense
 2 preparedness during the Cold War: what were the expectations on
 3 the part of Americans and the government? What would have
 4 happened if a nuclear conflagration had taken place? What
 5 contingency plans did the government have? How did the pall of
 6 imminent disaster affect Americans? But as a result of recent articles
 7 about the NSA, I decided to put the idea aside

8 I write books, most recently about civil liberties, and to protect the
 9 content of certain interviews, I am very careful what I put in emails
 10 to sources, even those who are not requesting anonymity. I'm also
 11 circumspect at times on the phone with them—again, even though
 12 they may not be requesting anonymity and the information is not
 13 classified. . . .

14 *Id.*, at 7, 8.

15 The message is clear: writers are restricting their activities and censoring their own work,
 16 in ways that are already damaging creative thought and expression and ultimately undermining
 17 public discourse. As PEN's Executive Director, Suzanne Nossel, stated upon release of the
 18 Survey, "[w]riters are kind of the canary in the coal mine in that they depend on free expression
 19 for their craft and livelihood." Noam Cohen, *Surveillance Leaves Writers Wary* (November 11,
 20 2013). While the danger is acute for writers, the threat to freedom reaches far beyond them.

21 **III. BALANCING FREEDOM AND SECURITY**

22 The type of surveillance the Order permits can no doubt make law enforcement and
 23 intelligence gathering easier and more effective. Yet even seemingly small sacrifices of privacy
 24 may gradually but fundamentally alter the delicate balance between liberty and security. As
 25 Justice Douglas warned, "[a]s nightfall does not come all at once, neither does oppression."
 26 Melvin I. Urofsky and Philip E. Urofsky eds., *Selections from the Private Papers of Justice*
 27 *William O. Douglas* 162 (1987). Even where sacrifices of liberty are sought for legitimate ends,
 28 we should not lose sight of the fundamental values at stake: "Experience should teach us to be
 most on our guard to protect liberty when the Government's purposes are beneficent. . . . The
 greatest 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, as the results of the PEN Survey testify, but also subtle and indirect – because

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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

For the foregoing reasons, Amicus Curiae PEN believes the plaintiffs’ motion for partial summary judgment should be granted.

Dated: November 18, 2013

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke

Thomas R. Burke

Attorneys for Amicus Curiae PEN American Center