No. 03-472

IN THE
Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICI CURIAE* FOR THE WASHINGTON POST COMPANY AND TWENTY-TWO OTHER LEADING NEWSPAPERS, MAGAZINES, BROADCASTERS, AND MEDIA-RELATED PROFESSIONAL AND TRADE ASSOCIATIONS (LISTED ON THE INSIDE COVER) IN SUPPORT OF PETITIONERS

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LIST OF *AMICI*

The Washington Post Company
ABC, Inc.
American Society of Newspaper Editors
The Associated Press
Association of American Publishers, Inc.
British Broadcasting Corporation
CBS Broadcasting, Inc.
Cable News Network L.P. LLLP
Gannett Company, Inc.
The Hearst Corporation
Magazine Publishers of America, Inc.
The McClatchy Company
National Broadcasting Company, Inc.
National Press Club
National Public Radio, Inc.
The New York Times Company
The Newspaper Association of America
North Jersey Media Group Inc.
Philadelphia Newspapers, Inc.
Radio-Television News Directors Association
Silha Center for the Study of Media Ethics and the Law
Society of Professional Journalists
Tribune Company

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INTEREST OF *AMICI*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, and media-related professional and trade associations in the United States and abroad.[1] They share an interest in enforcing the principles of transparency embodied in the Freedom of Information Act (FOIA) and the First Amendment. Of particular importance to this case, *Amici* have for centuries enjoyed access to the information contained in basic arrest and jail logs, and they traditionally have successfully invoked public records laws or the First Amendment whenever the government has tried to withhold such information.

Amici do not contend that their tradition of access to the information at issue here always trumps national security interests or that the government may never make a showing that a particular detainee's name must be withheld for a reasonable period of time. But the D.C. Circuit's decision here permits the Government to withhold basic facts regarding detainees based on nothing more than the incantation of "national security," without any individualized showing of need. Because this decision marks a sharp and particularly significant departure from heretofore established law and custom, *Amici* respectfully submit this brief in support of the petition for writ of certiorari.

ARGUMENT

This case involves access to information that is fundamental to our democracy. Because the government's power to deprive persons of their physical liberty is among its most awesome, basic arrest and jail records have always been available to the American press and the public as an essential check on this power. The D.C. Circuit majority, in fact, acknowledged that "arrest warrants, INS charging documents, and jail records . . . have traditionally been public." Pet. App.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

13a. Yet the majority ruled that the Department of Justice could withhold the substance of these documents regarding several hundreds of detainees because divulging that information is reasonably likely to interfere with the government's terrorism investigation. Pet. App. at 14a-19a (rejecting FOIA claim) & 31a-32a (First Amendment claim).

This decision stands alone in condoning the categorical withdrawal of basic information regarding detainees from the public sphere and threatens the media's ability to perform their time-honored role of scrutinizing the government's use of its arrest power. Ever since law enforcement authorities have kept running records of individuals they take into custody, the press and the public have had access to these lists. The press has used this access to undertake important investigations and to convey critical information to the populace. Accordingly, it should come as no surprise that every time before this case that a governmental agency has attempted to systematically withhold such information, courts have invoked public records statutes or the First Amendment, or both, to require the government to resume disclosing the information.

This Court should grant certiorari to hold that principles of openness embodied in FOIA and the First Amendment require the same result here. Public scrutiny into the federal government's treatment of persons it believes (or believed) are connected with terrorism is, if anything, more important than shedding light on the prosecution of more conventional, local crime. The national security implications of terrorism investigations, to be sure, also are heightened. Such concerns may even permit withholding some names of some detainees upon an appropriate individualized showing. But this Court should not let a decision become precedent that effectively holds that the mere invocation of national security is *categorically* sufficient to relieve the government of its longstanding obligation to keep the public at least minimally apprised of how it is using some of its most invasive powers. Our forefathers, our legislators, and our courts have always – quite properly – demanded more.

I. The Court of Appeals' Decision is at Odds With the Traditional Ability of the Press and Public to Inspect Arrest and Jail Records.

The basic information that Petitioners seek here has been available to the press and public throughout American history. Before this case, in fact, no American court or legislature had ever suggested that releasing detainees' mere identities or other background information could impede the government's ability to investigate or prosecute crime. To the contrary, the universal view has always been that keeping arrest and jail records generally open promotes the proper functioning of the justice system and operates as an indispensable check on the government's power to deprive people of their physical liberty.

A. Arrest and Jail Records Always Have Been Open to Inspection.

The Petition for Certiorari discusses the rich history, reaching back to the earliest days of the Republic, of maintaining open arrest and jail records even in the midst of national security threats. *See* Pet. for Cert. at 27-28. But the governmental disclosures during these specific periods represent only a part of a broader, continuous custom – enforced by law when necessary – of keeping this basic information publicly available.

1. Pre-FOIA landscape

In the 1800's, as local police departments were created, the departments began keeping records that became known as "police blotters." While the precise information kept in these records varied (as it still does today), a police blotter generally "chronicle[s] each day's significant, formal criminal justice contacts between members of the police force and the public, such as arrests and detentions." U.S. Dept. of Justice, Criminal Justice Information Policy, *Original Records of Entry*, NCJ 125626 (1990), at 1. It records the names of all persons taken into custody and often includes the place and time of arrests, a brief physical description of detainees, the name of the arresting officers, and any allegations against detainees.

Walter A. Steigleman, *The Legal Problem of the Police Blotter*, 20 Journalism Q. 30, 30 (1943).

From their inception, police blotters have been made available to the press and the public. During the 1800's, newspapers often assigned a reporter to inspect blotters on a daily basis. *See* Frank Luther Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 222 (1941) (describing press access to police blotter dating back to 1830's). Although it does not appear that this custom was systematically studied until the 1960's, research then confirmed that the overwhelming majority of jurisdictions allowed access to police blotters, even though most of these jurisdictions were not required to do so by statute. In 1966, a random sample by the American Bar Association found that 93% of local police chiefs permitted access to their blotters. ABA, *Standards Relating to Fair Trial and Free Press*, at 230-31 (1966). A concurrent ABA survey of 16 newspaper editors revealed that police departments made their blotters available in every instance. *Id.* at 242. In another study, 31 of 33 state attorneys general responded that police departments in their state allowed reporters and the public to inspect blotters upon demand. Michael J. Petrick, *The Press, the Police Blotter, and Public Policy*, 46 Journalism Q. 475, 477 (1969).

In the handful of instances during this period in which law enforcement adopted policies of blocking access to these basic arrest or jail records, every court to confront the issue required officials to disclose those records. In the earliest such decision, an Ohio court in 1920 admonished the Cleveland police chief for closing the city's police blotters and held that the First Amendment entitled the press to inspect those records. *The Cleveland Co. v. Smith* (Ohio Ct. Common Pleas July 21, 1920), *reprinted in* Harold L. Cross, The People's Right to Know 95 (1953). A 1933 Virginia decision granted a writ of mandamus permitting newspapers to inspect city "police blotters, the list of arrested persons, with their descriptions," ruling that withholding such access impinged "the constitutional rights of petitioners and the security and protection of

the public and arrested persons as well." *Times Dispatch Publishing Co. v. Sheppard* (Hustings Ct. of City of Richmond Jan. 13, 1933), *reprinted in* Cross, *supra*, at 100. The Florida and Alabama Supreme Courts similarly made it clear on statutory grounds that official documents listing names of arrestees were "public records." *Lee v. Beach Publishing Co.,* 173 So. 440 (Fla. 1937) (police department books); *Holcombe v. State,* 200 So. 739, 748 (Ala. 1941) ("jail dockets"). In 1953, a study of court decisions could find only one decision leaving disclosure of arrest logs to the discretion of a police department, and even there the department had permitted public inspection of these logs "for a long period of years." Cross, *supra*, at 102.

Legislatures sometimes acted even before courts could get involved. In 1954, when the District of Columbia attempted to impose limitations on access to its arrest records, Congress reacted promptly and decisively, just as it had almost one hundred years before, during the Civil War. *See* Pet. for Cert. at 27-28. Recognizing the "long custom and practice" of "keeping arrest books and [making] them available for public inspection," the House Committee on the District of Columbia resolved that such records should be public as a matter of law "both for the protection of the public against secret arrests and against the abuse in any way of the arrest power." H.R. Rep. No. 2332, 83rd Cong., 2d Sess., at 1 (1954). Congress enacted 4 D.C. Code § 135 (now codified at D.C. Official Code 5-113.01), which requires all arrest books to be "open for public inspection." Years later, the D.C. Circuit observed that this law guaranteed that there would be no "'secret arrests,' a concept odious to a democratic society." *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969).

In two other instances in which public records laws were not yet on the books, state legislatures swiftly responded to police departments' denials of access "to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law

enforcement information to the press." *County of Los Angeles v. Superior Court*, 22 Cal. Rptr. 2d 409, 416 (Cal. App. 1993) (describing California statute); *see also Gifford v. Freedom of Information Comm'n*, 631 A.2d 252, 262 (Conn. 1993) (Conn. Gen. Stat. §1-20b, which requires immediate disclosure of all adult arrestees' names, was passed "to make sure when somebody was booked there would be no way of keeping that information from the public") (quotation omitted).

2. Post-FOIA landscape

As modern federal and state freedom of information laws have proliferated, governments and courts have needed to separate "public" records from confidential ones. In every instance, basic detention information has been deemed public.

Since 1971, the Department of Justice's "guidelines to criminal actions," which apply to the release of information to the news media "from the time a person is the subject of a criminal investigation" through the termination of any proceedings, have stated that Department personnel may release "background information" regarding a detainee, such as his "name, age," and the "circumstances immediately surrounding an arrest, including the time and place of arrest." 28 C.F.R. § 50.2(b)(i) & (iv) (2003). Federal regulations further provide that confidentiality rules concerning criminal records do not apply to "original records of entry such as police blotters maintained by criminal justice agencies compiled chronologically and required by law or long-standing custom to be made public." 28 C.F.R. § 20.20(b)(2) (2003).

In the *only* reported instance (prior to this case) of a federal official refusing to disclose information regarding federal detainees, a federal district court held that it was not enough that a United States Attorney divulge the names of all persons whom had been "arrested *or* charged" with criminal violations. *Tennessean Newspaper, Inc. v. Levi,* 403 F. Supp. 1318, 1319 (M.D. Tenn. 1975) (emphasis added). The court held that FOIA also required disclosure of other "background material" that was "traditionally and routinely disseminated to the news media" under the federal regulations – arrestees' ages,

their employment status, and circumstances regarding their arrests. *Id.* at 1319-21.

States, applying state laws that mirror FOIA, consistently have reached the same conclusions with respect to state detainees. Every state provides that its police departments' arrest and detention logs open are open for public inspection, regardless of whether the detainees have been charged with any crime. *See* Bureau of Justice Statistics, *Report on the National Task Force on Privacy*, NCJ 187669 (2001), at 13. Even when states curtail access to composite information such as individual rap sheets, they still agree with the judgment of history that the urgency and seriousness of current detentions requires them to "provid[e] that other arrest-related documents, such as arrest logs, the name of the person being held in custody . . . are public documents open for inspection." Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law. 65, 87 (1996).[2]

What is more, by the Department of Justice's own reckoning, every state court during the post-FOIA period that has considered whether "contemporaneous information describing an arrest and an arrestee is available to the public has found some basis . . . on which to make such information available." *Original Records of Entry*, *supra,* at 37 (emphasis added). Such decisions usually have rested on state laws that replicate FOIA. *See Hengel v. City of Pine Bluff,* 821 S.W.2d 761, 764-65 (Ark. 1991) (requiring disclosure of arrest records and jail log); *Caledonian Record Publishing Co. v. Walton,* 573 A.2d 296, 299 (Vt. 1990) (arrest records); *State ex rel. Outlet Communications, Inc. v. Lancaster Police Dept.,* 528 N.E.2d 175 (Ohio 1988) (arrest record docket book); *State v. Brown,* 467 So.2d 1151 (La. App. 1985) (arrest log); *Lebanon News Publishing Co. v. City of Lebanon,* 451 A.2d 266 (Pa. Comm.

[2] Some jurisdictions also distinguish between arrestees' names and their home addresses, making the former public but curtailing commercial enterprises' access to the latter for privacy reasons. *See, e.g., Los Angeles Police Dept. v. United Reporting Publishing Corp,* 528 U.S. 32, 34-35 (1999) (statute requiring disclosure of names but not home addresses consistent with First Amendment).

Ct. 1982) (police blotters); *Sheehan v. City of Binghampton,* 398 N.Y.S.2d 905 (App. Div. 1977) ("police blotters and booking records"); *Houston Chronicle Publishing Co. v. City of Houston,* 531 S.W.2d 177, 185 (Tex. App. 1975) ("Police Blotter, Show-up Sheet, and Arrest Sheet"); *see also* 63 Op. Att'y General 543 (Md. 1978) (arrest logs). And these decisions have emphasized not so much the existence of any formal judicial proceedings as the need for the government to divulge basic information regarding any person whose liberty it restricts. As one court noted, "it is neither necessary nor controlling to engage in a query as to whether or not a person who has been arrested . . . has been formally charged." *Outlet Communications,* 528 N.E.2d at 178.

Furthermore, of particular relevance here, the courts issuing these decisions consistently have rejected the argument for withholding that the D.C. Circuit's majority accepted here – namely, that arrest and jail logs are "investigative" in nature and thus qualify for exceptions concerning records whose disclosure that could impede law enforcement investigations. *See Hengel,* 821 S.W.2d at 764; *Caledonian Record Publishing Co.,* 573 A.2d at 299 (arrest records not subject to exemption for "detection and investigation of crime"); *Outlet Communications,* 528 N.E.2d at 177-78 (arrest record book not subject to exemption for "confidential law enforcement investigatory records" such as those that would reveal "specific investigatory techniques"); *Houston Chronicle,* 531 S.W.2d at 185 (such records do not qualify for exemption regarding "detection and investigation of crime"). Requiring disclosure merely of an arrestee's "name, race, sex," and "time of arrest," these courts have explained, is an "entirely different matter" from ordering law enforcement authorities to divulge actual investigative theories or the substance of evidence they have collected. *See Hengel,* 821 S.W.2d at 764; *Houston Chronicle,* 531 S.W.2d at 187.

Indeed, whenever any state court has had any doubt that its public records statutes generally require disclosure of arrest or jail records, it has invoked the First Amendment to prevent law

enforcement from withholding that information. In 1974, for example, when the Houston Police Department began denying access to daily "arrest sheets" that the Department previously had disclosed "[f]or as long as veteran newspaper editors and reporters could recall," the Texas Court of Appeals ordered the Department immediately to resume its prior policy of access on the ground that the "press and the public have a constitutional right of access" to such basic law enforcement activity information. *Houston Chronicle,* 531 S.W.2d at 180-81, 186-87. The Supreme Courts of Vermont, Wisconsin and Wyoming, and Justices of the Ohio Supreme Court also have held that the government's denial of access to police blotter information implicated constitutional concerns. *See Caledonian Record,* 573 A.2d at 299 (statutory access to "arrest records" compelled "[p]ursuant to First Amendment"); *Sheridan Newspapers, Inc. v. City of Sheridan,* 660 P.2d 785, 793-96 (Wyo. 1983) (police department's "blanket withdrawal of the rolling log" of arrests and incident complaints made to police violates the First Amendment and state open records statutes; case-by-case analysis is necessary); *Newspapers, Inc. v. Breier,* 279 N.W.2d 179, 187 (Wis. 1979) (public has a statutory and common law right to inspect "daily arrest list," which is "consistent with the views of the Constitution of the United States, particularly the First Amendment"); *Dayton Newspapers v. City of Dayton,* 341 N.E.2d 576, 579 (Ohio 1976) (Corrigan, J. concurring) (stating that Due Process Clause requires jail logs to be kept public; majority did not reach issue because it mandated access on statutory grounds).[3]

[3] Some of these decisions predate this Court's creation of the First Amendment's "experience and logic" framework in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). But, as Justices of this Court, other courts and commentators have explained, a reasonable interpretation of that case supports the application of its framework to the type information at issue here, especially in light of the fact (*see* Pet. for Cert. at 4-5) that the Government took some affirmative steps to suppress it. *See Richmond Newspapers,* 448 U.S. at 583 (Stevens, J., concurring) (*Richmond Newspapers* test "unequivocally holds that an arbitrary interference with access *to important information* is an abridgment of the freedoms of speech and of the press protected by the First Amendment") (emphasis added); *id.* at 604 (Blackmun, J., concurring) (*Richmond Newspapers* test applies to

The D.C. Circuit's ruling here, in sum, not only is at odds with every other federal and state decision regarding access to detainees' identities, but it also creates a conflict with decisions holding that the impoundment of such information implicates the First Amendment.

B. Disclosure of Arrest and Jail Logs Serves Vital Functions in Our System of Self-Government.

The rich and previously unbroken history forbidding the categorical suppression of arrest and jail logs is grounded in sound logic. Courts and commentators have long recognized that public inspection of such logs provides a vital means of monitoring the government's use of its arrest power. Indeed, much significant press coverage would impossible without having access to such basic information regarding detainees.

1. Positive role of disclosure

The release of the names of detainees serves several functions of the highest order in our democracy:

First, disclosure of arrest records deters the government from making illegal arrests. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), this Court held that the First Amendment protected the public's right to attend criminal trials in part because such access fosters "the proper functioning" of such proceedings. *Id.* at 569 (plurality opinion). As the Federalist Papers recognize, publicity regarding initial detentions likewise guards against "dangerous" or "arbitrary" governmental actions. Federalist No. 84 (Hamil-

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"the administration of justice in general"); *North Jersey Media Group v. Ashcroft,* 308 F.3d 198, 207 (3rd Cir. 2002) ("[I]n this Court, *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings."), *cert. denied,* 123 S. Ct. 2215 (2003); *Cal-Almond, Inc v. U.S. Dept. of Justice,* 960 F.2d 105, 109 (9th Cir. 1992) (*Richmond Newspapers* test is applicable to a request for a governmental agency's voter list); *Lieberman v. State Bd. of Labor Relations,* 579 A.2d 505, 513 (Conn. 1990) (following Justice Stevens' explanation of *Richmond Newspapers* test); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution,* 86 Minn. L. Rev. 1137, 1203 (2002) ("The rationale for a right to access turns on the need for knowledge about the government as an essential component of discourse about government. Although the Court's cases involve judicial proceedings, the rationale can logically be extended beyond such proceedings.").

ton), at 577 (J. Cooke ed. 1961). A former editor of *The Washington Post* further explained: "The police, knowing that each arrest must be [publicly] recorded, and may have to be explained, are naturally reluctant to use arrest powers frivolously. . . . The entry in the arrest book, to which the people have full access, is the individual's assurance that his disappearance will not go unnoted, the cause of his detention unmentioned, and the means of his defense unprovided." James Russell Wiggins, Freedom or Secrecy 54 (1964).

Second, disclosure of detainees' identities similarly promotes "nondiscriminatory" use of the government's arrest power. *Caledonian,* 573 A.2d at 303. Reporters, in fact, periodically review arrest logs, as Petitioners wish to do here, to undertake systematic studies in this regard. A Massachusetts newspaper, for instance, recently reviewed arrest logs in a racial profiling investigation and reported that 68% of persons arrested had Hispanic surnames. Cathleen F. Cowley, *Crime in Lawrence: "It Knows No Race,"* Mass. Eagle-Tribune (Aug. 10, 2001). Another newspaper inspected the arrest log from a Mardi Gras disturbance in order to determine the ages of eighty-four arrestees. Anne Quinn, *Magic, Not Madness,* San Luis Obispo New Times, Mar. 15, 2001, at A1.

Third, public knowledge regarding whom our government is holding in jail serves as an indispensable check against prolonging unsupported detentions or mistreating detainees. The Department of Justice itself has recognized that "[a]ccess to public record information [regarding the criminal justice system] helps the public monitor government activities, thereby assisting the public to hold elected officials and nonelected civil servants accountable and protecting against secret activities." *Report on National Task Force on Privacy*, *supra*, at 8. Courts have agreed, concluding that disclosing arrestees' identities "protect[s] individuals from police abuse," *Caldarola v. County of Westchester,* 343 F.3d 570, 576 n.3 (2d Cir. 2003), and from official "attempts to use the courts for tools of persecution." *Sheridan Newspapers,* 660 P.2d at 791.

This need for public monitoring of the government's arrest power is even more compelling when, as here, the government jails people without charging them with any criminal offense. As the Supreme Court of Wisconsin explained in rejecting the Milwaukee Chief of Police's desire to withhold police blotter information regarding detainees until "formal charges" were filed against them:

> An arrest represents the exercise of the power of the state to deprive a person of his liberty . . . It is an initial step in the judicial process, which may be reviewed. . . . We cannot view the arrest, as the Chief of Police does, as merely a tentative or incomplete jural act. Whether an arrest is subsequently ratified by the issuance of a charge of the same or greater magnitude at some later time, it is, nevertheless, at the time it is made, a competed official act of the executive branch of government.
>
> The power to arrest is one of the most awesome weapons in the arsenal of the state. It is an awesome weapon for the protection of the people, but it also a power that may be abused.

Breier, 279 N.W.2d at 188; *see also Seattle Times Co. v. United States District Court,* 845 F.2d 1513, 1517 (9th Cir. 1988) (logic supports First Amendment right to information relating to pretrial detention because "[t]he decision to hold a person presumed innocent of any crime without bail is one of major importance to the administration of justice") (quotation omitted). Whenever the government restrains an individual's liberty, in short, revealing the target of that action serves an important function in monitoring prosecutorial or judicial misconduct.

Fourth, disclosure of detainees' names promotes accurate factfinding in the government's investigations. In the American system of justice, the press has long played "an essential role in overseeing the investigative process and in conducting independent investigations into criminal matters." Sarah Henderson Hutt, *In Praise of Public Access,* 41 Duke

L.J. 368, 381 (1991). Court decisions thus commonly emphasize the truth-seeking value of disclosing background information regarding detainees. Publicity, for example, "enables members of the public who may come forward with additional information relevant to the law enforcement investigation." *Caldarola,* 343 F.3d at 576; *see also Detroit Free Press, Inc. v. Department of Justice,* 73 F.3d 93, 98 (6th Cir. 1996) (FOIA requires government to release mug shots of detainees in part because these photos can "reveal the government's glaring error in detaining the wrong person for an offense"); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1178 (6th Cir. 1983) ("When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence.").

Fifth, disclosure of the names of detainees allows the public to monitor the progress of broad-based investigations such as this one and to judge whether taxpayer dollars are being well spent. While governmental programs frequently are debated in terms of their theoretical propriety, the public often needs to learn about programs' tangible effects in order to assess their continued desirability. For example, a "name-by-name" inspection of the Washington, D.C. police log in the 1950's revealed that the Metropolitan Police Department was releasing seriously distorted crime statistics and led, in turn, to changes in law enforcement policy. Wiggins, *supra,* at 55. The current need to understand the effects of implementing a broadly expanded detention policy is no exception. If, for example, disclosing the names of the detainees would reveal that most are persons of Middle Eastern descent who do not have any links to terrorism, the public should be able to question whether the Department of Justice's policy is worth its financial cost and its impact on civil liberties.

Finally, disclosing the identities of detainees promotes public confidence in the fairness of our justice system – both at home and abroad. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to

accept what they are prohibited from observing." *Richmond Newspapers,* 448 U.S. at 572 (plurality opinion). Today, simply entering the words "arrest log" or "police blotter" into an internet search engine produces hundreds of media and police department websites reproducing such logs. While the people may not check such logs on a daily basis, it is valuable to know they could – particularly in times of national crisis. As this Court noted years ago, "the greater the importance of safeguarding the community from . . . force and violence," the "more imperative" it is to preserve channels of communication "in order to maintain the opportunity for free political discussion." *DeJonge v. Oregon,* 299 U.S. 353, 365 (1937). If, during crises, the government is allowed categorically to withhold law enforcement information that it historically has made public, the citizenry is apt to feel less, not more, secure.

2. Press coverage of terrorism investigation

The federal government's aggressive use of its detention power in its current terrorism investigation has only elevated the need for access to arrest and jail logs. Here is a sample of what *Amici* have uncovered with respect to only a handful of names:

• Hady Hassan Omar, an Arkansas resident, was arrested on September 12, 2001, and detained for seventy-three days because he bought a one-way airline ticket on the same Kinko's computer as a hijacker. Dan Eggen, *9/11 Detainee Files Lawsuit,* Wash. Post, Sept. 10, 2002, at A2. The government denied him access to an attorney, and he was intimidated and abused in prison. Matthew Brzesinski, *Hady Hassan Omar's Detention,* N.Y. Times Magazine, Oct. 27, 2002, at 50-55. No charges were ever pressed against him. *Id.*

• Nabil Almarabh, a former Boston cab driver, was taken into custody on September 18, 2001. He did not appear before a judge until arraigned in May 2002. Steve Fainaru, *Suspect Held 8 Months Without Seeing Judge,* Wash. Post, June 12, 2002, at A1. On September 3, 2002, after eleven months in custody, the government conceded it had no evidence linking

Almarabh to terrorism. Steve Fainaru, *Sept. 11 Detainee Is Ordered Deported,* Wash. Post, Sept. 4, 2002, at A10.

• Abdullah Higazy, an Egyptian student staying in a hotel near the World Trade Center on September 11, 2001, was detained for thirty-one days before all charges were dropped. Subsequently unsealed records disclosed a court-ordered investigation into whether the FBI conduct coerced him to confess to crimes he did not commit. Benjamin Weiser, *F.B.I. Faces Inquiry on a False Confession from an Egyptian Student,* N.Y. Times, Aug. 6, 2002, at B4.

Amici have no desire to jeopardize the government's terrorism investigation or to rifle through the government's files to learn the names of everyone it has questioned or has under surveillance. Nor do *Amici* deny that the government might be able to show that holding back the names of certain detainees is the only way of furthering some vital safety concern. But the D.C. Circuit's holding here that the government may withhold the names of hundreds of people that it is jailing without any individualized showing or link to terrorism threatens to stifle public scrutiny into the government's use of its arrest power. That the detainees at issue here have not even been charged with any crimes only heightens the need for the press to "bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975).

II. The Court of Appeals' Extreme and Categorical Deference to the Government's National Security Assertions Compounds the Threat Its Decision Poses to the Accessibility of Information Traditionally Available to the Press and the Public.

The D.C. Circuit majority departed from the traditional norm of disclosing detainees' identities on the ground that the "national security" implications of the government's terrorism investigation require vastly increased deference to the government's desire to withhold this information. But instead of distinguishing this case from the unbroken precedent preceding it, the D.C. Circuit's extreme deference to the government's position compounded its error in two ways. First, the new type of deference that the court applied here endangers the media's ability to report on a variety of aspects of the "war on terror" – a fight that is likely to continue for many years without any clear end – as well as on other similar topics. Second, the D.C. Circuit's particular acceptance of the government's "mosaic" harm theory threatens to upend one of the media's customary methods of obtaining information: asking for a wide range of records and then depending on the agency at issue to disclose as much data as possible.

A. The Court of Appeals' Decision Grants Excessive Deference to Skeletal National Security Assertions.

In our post-September 11 era, national security concerns abound. No one, least of all *Amici*, disputes that the government has a compelling interest in protecting our country from terrorist attacks. But that cannot be the end of the matter, for, as the Fourth Circuit has noted:

> History teaches us how easily the specter of a threat to "national security" may be used to justify a wide variety of repressive governmental actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons would impermissibly compromise the

> independence of the judiciary and open the door to possible abuse.

In re The Washington Post Co., 807 F.2d 383, 391-92 (4th Cir. 1986); *accord United States v. Moussaoui,* 336 F.3d 279, 282 (4th Cir. 2003) (Wilkins, C.J., concurring in denial of en banc) (reaffirming this rule in context of current terrorism investigation). Accordingly, under both FOIA and the First Amendment, "the ready resort to suppression is for societies other than our own; an accommodation of competing values remains the commendable course." *In re Application & Affidavit for a Search Warrant,* 923 F.2d 324, 331 (4th Cir. 1991). Prior to this case, the prevailing law struck this balance by providing that, in assessing requests for access to information, courts owe "substantial weight" to agency explanations regarding needs for secrecy in the national security context so long as the explanations are "detailed" and reasonably plausible. *King v. Dept. of Justice,* 830 F.2d 210, 217 (D.C. Cir. 1987).

But the majority in this case below afforded virtually *preclusive* weight to officials' *skeletal* assertions that divulging the detainees' or their attorneys' identities might impede the government's terrorism investigation, stating that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." Pet. App. 17a. Under this decision, the government need only be willing to utter the words "national security," and it essentially is categorically exempt from any norm of openness.

The media cannot perform their proper role of oversight under such a system. There are always going to be policies that the government would prefer not to open up to public scrutiny. It is the purpose of FOIA and the First Amendment, however, and the duty of the courts to demand that the government give detailed explanations under oath (*in camera* if necessary) when it claims that national security concerns should excuse it from disclosing information that ordinarily is made available as a check on its powers. If the D.C. Circuit's abdication of this duty is allowed to stand, the media may be

improperly stymied from reporting not only on law enforcement's recent treatment of persons detained on American soil, but also on many other aspects of the government's "war on terror" and similar future policies. This Court should not allow the government to draw a curtain over such serious matters.

B. The Court of Appeals' Decision Adopts an Overly Broad "Mosaic" Rule.

While the government has advanced several general reasons why disclosing the names of the particular detainees could allegedly harm the terrorism investigation, *see* Pet. for Cert. at 21, the issue in this case is not whether the government may withhold the names of *some* detainees; it is whether it may assume a policy of withholding the names of *all* detainees, regardless of whether they have been cleared of any potential link to terrorism or have any ongoing relevance to the government's investigation. Only one of the government's arguments conceivably applies to *all* of the detainees: that the disclosure could reveal a "mosaic" that could assist terrorists in avoiding detection and plotting future attacks. Pet. App. 18a. The D.C. Circuit majority accepted this argument, holding that:

> Importantly, plaintiffs here do not request "bits and pieces" of information, but rather seek the names of *every single individual* detained in the course of the government's terrorism investigation. It is more than reasonable to expect that disclosing the name of *every individual* detained in the post-September 11 terrorism investigation would interfere with that investigation.

Pet. App. 18a-19a (emphasis added). The majority ruled, in other words, that because Petitioners requested too much information, they are not entitled to any information.

This logic turns FOIA on its head. It seriously threatens the customary method the media use to gather information from governmental agencies concerning sensitive issues. And it conflicts with the law in every other federal court to address "mosaic"-type arguments.

As courts have noted, FOIA disputes are characterized by an "asymmetrical distribution of knowledge." *McDonnell v. United States,* 4 F.3d 1227, 1241 (3rd Cir. 1993); *accord King,* 830 F.2d at 218. "[T]he party seeking disclosure does not know the contents of the information sought," *Ferri v. Bell,* 645 F.2d 1213, 1222 (3rd Cir. 1991), and, consequently, it often cannot be expected to predict the potential effect of disclosure on ongoing governmental investigations or other interests. *See King,* 830 F.2d at 218.

FOIA attends to this reality by providing that parties requesting information need not narrowly tailor their requests to exclude any information that may be exempt from disclosure or that may trigger otherwise uncongealed security threats. Instead, the burden falls on the government to identify any barriers to disclosure and, if any such barrier exists, to divulge "[a]ny reasonably segregable portion" of the requested records. 5 U.S.C. § 552(b); *see also, e.g., Rugiero v. U.S. Dept. of Justice,* 257 F.3d 534, 553-54 (6th Cir. 2001) (enforcing segregability doctrine); *Kimberlin v. Department of Justice,* 139 F.3d 944, 949-50 (D.C. Cir. 1998) (same); *Church of Scientology v. U.S. Dept. of the Army,* 611 F.2d 738, 743-44 (9th Cir. 1980) (same in context of national security objection).

Following this framework, the media typically submit broad FOIA requests when covering sensitive governmental operations and depend on the government to disclose as much information as possible. A governmental agency, to be sure, may withhold information when it could be combined "with other *known* data" to impede a law enforcement investigation. *Davin v. U.S. Dept. of Justice,* 60 F.3d 1043, 1064 (3rd Cir. 1995) (emphasis added); *accord Coastal Delivery Corp. v. U.S. Customs Serv.,* 272 F. Supp.2d 958, 965 (C.D. Cal. 2003) ("other known data"); *Edmonds v. FBI,* 272 F. Supp.2d 35, 47 (D.D.C. 2003) (other information "already in the public arena"); *see also Central Intelligence Agency v. Sims,* 471 U.S. 159, 178 (1985) (withholding information permissible when a person who is already "knowledgeable" could use it to discover the identity of an intelligence source). But until the D.C.

Circuit's "mosaic" holding in this case, no court had ever held that the government could withhold data that, if combined with other, *unknown* data that *it also is withholding*, could impede a law enforcement investigation.

This holding creates dangerous new law and should be reviewed by this Court. The very purpose of FOIA is to grant the press and the public "a broad right of access to official information" about the workings of our government. *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 772 (1989) (internal quotation omitted). But the D.C. Circuit's new mosaic rule penalizes parties for requesting too much information. That is, instead of requiring the government to release as much information as possible, the D.C. Circuit's rule allows the government to use the breadth of a FOIA request as an excuse to thwart the request in its entirety. This rule could be invoked to justify all sorts of broad-based, secretive policies. Indeed, as the Sixth Circuit correctly observed in the related context of closing deportation hearings, "there seems to be no limit to the government's [mosaic intelligence] argument." *Detroit Free Press v. Ashcroft,* 303 F.3d at 681, 709 (6th Cir. 2002). This Court should take action now to prevent this serious threat to our Nation's commitment to open government from taking root in federal jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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APPENDIX A

DESCRIPTIONS OF *AMICI*

The Washington Post Company publishes the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20*, and *Nightline*.

American Society of Newspaper Editors, Inc. is a non-profit organization founded in 1922 and has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers.

The Associated Press, founded in 1848, is the world's oldest and largest newsgathering association, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

The Association of American Publishers, Inc. ("AAP") is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

The British Broadcasting Corporation ("BBC") is the United Kingdom's largest public service broadcaster responsible, *inter alia*, for the broadcast, in the UK, of eight television channels; nine national radio stations; numerous regional and local radio stations; and an Online website.

Internationally, the BBC broadcasts for the World Service and (through its subsidiaries) the BBC World television channel.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes* and *48 Hours*. CBS owns and operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corp-oration, owns and operates radio stations throughout the country.

Cable News Network L.P., LLLP, a division of Turner Broadcasting System, Inc., a Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than one billion people in more than 212 countries and territories.

Gannett Company, Inc. is an international news and information company that publishes one hundred daily newspapers in the United States with a combined daily paid circulation of 7.7 million, including *USA Today*, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than one hundred web sites in the United States and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for tele-

vision and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1,400,000 daily and 1,900,000 Sunday.

National Broadcasting Company, Inc. ("NBC") is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels. The NBC News division provides news and public affairs programming to more than 200 affiliated television stations across the country, including 14 stations that are owned and operated by NBC and that also separately produce and broadcast local news and public affairs programs. NBC also owns and operates the Telemundo Spanish-language television network and station group, the cable business news network CNBC, the cable arts and entertainment network Bravo, and MSNBC, a 24-hour cable news network that is jointly owned with Microsoft.

National Press Club, established in 1908, is an organization of journalists and communicators with nearly 4,000 members in Washington, D.C. and around the world. Created in part to promote the ethical standards of journalists, the National Press Club serves as a center for the advancement of professional standards and skills and the promotion of free expression.

National Public Radio, Inc. ("NPR") is a non-profit organization incorporated in the District of Columbia. It is a membership organization composed of more than 680 public radio stations located throughout the United States and serves a growing broadcast audience of over 19 million Americans weekly. NPR gathers and reports the news through its award winning programs, including *Morning Edition, All Things Considered,* and *Talk of the Nation.* It also distributes its broadcast programming on-line, adding additional news features, and distributes its broadcasts worldwide through satellite and cable distribution, and to U.S. Military installations via the American Forces Network.

The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

North Jersey Media Group Inc. publishes two daily newspapers – *The Record* (Bergen County, NJ) and *Herald News* (Passaic County, NJ) – with a combined daily circulation of 185,000 and 225,000 on Sunday. In addition, North Jersey Media Group publishes 34 community newspapers, whose weekly circulation of 420,000 is in Bergen, Essex, Morris, and Passaic counties, NJ. In addition, the Company owns and operates a commercial printing business. The company has been family-owned since 1930.

Philadelphia Newspapers, Inc. is the publisher of *The Philadelphia Inquirer* and the *Philadelphia Daily News*, both newspapers of general circulation primarily in the Philadelphia region. It is a wholly owned subsidiary of Knight Ridder, Inc., the stock of which is publicly held and traded.

Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of more than 3,000 news directors, news directors, news associates, educators and students in radio, television, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation'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.

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers including *The Baltimore Sun*, *Chicago Tribune*, *Los Angeles Times*, *Newsday,* and the *Orlando Sentinel*; owns and operates 26 major market television stations; and operates a network of local and national news and information web sites throughout the United States.

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