No. 18-15416

United States Court of Appeals for the Ninth Circuit

DENNIS JOSEPH RAIMONDO, AKA Justin Raimondo;
ERIC ANTHONY GARRIS,

Plaintiffs-Appellants,

– v. –

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF NORTHERN CALIFORNIA, SAN FRANCISCO NO. 3:13-CV-02295-JSC, JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

BRIEF FOR *AMICI CURIAE* THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, CENTER FOR CONSTITUTIONAL RIGHTS, AND COLOR OF CHANGE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the *amici curiae* Knight First Amendment Institute at Columbia University, Center for Constitutional Rights, and Color Of Change are not subsidiaries of any other corporation and no publicly held corporation owns 10 percent or more of any *amici curiae* organization's stock.

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Dated: August 3, 2018

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CASES

Bassiouni v. *FBI*,
436 F.3d 712 (7th Cir. 2006) 23, 24, 27

Belanus v. *Clark*,
796 F.3d 1021 (9th Cir. 2015) 27

Clarkson v. *IRS*,
678 F.2d 1368 (11th Cir. 1982) 25

MacPherson v. *IRS*,
803 F.2d 479 (9th Cir. 1986) 14, 23, 25

Medrano v. *Flagstar Bank, FSB*,
704 F.3d 661 (9th Cir. 2012) 26

NAACP v. *Alabama*,
357 U.S. 449 (1958) 28

STATUTES

Privacy Act, 5 U.S.C. § 552a ..... passim

Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896 23

LEGISLATIVE MATERIALS

120 Cong. Rec. 12,646–47 (1974) 24

120 Cong. Rec. 36,650 (1974) 24

120 Cong. Rec. 36,651 (1974) 24

120 Cong. Rec. 36,900 (1974) 21

120 Cong. Rec. 36,957 (1974) 24

S. & H. Comms. on Gov't Operations, 94th Cong., *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579): Source Book on Privacy* 972 (J. Comm. Print 1976) 22

S. Comm. on the Judiciary, S. Rep. No. 93-1227 (1974) 20

2 S. Select Comm. to Study Gov't Operations with Respect to Intelligence Activities, *Final Report: Intelligence Activities and the Rights of Americans*, S. Rep. No. 755 (1976) 18, 19, 21, 22, 23, 24

S. Select Comm. on Presidential Campaign Activities, *Final Report*, S. Rep. 96-981 (1974) 22

Staff of the Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, 92d Cong., *Army Surveillance of Civilians: A Documentary Analysis* (Comm. Print 1972) 22

Staff of the Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, 93d Cong., *Military Surveillance of Civilian Politics* (Comm. Print 1973) 19, 20, 22

OTHER AUTHORITIES

Alex Kane, *How the NYPD's Counterterrorism Apparatus Is Being Turned on Protestors*, Vice (Jan. 18, 2015), https://www.vice.com/en_us/article/exm3z4/how-the-nypds-counter-terror-apparatus-is-being-turned-on-police-protesters-119 9

Andy Martino, *Black Lives Matter Activists are Convinced the NYPD Hacked Their Phones,* The Outline (April 7, 2017), https://theoutline.com/post/1360/black-lives-matter-police-surveillance-the-cops-hacked-their-phones?zd=2&zi=y375t3l6 16

Arthur R. Sepeta Declaration, *Color Of Change* v. *U.S. Dep't of Homeland Sec.*, 1:16-cv-08215-WHP (S.D.N.Y. Apr. 18, 2018), ECF No. 60, https://d11gn0ip9m46ig.cloudfront.net/images/Dkt_60_-_Def_Decl_DHS_-_SJ_Race_Paper.pdf (last visited Aug. 2, 2018) 13

Brentin Mock, *Memphis Police Spying on Activists is Worse Than We Thought* (July 27, 2018), CityLab https://www.citylab.com/equity/2018/07/memphis-police-spying-on-activists-is-worse-than-we-thought/566264/ 8, 12

Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, Wash. Monthly, Jan. 1970, *reprinted in* 116 Cong. Rec. 2,227–31 (1970) 21

Collier Meyerson, *Why Some Black Lives Matter Activists Are Scared off Social Media*, Splinter (Oct. 14, 2016, 6:41 PM), https://splinternews.com/why-some-black-lives-matter-activists-are-scared-off-so-1793862846 15

Craig Timberg & Elizabeth Dwoskin, *Facebook, Twitter and Instagram Sent Feeds That Helped Police Track Minorities in Ferguson and Baltimore, Report Says*, Wash. Post (Oct. 11, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/10/11/facebook-twitter-and-instagram-sent-feeds-that-helped-police-track-minorities-in-ferguson-and-baltimore-aclu-says/?utm_term=.6c210ae1d721 8

Craig Timberg, *In Trump's America, Black Lives Matter Activists Grow Wary of Their Smartphones*, Wash. Post (June 1, 2017), https://www.washingtonpost.com/business/technology/fearing-surveillance-in-the-age-of-trump-activists-study-up-on-digital-anonymity/2017/05/20/186e8ba0-359d-11e7-b4ee-434b6d506b37_story.html?utm_term=.f48dc6512cb4 15

Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. Rev. 112 (2007) 14, 15

Email Chain With Subject Heading Muslims Co-Opt Ferguson Demonstrations, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/NPPD%20282.pdf (last visited Aug. 2, 2018) 13

FBI Emails Concerning Social Media Surveillance of Protests in Baltimore in April of 2015 Part 1, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/FBI%201035-1037.pdf (last visited Aug. 2, 2018) 13

FBI Emails Concerning Social Media Surveillance of Protests in Baltimore in April of 2015 Part 1, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/BLM%201105.pdf (last visited Aug. 2, 2018) 9

FBI Situational Report, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/FBI%20881.pdf (last visited Aug. 2, 2018) 13

FBI Surveillance Documents, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/BLM%201272-1273.pdf (last visited Aug. 2, 2018) 11

Fruzsina Eördögh, *Evidence of 'Stingray' Phone Surveillance by Police Mounts in Chicago,* The Christian Science Monitor (Dec. 22, 2014), https://www.csmonitor.com/World/Passcode/2014/1222/Evidence-of-stingray-phone-surveillance-by-police-mounts-in-Chicago 10

George Joseph, *Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson*, The Intercept (July 24, 2015), https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/ 6, 9

George Joseph, *NYPD Officers Accessed Black Lives Matter Activists' Texts, Documents Show*, The Guardian (Apr. 4, 2017), https://www.theguardian.com/us-news/2017/apr/04/nypd-police-black-lives-matter-surveillance-undercover 6

George Joseph, *Undercover Police Have Regularly Spied on Black Lives Matter Protestors in New York*, The Intercept (Aug. 18, 2015), https://theintercept.com/2015/08/18/undercover-police-spied-on-ny-black-lives-matter/ 8, 10

Islamophobic Op-Ed Forwarded by DHS, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/IA%20261.pdf (last visited Aug. 2, 2018) 13

Jamiles Lartey, *Memphis Police Accused of Using Fake Accounts to Surveil Black Activists*, The Guardian (Aug. 1, 2018), https://www.theguardian.com/us-news/2018/aug/01/memphis-police-black-lives-matter-activists 12

Jodie A. Kirshner, *U.S. and U.K. Approaches to the War on Terror: The Surveillance of Religious Worship*, 14 U. Miami Int'l & Comp. L. Rev. 217 (2006) 17

Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 Internet Pol'y Rev., no. 2, 2017 14

Josh Hafner, *Police Killings of Black Men in the U.S. and What Happened to the Officers*, USA Today (Mar. 29, 2018), https://www.usatoday.com/story/news/nation-now/2018/03/29/police-killings-black-men-us-and-what-happened-officers/469467002/ 7

Letter from Rep. Hank Johnson to FCC Chairman Tom Wheeler (Dec. 2, 2016), https://hankjohnson.house.gov/sites/hankjohnson.house.gov/files/documents/FCC_Stingray_CS%20_sim.pdf 10

Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 Ariz. L. Rev. 621 (2004) 17, 18, 19, 23

Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. Rich. L. Rev. 465 (2015) 14

Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 Nw. U. L. Rev. 1169 (1992) 20

Mick Dumke, *Watchdogs: Undercover Cops, Rahm Aides Kept Tabs on Protestors*, The Chi. Sun-Times (Apr. 10, 2016), https://chicago.suntimes.com/news/watchdogs-undercover-cops-rahm-aides-kept-tabs-on-protesters/ 11

Mike Krauser, *Activists Say Chicago Police Used "Stingray" Eavesdropping Technology During Protests*, CBS Chi. (Dec. 6, 2014), https://chicago.cbslocal.com/2014/12/06/activists-say-chicago-police-used-stingray-eavesdropping-technology-during-protests/ 10

Nicky Woolf & Jessica Glenza, *Oakland Undercover Officer Who Drew Gun on Protesters 'Could Have Shot Anyone,'* The Guardian (Dec. 12, 2014), https://www.theguardian.com/us-news/2014/dec/12/oakland-undercover-officer-protesters-could-have-shot-anyone 11

Nightly News (NBC television broadcast Dec. 6, 1973), *reproduced in NBC's Carl Stern Reveals COINTELPRO Spy Programs*, NBC News (Jan. 7, 2014), http://www.nbcnews.com/video/nbc-news/54004879 21

Nusrat Choudhury, *The Government Is Watching #BlackLivesMatter, and It's Not Okay*, ACLU (Aug. 4, 2015), https://www.aclu.org/blog/racial-justice/government-watching-blacklivesmatter-and-its-not-okay 8, 9

NYPD Has Used Stingrays More than 1,000 Times Since 2008, NYCLU (Feb. 11, 2016), https://www.nyclu.org/en/press-releases/nypd-has-used-stingrays-more-1000-times-2008 9

Race Paper Email, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/IA%20269-70.pdf (last visited Aug. 2, 2018) 12

Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. Rev. 718 (2009) 14

William B. Saxbe, U.S. Att'y Gen., Press Conference with Members of the Press (Nov. 18, 1974) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-18-1974.pdf) 21

INTEREST OF AMICI CURIAE[1]

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute aims to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

The Center for Constitutional Rights ("CCR") is a non-profit legal and public education organization that engages in litigation, advocacy, and the production of public education materials in the fields of civil and international human rights. CCR's diverse dockets include litigation and advocacy addressing policing, surveillance, and racial and ethnic profiling. CCR is a member of several national social justice networks and provides legal support to civil rights movements. CCR is counsel in *Color Of Change* v. *U.S. Dep't of Homeland Sec.*, 1:16-cv-08215-WHP (S.D.N.Y.), a case brought under the Freedom of Information Act that obtained numerous documents that suggest federal and local law enforcement agencies targeted

[1] Counsel for all parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the *amici curiae* or their counsel contributed money intended to fund preparing or submitting the brief.

the political activities of the Movement for Black Lives ("MBL") for monitoring and surveillance.

Color Of Change is the nation's largest online racial justice organization, driven by over 1.3 million members. Using an integrated and intersectional approach, Color Of Change fights the policies and racism that undermine the progress of Black communities, and it champions solutions that move the country forward, in the economy, our democracy, and the media landscape. Color Of Change advocates in cases of discrimination and is involved in efforts to ensure that federal legislation and policy are fair and enforced without discrimination based on race, gender, sexual orientation, class, or religious beliefs. As the nation's largest racial justice organization, Color Of Change's track record of addressing issues at the intersection of race, gender and sexual orientation make it well suited to address the questions of surveillance and privacy laws here.

INTRODUCTION

Amici submit this brief to inform the Court of the far-reaching implications of the District Court's decisions (the "Decisions") for those who speak out against the government or associate with others who do. Those implications underscore the error in the District Court's interpretation of the Privacy Act, 5 U.S.C. § 552a (the "Act")—an interpretation which defies the history and animating purpose behind the Act's protections for First Amendment activity.

The Act's protections remain as important now as they have ever been. In response to baseless and farfetched "public safety" and "national security" concerns over the rise of the Movement for Black Lives ("MBL"),[2] the government has escalated efforts to collect and maintain information on racial justice activists across the country.

These efforts not only chill the exercise of core First Amendment rights, but they also continue a long history of discriminatory surveillance of the First Amendment activities of racial justice activists, like Dr. Martin Luther King, Jr., based on the supposed "threat" they posed to public safety and national security. The government often misused the fruits of this surveillance, seeking to intimidate activists into silence or to discredit them in the eyes of the public. Even absent documented intimidation and coercion, widespread efforts to collect and maintain information on persons exercising their First Amendment rights threaten to chill political speech and silence minority viewpoints. Indeed, given the ability of today's computers to store, analyze, and cross-reference massive amounts of information, the government's powers of surveillance, and the corresponding chilling effects of that surveillance, are stronger than ever.

[2] The MBL is a coalition of more than 50 organizations across the United States representing the interests of Black communities. Member organizations include the Black Lives Matter Network, the National Conference of Black Lawyers, and the Ella Baker Center for Human Rights.

It is precisely this kind of speech-based surveillance that Congress sought to prevent in passing the Act. The Act expressly prohibits the government from maintaining any "record describing how any individual exercises rights guaranteed by the First Amendment," unless the record is "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). Legislative history and case law both make clear that the "law enforcement" exception is narrow and intended to allow the government to collect and maintain information on First Amendment activities only in connection with legitimate investigations—not based on fanciful links to extremists or hypothetical risks of violence.

Yet the Decisions read the law enforcement exception so broadly that it swallows the rule. First, on May 10, 2016, the District Court ruled that the law enforcement exception permitted the Federal Bureau of Investigation (the "FBI") to prepare an April 30, 2004 "threat assessment" (the "April 30 Memo") focused on Appellants—journalists operating the pro-peace website Antiwar.com—after they posted a possible FBI watch list online, which the FBI knew had already been public for months. The April 30 Memo described Appellants' writings, statements, and media appearances, many of which were critical of U.S. foreign policy, and it recommended that a preliminary investigation be opened to determine if Appellants were engaged in activities "which constitute a threat to National Security on behalf of a foreign power." In the proceedings below, the FBI contended (and the District Court agreed) that Appellants' posting of the list implicated national security because

it "might have led to the compromise of then ongoing investigations or alternatively lead to the harming or harassment of innocent people," even though the April 30 Memo itself made no such claims.

Second, on January 12, 2018, the District Court ruled that an April 5, 2006 FBI memorandum (the "Halliburton Memo") also fell within the Act's law enforcement exception. The Halliburton Memo described Antiwar.com's role in spreading information about possible peace demonstrations at the annual shareholder meeting of Halliburton, a company with ties to then-Vice President Dick Cheney and to the Iraq War, and the District Court concluded that the memorandum fell within the exception because the demonstrations might somehow affect public safety.

In ruling that the Act's law enforcement exception permits the FBI to collect and maintain records of Appellants' political speech and protest activities based on unspecified and unsubstantiated claims of threats to national security and public safety, the District Court expanded the exception well beyond Congress's intent. Indeed, the Act's protections are meaningless if the government may record activists' First Amendment activities based on mere speculation or on litigation-created justifications appearing nowhere in the underlying government material. Instead, the Act should require the government to set forth a clear, non-speculative basis to conclude that there is a threat to public safety or national security before the exception will apply. The District Court's rulings to the contrary will predictably

burden the free expression of racial justice activists, who are increasingly the focus of government surveillance.

For these reasons and the reasons set forth in Appellants' Brief, the Decisions should be reversed with instructions to order the FBI to cease maintaining the April 30 Memo and Halliburton Memo.

ARGUMENT

I. RACIAL JUSTICE ACTIVISTS NEED THE PRIVACY ACT'S FIRST AMENDMENT PROTECTIONS NOW MORE THAN EVER.

The Act's protections are increasingly important to the scores of activists working for racial justice in the face of efforts by the Department of Homeland Security ("DHS"), FBI, and local law enforcement agencies to monitor, record, and sometimes disrupt that work—efforts that chill activists' speech and risk silencing their message.

A. Government Efforts to Document Racial Justice Activists' First Amendment Activities Are on the Rise.

The recent spike in surveillance of racial justice activists dates back at least to the 2014 killings of Michael Brown, an unarmed teenager shot by police in Ferguson, Missouri, and Eric Garner, who died after being placed into a chokehold by New York City police officers.[3] In the past five years, high-profile police killings of

[3] *See* George Joseph, *Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson*, The Intercept (July 24, 2015), https://theintercept.com/2015/07/24/documents-show-department-homeland-security-monitoring-black-lives-matter-since-ferguson/

Black men and children have continued at an alarming rate, including the killing of Laquan McDonald, Tamir Rice, Rumain Brisbon, Tony Robinson, Eric Harris, Walter Scott, Alton Sterling, Philando Castile, Terence Crutcher, and Stephon Clark. The police officers involved in these killings have rarely been held accountable.[4]

In the wake of these tragedies, MBL organizations have staged countless demonstrations, protests, and die-ins[5] in Ferguson, New York, and across the country. The purpose of these events was not only to protest police killings of Black men and children, but also to draw attention to a host of injustices affecting Black communities, such as the criminalization of Black youth, the militarization of law enforcement, and poverty.

Despite MBL's peaceful agenda, federal and local law enforcement agencies are monitoring and recording the expressive and associative activities of MBL organizations and other racial justice activists. The evidence of this surveillance marshalled below is necessarily fragmentary, given the surreptitious nature of

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[hereinafter Joseph, *Feds Regularly Monitored BLM*]; George Joseph, *NYPD Officers Accessed Black Lives Matter Activists' Texts, Documents Show*, The Guardian (Apr. 4, 2017), https://www.theguardian.com/us-news/2017/apr/04/nypd-police-black-lives-matter-surveillance-undercover.

[4] *See* Josh Hafner, *Police Killings of Black Men in the U.S. and What Happened to the Officers*, USA Today (Mar. 29, 2018), https://www.usatoday.com/story/news/nation-now/2018/03/29/police-killings-black-men-us-and-what-happened-officers/469467002/.

[5] A die-in is a demonstration where the participants lie down as if dead.

government surveillance, but it paints an ominous picture of the lengths to which law enforcement has gone to monitor racial justice activists in recent years.

Social Media Surveillance: Law enforcement regularly monitors and records activists' social media accounts, including Facebook, Twitter, and Instagram.[6] The surveillance of these sources significantly impacts the MBL community because its members and the members of other racial justice groups are active on social media as part of their efforts to organize, share information, and build support.

Social media monitoring by law enforcement appears to escalate in connection with planned demonstrations.[7] For instance, FBI emails obtained through FOIA requests show that federal law enforcement agencies were actively documenting activists' social media activities during the 2015 racial justice protests in

[6] George Joseph, *Undercover Police Have Regularly Spied on Black Lives Matter Protestors in New York*, The Intercept (Aug. 18, 2015), https://theintercept.com/2015/08/18/undercover-police-spied-on-ny-black-lives-matter/ [hereinafter Joseph, *Undercover Police*]; *see also* Craig Timberg & Elizabeth Dwoskin, *Facebook, Twitter and Instagram Sent Feeds That Helped Police Track Minorities in Ferguson and Baltimore, Report Says*, Wash. Post (Oct. 11, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/10/11/facebook-twitter-and-instagram-sent-feeds-that-helped-police-track-minorities-in-ferguson-and-baltimore-aclu-says/?utm_term=.6c210ae1d721; Brentin Mock, *Memphis Police Spying on Activists is Worse Than We Thought* (July 27, 2018), CityLab https://www.citylab.com/equity/2018/07/memphis-police-spying-on-activists-is-worse-than-we-thought/566264/ (describing law enforcement use of dummy social media accounts to access information and correspond with activists).

[7] *See* Nusrat Choudhury, *The Government Is Watching #BlackLivesMatter, and It's Not Okay*, ACLU (Aug. 4, 2015), https://www.aclu.org/blog/racial-justice/government-watching-blacklivesmatter-and-its-not-okay.

Baltimore, including "photos circulating around Instagram," "hashtags," and "social media feeds."[8] In addition, law enforcement has tracked "minute-by-minute, the movements of participants" in racial justice protests using online sources like Google maps.[9]

High-Tech Surveillance: Law enforcement has reportedly used advanced surveillance technology, such as "Stingrays" to collect information about activists. This technology "allows authorities to spy on cell phones in the area by mimicking a cell tower" and provides the police with "a person's location," "phone numbers that a person has been texting and calling," and "the contents of communications."[10] There

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[8] *See FBI Emails Concerning Social Media Surveillance of Protests in Baltimore in April of 2015 Part 1*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/BLM%201105.pdf (last visited Aug. 2, 2018). FBI emails also describe law enforcement's social media monitoring of protests using certain hashtags "in support of Black Lives Matter." *FBI Email Chain on Planned Protests in the Bay Area*, Addendum at A-6. This document is not available in the public domain, and *amici* therefore include it in an addendum attached hereto for the Court's convenience.

DHS documents show similar monitoring and recording of MBL activists' social media accounts even after the demonstrations ended. *See* Joseph, *Feds Regularly Monitored BLM*, *supra* note 3 (reporting on DHS communications listing numerous planned protests based on information gathered from social media surveillance).

[9] Choudhury, *supra* note 7; *see also* Alex Kane, *How the NYPD's Counterterrorism Apparatus Is Being Turned on Protestors*, Vice (Jan. 18, 2015), https://www.vice.com/en_us/article/exm3z4/how-the-nypds-counter-terror-apparatus-is-being-turned-on-police-protesters-119.

[10] *NYPD Has Used Stingrays More than 1,000 Times Since 2008*, NYCLU (Feb. 11, 2016), https://www.nyclu.org/en/press-releases/nypd-has-used-stingrays-more-1000-times-2008.

are reports that the Chicago Police Department deployed Stingray devices to monitor racial justice activists at a protest in December 2014.[11] These reports led nine members of Congress to request that the Federal Communications Commission investigate the relationship between law enforcement's use of Stingray devices and race-based discrimination.[12]

Undercover Infiltration: Law enforcement frequently uses undercover officers to infiltrate protests. For example, nearly 300 documents obtained from the Metropolitan Transit Authority ("MTA") and the Metro-North Railroad in New York show that officials sent undercover officers to more than a dozen MBL demonstrations in 2014 and 2015.[13] The undercover officers provided "live updates," "report[ed] on group sizes," and "track[ed] protesters' movements around the city."[14] A number of law enforcement reports went as far as tracking and including pictures

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[11] Mike Krauser, *Activists Say Chicago Police Used "Stingray" Eavesdropping Technology During Protests*, CBS Chi. (Dec. 6, 2014), https://chicago.cbslocal.com/2014/12/06/activists-say-chicago-police-used-stingray-eavesdropping-technology-during-protests/; *see also* Fruzsina Eördögh, *Evidence of 'Stingray' Phone Surveillance by Police Mounts in Chicago,* The Christian Sci. Monitor (Dec. 22, 2014), https://www.csmonitor.com/World/Passcode/2014/1222/Evidence-of-stingray-phone-surveillance-by-police-mounts-in-Chicago.

[12] Letter from Rep. Hank Johnson to FCC Chairman Tom Wheeler (Dec. 2, 2016), https://hankjohnson.house.gov/sites/hankjohnson.house.gov/files/documents/FCC_Stingray_CS%20_sim.pdf.

[13] Joseph, *Undercover Police*, *supra* note 6.

[14] *Id.*

of specific activists. Law enforcement in Chicago employed similar tactics after the shooting of Laquan McDonald, infiltrating MBL meetings, as well as other activist organizations, churches, and philanthropic organizations.[15]

Dossier-Compilation on Individual Activists: In addition to tracking group activities, law enforcement has been compiling dossiers on individual activists based solely on their participation in peaceful protests and other protected First Amendment activity. For example, an FBI report obtained by CCR contains detailed surveillance of an activist who flew from New York for a Ferguson protest, refers to the activist as a "suspect" (based only on the activist's plans to take part in a protected free speech activity), and shows that the FBI coordinated with local law enforcement to identify this activist and his or her activities.[16] Similarly, an email chain between FBI agents with the subject line "POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)" refers to one individual as "a person of interest who may pose a threat in the St. Louis area" based solely on the individual's protected First

[15] Mick Dumke, *Watchdogs: Undercover Cops, Rahm Aides Kept Tabs on Protestors*, The Chi. Sun-Times (Apr. 10, 2016), https://chicago.suntimes.com/news/watchdogs-undercover-cops-rahm-aides-kept-tabs-on-protesters/; *see also* Nicky Woolf & Jessica Glenza, *Oakland Undercover Officer Who Drew Gun on Protesters 'Could Have Shot Anyone,'* The Guardian (Dec. 12, 2014), https://www.theguardian.com/us-news/2014/dec/12/oakland-undercover-officer-protesters-could-have-shot-anyone (describing undercover officer infiltration of protests in Oakland).

[16] *FBI Surveillance Documents*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/BLM%201272-1273.pdf (last visited Aug. 2, 2018).

Amendment activity such as social media activism and attending and/or organizing protests against police brutality in Ferguson, Missouri.[17] In addition, law enforcement in Memphis compiled briefs "initially . . . about protests against police violence in Memphis," but that "quickly became . . . dossier[s] of any kind of anti-police violence activity happening across the nation, namely any . . . that were part of the Black Lives Matter network, even [though] it had nothing to do with Memphis."[18] Memphis law enforcement shared these briefs with the U.S. government and the military.[19]

* * *

Law enforcement regularly justifies its efforts to document the First Amendment activities of racial justice activists based on groundless fears over public safety and national security. For instance, DHS justified the creation of several draft reports titled "The Growing Frequency of Domestic Race-Based Terror" in part on the unsupported assertion that "violent ideological actors [will] coopt peaceful

[17] *FBI Email Chain Concerning "POSSIBLE DOMESTIC THREAT,"* Addendum at A-2. Because this document is not available in the public domain, *amici* include it in an addendum attached hereto for the Court's convenience.

[18] Mock, *supra* note 6; *see also* Jamiles Lartey, *Memphis Police Accused of Using Fake Accounts to Surveil Black Activists*, The Guardian (Aug. 1, 2018), https://www.theguardian.com/us-news/2018/aug/01/memphis-police-black-lives-matter-activists (describing dossiers on particular activists).

[19] *Mock, supra* note 6.

political activity."[20] Likewise, local law enforcement looking to justify similar surveillance has shared and relied upon plainly racist and anti-Muslim articles from far-right websites which included unfounded claims that ISIS could co-opt protests organized by Black activists.[21] Relatedly, the FBI advised its agents that any monitoring and recording of MBL's First Amendment activities could be justified on the grounds that those activities might "invite a violent reaction towards the subject individuals or groups, or . . . be used as a means to target law enforcement."[22] As discussed below, *see infra* § II.A, government citations to flimsy and hypothetical links between civil rights groups and violent extremists has a long history—a history that the Act was specifically created to end.

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[20] *See Race Paper Email*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/IA%20269-70.pdf (last visited Aug. 2, 2018); Arthur R. Sepeta Decl. ¶¶ 22–23, *Color Of Change* v. *U.S. Dep't of Homeland Sec.*, 1:16-cv-08215-WHP (S.D.N.Y. Apr. 18, 2018), ECF No. 60, https://d11gn0ip9m46ig.cloudfront.net/images/Dkt_60_-_Def_Decl_DHS_-_SJ_Race_Paper.pdf (last visited Aug. 2, 2018); *see also Islamophobic Op-Ed Forwarded by DHS*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/IA%20261.pdf (last visited Aug. 2, 2018).

[21] *See Email Chain With Subject Heading Muslims Co-Opt Ferguson Demonstrations*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/NPPD%20282.pdf (last visited Aug. 2, 2018); *FBI Situational Report*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/FBI%20881.pdf (last visited Aug. 2, 2018) (FBI Situation Report citing unspecified media reports to claim that "ISIS supporters are urging Ferguson protestors to embrace radical Islam and engage in further violence").

[22] *See FBI Emails Concerning Social Media Surveillance of Protests in Baltimore in April of 2015 Part 1*, CCR, https://ccrjustice.org/sites/default/files/attach/2018/03/FBI%201035-1037.pdf (last visited Aug. 2, 2018).

B. Documenting the First Amendment Activities of Racial Justice Activists Chills Their Speech and Association.

The "mere compilation by the government of records describing the exercise of First Amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise." *MacPherson* v. *IRS*, 803 F.2d 479, 484 (9th Cir. 1986) (citation omitted). Many targets of such surveillance "will not be willing to accept the risk and will instead simply change their behavior" so as to avoid having their "information . . . go into a government database for some unknown future use when the time is ripe."[23] These effects are felt predominantly by minority groups or those whose viewpoints the

[23] Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. Rev. 112, 157 (2007); *see also* Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 Internet Pol'y Rev., no. 2, 2017, at 1. (finding that 62% of respondents "much less likely" or "somewhat less likely" to "speak or write about certain topics online" due to government surveillance, and 78% of respondents strongly agreeing or "somewhat" agreeing that they would "be more careful about what [they] say or discuss" online due to government surveillance).

government dislikes—often the targets of surveillance.[24] Government surveillance therefore "strikes at the heart of First Amendment values."[25]

Targeted government surveillance of MBL activists has dramatically chilled their exercise of protected First Amendment activities in concrete ways. Many activists are reluctant to use social media platforms, previously key to their efforts at organizing, because those platforms are easy for law enforcement to monitor. For example, one Black Trans-rights activist reported that the revelation that social media platforms provided user information to Geofeedia—a surveillance aggregator on which law enforcement relies—"caused [her] to use her social media accounts less often and to set them to private," limiting the reach and effectiveness of her activism.[26] Relatedly, reports of phone hacking by law enforcement have caused some

[24] The surreptitious nature of government surveillance extends the chilling effects beyond the direct targets of surveillance to those who fear they might be targets. *See* Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. Rev. 71, 78 (2009); *see also* Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. Rich. L. Rev. 465, 483–84 (2015) (documenting research showing that the mere suggestion of observation—let alone the knowledge of actual surveillance—can reinforce majoritarian influence, incentivizing conformity).

[25] Solove, *supra* note 23, at 122-23.

[26] Collier Meyerson, *Why Some Black Lives Matter Activists Are Scared off Social Media*, Splinter (Oct. 14, 2016, 6:41 PM), https://splinternews.com/why-some-black-lives-matter-activists-are-scared-off-so-1793862846.

MBL activists "to take more precautions in their communications around organizing, and foster[ed] a sense of discomfort and paranoia."[27]

In response to government surveillance, social justice groups have also held digital security trainings of their own "intended to blunt what they consider government overreach that threatens their constitutional rights to free expression."[28] Participants in these political and social movements "feel like using these [digital security] tools will give them some semblance of freedom and autonomy and ability to speak." However, these tools are also cumbersome. Secure alternatives, like encrypted browsers, "often require new technical skills or extra precautions" that more widely available and easily accessible (but more vulnerable) technologies do not.[29] As a result, "the push for tighter security" in response to government surveillance risks "dampen[ing] or discourage[ing] some activists."[30]

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[27] *See* Andy Martino, *Black Lives Matter Activists are Convinced the NYPD Hacked Their Phones,* The Outline (April 7, 2017), https://theoutline.com/post/1360/black-lives-matter-police-surveillance-the-cops-hacked-their-phones?zd=2&zi=y375t3l6.

[28] Craig Timberg, *In Trump's America, Black Lives Matter Activists Grow Wary of Their Smartphones*, Wash. Post (June 1, 2017), https://www.washingtonpost.com/business/technology/fearing-surveillance-in-the-age-of-trump-activists-study-up-on-digital-anonymity/2017/05/20/186e8ba0-359d-11e7-b4ee-434b6d506b37_story.html?utm_term=.f48dc6512cb4.

[29] *Id.*

[30] *Id.*

II. The Privacy Act Was Passed to Prevent the Government's Documentation of Activists' First Amendment Activities.

From the 1950s to 1970s, the federal government operated several clandestine domestic surveillance programs that collected and maintained records on the First Amendment activities of citizens. These programs often targeted civil rights groups based on an imagined fear that they would abandon their peaceful activities and turn violent or that they would begin coordinating with foreign agents—the same rationales DHS and other law enforcement agencies cite today in support of their surveillance of MBL groups. Congress passed the Privacy Act of 1974 in direct response to these programs and their chilling effects on speech.

A. The Government's Documentation of Racial Justice Activists' First Amendment Activities Continues a Long History of Discriminatory Surveillance Based on Activists' Speech and Association.

Federal law enforcement agencies targeted racial justice and political activists in a number of surreptitious surveillance programs conducted during the mid-twentieth century. Purportedly created to collect and maintain information on supposed subversives and communist agitators, these programs soon identified targets based on their political or religious beliefs, and civil rights leaders, unions, and other asserted "threats" became subject to regular government surveillance.[31] The most

[31] *See* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 Ariz. L. Rev. 621, 623 (2004); Jodie A. Kirshner, *U.S. and U.K.*

notorious domestic surveillance programs from this time were the FBI's COINTELPRO program, the U.S. Army's Continental United States ("CONUS") program, and the Internal Revenue Service's ("IRS's") "Special Service Staff" program.

COINTELPRO: In 1956, the FBI established COINTELPRO, a counterintelligence program to monitor, disrupt, and neutralize political and religious groups that the FBI, acting without any oversight, deemed to be national security threats. *See* 2 S. Select Comm. to Study Gov't Operations with Respect to Intelligence Activities, *Final Report: Intelligence Activities and the Rights of Americans*, S. Rep. No. 755, at 10 (1976) [hereinafter *Church Committee Final Report*]. Starting with the Communist Party, COINTELPRO's list of supposed national security threats quickly expanded to include civil rights activists, and by the mid-1960s, the FBI was gathering information on the objectives, membership, and planned activities of a large number of civil rights leaders, including well-known groups like the Congress of Racial Equality and Dr. King's Southern Christian Leadership Conference ("SCLC"). 2 *Church Committee Final Report*, *supra*, at 40, 71–72.[32]

Approaches to the War on Terror: The Surveillance of Religious Worship, 14 U. Miami Int'l & Comp. L. Rev. 217, 222 (2006).

[32] *See also* Fisher, *supra* note 31, at 631. As discussed above, law enforcement is using many of these same unsubstantiated "public safety" and "national security" concerns to justify collecting and maintaining information on racial justice activists today. *See supra* § I.A.

By March 1968, the FBI turned to active interference. 2 *Church Committee Final Report*, *supra*, at 87. It launched anonymous attacks on "the political beliefs of targets in order to induce their employers to fire them" and obtained targets' tax returns with the aim of instigating IRS investigations, all to stop civil rights groups and leaders from gaining "respectability" and "recruiting young people," and to prevent a "messiah" from "unify[ing] and electrify[ing]" the civil rights movement. *Id.* at 10–11, 87–88. COINTELPRO attempted not only to discredit Dr. King, but also to coerce him into committing suicide by sending him the notorious "You Are Done" letter in 1964, accusing him of adultery and being a "fraud." *See id.* at 220–21.[33]

CONUS Program: The U.S. Army also engaged in the widespread monitoring of peaceful domestic organizations via its CONUS program. The Army had been involved in domestic surveillance since World War I, if not before, but this surveillance expanded drastically during the latter half of the 1960s, particularly after the 1967 antiwar "March on the Pentagon." Staff of the Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, 93d Cong., *Military Surveillance of Civilian Politics* 5, 14–19 (Comm. Print 1973) [hereinafter *Military Surveillance Report*]. During this time, CONUS repeatedly targeted peaceful racial justice and political organizations, including the Congress of Racial Equality, the Interfaith Peace Mission, the National Association for the Advancement of Colored People ("NAACP"), the SCLC, and

[33] Fisher, *supra* note 31, at 623.

Women Strike for Peace—justifying its surveillance of these groups on a speculative concern that they might turn violent or be infiltrated by communist conspirators, and thus threaten public safety or national security. *Id.* at 4–5, 10–14, 40, 42. The CONUS program compiled the information it gathered into blacklists and "Compendiums" of "Potential Trouble Areas" (almost all of which were Black neighborhoods) and purportedly subversive "Organizations of Interest" (such as the racial justice groups listed above). *Id.* at 50–57. CONUS shared these materials with the FBI and other Army units—located in the United States and abroad—and used the underlying surveillance to generate "civil disturbance estimates" and long-term "threat estimates." *Id.* at 12, 49, 58–59.

IRS Special Service Staff: In 1969, the IRS set up a "secret political intelligence unit known as the Special Service Staff which was responsible for compiling political intelligence data on . . . individuals and organizations deemed to be 'activist . . . ideological, militant, subversive or radical.'" S. Comm. on the Judiciary, S. Rep. No. 93-1227, at 23 (1974) (second ellipsis in original). Created "to determine whether there existed a relationship between a taxpayer's political affiliation and his or her propensity towards tax evasion,"[34] the IRS Special Service Staff surveilled politically active groups and individuals chosen from an FBI and Justice Department

[34] Matthew N. Kleiman, Comment, *The Right to Financial Privacy Versus Computerized Law Enforcement: A New Fight in an Old Battle*, 86 Nw. U. L. Rev. 1169, 1177 n.46 (1992).

list of "activists" and "ideological organizations." 2 *Church Committee Final Report*, *supra*, at 168; *see also* 120 Cong. Rec. 36,900 (1974) (statement of Sen. Gaylord Nelson). In providing the list, the FBI "expressed its hope that the [Special Service Staff] tax examinations would 'deal a blow to dissident elements.'" 2 *Church Committee Final Report*, *supra*, at 168.

B. Congress Passed the Privacy Act to Repudiate This History and Prohibit Government Documentation of Activists' Speech and Association.

These domestic surveillance programs came to light in the early 1970s,[35] leading to wide-ranging congressional investigations and the passage of the Privacy Act of 1974, a statute specifically designed to prevent the abuses uncovered through intrepid reporting and Congressional inquiries.

[35] *See* Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, Wash. Monthly, Jan. 1970 (disclosing CONUS), *reprinted in* 116 Cong. Rec. 2,227–31 (1970); *Nightly News* (NBC television broadcast Dec. 6, 1973) (disclosing COINTELPRO), *reproduced in NBC's Carl Stern Reveals COINTELPRO Spy Programs*, NBC News (Jan. 7, 2014), http://www.nbcnews.com/video/nbc-news/54004879; William B. Saxbe, U.S. Att'y Gen., Press Conference with Members of the Press (Nov. 18, 1974) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-18-1974.pdf) (disclosing results of Department of Justice investigation into CONTELPRO); 3 *Church Committee Final Report*, *supra*, at 259, 925 & n.3a, 926 (discussing disclosure of Watergate Scandal).

Through a number of different investigations,[36] Congress found that these surveillance programs posed a direct threat to the First Amendment. As explained by the House Republican Research Committee's Privacy Task Force:

> The direct threat to individual civil liberties is obvious in those cases in which a person is actually being monitored but even more alarming is the "chilling effect" such activities have on all citizens. *A person who fears that he will be monitored may, either subconsciously or consciously, fail to fully exercise his constitutionally guaranteed liberties.* The mere existence of such fear erodes basic freedoms and cannot be accepted in a democratic society.

S. & H. Comms. on Gov't Operations, 94th Cong., *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579): Source Book on Privacy* 972 (J. Comm. Print 1976) [hereinafter *Source Book*] (emphasis added). A committee headed by Senator Frank Church (the so-called "Church Committee") completed a comprehensive investigation into the "intelligence activities and the extent . . . to which illegal, improper, or unethical activities were engaged in by any agency of the Federal

[36] The Senate's Subcommittee on Constitutional Rights published findings on the CONUS program in 1972 and 1973. Staff of the Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, 92d Cong., *Army Surveillance of Civilians: A Documentary Analysis* (Comm. Print 1972); *Military Surveillance Report*, *supra*. In May 1973, the Senate Watergate Committee began hearings on the break-in at the Democratic National Committee headquarters at the Watergate office complex, any subsequent cover up, and any related illegal or unethical conduct, and the Committee published its findings on June 27, 1974. S. Select Comm. on Presidential Campaign Activities, *Final Report*, S. Rep. 96-981 (1974).

government," and similarly concluded these surveillance programs were "indisputably degrading to a free society." 2 *Church Committee Final Report*, at v, 10.[37]

Steeped in the findings of these investigations when it passed the Act, "Congress expressed particular concern with the Government's action in collecting information about citizens' exercise of their First Amendment rights." *Bassiouni* v. *FBI*, 436 F.3d 712, 716 (7th Cir. 2006). Congress therefore "intended to restrict the information about individuals' First Amendment activities that the government may collect and maintain." *MacPherson* v. *IRS*, 803 F.2d 479, 482 (9th Cir. 1986).

Congress also recognized that computers afforded the government an unprecedented ability to store tremendous volumes of information on its citizens and to cross-reference that information between various departments, to the detriment of citizens' privacy and expressive rights alike. *See* Privacy Act of 1974, Pub. L. 93-579, § 2(a)(2), 88 Stat. 1896, 1896 ("The Congress finds that . . . the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information. . . ."). Moreover, "[t]he massive centralization of [surveillance]

[37] *See also* Fisher, *supra* note 31, at 631 (explaining that COINTELPRO "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence").

information creates a temptation to use it for improper purposes, threaten[ing] to 'chill' the exercise of First Amendment rights, and is inimical to the privacy of citizens." 3 *Church Committee Final Report*, *supra*, at 778; *see also* 120 Cong. Rec. 12,646–47 (1974) (statement of Sen. Sam J. Ervin), *reprinted in Source Book*, *supra*, at 5–6.

Accordingly, the Act expressly prohibits a federal agency from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment." *See* 5 U.S.C. § 552a(e)(7).

The Act also includes an exception for records within the ambit of an "authorized law enforcement activity," *id.*, but this exception is intended to be *narrow*, as is evident from the congressional record. During the House debate over the Act, Representative Howard Ichord introduced a clarifying amendment (which would eventually become the Act's law enforcement exception) to ensure the Act would not "prohibit the maintenance of any record of activity which is pertinent to and within the scope of a duly authorized law enforcement activity." 120 Cong. Rec. 36,650 (1974), *reprinted in Source Book*, *supra*, at 901. Representative Ichord, an avowed anti-Communist, explained that the purpose of the amendment was "to protect only *legitimate national or internal security intelligence and investigations*," and to ensure that "political and religious activities are not used as a cover for illegal or subversive activities." 120 Cong. Rec. 36,651 (1974) (emphasis added), *reprinted in Source Book*, *supra*, at 902–03; 120 Cong. Rec. 36,957 (1974), *reprinted in Source Book*, *supra*, at 929; *see also Bassiouni*, 436 F.3d at 718.

The "law enforcement activities" exception therefore requires a "narrow reading." *MacPherson*, 803 F.2d at 482; *see also Clarkson* v. *IRS*, 678 F.2d 1368, 1374–75 (11th Cir. 1982). Government documentation of First Amendment Activities should take place only where the government sets forth a clear, non-speculative basis to conclude that there is a threat to public safety or national security; *post hoc* rationales not present in the government materials themselves and manufactured only for litigation purposes should not suffice. To hold otherwise would amount to "[b]lanket allowance of . . . 'incidental' surveillance and recording under the guise of general investigation [and] permit the exception to swallow the rule." *MacPherson*, 803 F.2d at 484 (declining "to fashion a hard and fast standard" and considering appeals involving the law enforcement exception "on an individual, case-by-case basis"). The same unintended result would obtain if law enforcement were allowed to sidestep the Act's protections and collect and maintain information on First Amendment activities under the guise of protecting public safety or national security. *See Clarkson*, 678 F.2d 1368 at 1374 ("The objective of the law enforcement exception to subsection (e)(7) was to make certain that political and religious activities are not used as a cover for illegal or subversive activities. . . . Congress did not intend to dilute the guarantees of the First Amendment by authorizing the maintenance of files on persons who are merely exercising their constitutional rights." (internal quotation marks omitted)). Consistent with the Act's legislative history and animating purpose, the exception

cannot be understood to apply where law enforcement conjures up national security or public safety concerns based solely on speculation or stereotype.

III. Contrary to the Purposes of the Privacy Act, the Decisions Pave the Way for Increased Documentation of Racial Justice Activists' First Amendment Activities.

The Decisions should be reversed because they expand the Act's law enforcement exception so far as to engulf the Act's core protections. *See Medrano* v. *Flagstar Bank, FSB*, 704 F.3d 661, 666 (9th Cir. 2012) (rejecting an interpretation that would be "inconsistent with Congress' intent that the statute serve a broad remedial purpose"). If those protections are to have any meaning, the Government must articulate clear, non-speculative grounds on which to conclude the collection and maintenance of records on First Amendment activities is necessary to a legitimate investigation.

If left to stand, the Decisions would allow the government to collect and maintain information on any racial justice activist whenever the government claimed—no matter how speculatively—a need to protect "public safety" or "national security." The District Court's May 10, 2016 Decision held the FBI could legally prepare and maintain the April 30 Memo, detailing the FBI's "threat assessment" of Appellants and Antiwar.com, after Antiwar.com posted a possible FBI watch list. ER 59-62. The memorandum itself cited no facts suggesting that Appellants' posting of the list implicated national security. ER 521–22. Nonetheless, during this litigation, the FBI offered the *post hoc* rationalization that Appellants "might have . . .

compromise[d] . . . then ongoing investigations" or "harm[ed] . . . innocent people"—a particularly hollow justification, given that the list had already been public for months, as the FBI knew. *Id.*

Similarly, the District Court's January 12, 2018 Decision upheld the FBI's preparation and maintenance of the Halliburton Memo describing Antiwar.com's role in spreading information about possible antiwar demonstrations at the annual shareholder meeting of Halliburton. ER 9–11. The District Court agreed with the FBI that the memorandum related to public safety simply because there had been arrests during past demonstrations and the memorandum "convey[ed] the level of public awareness of the event." ER 6.

Taken together, the Decisions state that the FBI may document Appellants' First Amendment activities based on nothing more than the FBI's conclusory, unsupported claims that surveillance was related to "national security" or "public safety." Such baseless surveillance is precisely the sort of government overreach the Act was intended to prohibit. *See Bassiouni*, 436 F.3d at 718 (7th Cir. 2006) ("[I]n enacting [the Act], Congress was motivated by a general concern with the potential for abuse if the Government is allowed to collect political dossiers about American citizens."); *see also Belanus* v. *Clark*, 796 F.3d 1021, 1028 (9th Cir. 2015) (evaluating whether a particular statutory interpretation "is consistent with and furthers the statute's purposes"); *see also supra* § II.B. To allow law enforcement to collect and maintain records on civil rights groups based only on the government's

unsupported say-so would invite a return to the days of COINTELPRO and CONUS—programs whose replication the Act was specifically passed to prevent. As such, instead of interpreting the law enforcement activities exception narrowly, which is what Congress intended, the Decisions eviscerate the protections of the Act.

Moreover, these rulings allow for the collection and maintenance of information on racial justice activists who simply speak about, but do not participate in, a demonstration. Appellants did not attend the Halliburton protests; they simply wrote about them. The government collected and maintained information about them nonetheless.

The Decisions hint at even more expansive readings of the law enforcement exception, too. If the "level of public awareness" of an event is sufficiently related to public safety to satisfy the law enforcement exception, then presumably the exception would also allow the government to gather and record information about the identities of the speakers at the event, their ideologies, and the content of their planned speeches. Surely, government gathering of this kind of information is precisely what the Act was passed to prevent. *See, e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (forced disclosure of membership list violated First Amendment's protection of free association).

Thus, under the Decisions' logic, the Act's law enforcement exception would swallow the rule, allowing the government to collect and maintain extensive information, in fine detail, on racial justice activists speaking about or involved in

demonstrations, marches, or protests. This is the very overreach the Act was designed to safeguard against. This Court should therefore reject the District Court's expansive interpretation of the law enforcement exception and, consistent with Congress's clear purpose in passing the Act, affirm the protections it expressly affords individuals—like the civil rights leaders of the mid-twentieth century, and like the MBL members and other racial justice activists of today—engaged in protected First Amendment activity.

CONCLUSION

For these reasons, *amici* join Appellants in urging the Court to reverse the Decisions with instructions to order the FBI to cease maintaining the April 30 Memo and Halliburton Memo.

Dated: August 3, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1 because this brief contains 6,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

/s/ Aidan Synnott
Aidan Synnott
Counsel for Amici

Dated: August 3, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 3, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Aidan Synnott
Aidan Synnott
Counsel for Amici

Dated: August 3, 2018

ADDENDUM

[redacted](SL) (FBI) b6 -1 b7C -1

From: [redacted]
Sent: Wednesday, October 29, 2014 9:10 AM
To: [redacted]
Subject: Fwd: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

-------- Original message --------
From: [redacted] b6 -1 b7C -1 b7E -5
Date:10/17/2014 8:02 PM (GMT-06:00)
To: [redacted]
Subject: Re: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

Oh I know....but what else does the MIAC have to do?

----- Original Message -----
From: [redacted]
To: [redacted]
Sent: Fri Oct 17 21:00:53 2014
Subject: Re: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

Everyone needs to stay calm! I'll reach out for him again tonight. He hasn't been arrested for violence, he's been explicitly calling for peaceful protests. He is [redacted] b6 -1,-3 b7C -1,-3 b7E -3

----- Original Message -----
From: [redacted]
To [redacted]
Sent: Fri Oct 17 20:40:15 2014
Subject: Fw: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

The whole area is spun up on him

----- Original Message -----
From: [redacted]
To [redacted]
Sent: Fri Oct 17 20:36:15 2014
Subject: Fw: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

Isn't this your guy?

----- Original Message -----
From: [redacted] b6 -1,-3 b7C -1,-3 b7E -3,-12
To [redacted]
Sent: Fri Oct 17 10:49:17 2014
Subject: Fw: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

Got this from [redacted] and [redacted] Not sure if it is something [redacted] would be interested in or even if [redacted]

St. Louis County is well aware of what he's doing as far as protests and stuff.

[redacted]

----- Original Message -----
From: [redacted]
To: [redacted]
Sent: Fri Oct 17 09:26:29 2014
Subject: Fw: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

b6 -1
b7C -1
b7E -12

SSA [redacted]
FBI-St. Louis
[redacted] DT/WMD/Bomb Tech
Special Events/MST

----- Original Message -----
From: [redacted]
To: [redacted]
Sent: Fri Oct 17 09:23:30 2014
Subject: FW: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

b6 -1
b7C -1

For your information, thanks, [redacted]

-----Original Message-----
From: [redacted] SFC USARMY [redacted] (US) [mailto [redacted]
Sent: Thursday, October 16, 2014 9:27 PM
To: [redacted]
Cc: Stlouis; [redacted] MAJ USARMY [redacted] (US)
Subject: FW: POSSIBLE DOMESTIC THREAT (UNCLASSIFIED)

b6 -1,-4
b7C -1,-4

CLASSIFICATION: UNCLASSIFIED

Mr. [redacted]

See below (Check the links) and attached regarding a person of interest who may pose a domestic threat in the St Louis area. [redacted] the St Louis area. Someone is probably already tracking this guy, but I wanted to make sure this was reported. This is a specific concern to our Command, as we have two Army Reserve facilities in the St Louis area.

b6 -3
b7C -3

This guy may just be an activist that likes to talk, but better safe than sorry.

Please let me know if you have any questions, or if there is any additional information available.

Thank You

SFC [redacted]
NCOIC/Security Manager
[redacted]

b6 -4
b7C -4

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of the original message.

SFC [redacted]
Per our phone conversation, here is what I have.

b6 -3,-4
b7C -3,-4
b7E -3

Subject's Name: [redacted]

Background: [redacted] that has been stirring up a lot of attention at the Ferguson, Saint Louis, and surrounding area protests. He has been arrested multiple times at these events for violence. Recently he [redacted] He has [redacted] threatening to bring that violence to these areas as well as heightened acts of violence in the current protest areas. [redacted] He has also [redacted]

b6 -3
b7C -3
b7E -3

My concern is this. [redacted]

I am very concerned about who he might be in contact with, encouraging, or recruiting to escalate the ever worsening situation in St. Louis. A quick Google search of his name will bring up multiple links. I have posted his personal links and the link [redacted]

Twitter - [redacted]

YouTube - [redacted]

Facebook - [redacted]

Wordpress - [redacted]

b6 -3
b7C -3
b7E -3

[redacted]

For all I know, he could just be all talk and have no sort of influence over [redacted] the Ferguson and surrounding areas' situation. However, I would have never forgiven myself if something did in fact happen and I never "Saw Something, Said Something". Despite not knowing exactly [redacted] he is definitely someone that the correct authorities may want to have a chat with.

Mr. [redacted]
Unit Administrator
[redacted]
191 Soldiers Drive
St. Charles, Missouri 63304
[redacted]

b6 -4
b7C -4

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-----Original Message-----
From: [redacted] (SF) (FBI) b6 -1 b7C -1 b7E -5
Sent: Friday, July 15, 2016 11:04 AM
To: [redacted]
Subject: FW: Planned Protests in the Bay Area on 7/15/2016

Here's the overall agenda that I'm aware of.

-----Original Message-----
From: [redacted] (SF) (FBI) b6 -1 b7C -1 b7E -5
Sent: Thursday, July 14, 2016 5:55 PM
To: [redacted]
Cc: [redacted]
Subject: Planned Protests in the Bay Area on 7/15/2016

Hi [redacted]

Please pass this to US Marshal [redacted] and your other supervisors. b6 -4 b7C -4

FBI SF JTTF is not aware of any specific threats of violence for planned protests Friday afternoon or evening (7/15/2016). There are numerous online social media sites that are calling for "Days of Rage," "Days of Solidarity," and "March in Solidarity" in support of Black Lives Matter. Some of these have appear to have been organized online by the grou[redacted] b7E -10

[redacted] The above open source social media streams include 4:00 pm at Civic Center Plaza, San Francisco and 6:00 pm in vicinity Oscar Grant Plaza in downtown Oakland, CA. Open source social media calls for general anarchy type civil-disobedience and vandalism.

Another group that has posted "Solidarity March and Rally w. Oaxacan Uprising" in support of brown and black lives (from social media) stolen by violent police encounters. This is scheduled for Friday, 7/15/2016 at 7:00 pm at 24th Street Mission Bart Station.

b7E -10,-11

[redacted]

This year, with the current state of affairs, I think's it is reasonable to expect a larger turn out than last year. Probably more in San Francisco than Oakland.

Regards,



b6 -1
b7C -1

Important FBI SF JTTF Caveat:

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