File No. 36602

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

GOOGLE INC.

Appellant

- and -

EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, CLARMA ENTERPRISES INC.

Respondents

MOTION FOR INTERVENTION OF THE MEDIA COALITION
(Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

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TAB 1

File No. 36602

IN THE SUPREME COURT OF CANADA
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B E T W E E N:

GOOGLE INC.

Appellant

- and -

EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, CLARMA ENTERPRISES INC.

Respondents

NOTICE OF MOTION OF THE PROPOSED INTERVENER, THE MEDIA COALITION
(Rules 47 and 55 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the Media Coalition (which is comprised of 15 media organizations as set out in Schedule "A") applies to a Judge pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, for an order:

(a) granting the Media Coalition leave to intervene in this appeal;

(b) permitting the Media Coalition to file a memorandum of argument not exceeding 20 pages;

(c) permitting the Media Coalition to present oral argument not exceeding 15 minutes; and

(d) for such further or other order as the Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

(a) The Media Coalition consists of the Reporters Committee for Freedom of the Press (the "**Reporters Committee**") and 14 media companies and organizations, many global, as set out in Schedule "A";

(b) The Reporters Committee is an unincorporated non-profit association of reporters and editors based in Washington D.C. that works to defend First Amendment rights and freedom of information interests of the news media. Its mission is to protect the right to gather and distribute news; to keep government accountable by ensuring access to public records, meetings and courtrooms; and to preserve the principles of free speech and unfettered press, as guaranteed by the First Amendment of the United States Constitution. The Reporters Committee has provided assistance and research in freedom of speech litigation since 1970 and regularly organizes coalitions of media organizations to intervene in litigation involving freedom of expression and related issues in the United States and elsewhere;

(c) The other members of the Media Coalition are either public interest organizations with a mandate to protect First Amendment rights or media organizations and digital content providers that have a direct interest in freedom of expression issues;

(d) Members of the Media Coalition have frequently acted as *amicus* and intervenors to courts and have provided submissions to public bodies on issues relating to freedom of expression;

(e) This is an appeal about the ability of a Canadian court to order a mandatory injunction requiring a (foreign, non-party) web-based company to remove content from its websites in order to give effect to court orders made in a private party dispute. It raises issues regarding appropriate restrictions on freedom of expression, jurisdiction of national courts over global digital platforms, and the dangers of national court orders with expansive extraterritorial effect. The Court's

decision in this appeal will have an impact beyond the interests of the immediate parties to the appeal, and in particular on the international news media;

(f) The Media Coalition proposes to make submissions on this appeal that will be relevant, useful to the Court and different from those of the parties and the other proposed intervenors. The Media Coalition's submissions will be especially valuable given its extensive experience with freedom of expression and issues involving the media and the Internet in Canada, the United States and internationally;

(g) If granted leave to intervene, the Media Coalition plans to make the following specific submissions:

(i) The British Columbia Court of Appeal's ("**BCCA**") analysis of territorial competence and jurisdiction failed to properly take into account the context of multinational companies with a significant or exclusive online presence. Such companies, including the media organizations that form the proposed intervener Media Coalition, may publish websites or content that have global reach, yet more must be required for jurisdiction to be exercised by a national court. In particular, the BCCA's interpretation of "proceeding" in the *Court Jurisdiction and Proceedings Transfer Act* threatens principles of order, fairness and comity as, under this interpretation, a court could issue an injunction against any non-party outside of the country so long as the injunction had some remedial effect on a dispute within the province's jurisdiction. The concerning implication of this approach is that companies with global reach could be beholden to any – and every – state's laws.

If every state could take jurisdiction over digital platforms – like Google, news sites and others – the regulatory burden of compliance would become unmanageable, especially for smaller content providers. This would have serious implications for freedom of expression and could lead to a "balkanization" of the Internet. If the costs of compliance become too high, digital platforms and content providers may search for ways to limit the countries that can assert jurisdiction over them. Thus, some may limit access to subscribers who offer proof of geographical residence in certain countries, and they are most likely to eliminate or reduce business activity in "high risk jurisdictions". Citizens of oppressive regimes who rely on the Internet for uncensored news or political organizing would be the first to lose access because their governments have the most repressive laws. As a result, the globalized Internet may become regionalized, or even nationalized, and the benefits of globalization could be rolled back.

(ii) The Court should adopt the "targeting" approach to assist in determining when e-trade in a jurisdiction creates a real and substantial connection between a foreign defendant or a dispute and the jurisdiction. In addition, the "active/passive" approach – by which an entity with a highly interactive and transactional website that enters into transactions with persons and entities in the jurisdiction is more likely to be subject to jurisdiction of the forum than an entity with a passive website that only makes information available to users in the jurisdiction – may also provide some guidance. While there was some reference to these approaches by the lower courts in this case, and these approaches have been considered by lower courts in Canada in a small number of other cases, these approaches should have a more prominent role in the Canadian jurisdiction analysis and the correct analysis under these approaches should be clarified. These approaches are regularly employed by courts in the United States.

A proper analysis would lead to both approaches supporting a lack of jurisdiction in this case. For instance, under the "targeting approach", a forum has jurisdiction over an out-of-forum defendant based on the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction – i.e. whether a party is targeting a particular jurisdiction. Here, the Court would not have jurisdiction over the injunction application because it asserts authority over Google websites that expressly target other states (i.e. the injunction requires removal of content from Google France and Google India, even though Google is not targeting British Columbians, or Canadians, through those websites).

Notably, these approaches should also be employed when determining whether a court should exercise its discretion to grant a mandatory injunction with extraterritorial effect.

(iii) Even accepting, for the purposes of argument, that courts may have unlimited equitable jurisdiction to grant injunctions as found by the BCCA, such jurisdiction must be exercised within the confines of the Constitution of Canada and the *Canadian Charter of Rights and Freedoms*. Therefore, in exercising discretion to grant injunctions with extraterritorial effect, courts must take far greater account of whether such an order violates an affected party's freedom of expression than was done in this case. Account must also be taken of the free expression rights of the public and the press, which uses search engines like Google for newsgathering and accurate reporting purposes.

(iv) Courts should not issue mandatory injunctions requiring digital platforms or content providers to assist in enforcing state law around the world, as was done here with respect to Canadian intellectual property laws. On this

occasion, it is Google, but on another occasion it could be the press. In either case, digital platforms and content providers should not be co-opted for use as an arm of the state, particularly when limitless international jurisdiction could mean that repressive regimes would also seek to use them in this fashion. There are robust constitutional protections for an independent press, which must be taken into account as the law in this area is developed.

AND FURTHER TAKE NOTICE that the following documents will be relied on in support of this motion:

(a) the affidavit of Bruce Brown sworn July 7, 2016; and

(b) such further and other material as counsel may advise and this Court may permit.

Dated at Toronto, Ontario this 8th day of July, 2016.

SIGNED BY

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Helen Richards

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

Schedule "A"

1. Reporters Committee for Freedom of the Press
2. American Society of News Editors
3. Association of Alternative Newsmedia
4. The Center for Investigative Reporting
5. Dow Jones & Company, Inc.
6. First Amendment Coalition
7. First Look Media Works, Inc.
8. New England First Amendment Coalition
9. Newspaper Association of America
10. AOL Inc.
11. California Newspaper Publishers Association
12. The Associated Press
13. The Investigative Reporting Workshop at American University
14. Online News Association
15. Society of Professional Journalists

TAB 2

File No. 36602

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

GOOGLE INC.

Appellant

- and -

EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, CLARMA ENTERPRISES INC.

Respondents

AFFIDAVIT OF BRUCE BROWN
(Motion for Leave to Intervene of the Proposed Intervener, the Media Coalition)

I, Bruce Brown, of the City of Washington, D.C., SOLEMNLY AFFIRM AND DECLARE:

1. I am the Executive Director of the Reporters Committee for Freedom of the Press (the "**Reporters Committee**"). As such, I have personal knowledge of the matters to which I depose, or I have received information from others, in which case I believe that information to be true.

2. The Media Coalition consists of the Reporters Committee and 14 media companies and organizations, many global, as set out below at paragraph 6. The Media Coalition seeks leave to intervene in this appeal. As a result of our expertise, special knowledge and perspective regarding freedom of expression and the press as they relate to this appeal, the Media Coalition can assist and bring a unique perspective to the Court.

The Reporters Committee

3. Founded in 1970, the Reporters Committee is an unincorporated nonprofit association

of reporters and editors based in Washington DC that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment litigation since 1970. The Reporters Committee is also a major national and international resource on free speech issues, disseminating information in a variety of forms, including a quarterly legal review, a weekly newsletter, a 24-hour hotline, and various handbooks on media law issues. Academics, state and federal agencies in the United States and Congress regularly call on the Reporters Committee and its attorneys for advice and expertise, and it has become a leading advocate for reporters' interests in cyberspace.

4. The Reporters Committee's underlying mission is "to protect the right to gather and distribute news; to keep government accountable by ensuring access to public records, meetings and courtrooms; and to preserve the principles of free speech and unfettered press, as guaranteed by the First Amendment of the US Constitution". In furtherance of this mission, the Reporters Committee frequently acts as, and organizes media coalitions to act as, *amicus* to courts in the United States. It has also intervened in legal proceedings in Ontario and elsewhere in the world. The following is a list of some of the freedom of expression cases in which the Reporters Committee been granted intervenor or *amicus* status (often in coalitions with other members of this Media Coalition). A more comprehensive list of the cases relating to freedom of expression in which the Reporters Committee has been involved, including those that touch on issues relating to the Internet, is attached as **Exhibit "A"**.

(a) *Bangoura v. Washington Post*, [2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2006] SCCA No. 497 (February 16, 2006): The plaintiff brought an action for an order, *inter alia*, directing the newspaper to cease publication of the impugned articles about his U.N. service published by the defendant on its website, on the basis that they were defamatory. Issues arose as to the connection between Ontario as a jurisdiction and the plaintiff's claim. On this point, the Reporters Committee, alongside other national and international media organizations, offered alternative approaches to the issue of jurisdiction and the real and substantial connection test before the Court.

(b) *In re WP Company LLC (US v. McDonnell)* (4th Cir., Order remanding for particularized findings justifying disclosure, April 27, 2015): The Washington Post sought access to completed jury questionnaires in the criminal trial of former Virginia governor Robert F. McDonnell and his wife in the US District Court for the Eastern District of Virginia. The district court released the

completed questionnaires but with names and juror numbers redacted, making it impossible for the public to know which questionnaires corresponded with empaneled jurors. The Washington Post filed a petition for a writ of mandamus in the Fourth Circuit, seeking an order directing the district court to identify which questionnaires were completed by seated jurors. The Reporters Committee and 22 media organizations, including some that form part of this Media Coalition, filed an *amicus* brief, arguing that the First Amendment provides a presumptive right of access to juror questionnaires, which are merely a written form of oral *voir dire*, which is presumptively open to the public.

(c) *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015): The defendant was convicted in the US District Court for the Eastern District of Pennsylvania of making threatening communications based on comments he posted on a social networking website. The Reporters Committee filed an *amicus* brief with the US Supreme Court, which argued that an objective intent test for threatening communications crimes had the potential to infringe on the First Amendment rights of media organizations that cover controversial and thought-provoking topics.

(d) *United States v. Alvarez*, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012): The Reporters Committee submitted to the US Supreme Court that the petitioner's proposal to create a new, virtually limitless category of unprotected false speech, and a new test for regulating false speech under the First Amendment, should be rejected. They also suggested that if the new category were accepted, it would allow the government to criminalize false speech anywhere, by anyone, to anyone, regarding any subject, regardless of whether the speech caused any tangible harm, so long as the prohibition purportedly served an "important" government interest.

5. As a long-time defender of freedom of expression and freedom of the press, the Reporters Committee has also made submissions and provided advice on a range of freedom of expression issues to a variety of public bodies. The following is a list of some of the most recent submissions:

(a) June 22, 2016: On behalf of the Reporters Committee, I made submissions to lawmakers in the US House Judiciary Committee Subcommittee on the Constitution and Civil Justice regarding federal anti-SLAPP legislation, which would combat lawsuits filed to intimidate the exercise of free speech.

(b) June 13, 2016: The Reporters Committee submitted administrative comments to the US Department of Labor recommending that it modify its routine uses of the *Privacy Act* so that the Office of Governmental Information Services could better fulfill its statutory duties under the *Freedom of Information Act*.

(c) May 11, 2016: The Reporters Committee asked Minnesota lawmakers to amend right-of-publicity legislation to provide safeguards for constitutional rights. In its letter, the Reporters Committee urged the Minnesota legislature to explicitly avoid regulating any form of political, artistic, or other socially relevant expression by limiting themselves to commercial products that imply an endorsement or other connection to the individual.

(d) April 28, 2016: The Reporters Committee and other news organizations submitted comments to the Canadian Office of the Privacy Commissioner, urging it not to adopt a "right to be forgotten" as part of its privacy program.

(e) September 25, 2015: The Reporters Committee submitted comments regarding the proposed updates to the US Department of Homeland Security's *Freedom of Information Act* regulations.

(f) September 14, 2015: The Reporters Committee, joined by a coalition of media, including The Associated Press, made submissions to the independent French data protection agency (la Commission Nationale de l'Informatique et des Libertés) urging it to rescind its order that Google search delistings required under the European Union's "right to be forgotten" rule include domains not just in France or Europe, but around the world.

(g) September 15, 2014: The Reporters Committee and other media organizations, including some that form part of this Media Coalition, submitted comments to the Federal Communications Commission encouraging it to maintain an open internet.

The Media Coalition

6. The Media Coalition is comprised of the following companies and organizations:

(a) American Society of News Editors ("**ASNE**");

(b) Association of Alternative Newsmedia ("**AAN**");

(c) The Center for Investigative Reporting ("**CIR**");

(d) Dow Jones & Company, Inc. ("**Dow Jones**");

(e) First Amendment Coalition ("**FAC**");

(f) First Look Media Works, Inc. ("**First Look**");

(g) New England First Amendment Coalition ("**New England Coalition**");

(h) Newspaper Association of America ("**NAA**");

(i) AOL Inc. ("**AOL**");

(j) California Newspaper Publishers Association ("**CNPA**");

(k) The Associated Press ("**AP**");

(l) The Investigative Reporting Workshop at American University (the "**Workshop**");

(m) Online News Association ("**ONA**"); and

(n) Society of Professional Journalists ("**SPJ**").

7. I have been advised by representatives of the aforementioned media organizations of the following information.

8. ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

9. AAN is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

10. CIR believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, CIR is upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage an audience, across the aisle, coast to coast and worldwide.

11. Dow Jones, a global provider of news and business information, is the publisher of The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones maintains one of the world's largest newsgathering operations, with more than 1,800 journalists in nearly fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

12. FAC is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. FAC's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, it resists excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

13. First Look is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

14. The New England Coalition is a nonprofit organization of lawyers, journalists, historians, librarians, and academics, as well as private citizens whose core beliefs include the principles of the First Amendment. It aspires to advance and protect the five freedoms of the First Amendment and the principle of the public's right to know in New England, and regularly files *amicus curiae* briefs on press freedom issues.

15. 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.

16. AOL is a media technology company with a mission to connect consumers and creators through open marketplaces. AOL uses data to disrupt content production, distribution and monetization. The company connects publishers with advertisers across its global,

programmatic platforms, tapping into Microsoft inventory and original content brands like TechCrunch, The Huffington Post, and MAKERS which reach over 500 million monthly global consumers. Within its mobile advertising network alone, AOL has a reach of roughly 800 million users. A subsidiary of Verizon Communications Inc., AOL is shaping the digital future.

17. CNPA is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and newspaper websites throughout California.

18. The AP is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 US newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

19. The Workshop, a project of the School of Communication 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.

20. ONA is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

21. SPJ is dedicated to improving and protecting journalism. It is America'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.

22. All of the members of the Media Coalition have been granted *amicus*, intervenor or similar status in various court cases in the United States and around the world. A list of selected cases relating to freedom of expression in which members of the Media Coalition have been involved is attached as **Exhibit "B"**.

The Media Coalition's Distinct Perspective on the Appeal

23. The members of the Media Coalition are either public interest organizations with a mandate to protect First Amendment rights or media organizations and content providers with digital platforms that have a direct interest in freedom of expression issues, including as related to the Internet. The mandates and interests of these organizations confer on the Media Coalition a special expertise, interest and concern in ensuring that the law adequately protects the fundamental rights enjoyed by the public and press, including freedom of expression, and that national court jurisdiction is not expanded without due regard for free expression rights.

24. As set out above, and enumerated in detail in **Exhibits "A" and "B"**, the members of the Media Coalition have long demonstrated their interest in laws relating to freedom of expression and the intersection between freedom of expression and the Internet. Members of the Media Coalition have made key contributions to the jurisprudence on these issues in the United States and elsewhere. In keeping with the members' ongoing commitment to the preservation of the principles of freedom of expression, the Media Coalition has a pressing and significant interest in this appeal.

25. The Media Coalition believes that the outcome of this appeal will have a profound effect on all those who provide content online, and in particular the media. The issues relating to freedom of expression, jurisdiction and the extraterritorial scope of national court orders raised in this appeal include much broader issues of public debate which go to the core of the mandates and interests of the members of the Media Coalition. Made from a perspective different from those of the immediate parties and to the best of my knowledge, other proposed intervenors, the Media Coalition's submissions will be uniquely grounded in the members' interest in freedom of expression as media organizations and content providers.

Submissions to Be Advanced by the Media Coalition if Leave is Granted

26. I believe that the Media Coalition's submissions in the appeal will be of assistance to the Court in deciding the important issues that it raises. The Media Coalition's submissions will be grounded in the mandates of its members and their knowledge of media law, freedom of expression and related technological issues as well as the status of many as content providers and media companies with international and digital platforms.

27. If granted leave to intervene, I anticipate that the Media Coalition will make the following submissions with respect to the issues raised:

(a) The British Columbia Court of Appeal's ("**BCCA**") analysis of territorial competence and jurisdiction failed to properly take into account the context of multinational companies with a significant or exclusive online presence. Such companies, including the media organizations that form the proposed intervener Media Coalition, may publish websites or content that have global reach, yet more must be required for jurisdiction to be exercised by a national court. In particular, the BCCA's interpretation of "proceeding" in the *Court Jurisdiction and Proceedings Transfer Act* threatens principles of order, fairness and comity as, under this interpretation, a court could issue an injunction against any non-party outside of the country so long as the injunction had some remedial effect on a dispute within the province's jurisdiction. The concerning implication of this approach is that companies with global reach could be beholden to any – and every – state's laws.

If every state could take jurisdiction over digital platforms – like Google, news sites and others – the regulatory burden of compliance would become unmanageable, especially for smaller content providers. This would have serious implications for freedom of expression and could lead to a "balkanization" of the Internet. If the costs of compliance become too high, digital platforms and content providers may search for ways to limit the countries that can assert jurisdiction over them. Thus, some may limit access to subscribers who offer proof of geographical residence in certain countries, and they are most likely to eliminate or reduce business activity in "high risk jurisdictions". Citizens of oppressive regimes who rely on the Internet for uncensored news or political organizing would be the first to lose access because their governments have the most repressive laws. As a result, the globalized Internet may become regionalized, or even nationalized, and the benefits of globalization could be rolled back.

(b) The Court should adopt the "targeting" approach to assist in determining when e-trade in a jurisdiction creates a real and substantial connection between a foreign defendant or a dispute and the jurisdiction. In addition, the "active/passive" approach – by which an entity with a highly interactive and transactional website that enters into transactions with persons and entities in the jurisdiction is more likely to be subject to jurisdiction of the forum than an entity with a passive website that only makes

information available to users in the jurisdiction – may also provide some guidance. While there was some reference to these approaches by the lower courts in this case, and these approaches have been considered by lower courts in Canada in a small number of other cases, these approaches should have a more prominent role in the Canadian jurisdiction analysis and the correct analysis under these approaches should be clarified. These approaches are regularly employed by courts in the United States.

A proper analysis would lead to both approaches supporting a lack of jurisdiction in this case. For instance, under the "targeting approach", a forum has jurisdiction over an out-of-forum defendant based on the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction – i.e. whether a party is targeting a particular jurisdiction. Here, the Court would not have jurisdiction over the injunction application because it asserts authority over Google websites that expressly target other states (i.e. the injunction requires removal of content from Google France and Google India, even though Google is not targeting British Columbians, or Canadians, through those websites).

Notably, these approaches should also be employed when determining whether a court should exercise its discretion to grant a mandatory injunction with extraterritorial effect.

(c) Even accepting, for the purposes of argument, that courts may have unlimited equitable jurisdiction to grant injunctions as found by the BCCA, such jurisdiction must be exercised within the confines of the Constitution of Canada and the *Canadian Charter of Rights and Freedoms*. Therefore, in exercising discretion to grant injunctions with extraterritorial effect, courts must take far greater account of whether such an order violates an affected party's freedom of expression than was done in this case. Account must also be taken of the free expression rights of the public and the press, which uses search engines like Google for newsgathering and accurate reporting purposes.

(d) Courts should not issue mandatory injunctions requiring digital platforms or content providers to assist in enforcing state law around the world, as was done here with respect to Canadian intellectual property laws. On this occasion, it is Google, but on another occasion it could be the press. In either case, digital platforms and content providers should not be co-opted for use as an arm of the state, particularly when limitless international jurisdiction could mean that repressive regimes would also seek to use them in this fashion. There are robust constitutional protections for an independent press, which must be taken into account as the law in this area is developed.

28. The Media Coalition will expand on these submissions if leave to intervene is granted.

29. The Media Coalition will not seek costs, and asks that it not be liable for costs to any other party.

AFFIRMED BEFORE ME at the City of Washington, D.C. in the United States of America on July 7, 2016

A Notary Public
(or as may be)

Bruce Brown

MILDRED ANN AUSTIN
NOTARY PUBLIC
DISTRICT OF COLUMBIA
My Commission Expires
May 31, 2018

This is **Exhibit "A"** referred to in the Affidavit of

Bruce Brown

Sworn before me this 7th day of July, 2016.

A NOTARY PUBLIC, ETC.

Exhibit "A"

Canadian Case

Bangoura v. Washington Post, [2005] O.J. No. 3849 (Ont. C.A.), leave to appeal dismissed, [2006] SCCA No. 497 (February 16, 2006).

- The plaintiff brought an action for an order, *inter alia*, directing the newspaper to cease publication of the impugned articles about his U.N. service published by the defendant on its website. Issues arose as to the connection between Ontario as a jurisdiction and the plaintiff's claim. On this point, the Reporters Committee, alongside other national and international media organizations, offered alternative approaches to the issue of jurisdiction and the real and substantial connection test before the Court.

First Amendment Cases

United States v. Alvarez, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

- The Reporters Committee submitted that the petitioner's proposal to create a new, virtually limitless category of unprotected false speech, and a new test for regulating false speech under the First Amendment, should be rejected. They also suggested that if the new category were accepted, it would allow the government to criminalize false speech anywhere, by anyone, to anyone, regarding any subject, regardless of whether the speech caused any tangible harm, so long as the prohibition purportedly serves an "important" government interest.

Air Wisconsin Airlines Corp. v. Hoeper, 134 S. Ct. 852, 187 L. Ed. 2d 744, reh'g denied, 134 S. Ct. 1575, 188 L. Ed. 2d 582 (2014).

- A pilot brought action against Air Wisconsin Airlines Corporation for defamation based upon statements the airline made to the Transportation Security Administration (TSA) regarding the pilot. The Reporters Committee urged the Court to accept review of this case in order to clarify for lower courts that the principle of independent appellate review of actual malice in defamation cases should apply with equal force to the question of falsity.

Milner v. Dep't of Navy, 562 U.S. 562, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011).

- The Navy denied the *Freedom of Information Act* (*FOIA*) request for unclassified Navy maps showing the extent of damage expected in the event of an explosion at a military ammunition dump on an island off the coast of Washington State. The Obama administration defended that decision under a *FOIA* provision that exempts from disclosure documents "related solely to the internal personnel rules and practices of an agency". The Reporters Committee prepared an *amicus* brief opposing the government's position.

Animal Legal Defense Fund v. Wasden, Case No. 15-35960 (9th Cir. 2016) [Judgment not yet rendered].

- The Animal Legal Defense Fund and other organizations challenged *Idaho Code Ann.* § 18-7042, known as an "ag-gag" statute, as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. The law criminalizes audio and video recording at agriculture facilities. The Reporters Committee, alongside 22 other media organizations, filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit arguing that Idaho's "ag-gag" statute infringes upon the First Amendment rights of those seeking to disseminate information to the public about food safety, the treatment of animals, and environmental concerns.

Animal Legal Defense Fund v. Herbert, Case No. 2:13-cv-00679-RJS (D. Utah) [Judgment not yet rendered].

- Two animal protection organizations and a woman arrested while documenting events at an agricultural site from a public road have challenged *Utah Code Ann* § 76-6-112, known also as an "ag-gag" statute, as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. The statute criminalizes recording images and sounds of agricultural production facilities without the facility owner's express consent. The Reporters Committee, joined by 17 other media organizations, filed an *amicus* brief in support of the plaintiffs' motion for summary judgment. *Amici* explained that journalists and other organizations have a long history of improving food safety by exposing violations in agriculture productions. A motion to dismiss the action was denied in 2014.

Courthouse News Service v. Planet, 750 F.3d 776 (9th Cir. 2014).

- Courthouse News Service asked the U.S. District Court for the Central District of California to grant a motion for summary judgment in a case CNS filed against the Ventura County Superior Court over policies the Court instituted that delay access to newly filed civil complaints. The Reporters Committee and 12 other media organizations, writing in support of CNS's motion for summary judgment, argued that a First Amendment right of access attaches to civil complaints immediately upon the document's submission to the court.

Wikimedia v. NSA, Case No. 15-2560 (4th Cir. 2016) [Judgment not yet rendered].

- Wikimedia, The Nation Magazine, and PEN American Center joined with a group of other plaintiffs to challenge the constitutionality of "upstream" surveillance pursuant to Section 702 of the *FISA Amendments Act* on the grounds that it violates the First Amendment, as well as the Fourth Amendment. The District Court held that the plaintiffs lacked standing to challenge the surveillance at issue because their claims were too speculative. The Reporters Committee argued that, because communications surveillance under Section 702 impeded confidential reporter-source relationships and newsgathering, the plaintiffs have alleged a sufficient harm to establish a standing to sue.

State ex rel. BuzzFeed v. Cunningham, Case No. SC95265 (Mo Sup Ct) [Judgment not yet rendered].

- BuzzFeed asked the Supreme Court of Missouri to review a trial court judge's decision to seal the jury list in the high profile criminal case against Michael L. Johnson, accused of recklessly transmitting the HIV virus. The Reporters Committee submitted *amicus* suggestions in support of BuzzFeed's petition, arguing that jury lists are presumptively open under the First Amendment and that their closure can be justified only upon showing a compelling governmental interest. The Reporters Committee further argued that providing the press with access to jury lists increases public confidence by ensuring the judicial process is conducted in the open and by exposing potential corruption.

In re WP Company LLC (U.S. v. McDonnell), Case No. 15-1293 (4th Cir., Order remanding for particularized findings justifying disclosure, April 27, 2015).

- The Washington Post sought access to completed jury questionnaires in the criminal trial of former Virginia governor Robert F. McDonnell and his wife in the U.S. District Court for the Eastern District of Virginia. The District Court released the completed questionnaires, but with names and juror numbers redacted, making it impossible for the public to know which questionnaires corresponded with empaneled jurors. The Washington Post filed a petition for a writ of *mandamus* in the Fourth Circuit, seeking an order directing the District Court to identify which questionnaires were completed by seated jurors. The Reporters Committee and 22 media organizations filed an *amicus* brief, arguing that the First Amendment provides a presumptive right of access to juror questionnaires, which are merely a written form of oral *voir dire*, which is presumptively open to the public.

Merrill v. Holder, Case No. 14-cv-9763 (S.D.N.Y.) [Judgment not yet rendered; filed: 12/11/2014].

- Nick Merrill sued the FBI to lift a ten-year-old gag order preventing him from disclosing key details related to a National Security Letter (NSL) he received in 2004. NSLs are a secretive form of administrative subpoena frequently accompanied by a nondisclosure order. Merrill was the first person to challenge the constitutionality of NSLs. In 2010, the gag order preventing Merrill from speaking about the NSL he received was partially lifted, but the FBI continued to bar Merrill from disclosing the categories of information they sought in the 2004 NSL. The Reporters Committee submitted an *amicus* brief in support of Merrill arguing that the press and the public have a constitutional right to hear information that Merrill wishes to disclose. It also argued that information regarding how the FBI uses NSLs to obtain communication records has significant statutory and constitutional implications. "Knowing what types of information the government can obtain without notice or judicial process is of the utmost importance to reporters and media organizations," it argued. The secrecy surrounding NSLs imperils the confidential relationship between reporters and sources by obscuring how the government collects communication records.

In re The Wall Street Journal, 601 F. App'x 215 (4th Cir. 2015).

- Donald Blankenship was charged with conspiracy to violate federal mine safety and health standards and securities fraud, among other things, stemming from the Upper Big Branch mine explosion in 2010, which killed 29 people. Immediately following the indictment, a federal judge ordered the parties, attorneys, witnesses, families of victims and others from making any statements to the media, and restricted all access to filings in the case. A coalition of media outlets intervened to overturn the restrictive orders. The Reporters Committee and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The Reporters Committee also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

Detroit Free Press v. U.S. Department of Justice, 796 F.3d 649 (6th Cir. 2015), reh'g en banc granted, opinion vacated (Nov. 20, 2015).

- The Detroit Free Press (DFP) sued the DOJ for the release of mugshots taken by the U.S. Marshals Service under the *Freedom of Information Act*. The trial court held for DFP, and the government appealed to the 6th Circuit. The brief of a coalition of media organizations, including the Reporters Committee, argued that neither the Constitution nor common law recognizes a privacy interest in photographs of persons who have been arrested and indicted, and appeared in open court, specifically noting that mugshots are open or presumably open to the public under the laws of at least 40 states. The brief also argued that even if there is a privacy interest in mugshots, it is outweighed by the public interest in their disclosure.

In re Emma F, 315 Conn. 414, 107 A.3d 947 (2015).

- A Connecticut Superior Court judge in the juvenile division, overseeing a custody dispute, issued a prior restraint order against the Connecticut Law Tribune, prohibiting a reporter from publishing information he obtained while in the courtroom and from a court document that had been posted publicly on the Court's website. The judge also sealed transcripts and his orders and memorandum justifying the prior restraint. The Connecticut Law Tribune appealed, and the Connecticut Supreme Court agreed to hear the appeal. The Reporters Committee and 48 media companies filed a motion to appear as *amici curiae* and argued that the Court violated the First and Fourteenth Amendments when it issued an order barring publication of information lawfully obtained from a court document posted on the Court's own public website. The brief argued that there is a heavy presumption against prior restraints generally, and specifically under the U.S. Supreme Court holding in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), finding an order restricting the publication of information related to a juvenile proceeding was unconstitutional when the reporter obtained the information lawfully.

Hamdan v. Department of Justice, Case No. 13-55172 (9th Cir. 2015) [Decision on petition for en banc rehearing not yet rendered].

- Naji Hamdan, a U.S. citizen currently living in Lebanon, filed *FOIA* requests with several government agencies seeking information about their role in his detention and torture in the United Arab Emirates. The District Court dismissed the case, and a panel of the Ninth Circuit upheld the dismissal (797 F.3d 759). The Reporters Committee submitted a brief in support of Hamdan's petition for en banc rehearing, arguing that the District Court and the panel erroneously applied a highly deferential standard of review to the government's claims that the records requested were exempt from disclosure because they were national security secrets. The *amicus* brief argued that the plain language of *FOIA* and the legislative history of the statute require more searching review. Applying the correct standard of review is crucial to ensuring that government claims of national security secrecy do not go unchecked and unscrutinized by the courts.

Technology/Internet cases

Elonis v. United States, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015).

- The defendant was convicted in the United States District Court for the Eastern District of Pennsylvania of making threatening communications, based on comments he posted on a social networking website. The Reporters Committee filed an *amicus* brief with the U.S. Supreme Court, which argued that an objective intent test for threatening communications crimes had the potential to infringe on the First Amendment rights of media organizations that cover controversial and thought-provoking topics.

Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

- Connecticut maximum security prisons, faced with an overcrowding problem, contracted with Virginia to house Connecticut prisoners in Virginia's correctional facilities. Two newspapers in Connecticut reported on the conditions at the Virginia prison and a class action lawsuit brought by inmates against the prison's warden. The warden sued the Connecticut newspapers for libel in a Virginia court. The newspapers filed a motion to dismiss based on lack of personal jurisdiction over the newspapers in Virginia. The trial court denied the motion. The Reporters Committee submitted an *amicus* brief with 25 other media organizations to the U.S. Court of Appeals for the Fourth Circuit arguing there was a lack of personal jurisdiction in Virginia because the articles were not targeted at Virginia. *Amici* explained that exposing defendants to lawsuits throughout the country merely because the online articles are accessible from the forum state was inconsistent with jurisprudence across the country and the Due Process Clause of the United States Constitution.

Yelp v. Hadeed Carpet Cleaning, 770 S.E.2d 440 (Va. 2015).

- Hadeed Carpet Cleaning sued seven Yelp reviewers for libel, saying it suspects they were not customers but competitors intentionally lying about the company. Hadeed subpoenaed Yelp for the reviewers' identities, and Yelp argued that the reviewers' speech was protected by the First Amendment and their identities should not be revealed. The Reporters Committee and

16 others filed an *amicus* brief in the Virginia Supreme Court, arguing that anonymous speech on matters of public concern, especially anonymous commentary on news websites, is vital to public participation and must be protected. The brief further argued that the Virginia unmasking statute must be interpreted robustly, so that a plaintiff is required to provide sufficient evidence to support its claim before it may unmask an anonymous speaker.

Jones v. Dirty World Entertainment Recordings, LLC, 755 F.3d 398 (6th Cir. 2014).

- Sarah Jones sued TheDirty.com for libel after the website published photos and comments submitted by users about Jones on the website. The website asserted immunity under Section 230 of the Communications Decency Act. The Reporters Committee, together with 8 other media organizations, filed an *amicus* brief arguing that the website was not liable for the third-party postings of others under Section 230. The brief stressed how websites should not be liable under Section 230 for selecting what posts to publish, not verifying their accuracy, and failing to remove them upon notice.

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2016) [Judgment not yet rendered].

- Dr. Tobinick sued Dr. Novella for unfair competition, trade libel, and libel per se in federal court after Novella published two online articles about what Novella believed were Tobinick's unproven practice of treating Alzheimer's disease and strokes with the drug Embrel. The Reporters Committee, with 24 other media organizations, filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit arguing the District Court properly dismissed Tobinick's state claims under the California anti-SLAPP statute and federal claims under the *Lanham Act*.

Electronic Arts, Inc. v. Brown, Case No. B262873 (Cal. Ct. App. 2016).

- Former NFL fullback James (Jim) Brown claimed that Electronic Arts, Inc. (EA) violated his right of publicity after including his biographical and statistical information in Madden NFL, a video game that allows users to simulate NFL games and play as their favorite NFL players. The Reporters Committee, with eight other media organizations, filed an *amicus* brief in the California Court of Appeal arguing that the First Amendment shields EA's limited use of Brown's likeness in a constitutionally protected video game because it contains speech on matters of public interest and does not survive strict scrutiny as a content-based restriction. *Amici* further contended EA's speech must be protected to prevent chilling effects on speech and encourage the news industry to continue evolving as technology advances.

Other Relevant American Cases

Friedman v. Rice, 134 A.D.3d 826, 20 N.Y.S.3d 600 (N.Y. App. Div. 2015), leave to appeal granted, 27 N.Y.3d 903, 51 N.E.3d 565 (2016).

- Jesse Friedman was denied access to witness statements provided to local law enforcement under the confidential source exemption in New York's *Freedom of Information Law (FOIL)*. The Reporters Committee and 19 media organizations argued that the Second

Department of the Appellate Division erred in concluding that non-testifying witness statements are categorically exempt under *FOIL*. Access to witness statements is also crucially important for the press to keep the public informed about the activities of law enforcement agencies, which counsels against a blank exemption for such statements.

Freedom of the Press Foundation v. United States Department of Justice, Case No. 15-cv-03503-HSG (N.D. Cal., 2016).

- This federal *Freedom of Information Act* case arises out of the refusal of the FBI to release records requested by Freedom of the Press Foundation regarding the FBI's use of national security letters and exigent letters to obtain the toll billing records of journalists. The Reporters Committee, joined by 37 media organizations, filed an *amicus* brief in support of Freedom of the Press Foundation's opposition to the government's motion for summary judgement. The brief emphasized the critical importance to the press and the public of access to information about the manner in which the FBI seeks to use legal processes to obtain the toll billing records of reporters and news organizations.

This is **Exhibit "B"** referred to in the Affidavit of

Bruce Brown

Sworn before me this 7th day of July, 2016.

A NOTARY PUBLIC. ETC.

Exhibit "B"

AMERICAN SOCIETY OF NEWS EDITORS (ASNE)

Flynt v. Lombardi, 782 F.3d 963 (8th Cir. 2015).

- In this case, a publisher sought to unseal court records and docket entries in two cases brought by death row inmates that challenged Missouri's protocol for carrying out executions.

In re The Wall Street Journal, 601 F. App'x 215 (4th Cir. 2015).

- Donald Blankenship was charged with conspiracy to violate federal mine safety and health standards and securities fraud, among other things, stemming from the Upper Big Branch mine explosion in 2010, which killed 29 people. Immediately following the indictment, a federal judge ordered the parties, attorneys, witnesses, families of victims and others from making any statements to the media, and restricted all access to filings in the case. A coalition of media outlets intervened to overturn the restrictive orders. American Society of News Editors and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The coalition also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

Abdur-Rashid v. New York City Police Dept, No. 101559/13, 2016 WL 3081103 (N.Y. App. Div. June 2, 2016).

- The petitioner sought an Article 78 order directing the city's police department and its commissioner to provide records responsive to his Freedom of Information Law request. The Supreme Court, New York County, determined that the respondents were entitled to issue *Glomar*-like response to individual's Freedom of Information Law request, and this was affirmed.

Grabell v. New York City Police Dept, 139 A.D.3d 477, 32 N.Y.S.3d 81 (N.Y. App. Div. 2016).

- In this Article 78 proceeding, the petitioner sought judgment declaring that the city police department acted unlawfully under the Freedom of Information Law by withholding documents regarding purchase and use of police vehicles that contained x-ray devices that could detect drugs and bomb-making equipment. The Court directed the department to provide access to the non-exempt documents requested. This group argued that the NYPD's use of backscatter x-ray technology is a matter of significant public interest and has been the subject of extensive reporting. Considering the detailed information already available to the public about backscatter x-rays, NYPD's contention that any release of information concerning the technology could allow terrorists to exploit "limitations in the van's x-ray capabilities" is unconvincing. New York's *FOIL* is an important tool for facilitating public

access to information about law enforcement generally, and controversial law enforcement technologies are exactly the kind of matter regarding which public access is essential.

O'Keefe v. Schmitz, No. 14-CV-139, 2014 WL 2779091 (E.D. Wis. June 19, 2014).

- ASNE intervened in this case, seeking to unseal the court documents related to the underlying criminal investigation on the basis of the First Amendment.

McBurney v. Young, 667 F.3d 454 (4th Cir. 2012), aff'd, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013).

- Individuals without American citizenship argued that the 'citizens only' provision of Virginia's Freedom of Information Law violated the dormant Commerce Clause and the Privileges and Immunities Clause of the United States Constitution.

Prison Legal News v. Executive Office for U.S. Attorneys, 628 F.3d 1243 (10th Cir. 2011).

- This *Freedom of Information Act* action sought disclosure of a videotape depicting the aftermath of a prison murder, as well as autopsy photos of the victim.

Project Vote/Voting for Am., Inc. v. Long, 682 F.3d 331 (4th Cir. 2012).

- A public interest organization brought this action to require state and city officials to produce rejected voter registration applications. American Society of News Editors, alongside other media organizations and First Amendment groups, rely on voter registration information to expose potential inconsistencies, fraud, and errors in voter registration, and their ability to investigate and report on registration deficiencies is critical to the legitimacy of the system. Consequently, they submitted an *amicus* brief in support of upholding the lower court's decision that future registration applications are public.

ASSOCIATION OF ALTERNATIVE NEWSMEDIA

Von Kahl v. Bureau of National Affairs, [Judgment not yet rendered].

- In this case, a prisoner has launched a defamation suit against a news organization with regards to the article it published on his petition to the U.S. Supreme Court. AAN agued in favour of the need to protect the press from liability for good faith mistakes, especially when writing about public officials or public figures, particularly because defamation is not a 'strict liability' tort.

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2016) [Judgment not yet rendered].

- Dr. Edward Tobinick sued Dr. Steven Novella for unfair competition, trade libel, and libel per se in Federal Court after Novella published two online articles about what Novella believed were Tobinick's unproven practice of treating Alzheimer's disease and strokes with the drug Embrel. Tobinick also sued Novella under the Lanham Act for the same

publications. NAA, with 24 other media organizations including the AAN, filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit arguing the District Court properly dismissed Tobinick's state claims under the California anti-SLAPP statute and federal claims under the Lanham Act. The brief asserted that the District Court correctly applied the California anti-SLAPP statute in the Federal Court because the statute does not conflict with the federal rules and is a substantive protection, not a procedural rule. Further, applying anti-SLAPP statutes in Federal Court protects speakers from frivolous lawsuits and reduces chilling effects. The brief also contends the District Court appropriately found Novella's speech to be noncommercial speech and thus shielded from Lanham Act liability under the First Amendment.

ACLU and Electronic Frontier Foundation v. Los Angeles County, the Los Angeles Police Department, and the City of Los Angeles, [Judgment not yet rendered].

- This case concerns the breadth of access to data collected through automatic license plate readers that should be granted to law enforcement agencies. AAN argued that any exemptions to California's *Public Records Act*, including one for law enforcement, must be narrowly construed to avoid broad negative impacts on journalists.

Wikimedia Foundation, et. al v. National Security Agency, et. al., Case No. 15-2560 (4th Cir. 2016) [Judgment not yet rendered].

- This case in the Court of Appeals for the Fourth Circuit challenges the constitutionality of the NSA's "upstream surveillance" program under the First and Fourth Amendments. The *amicus* brief that was signed by AAN argued that the impugned legislation has drastic negative impacts on journalists and the general public, by making it less likely that sources will contact journalists with sensitive information.

Gilleran v. Township of Bloomfield, [Judgment not yet rendered].

- This case involves a request under New Jersey's *Open Public Records Act* for surveillance footage from a security camera and challenges whether a blanket exemption should exist under the *Act* for emergency or security information. The Association's *amicus* brief argues that such a blanket exemption would undermine the ability of the public to hold their government and law enforcement agencies accountable.

Flynt v. Lombardi, 782 F.3d 963 (8th Cir. 2015).

- In this case, a publisher sought to unseal court records and docket entries in two cases brought by death row inmates that challenged Missouri's protocol for carrying out executions.

In re The Wall Street Journal, 601 F. App'x 215 (4th Cir. 2015).

- Donald Blankenship was charged with conspiracy to violate federal mine safety and health standards and securities fraud, among other things, stemming from the Upper Big Branch mine explosion in 2010, which killed 29 people. Immediately following the indictment, a

federal judge ordered the parties, attorneys, witnesses, families of victims and others from making any statements to the media, and restricted all access to filings in the case. A coalition of media outlets intervened to overturn the restrictive orders. Association of Alternative Newsmedia and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The coalition also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

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CENTER FOR INVESTIGATIVE REPORTING

In re The Wall Street Journal, 601 F. App'x 215 (4th Cir. 2015).

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Investigative Reporting and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The coalition also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

Economic Development Commission, Etc. v. Scott Ellis, in his Official Capacity, Etc, No. 5D14-1356, 2015 WL 6554566 (Fla. Dist. Ct. App. Oct. 30, 2015).

- The Economic Development Commission of Florida's Space Coast, Inc. appealed the judgment of the trial court requiring it to disclose official records to the clerk of the Courts for Brevard County, Florida.

San Diego Cty. Employees Ret. Assn. v. Superior Court, 196 Cal. App. 4th 1228, 127 Cal. Rptr. 3d 479 (2011).

- Researchers petitioned for a writ of mandate to compel county employees' retirement system to reveal the pension benefits of individual retirees. The Superior Court, San Diego County, granted the petition. Retirement system petitioned for a writ of mandate, which was denied.

DOW JONES INC. [DOW JONES & COMPANY INC]

Dow Jones & Company v. M/S Indiabulls Housing Finance.

- The Delhi High Court granted Indiabulls an injunction against Dow Jones & Co., restraining it from publishing an article on Mr. Mangal's research report. The Indian Court also issued an injunction to prohibit Veritas and Monga from proceeding with filings in their Canadian lawsuit against Indiabulls.

Jameel v Wall Street Journal Europe SPRL (No.3), [2007] 1 A.C. 359.

- A prominent Saudi Arabian businessman brought this defamation suit against the Wall Street Journal, which is owned and operated by Dow Jones & Company Inc. The defendant argued that Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which covers freedom of expression, protects responsible journalism when reporting matters of public concern.

U.S. v. Sterling, 724 F.3d 482 (4th Cir. 2013).

- This case concerned a motion to quash a subpoena that would have required a journalist to testify in the prosecution of a former CIA officer accused of disclosing confidential information. The Court was forced to address whether the First Amendment or federal common law granted a privilege to reporters such that they should not be compelled to testify.

Florida Medical Ass'n, Inc. v. Department of Health, Educ., & Welfare, 2011 WL 4459387 (M.D. Florida, Jacksonville Division, 2011).

- This case raised a challenge to an injunction preventing the Secretary of the Department of Health from disclosing Medicare information which included the annual amounts of reimbursements paid to providers. Dow Jones Inc. was working with a non-profit journalism organization and sought access to the files in order to expose fraud in the Medicare system.

Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York, 87 A.D.3d 506, 928 N.Y.S.2d 701 (2011).

- This action by teachers sought to enjoin the Board of Education from releasing information that disclosed their job performance in response to a Freedom of Information Law request.

Doe v. Pub. Citizen, 749 F.3d 246 (4th Cir. 2014).

- A manufacturing company brought an action to enjoin a Consumer Product Safety Commission from publishing an online report attributing an infant's death to one its products. The case addressed whether the First Amendment right of access extends to judicial rulings and whether the public and the press enjoy a presumptive right to inspect docket sheets in civil cases.

Mail Order Ass'n of Am. v. U.S. Postal Serv., 2 F.3d 408 (D.C. Cir. 1993).

- This case centred around a judicial review of the decision to change postal rates. Specifically Dow Jones Inc. challenged the decision not to adopt a zoned postage rate for second-class editorial mail. Dow Jones Inc. also intervened in a similar case previously (See: Nat'l Ass'n of Greeting Card Publishers v. U. S. Postal Serv., 607 F.2d 392 (D.C. Cir. 1979)).

Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000).

- An oil company sought to have the courts place a newspaper and a reporter in civil and criminal contempt for violating a sealing order in a previous case.

Uhlfelder v. Weinshall, 47 A.D.3d 169, 845 N.Y.S.2d 41 (2007).

- This case involved a constitutional challenge under the First Amendment to city ordinances restricting the ownership and installation of advertisements on newsstands.

Mink v. Suthers, 482 F.3d 1244 (10th Cir. 2007).

- The plaintiff in this case challenged Colorado's criminal libel statute on the basis that it infringed the First Amendment.

Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

- The warden of a Virginia prison sued two Connecticut newspapers in Virginia, alleging that the newspapers defamed him in articles posted on Internet.

Hatfill v. The New York Times Co., 532 F.3d 312 (4th Cir. 2008).

- This appeal concerned a claim by a research scientist that various newspapers defamed him and caused him emotional distress.

CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280 (4th Cir. 2008).

- A military contractor brought this defamation action against a radio host after the host blamed the contractor for the abuses at Abu Ghraib prison.

W. Union Tel. Co. v. F.C.C., 815 F.2d 1495 (D.C. Cir. 1987).

- The District Court held that the FCC has the authority to prescribe changes in contract rates between telecommunications companies and carriers when this is necessary to serve the public interest.

W. Union Int'l, Inc. v. F.C.C., 804 F.2d 1280 (D.C. Cir. 1986).

- This judicial review concerned various decisions of the FCC that substantially affected the structure of the international telecommunications industry, including permitting Comsat to provide "space segment" to noninternational record carriers and to offer "end-to-end" services through a subsidiary and refusing carriers direct access to the International Telecommunications Satellite Organization.

Wold Commc'ns, Inc. v. F.C.C., 735 F.2d 1465 (D.C. Cir. 1984).

- Certain communications companies brought this action challenging a determination by the Federal Communications Commission authorizing the sale of certain discrete transponders on a non-common carrier basis.

FIRST AMENDMENT COALITION (FAC)

Apple Inc. v. Samsung Elecs. Co., 727 F.3d 1214 (Fed. Cir. 2013).

- FAC advocated for public disclosure of confidential financial records that both Apple and Samsung filed in court under seal during a patent infringement case. Apple and Samsung have both appealed a ruling by the trial court judge ordering the unsealing of many (but not all) of the sealed records, and FAC was looking to make the argument that the public interest in open and public court proceedings—an interest protected by the First Amendment—should be upheld here. Unfortunately, the appellate court denied FAC's request to join the appeal.

Rich McKee v. Tulare Country Board of Supervisors, No. F061146, 2011 WL 5184469 (Cal. Ct. App. Nov. 2, 2011), as modified on denial of reh'g (Nov. 29, 2011).

- FAC took the lead on an *amicus* brief joined by more than 90 newspapers and other publications and national media/First Amendment organizations demonstrating concerns about enforcing the *Brown Act* (an Act that guarantees the public's right to attend and participate in meetings of local legislative bodies).

United States v. Alvarez, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

- FAC submitted that the petitioner's proposal to create a new, virtually limitless category of unprotected false speech, and a new test for regulating false speech under the First Amendment, should be rejected. FAC also suggested that if the new category were accepted, it would allow the government to criminalize false speech anywhere, by anyone, to anyone, regarding any subject, regardless of whether the speech caused any tangible harm, so long as the prohibition purportedly serves an "important" government interest.

Milner v. Dep't of Navy, 562 U.S. 562, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011).

- The Navy denied the *Freedom of Information Act* request for unclassified Navy maps showing the extent of damage expected in the event of an explosion at a military ammunition dump on an island off the cost of Washington State. The Obama administration defended that decision under a *FOIA* provision that exempts from disclosure documents "related solely to the internal personnel rules and practices of an agency". FAC signed on to an *amicus* brief, prepared by the Reporters Committee and mentioned in Exhibit "A", that opposed the government's position.

Rangra v. Brown, 584 F.3d 206, 207 (5th Cir. 2009).

- FAC filed an *amicus* brief in support of *The Texas Open Meetings Act*, which withstood a constitutional challenge by former city council members who asserted the law violated their rights to exchange e-mail messages discussing city business in secret.

FIRST LOOK MEDIA, INC.

Grabell v. New York City Police Dept, 139 A.D.3d 477, 32 N.Y.S.3d 81 (N.Y. App. Div. 2016).

- In this Article 78 proceeding, the petitioner sought judgment declaring that the city police department acted unlawfully under the Freedom of Information Law by withholding documents regarding purchase and use of police vehicles that contained x-ray devices that could detect drugs and bomb-making equipment. The Court directed the department to provide access to the non-exempt documents requested. This group argued that the NYPD's use of backscatter x-ray technology is a matter of significant public interest and has been the subject of extensive reporting. Considering the detailed information already available to the public about backscatter x-rays, NYPD's contention that any release of information concerning the technology could allow terrorists to exploit "limitations in the van's x-ray

capabilities" is unconvincing. New York's *FOIL* is an important tool for facilitating public access to information about law enforcement generally, and controversial law enforcement technologies are exactly the kind of matter regarding which public access is essential.

Abdur-Rashid v. New York City Police Dept, No. 101559/13, 2016 WL 3081103 (N.Y. App. Div. June 2, 2016).

- The petitioner sought an Article 78 order directing the city's police department and its commissioner to provide records responsive to his Freedom of Information Law request. The Supreme Court, New York County, determined that respondents were entitled to issue *Glomar*-like response to individual's Freedom of Information Law request, and this was affirmed.

In re The Wall Street Journal, 601 F. App'x 215 (4th Cir. 2015).

- Donald Blankenship was charged with conspiracy to violate federal mine safety and health standards and securities fraud, among other things, stemming from the Upper Big Branch mine explosion in 2010, which killed 29 people. Immediately following the indictment, a federal judge ordered the parties, attorneys, witnesses, families of victims and others from making any statements to the media, and restricted all access to filings in the case. A coalition of media outlets intervened to overturn the restrictive orders. First Look Media, Inc. and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The coalition also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

Brodeur v. Atlas Entertainment, Inc, No. B263379, 2016 WL 3537089 (Cal. Ct. App. June 6, 2016).

- The principle issue in this case was whether a statement made by a "slightly unhinged" character in a motion picture, American Hustle, was made "in connection with a public issue or an issue of public interest" within the meaning of the anti-SLAPP statute. The Court held that it was, and also concluded that the plaintiff failed to show a probability of prevailing on his defamation and related claims.

Dhiab v. Obama, 70 F. Supp. 3d 486 (D.D.C. 2014), appeal dismissed, 787 F.3d 563 (D.C. Cir. 2015), and reconsideration denied, 141 F. Supp. 3d 23 (D.D.C. 2015).

- In a *habeas corpus* proceeding brought by a detainee at United States Naval Base in Guantanamo Bay, Cuba, news media companies, including First Look Media, Inc., filed a motion to intervene and to unseal videotapes of force-feeding of detainee and forced cell extractions in response to his hunger strike. The motion to intervene was granted and the motion to unseal was granted, with modifications.

NEW ENGLAND FIRST AMENDMENT COALITION

Rideout v. Gardner, Case No. 15-2021 (1st Cir. 2016) [Judgment not yet rendered].

- This case challenged the constitutionality of an amendment to New Hampshire's ballot disclosure laws that specifically prevent a person from taking a photograph of a marked ballot and sharing it on social media. The New England First Amendment Coalition joined a group of media organizations in filing an *amicus* brief arguing that the law infringed the First Amendment by stifling a modern form of expression that fosters meaningfully debate about the political process.

Pinkham v. Dep't of Transp., 2016 ME 74.

- This case concerned the right of litigants to obtain government information from the Maine Department of Transportation relevant to their cases. The New England First Amendment Coalition argued that litigants should have access to all relevant information in order to achieve informed decisions by courts and public confidence in the judicial system.

Com. v. Lucas, 472 Mass. 387, 34 N.E.3d 1242 (2015).

- This case addressed the constitutionality of a state law that criminalized false statements regarding candidates for public office. The New England First Amendment Coalition joined other *amici* in arguing that the impugned law violated the First Amendment by allowing the government to regulate vitally important political and social discussion. It also claimed that the legislation was impermissibly vague.

Courthouse News Service v. Planet, 750 F.3d 776 (9th Cir. 2014).

- Courthouse News Service (CNS) has asked the U.S. District Court for the Central District of California to grant a motion for summary judgment in a case CNS filed against the Ventura County Superior Court over policies the Court instituted that delay access to newly filed civil complaints. The New England First Amendment Coalition and 12 other media organizations, writing in support of CNS's motion for summary judgment, argued that a First Amendment right of access attaches to civil complaints immediately upon the document's submission to the court.

Detroit Free Press v. U.S. Department of Justice, 796 F.3d 649 (6th Cir. 2015), reh'g en banc granted, opinion vacated (Nov. 20, 2015).

- The Detroit Free Press (DFP) sued the Department of Justice for the release of mugshots taken by the U.S. Marshals Service under the *Freedom of Information Act*. The trial court held for DFP, and the government appealed to the 6th Circuit. The brief of a coalition of media organizations, including the New England First Amendment Coalition, argued that neither the Constitution nor common law recognizes a privacy interest in photographs of persons who have been arrested and indicted, and appeared in open court, specifically noting that mugshots are open or presumably open to the public under the laws of at least 40 states.

The brief also argued that even if there is a privacy interest in mugshots, it is outweighed by the public interest in their disclosure.

In re Emma F, 315 Conn. 414, 107 A.3d 947 (2015).

- A Connecticut Superior Court judge in the juvenile division, overseeing a custody dispute, issued a prior restraint order against the Connecticut Law Tribune, prohibiting a reporter from publishing information he obtained while in the courtroom and from a court document that had been posted publicly on the Court's website. The judge also sealed transcripts and his orders and memorandum justifying the prior restraint. The Connecticut Law Tribune appealed, and the Connecticut Supreme Court agreed to hear the appeal. The New England First Amendment Coalition and 48 media companies filed a motion to appear as *amici curiae*, arguing that the Court violated the First and Fourteenth Amendments when it issued an order barring publication of information lawfully obtained from a court document posted on the Court's own public website. The brief argued that there is a heavy presumption against prior restraints generally, and specifically under the U.S. Supreme Court holding in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), finding an order restricting the publication of information related to a juvenile proceeding was unconstitutional when the reporter obtained the information lawfully.

MaineToday Media, Inc. v. State, 2013 ME 100, 82 A.3d 104.

- Media organizations in this case challenged the actions of the State of Maine to restrict public access to the transcripts of all 911 calls places in investigative files. The *amicus* brief filed on behalf of the New England First Amendment Coalition and others argued that legislative change violated the purpose of Maine's *Freedom of Access Act* and its presumptions in favour of access.

Ctr. for Constitutional Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013).

- The petitioners in this case sought access to the sealed dockets of the court martial proceedings. The New England First Amendment Coalition joined 30 other news media organizations in supporting the petitioners. It argued that the presumptive right of access to criminal proceedings under the First Amendment should extend to the files at issue.

Com. v. George W. Prescott Pub. Co., LLC, 463 Mass. 258, 973 N.E.2d 667 (2012).

- The New England First Amendment Coalition intervened with other media organizations in this case to support the public's right to access materials filed in support of search warrant applications. The *amicus* brief claimed that such a right of access is mandated by the First Amendment, the common law, and Massachusetts state law.

Union Leader Corp. v. New Hampshire Ret. Sys., 162 N.H. 673, 34 A.3d 725 (2011).

- This case addressed whether New Hampshire state law required the disclosure of the names of retirement system members who received the highest annual pensions. The New England

First Amendment Coalition filed an *amicus* brief that argued that disclosure reinforced public scrutiny of the State's retirement system, which is subsidized by public tax revenues.

NEWSPAPER ASSOCIATION OF AMERICA

Freedom of the Press Foundation v. United States Department of Justice, Case No. 15-cv-03503-HSG (N.D. Cal., 2016).

- This federal *Freedom of Information Act* case arises out of the refusal of the FBI Justice to release records requested by Freedom of the Press Foundation regarding the FBI's use of national security letters ("NSLs") and exigent letters to obtain the toll billing records of journalists. Newspaper Association of America, joined by 37 media organizations, filed an *amicus* brief in support of Freedom of the Press Foundation's opposition to the government's motion for summary judgment. The brief emphasized the critical importance to the press and the public of access to information about the manner in which the FBI seeks to use legal process to obtain the toll billing records of reporters and news organizations.

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2016) [Judgment not yet rendered].

- Dr. Edward Tobinick sued Dr. Steven Novella for unfair competition, trade libel, and libel per se in Federal Court after Novella published two online articles about what Novella believed were Tobinick's unproven practice of treating Alzheimer's disease and strokes with the drug Embrel. Tobinick also sued Novella under the Lanham Act for the same publications. NAA, with 24 other media organizations, filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit arguing the District Court properly dismissed Tobinick's state claims under the California anti-SLAPP statute and federal claims under the Lanham Act. The brief asserted that the District Court correctly applied the California anti-SLAPP statute in the Federal Court because the statute does not conflict with the federal rules and is a substantive protection, not a procedural rule. Further, applying anti-SLAPP statutes in Federal Court protects speakers from frivolous lawsuits and reduces chilling effects. The brief also contends the District Court appropriately found Novella's speech to be noncommercial speech and thus shielded from Lanham Act liability under the First Amendment.

Merrill v. Holder, (S.D.N.Y.) [Judgment not yet rendered; filed: 12/11/2014].

- Nick Merrill sued the FBI to lift a ten-year-old gag order preventing him from disclosing key details related to a National Security Letter (NSL) he received in 2004. NSLs are a secretive form of administrative subpoena frequently accompanied by a nondisclosure order. Merrill was the first person to challenge the constitutionality of NSLs. In 2010, the gag order preventing Merrill from speaking about the NSL he received was partially lifted, but the FBI continued to bar Merrill from disclosing the categories of information they sought in the 2004 NSL. Newspaper Association of America submitted an *amicus* brief in support of Merrill arguing that the press and the public have a constitutional right to hear information that Merrill wishes to disclose. It also argued that information regarding how the FBI uses

NSLs to obtain communication records has significant statutory and constitutional implications. "Knowing what types of information the government can obtain without notice or judicial process is of the utmost importance to reporters and media organizations," it argued. The secrecy surrounding NSLs imperils the confidential relationship between reporters and sources by obscuring how the government collects communication records.

In re The Wall Street Journal, 601 F. App'x 215 (4th Cir. 2015).

- Donald Blankenship was charged with conspiracy to violate federal mine safety and health standards and securities fraud, among other things, stemming from the Upper Big Branch mine explosion in 2010, which killed 29 people. Immediately following the indictment, a federal judge ordered the parties, attorneys, witnesses, families of victims and others from making any statements to the media, and restricted all access to filings in the case. A coalition of media outlets intervened to overturn the restrictive orders. Newspaper Association of America and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The coalition also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011).

- Newspaper Association of America, alongside other media organizations, submitted an *amicus* brief in this case asking the Court to address and reject the post-injunction "duty to police" that the District Court imposed on the plaintiff-appellate firms. The Court's opinion will likely be given substantial consideration in future "hot-news" litigation that is brought by news originators and therefore submitted the brief to inform the Court of their interest in, and views about, the "hot-news" doctrine and, therefore, they asked the Court to frame its opinion so as to avoid overbroad statements that may inadvertently restrict news publishers' rights.

Project Vote/Voting for Am., Inc. v. Long, 682 F.3d 331 (4th Cir. 2012).

- A public interest organization brought this action to require state and city officials to produce rejected voter registration applications. Newspaper Association of America, alongside other media organizations and First Amendment groups rely on voter registration information to expose potential inconsistencies, fraud, and errors in voter registration, and their ability to investigate and report on registration deficiencies is critical to the legitimacy of the system. Consequently, they submitted an *amicus* brief in support of upholding the lower court's decision that future registration applications are public.

Initiative & Referendum Inst. v. U.S. Postal Serv., 685 F.3d 1066 (D.C. Cir. 2012).

- The regulation on appeal, 39 C.F.R. § 232.1(h)(1), banned a wide range of activities protected by the First Amendment beyond the collection of signatures on petitions – the

interest represented by the plaintiffs. Newspaper Association of America therefore submitted an *amicus* brief to ask the Court to hold that all sidewalks on postal property are public forums, to protect the right to vend newspapers.

Political Activity:

- April 28, 2016: Newspaper Association of America and other news organizations submitted comments to the Canadian Office of the Privacy Commissioner, urging it not to consider adopting a "right to be forgotten" as part of its privacy program.

- September 14, 2015: Newspaper Association of America, joined by a coalition of media and journalism organizations, wrote to the independent French data protection agency urging it to rescind its order that Google search delistings required under the European Union's "right to be forgotten" rule include domains not just in France or Europe, but around the world.

AOL INC.

Abdur-Rashid v. New York City Police Dept, No. 101559/13, 2016 WL 3081103 (N.Y. App. Div. June 2, 2016).

- The petitioner sought an Article 78 order directing the city's police department and its commissioner to provide records responsive to his Freedom of Information Law request. The Supreme Court, New York County, determined that respondents were entitled to issue *Glomar*-like response to individual's Freedom of Information Law request, and this was affirmed.

In re WP Company LLC (U.S. v. McDonnell), (4th Cir.) [Judgment not yet rendered; filed: 03/20/2015].

- The Washington Post sought access to completed jury questionnaires in the criminal trial of former Virginia governor Robert F. McDonnell and his wife in the U.S. District Court for the Eastern District of Virginia. The District Court released the completed questionnaires, but with names and juror numbers redacted, making it impossible for the public to know which questionnaires corresponded with empaneled jurors. The Washington Post filed a petition for a writ of *mandamus* in the Fourth Circuit, seeking an order directing the District Court to identify which questionnaires were completed by seated jurors. AOL Inc. and 22 media organizations filed an *amicus* brief, arguing that the First Amendment provides a presumptive right of access to juror questionnaires, which are merely a written form of oral *voir dire*, which is presumptively open to the public.

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- Donald Blankenship was charged with conspiracy to violate federal mine safety and health standards and securities fraud, among other things, stemming from the Upper Big Branch mine explosion in 2010, which killed 29 people. Immediately following the indictment, a federal judge ordered the parties, attorneys, witnesses, families of victims and others from

making any statements to the media, and restricted all access to filings in the case. A coalition of media outlets intervened to overturn the restrictive orders. AOL Inc. and a coalition of other media organizations filed an *amicus* brief arguing that the restrictive orders are unconstitutional, because, among other reasons, they are based on mere speculation that widespread coverage about the trial would prevent Blankenship from receiving a fair trial, rather than specific findings, as required by the First Amendment. The group also argued that the orders swept too broadly, effectively prohibiting anyone with personal knowledge of the mine explosion from talking to the media, even if the resulting stories would not be unfairly prejudicial to the defendant.

CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION

Animal Legal Defense Fund v. Wasden, 44 F. Supp. 3d 1009 (D. Idaho 2014).

- The Animal Legal Defense Fund and other organizations challenged *Idaho Code Ann.* § 18-7042, known as an "ag-gag" statute, as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. The law criminalizes audio and video recording at agriculture facilities. California Newspaper Publishers Association, alongside 22 other media organizations, filed an *amicus* brief arguing that Idaho's "ag-gag" statute infringes upon the First Amendment rights of those seeking to disseminate information to the public about food safety, the treatment of animals, and environmental concerns.

Freedom of the Press Foundation v. United States Department of Justice, Case No. 15-cv-03503-HSG (N.D. Cal., 2016).

- This federal *Freedom of Information Act* case arises out of the refusal of the FBI to release records requested by Freedom of the Press Foundation regarding the FBI's use of national security letters and exigent letters to obtain the toll billing records of journalists. California Newspaper Publishers Association, joined with 37 media organizations, filed an *amicus* brief in support of Freedom of the Press Foundation's opposition to the government's motion for summary judgement. The brief emphasized the critical importance to the press and the public of access to information about the manner in which the FBI seeks to use legal processes to obtain the toll billing records of reporters and news organizations

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2016) [Judgment not yet rendered].

- Dr. Edward Tobinick sued Dr. Steven Novella for unfair competition, trade libel, and libel per se in Federal Court after Novella published two online articles about what Novella believed were Tobinick's unproven practice of treating Alzheimer's disease and strokes with the drug Embrel. Tobinick also sued Novella under the Lanham Act for the same publications. NAA, with 24 other media organizations including the California Newspaper Publishers Association, filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit arguing the District Court properly dismissed Tobinick's state claims under the California anti-SLAPP statute and federal claims under the Lanham Act. The brief asserted that the District Court correctly applied the California anti-SLAPP statute in the Federal

Court because the statute does not conflict with the federal rules and is a substantive protection, not a procedural rule. Further, applying anti-SLAPP statutes in Federal Court protects speakers from frivolous lawsuits and reduces chilling effects. The brief also contends the District Court appropriately found Novella's speech to be noncommercial speech and thus shielded from Lanham Act liability under the First Amendment.

ACLU and Electronic Frontier Foundation v. Los Angeles County, the Los Angeles Police Department, and the City of Los Angeles, [Judgment not yet rendered].

- This case concerns the breadth of access to data collected through automatic license plate readers that should be granted to law enforcement agencies. CNPA argued that any exemptions to California's *Public Records Act*, including one for law enforcement, must be narrowly construed to avoid broad negative impacts on journalists.

THE ASSOCIATED PRESS

Freedom of the Press Foundation v. United States Department of Justice, Case No. 15-cv-03503-HSG (N.D. Cal., 2016).

- This federal Freedom of Information Act case arises out of the refusal of the FBI to release records requested by Freedom of the Press Foundation regarding the FBI's use of national security letters and exigent letters to obtain the toll billing records of journalists. The Associated Press, joined 37 media organizations and filed an *amicus* brief in support of Freedom of the Press Foundation's opposition to the government's motion for summary judgement. The brief emphasized the critical importance to the press and the public of access to information about the manner in which the FBI seeks to use legal processes to obtain the toll billing records of reporters and news organizations.

Grabell v. New York City Police Dept, 139 A.D.3d 477, 32 N.Y.S.3d 81 (N.Y. App. Div. 2016).

- In this Article 78 proceeding, the petitioner sought judgment declaring that the city police department acted unlawfully under the Freedom of Information Law by withholding documents regarding purchase and use of police vehicles that contained x-ray devices that could detect drugs and bomb-making equipment. The Court directed the department to provide access to the non-exempt documents requested. This group argued that the NYPD's use of backscatter x-ray technology is a matter of significant public interest and has been the subject of extensive reporting. Considering the detailed information already available to the public about backscatter x-rays, NYPD's contention that any release of information concerning the technology could allow terrorists to exploit "limitations in the van's x-ray capabilities" is unconvincing. New York's *FOIL* is an important tool for facilitating public access to information about law enforcement generally, and controversial law enforcement technologies are exactly the kind of matter regarding which public access is essential.

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- A Connecticut Superior Court judge in the juvenile division, overseeing a custody dispute, issued a prior restraint order against the Connecticut Law Tribune, prohibiting a reporter from publishing information he obtained while in the courtroom and from a court document that had been posted publicly on the Court's website. The judge also sealed transcripts and his orders and memorandum justifying the prior restraint. The Connecticut Law Tribune appealed, and the Connecticut Supreme Court agreed to hear the appeal. The AP and 48 media companies filed a motion to appear as *amici curiae*, arguing that the Court violated the First and Fourteenth Amendments when it issued an order barring publication of information lawfully obtained from a court document posted on the Court's own public website. The brief argued that there is a heavy presumption against prior restraints generally, and specifically under the U.S. Supreme Court holding in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), finding an order restricting the publication of information related to a juvenile proceeding was unconstitutional when the reporter obtained the information lawfully.

THE INVESTIGATIVE REPORTING WORKSHOP

Animal Legal Defense Fund v. Wasden, 44 F. Supp. 3d 1009 (D. Idaho 2014).

- The Animal Legal Defense Fund and other organizations challenged *Idaho Code Ann.* § 18-7042, known as an "ag-gag" statute, as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. The law criminalizes audio and video recording at agriculture facilities. The Investigative Reporting Workshop, alongside 22 other media organizations, filed an *amicus* brief arguing that Idaho's "ag-gag" statute infringes upon the First Amendment rights of those seeking to disseminate information to the public about food safety, the treatment of animals, and environmental concerns.

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Hamdan v. Department of Justice, Case No. 13-55172 (9th Cir. 2015) [Decision on petition for en banc rehearing not yet rendered].

- Naji Hamdan, a United States citizen currently living in Lebanon, filed *FOIA* requests with several government agencies seeking information about their role in his detention and torture in the United Arab Emirates. The District Court dismissed the case, and a panel of the Ninth Circuit upheld the dismissal. The Investigative Reporting Workshop submitted a brief in support of Hamdan's petition for en banc rehearing, arguing that the District Court and the panel erroneously applied a highly deferential standard of review to the government's claims that the records requested were exempt from disclosure because they were national security secrets. The *amicus* brief argued that the plain language of *FOIA* and the legislative history of the statute require more searching review. Applying the correct standard of review is crucial to ensuring that government claims of national security secrecy do not go unchecked and unscrutinized by the courts.

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- In this Article 78 proceeding, the petitioner sought judgment declaring that the city police department acted unlawfully under the Freedom of Information Law by withholding documents regarding purchase and use of police vehicles that contained x-ray devices that could detect drugs and bomb-making equipment. The Court directed the department to provide access to the non-exempt documents requested. This group argued that the NYPD's use of backscatter x-ray technology is a matter of significant public interest and has been the subject of extensive reporting. Considering the detailed information already available to the public about backscatter x-rays, NYPD's contention that any release of information concerning the technology could allow terrorists to exploit "limitations in the van's x-ray capabilities" is unconvincing. New York's *FOIL* is an important tool for facilitating public access to information about law enforcement generally, and controversial law enforcement technologies are exactly the kind of matter regarding which public access is essential.

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ONLINE NEWS ASSOCIATION

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- The Animal Legal Defense Fund and other organizations challenged *Idaho Code Ann.* § 18-7042, known as an "ag-gag" statute, as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. The law criminalizes audio and video recording at agriculture facilities. Online News Association, alongside 22 other media organizations, filed an *amicus* brief arguing that Idaho's "ag-gag" statute infringes upon the First Amendment rights of those seeking to disseminate information to the public about food safety, the treatment of animals, and environmental concerns.

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- This federal *Freedom of Information Act* case arises out of the refusal of the FBI to release records requested by Freedom of the Press Foundation regarding the FBI's use of national security letters and exigent letters to obtain the toll billing records of journalists. The Online News Association, joined with 37 media organizations and filed an *amicus* brief in support of Freedom of the Press Foundation's opposition to the government's motion for summary judgement. The brief emphasized the critical importance to the press and the public of access to information about the manner in which the FBI seeks to use legal processes to obtain the toll billing records of reporters and news organizations.

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2016) [Judgment not yet rendered].

- Dr. Edward Tobinick sued Dr. Steven Novella for unfair competition, trade libel, and libel per se in Federal Court after Novella published two online articles about what Novella believed were Tobinick's unproven practice of treating Alzheimer's disease and strokes with the drug Embrel. Tobinick also sued Novella under the Lanham Act for the same publications. NAA, with 24 other media organizations including the Online News Association, filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit arguing the District Court properly dismissed Tobinick's state claims under the California anti-SLAPP statute and federal claims under the Lanham Act. The brief asserted that the District Court correctly applied the California anti-SLAPP statute in the Federal Court because the statute does not conflict with the federal rules and is a substantive protection, not a procedural rule. Further, applying anti-SLAPP statutes in Federal Court protects speakers from frivolous lawsuits and reduces chilling effects. The brief also contends the District Court appropriately found Novella's speech to be noncommercial speech and thus shielded from Lanham Act liability under the First Amendment.

Wikimedia v. NSA, Case No. 15-2560 (4th Cir. 2016) [Judgment not yet rendered].

- Wikimedia, The Nation Magazine, and PEN American Center have joined with a group of other plaintiffs to challenge the constitutionality of "upstream" surveillance pursuant to

Section 702 of the *FISA Amendments Act* on the grounds that it violates the First Amendment as well as the Fourth Amendment. The District Court held that the plaintiffs lacked standing to challenge the surveillance at issue because their claims were too speculative. Online News Association argued that, because communications surveillance under Section 702 impeded confidential reporter-source relationships and newsgathering, the plaintiffs have alleged a sufficient harm to establish a standing to sue.

Hamdan v. Department of Justice, Case No. 13-55172 (9th Cir. 2015) [Decision on petition for en banc rehearing not yet rendered].

- Naji Hamdan, a United States citizen currently living in Lebanon, filed *FOIA* requests with several government agencies seeking information about their role in his detention and torture in the United Arab Emirates. The District Court dismissed the case, and a panel of the Ninth Circuit upheld the dismissal (797 F.3d 759). Online News Association submitted a brief in support of Hamdan's petition for en banc rehearing, arguing that the District Court and the panel erroneously applied a highly deferential standard of review to the government's claims that the records requested were exempt from disclosure because they were national security secrets. The *amicus* brief argued that the plain language of *FOIA* and the legislative history of the statute require more searching review. Applying the correct standard of review is crucial to ensuring that government claims of national security secrecy do not go unchecked and unscrutinized by the courts.

Grabell v. New York City Police Dept, 139 A.D.3d 477, 32 N.Y.S.3d 81 (N.Y. App. Div. 2016).

- In this Article 78 proceeding, the petitioner sought judgment declaring that the city police department acted unlawfully under the Freedom of Information Law by withholding documents regarding purchase and use of police vehicles that contained x-ray devices that could detect drugs and bomb-making equipment. The Court directed the department to provide access to the non-exempt documents requested. This group argued that the NYPD's use of backscatter x-ray technology is a matter of significant public interest and has been the subject of extensive reporting. Considering the detailed information already available to the public about backscatter x-rays, NYPD's contention that any release of information concerning the technology could allow terrorists to exploit "limitations in the van's x-ray capabilities" is unconvincing. New York's *FOIL* is an important tool for facilitating public access to information about law enforcement generally, and controversial law enforcement technologies are exactly the kind of matter regarding which public access is essential.

SOCIETY OF PROFESSIONAL JOURNALISTS

Animal Legal Defense Fund v. Wasden, 44 F. Supp. 3d 1009 (D. Idaho 2014).

- The Animal Legal Defense Fund and other organizations challenged *Idaho Code Ann.* § 18-7042, known as an "ag-gag" statute, as unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution. The law criminalizes audio and video recording at agriculture facilities. Society of Professional Journalists, alongside 22 other media

organizations, filed an *amicus* brief arguing that Idaho's "ag-gag" statute infringes upon the First Amendment rights of those seeking to disseminate information to the public about food safety, the treatment of animals, and environmental concerns.

Freedom of the Press Foundation v. United States Department of Justice, Case No. 15-cv-03503-HSG (N.D. Cal., 2016).

- This federal *Freedom of Information Act* case arises out of the refusal of the FBI to release records requested by Freedom of the Press Foundation regarding the FBI's use of national security letters and exigent letters to obtain the toll billing records of journalists. Society of Professional Journalists joined 37 media organizations and filed an *amicus* brief in support of Freedom of the Press Foundation's opposition to the government's motion for summary judgement. The brief emphasized the critical importance to the press and the public of access to information about the manner in which the FBI seeks to use legal processes to obtain the toll billing records of reporters and news organizations.

Tobinick v. Novella, Case No. 15-14889 (11th Cir. 2016) [Judgment not yet rendered].

- Dr. Edward Tobinick sued Dr. Steven Novella for unfair competition, trade libel, and libel per se in Federal Court after Novella published two online articles about what Novella believed were Tobinick's unproven practice of treating Alzheimer's disease and strokes with the drug Embrel. Tobinick also sued Novella under the Lanham Act for the same publications. NAA, with 24 other media organizations including the Society of Professional Journalists, filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit arguing the District Court properly dismissed Tobinick's state claims under the California anti-SLAPP statute and federal claims under the Lanham Act. The brief asserted that the District Court correctly applied the California anti-SLAPP statute in the Federal Court because the statute does not conflict with the federal rules and is a substantive protection, not a procedural rule. Further, applying anti-SLAPP statutes in Federal Court protects speakers from frivolous lawsuits and reduces chilling effects. The brief also contends the District Court appropriately found Novella's speech to be noncommercial speech and thus shielded from Lanham Act liability under the First Amendment.

ACLU and Electronic Frontier Foundation v. Los Angeles County, the Los Angeles Police Department, and the City of Los Angeles, [Judgment not yet rendered].

- This case concerns the breadth of access to data collected through automatic license plate readers that should be granted to law enforcement agencies. Society of Professional Journalists argued that any exemptions to California's *Public Records Act*, including one for law enforcement, must be narrowly construed to avoid broad negative impacts on journalists.

TAB 3

File No. 36602

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

GOOGLE INC.

Appellant

- and -

EQUUSTEK SOLUTIONS INC., ROBERT ANGUS, CLARMA ENTERPRISES INC.

Respondents

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER, THE MEDIA COALITION
(Motion for Leave to Intervene, Pursuant to Rule 47 and 55 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. This is a motion by the Media Coalition to intervene in this appeal, including leave to file a factum and present oral argument at the hearing of the appeal. The Media Coalition consists of 15 media companies and organizations, many global, as set out below at paragraph 7.

2. This appeal involves issues of freedom of expression, jurisdiction and the extraterritorial scope of national court orders. If granted leave to intervene, the Media Coalition will assist the Court in its consideration of the appeal by providing submissions that are useful and different from the parties and other proposed intervenors, and which will be uniquely grounded in the Media Coalition's interest and special expertise in freedom of expression as media organizations and content providers.

3. The Court's ruling in this appeal will have a wide-reaching impact. Given the Media Coalition's long-established interest and expertise in the key areas at issue, it is particularly well placed to assist the Court as an intervener in this appeal. Moreover, the Media Coalition's intervention will not delay the hearing of this appeal or prejudice the interests of the parties. The Media Coalition therefore respectfully requests the Court grant its motion for leave to intervene.

PART II - STATEMENT OF FACTS

A. The Reporters Committee for Freedom of the Press and Other Members of the Media Coalition

4. The Reporters Committee for Freedom of the Press (the "**Reporters Committee**") is an unincorporated non-profit association of reporters and editors based in Washington, D.C. that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment litigation since it was founded in 1970. Academics, state and federal agencies in the United States and

Congress regularly call on the Reporters Committee and its attorneys for advice and expertise, and it has become a leading advocate for reporters' interests in cyberspace.[1]

5. The Reporters Committee's underlying mission is "to protect the right to gather and distribute news; to keep government accountable by ensuring access to public records, meetings and courtrooms; and to preserve the principles of free speech and unfettered press, as guaranteed by the First Amendment of the U.S. Constitution". In furtherance of this mission, the Reporters Committee frequently acts as, and organizes media coalitions to act as, *amicus* to courts in the United States. It has also intervened in legal proceedings in Ontario and elsewhere in the world. The following is a list of some of the freedom of expression cases in which the Reporters Committee has been granted intervenor or *amicus* status (often in coalitions with other members of this Media Coalition):[2]

> (a) *Bangoura v. Washington Post* (2005), 258 D.L.R. (4th) 341 (ONCA), leave to appeal dismissed, [2005] S.C.C.A. No. 497: The plaintiff brought an action for an order, *inter alia*, directing the newspaper to cease publication of the impugned articles about his U.N. service published by the defendant on its website, on the basis that they were defamatory. Issues arose as to the connection between Ontario as a jurisdiction and the plaintiff's claim. On this point, the Reporters Committee, alongside other national and international media organizations, offered alternative approaches to the issue of jurisdiction and the real and substantial connection test before the Court.
>
> (b) *In re WP Company LLC* (*US v. McDonnell*) (4th Cir., Order remanding for particularized findings justifying disclosure, April 27, 2015): The Washington Post sought access to completed jury questionnaires in the criminal trial of former Virginia governor Robert F. McDonnell and his wife in the US District Court for the Eastern District of Virginia. The district court released the completed questionnaires but with names and juror numbers redacted, making it impossible for the public to know which questionnaires corresponded with empaneled jurors. The Washington Post filed a petition for a writ of mandamus in the Fourth Circuit, seeking an order directing the district court

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[1] Affidavit of Bruce Brown sworn July 7, 2016 at para. 3 [Brown Affidavit], Motion Record of the Proposed Intervenor, the Media Coalition at pp. 8-9 [MR].
[2] Brown Affidavit at para. 4, MR pp. 9-10. A more comprehensive list of cases that the Reporters Committee has been involved in can be seen at the Brown Affidavit, Exhibit "A", MR pp. 19-26.

to identify which questionnaires were completed by seated jurors. The Reporters Committee and 22 media organizations, including some that form part of this Media Coalition, filed an *amicus* brief, arguing that the First Amendment provides a presumptive right of access to juror questionnaires, which are merely a written form of oral *voir dire*, which is presumptively open to the public.

(c) *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015): The defendant was convicted in the US District Court for the Eastern District of Pennsylvania of making threatening communications based on comments he posted on a social networking website. The Reporters Committee filed an *amicus* brief with the US Supreme Court, which argued that an objective intent test for threatening communications crimes had the potential to infringe on the First Amendment rights of media organizations that cover controversial and thought-provoking topics.

(d) *United States v. Alvarez*, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012): The Reporters Committee submitted to the US Supreme Court that the petitioner's proposal to create a new, virtually limitless category of unprotected false speech, and a new test for regulating false speech under the First Amendment, should be rejected. They also suggested that if the new category were accepted, it would allow the government to criminalize false speech anywhere, by anyone, to anyone, regarding any subject, regardless of whether the speech caused any tangible harm, so long as the prohibition purportedly served an "important" government interest.

6. As a long-time defender of freedom of expression and freedom of the press, the Reporters Committee has also made submissions and provided advice on a range of freedom of expression issues to a variety of public bodies. The following is a list of some of the most recent submissions:[3]

(a) June 22, 2016: The Reporters Committee made submissions to lawmakers in the US House Judiciary Committee Subcommittee on the Constitution and Civil Justice regarding federal anti-SLAPP legislation, which would combat lawsuits filed to intimidate the exercise of free speech.

(b) June 13, 2016: The Reporters Committee submitted administrative comments to the US Department of Labor recommending that it modify its routine uses of the *Privacy Act* so that the Office of Governmental Information Services could better fulfill its statutory duties under the *Freedom of Information Act*.

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[3] Brown Affidavit at para. 5, MR pp. 10-11.

(c) May 11, 2016: The Reporters Committee asked Minnesota lawmakers to amend right-of-publicity legislation to provide safeguards for constitutional rights. In its letter, the Reporters Committee urged the Minnesota legislature to explicitly avoid regulating any form of political, artistic, or other socially relevant expression by limiting themselves to commercial products that imply an endorsement or other connection to the individual.

(d) April 28, 2016: The Reporters Committee and other news organizations submitted comments to the Canadian Office of the Privacy Commissioner, urging it not to adopt a "right to be forgotten" as part of its privacy program.

(e) September 25, 2015: The Reporters Committee submitted comments regarding the proposed updates to the US Department of Homeland Security's *Freedom of Information Act* regulations.

(f) September 14, 2015: The Reporters Committee, joined by a coalition of media, including The Associated Press, made submissions to the independent French data protection agency (la Commission Nationale de l'Informatique et des Libertés) urging it to rescind its order that Google search delistings required under the European Union's "right to be forgotten" rule include domains not just in France or Europe, but around the world.

(g) September 15, 2014: The Reporters Committee and other media organizations, including some that form part of this Media Coalition, submitted comments to the Federal Communications Commission encouraging it to maintain an open internet.

7. In addition to the Reporters Committee, the Media Coalition is comprised of the following companies and organizations:[4]

(a) American Society of News Editors;

(b) Association of Alternative Newsmedia;

(c) The Center for Investigative Reporting;

(d) Dow Jones & Company, Inc.;

(e) First Amendment Coalition;

(f) First Look Media Works, Inc.;

(g) New England First Amendment Coalition;

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[4] Brown Affidavit at para. 6, MR pp. 11-12.

(h) Newspaper Association of America;

(i) AOL Inc.;

(j) California Newspaper Publishers Association;

(k) The Associated Press;

(l) The Investigative Reporting Workshop at American University;

(m) Online News Association; and

(n) Society of Professional Journalists.

8. The members of the Media Coalition are either public interest organizations with a mandate to protect First Amendment rights or media organizations and digital content providers that have a direct interest in freedom of expression issues. They have frequently acted as *amicus* and intervenors to courts on issues relating to freedom of expression.[5]

B. The Media Coalition's Proposed Helpful and Distinct Submissions

9. If granted leave to intervene, the Media Coalition plans to make the following submissions:[6]

> (a) The British Columbia Court of Appeal's ("**BCCA**") analysis of territorial competence and jurisdiction failed to properly take into account the context of multinational companies with a significant or exclusive online presence. Such companies, including the media organizations that form the proposed intervener Media Coalition, may publish websites or content that have global reach, yet more must be required for jurisdiction to be exercised by a national court. In particular, the BCCA's interpretation of "proceeding" in the *Court Jurisdiction and Proceedings Transfer Act*[7] threatens principles of order, fairness and comity as, under this interpretation, a court could issue an injunction against any non-party outside of the country so long as the injunction had some remedial effect on a dispute within the province's jurisdiction. The concerning implication of this approach is that companies with global reach could be beholden to any – and every – state's laws.

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[5] Brown Affidavit at paras. 8-22 and Exhibit "B", MR pp. 12-15 & 28-48.
[6] Brown Affidavit at para. 27, MR pp. 16-17.
[7] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, Chapter 28.

If every state could take jurisdiction over digital platforms – like Google, news sites and others – the regulatory burden of compliance would become unmanageable, especially for smaller content providers. This would have serious implications for freedom of expression[8] and could lead to a "balkanization" of the Internet. If the costs of compliance become too high, digital platforms and content providers may search for ways to limit the countries that can assert jurisdiction over them. Thus, some may limit access to subscribers who offer proof of geographical residence in certain countries, and they are most likely to eliminate or reduce business activity in "higher risk jurisdictions".[9] Citizens of oppressive regimes who rely on the Internet for uncensored news or political organizing would be the first to lose access because their governments have the most repressive laws. As a result, the globalized Internet may become regionalized, or even nationalized, and the benefits of globalization could be rolled back.

(b) The Court should adopt the "targeting" approach to assist in determining when e-trade in a jurisdiction creates a real and substantial connection between a foreign defendant or a dispute and the jurisdiction. In addition, the "active/passive" approach – by which an entity with a highly interactive and transactional website that enters into transactions with persons and entities in the jurisdiction is more likely to be subject to jurisdiction of the forum than an entity with a passive website that only makes information available to users in the jurisdiction[10] – may also provide some guidance. While there was some reference to these approaches by the lower courts in this case,[11] and these approaches have been considered by lower courts in Canada in a small number of other cases,[12] these approaches should have a more prominent role in the Canadian jurisdiction analysis and the correct analysis under these approaches should be clarified. These approaches are regularly employed by courts in the United States.[13]

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[8] As noted by the BCCA in *Braintech Inc. v. Kostiuk*, 1999 BCCA 169 at para. 63 [*Braintech*]: "It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained."

[9] M. Geist, *Global Internet Jurisdiction: The ABA/ICC Survey* (April 2004).

[10] The spectrum of activity was explained in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) [*Zippo*] as follows: "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper…At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction…The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site..." Also see *Braintech*, *supra* note 8 citing *Zippo*, *supra* at para. 60.

[11] *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063 at paras. 32-65, aff'd 2015 BCCA 265 at para. 52 [*Equustek* COA].

[12] See, for example, *Braintech*, *supra* note 8 at paras. 60-65 (which applies the interactivity approach) and *Mahmoud Elfarnawani and International Olympic Committee and Ethics Commission*, 2011 ONSC 6784 at paras 31 & 36 (which applies both approaches but focuses on the targeting approach). Both approaches were also mentioned by the Ontario Court of Appeal in *Bangoura v. Washington Post* (2005), 258 D.L.R. (4th) 341 (ONCA), leave to appeal dismissed, [2005] S.C.C.A. No. 497, referring to submissions made by a media coalition that included members of this Media Coalition, but the Court decided it did not need to adopt any of the suggested approaches to determine the issue in that case (at paras. 47-48).

[13] See, for example, *Zippo*, *supra* note 10, which applies the interactivity approach, and *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), which applies the targeting approach.

A proper analysis would lead to both approaches supporting a lack of jurisdiction in this case. For instance, under the "targeting approach", a forum has jurisdiction over an out-of-forum defendant based on "the intentions of the parties and . . . the steps taken to either enter or avoid a particular jurisdiction"[14] – i.e. whether a party is targeting a particular jurisdiction. Here, the Court would not have jurisdiction over the injunction application because it asserts authority over Google websites that expressly target other states (i.e. the injunction requires removal of content from Google France and Google India, even though Google is not targeting British Columbians, or Canadians, through those websites).

Notably, these approaches should also be employed when determining whether a court should exercise its discretion to grant a mandatory injunction with extraterritorial effect.

(c) Even accepting, for the purposes of argument, that courts may have unlimited equitable jurisdiction to grant injunctions as found by the BCCA,[15] such jurisdiction must be exercised within the confines of the Constitution of Canada[16] and the *Canadian Charter of Rights and Freedoms*.[17] Therefore, in exercising discretion to grant injunctions with extraterritorial effect, courts must take far greater account of whether such an order violates an affected party's freedom of expression than was done in this case. Account must also be taken of the free expression rights of the public and the press, which uses search engines like Google for newsgathering and accurate reporting purposes.

(d) Courts should not issue mandatory injunctions requiring digital platforms or content providers to assist in enforcing state law around the world, as was done here with respect to Canadian intellectual property laws. On this occasion, it is Google, but on another occasion it could be the press. In either case, digital platforms and content providers should not be co-opted for use as an arm of the state, particularly when limitless international jurisdiction could mean that repressive regimes would also seek to use them in this fashion. There are robust constitutional protections for an independent press,[18] which must be taken into account as the law in this area is developed.

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[14] M. Geist, 16 Berkeley Tech. L.J. 1345, 1380.
[15] *Equustek* COA, *supra* note 11 at paras. 71-75.
[16] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
[17] *Constitution Act, 1967* (UK), 30 & 31 Vict, c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 91, 92.
[18] For instance, in the context of issuing search warrants for media premises, this Court considered the possible chilling effect on freedom of the press and newsgathering, noting that "[t]he press should not be turned into an investigative arm of the police", *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 at 432, *per* La Forest J. Nor should it be turned into an enforcement arm, it would be submitted. In *Lessard*, this Court also held that the rights of the press as an "innocent third party" should be taken into account in determining whether a search warrant for media premises should be issued, *per* Cory J. (at 445).

PART III - QUESTIONS IN ISSUE

10. The test for leave to intervene established by this Court is as follows:

(a) whether the Applicant has a real interest in the subject-matter of the appeal; and

(b) whether the Applicant's submissions will be useful to the Court and different from those of other parties.[19]

PART IV - STATEMENT OF ARGUMENT

A. The Applicant Has a Real Interest in this Appeal

11. The Media Coalition has a significant interest in the subject-matter of this appeal. This is an appeal about the ability of a Canadian court to order a mandatory injunction requiring a (foreign, non-party) web-based company to remove content from its websites in order to give effect to court orders made in a private party dispute. It raises issues regarding appropriate restrictions on freedom of expression, jurisdiction of national courts over global digital platforms, and the dangers of national court orders with expansive extraterritorial effect. The Court's decision in this appeal will have an impact beyond the interests of the immediate parties to the appeal, and in particular on the international news media.

12. The members of the Media Coalition are either public interest organizations with a mandate to protect First Amendment rights or media organizations and content providers with digital platforms that have a direct interest in freedom of expression issues, including as related to the Internet. The mandates and interests of these organizations confer on the Media Coalition a

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[19] *Reference re Workers' Compensation Act (1983) (Nfld.)*, [1989] 2 S.C.R. 335 at para. 8.

special interest and concern in ensuring that the law adequately protects the fundamental rights enjoyed by the public and press, including freedom of expression, and that national court jurisdiction is not expanded without due regard for free expression rights. In keeping with the members' ongoing commitment to the preservation of the principles of freedom of expression, the Media Coalition has a pressing and significant interest in this appeal.[20]

B. The Applicant's Submissions Will Be Useful and Different

13. The Media Coalition's submissions in this case will be both useful and different as they will be uniquely grounded in the mandates of its members and their knowledge of media law, freedom of expression and related technological issues, as well as the status of many as content providers and media companies with international and digital platforms.[21]

14. Furthermore, the members of the Media Coalition have a history of assisting courts and other public bodies around the world in matters relating to freedom of expression.[22] Therefore, the Media Coalition has a distinct awareness and understanding of the various issues that come into play relating to freedom of expression and related rights.

15. The Media Coalition's submissions will allow the Court to consider input regarding the impact of extraterritorial orders on the media and the risk of "balkanization" of the Internet; the proper approach to determine when e-trade creates a real and substantial connection between a foreign defendant or a dispute and the jurisdiction; the limitations on a court's discretion to order

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[20] Brown Affidavit at paras. 23-24, MR p. 15.
[21] Brown Affidavit at paras. 24 & 26, MR pp. 15-16.
[22] Brown Affidavit at paras. 4, 5 & 22, MR pp. 9-11 & 15.

injunctions in light of the right to freedom of expression; and the risks and advantages of using digital platforms and the media to enforce state laws.[23]

PART V - COSTS

16. The Media Coalition undertakes not to seek any costs and asks that no costs be awarded against it.[24]

PART VI - ORDER SOUGHT

17. The Media Coalition seeks leave to intervene in the appeal before this Court and to file a factum not to exceed twenty (20) pages in length and to present oral submissions not exceeding fifteen (15) minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July, 2016.

Iris Fischer

Helen Richards

Blake, Cassels & Graydon LLP

Counsel for the Proposed Intervener,
the Media Coalition

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[23] Brown Affidavit at para. 27, MR pp. 16-17.
[24] Brown Affidavit at para. 29, MR p. 17.

PART VII - TABLE OF AUTHORITIES

No. **Cases**

1. *Braintech Inc. v. Kostiuk*, 1999 BCCA 169, leave to appeal refused, 2000 CarswellBC 546

2. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)

3. *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, affirmed 2015 BCCA 265

4. *Mahmoud Elfarnawani and International Olympic Committee and Ethics Commission*, 2011 ONSC 6784

5. *Bangoura v. Washington Post* (2005), 258 D.L.R. (4th) 341 (ONCA), leave to appeal dismissed, [2005] S.C.C.A. No. 497

6. *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002)

7. *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 42

8. *Reference re Workers' Compensation Act (1983) (Nfld.)*, [1989] 2 S.C.R. 335

No. **Secondary Sources**

1. M. Geist, *Global Internet Jurisdiction: The ABA/ICC Survey* (April 2004)

2. M. Geist, 16 Berkeley Tech. L.J. 1345, 1380.

PART VIII - RELEVANT STATUTES

No.	Statute
1.	*Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, Chapter 28
2.	*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11
3.	*Constitution Act, 1967* (UK), 30 & 31 Vict, c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 91, 92