UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

American Civil Liberties Union et al., Plaintiffs, v. James R. Clapper, et al., Defendants.	No. 13-cv-03994 (WHP) ECF CASE

MOTION OF NONPARTY, MICHAEL P. LYNCH, TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PLAINTIFFS

Now comes, nonparty, Michael P. Lynch, and hereby moves for leave to file the attached *amicus curiae* brief in the above-captioned case in support of the Plaintiffs. Both the Plaintiffs and Defendants consent to the filing of this brief.

Amicus Lynch is a Professor of Philosophy whose area of study has focused on the role that reason and deliberation play as necessary conditions for democratic governance. More specifically, Professor Lynch has written about the way that informational privacy—as an extension of the privacy human beings have in their thoughts and their own personal autonomy—is an important component of democracy and, ultimately, the human dignity of citizens living in a democratic society. Professor Lynch writes regularly on contemporary issues that implicate these values, and has written in particular on the government's surveillance programs at issue in here.

This court has broad discretion in determining whether to permit or deny an appearance as *amicus* in a given case, *Onondaga Indian Nat. v. State*, 1997 WL

369389, at *2 (N.D.N.Y. June 25, 1997); *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683 n. 2 (N.D.N.Y. 1995), and the "usual rationale for *amicus curiae* submissions is that they are of aid to the court and offer insights not available from the parties." *Auto. Club of N.Y., Inc. v. Port Auth. Of N.Y. & N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) (citing *United States v. El–Gabrowny*, 844 F. Supp. 955, 957 n. 1 (S.D.N.Y. 1994)).

Accordingly, an *amicus* brief "should normally be allowed" in at least three circumstances: (1) "when a party is not represented competently or is not represented at all"; (2) "when the *amicus* has an interest in some other case that may be affected by the decision in the present case"; or (3) "when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Id.* at *2 (quoting *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)) (internal quotes omitted)). In the third category, *amici* can be helpful in providing the Court with "particular expertise not possessed by any party to the case," or by arguing points "deemed too far-reaching for emphasis by a party intent on winning a particular case." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002).

Here, Professor Lynch will provide briefing that will greatly aid the Court in the third manner—by providing a "perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Auto Club*, 2011 WL 5865296, at *1. While the Plaintiffs' challenge to the government's surveillance

regime is, in many respects, novel, it nonetheless implicates core, basic ideals and constitutional rights that pertain to how citizens interact with their government. That this lawsuit implicates these ideals and rights in a novel way is a compelling reason to seek guidance beyond the caselaw—and into the inquiry of rights and values—as the Court contemplates how to decide this suit. Potential questions are myriad. For example: what sorts of rights are at stake and implicated by the government's acquisition of telephony metadata; what values, if any, are compromised or implicated by the government's regime; what remedy, if any, is necessary to cure the violation of these harms; and whether individuals retain any privacy in their telephony metadata when it is held by a third party.

At core, therefore, the basic question before the Court is how to think about what rights Americans have in the information the government is collecting and, more fundamentally, what the source of those rights interests might be. This is the precise question that Professor Lynch, by providing a philosophical perspective that underlies the legal and policy arguments cited by the parties, can help the court answer. That is, whether and to what extent individuals have cognizable rights interests in the context presented here is a question that goes beyond the caselaw cited by the parties. Instead, it lies in the deeper, theoretical work of philosophy. Accordingly, Professor Lynch will aid the court in framing and considering the core rights-based questions at the center of this lawsuit, and provide a theoretical perspective—addressing the political and epistemological philosophy implicated by this case—unaddressed by the parties.

In short, as the founders did when drafting the Constitution itself, Professor Lynch will provide the court with an analytical, philosophical framework for thinking about the rights interests at stake in resolving the difficult questions now before it. *See, e.g.*, JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION: A DISCOURSE 40 (1839) ("The Declaration of Independence and the Constitution of the United States, are parts of one consistent whole, founded upon one and the same theory of government, then new, not as a theory, for it had been working itself into the mind of a man for many ages, and been especially expounded in the writings of Locke, but had never been adopted by a great nation in practice."); GEORGE MACE, LOCKE, HOBBES, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE (1979).

For these reasons, amicus Lynch respectfully requests that the Court grant his unopposed motion for leave to file the attached *amicus curiae* brief.

Dated: September 3, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David B. Owens, an attorney, certify that on September 4, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States District Court, Southern District of New York by using the CM/ECF notification and filing system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 4, 2013 By: 

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

American Civil Liberties Union et al., Plaintiffs, v. James R. Clapper, et al., Defendants.	No. 13-cv-03994 (WHP) ECF CASE

BRIEF OF, MICHAEL P. LYNCH, AS *AMICUS CURIAE*,
IN SUPPORT OF THE PLAINTIFFS

Dated: September 4, 2013

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INTEREST OF *AMICUS CURIAE*

Amicus, Michael P. Lynch, writes to provide the court with an analytical and philosophical framework for contextualizing and evaluating the issues at stake in the Plaintiffs' challenge to the collection of their telephony metadata collection by the government. *Amicus* supports the Plaintiffs' position in this action and, in so doing, urges this Court to find that the government's collection regime both implicates and violates their constitutionally-protected interests—meaning that the court should enjoin the government's practice and require it to purge the telephony metadata records it has obtained.

Professor Lynch is a Professor of Philosophy at the University of Connecticut; an Associate Fellow of the Northern Institute of Philosophy, University of Aberdeen; and the Associate Fellow of Arché, University of St. Andrews. Professor Lynch has written extensively on the nature and value of truth and reason, and why they matter for civil society and democratic governments. As a corollary to his formal academic work, for example, Professor Lynch has regularly contributed to *The Stone—The New York Times*' column featuring writing of contemporary philosophers—addressing issues related to privacy and the crucial role that reason and rational deliberation play in the context of a democracy and the construction of political values.

SUMMARY OF ARGUMENT

To some, this lawsuit, and the Plaintiffs' Fourth Amendment claims in particular, concerns only whether Americans have a cognizable interest in the privacy of their telephone "metadata," and whether such privacy interests have been violated by the National Security Association's (NSA) collection and tracking of such metadata. This framing, however, is far too narrow: it underestimates the values and interests at stake and therefore misrepresents the nature of the harm caused by such surveillance.

Human beings have a natural interest in privacy. In the normal course of our lives, we are uncomfortable, even outraged, when information we consider to be personal is divulged or accessed without our consent: what is private is what should be ours alone to control, without interference from others or the state. But the grounds for this value, and the harms incurred by intrusions on privacy, particularly by the government, are often misunderstood. Two kinds of harm, in particular, are of essential importance. First, there is a contingent harm to liberty: when intrusions on informational privacy by the government are widely known, for example, whistle blowers are less likely to come forward. Second, and more fundamentally, there are intrinsic harms. Whether or not people know they are under surveillance, intrusions on informational privacy are wrong. They are wrong because the value of informational privacy is grounded on the very nature of what it is to be an autonomous person. And thus it is personal autonomy—the protection of which is a necessary element of any democracy—that is ultimately harmed by the government's dragnet acquisition of telephone and digital data. Such violations of privacy are, consequently, an affront to human dignity.

Protection of these basic human ideals—informational privacy, autonomy, and dignity—are at stake in the challenge to the NSA's massive data collection regime. Accordingly, when analyzing the privacy-related issues before the Court, and in determining whether the intrusions upon the Plaintiffs' privacy are constitutionally cognizable (and, ultimately, proscribable) this Court ought to be mindful of the fact that other important interests are at stake. In so doing, this Court should enjoin the NSA's practices on account of the fact that the Plaintiff's fundamental rights have been, and will continue to be, irreparably harmed.

ARGUMENT

1. Informational Privacy is an Extension of the Privacy of the Mental, and Their Value is Connected

The government's acquisition of telephone metadata—involving the number, location, duration, and frequency of calls made by nearly all Americans—makes what has long been considered private open to review by the government. As such, it undermines informational privacy—where information is private to the extent that access to that information is an individual's to control. The value of that privacy is fundamental. It stems from the natural interest we have in the privacy of our thoughts: how we think, feel, imagine, and make decisions about the world.

The idea that our thoughts are essentially private is a longstanding assumption in Western philosophy, and since persons are beings with minds, it has been traditionally connected to the notion of personhood itself. The *locus classicus* is Descartes' 1647 work, *Meditations on First Philosophy*. RÉNE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (John Cottingham trans., Cambridge University Press, 1986). John Locke, influential in conceptualizing the United States' democracy, made the same connection. *See* JOHN LOCKE, ESSAY CONCERNING HUMAN KNOWLEDGE (Oxford University Press, 1979). Both Descartes and Locke held that what identifies your thoughts as *your* thoughts is that you have "privileged access" to them. This means at least two things. First, you access them in a way I cannot. Even if I could walk a mile in your shoes, I cannot know what you feel in *the same way* you can: you see it from the inside, so to speak. Second, you can, at least sometimes, control what I know about your thoughts. You can refrain from telling me the extent of your views and your feelings, or you can let me have the key to your heart. Understood in this way, a person's privileged access to his or her thoughts is not only the most basic and original form of informational privacy, it is part of what differentiates one person from another and thus helps to constitute our status as individuals. *See, e.g.*, BRIE GERTLER,

PRIVILEGED ACCESS: PHILOSOPHICAL ACCOUNTS OF SELF-KNOWLEDGE (LONDON ASHGATE (2003); RICHARD MORAN, AUTHORITY AND ESTRANGEMENT: AN ESSAY ON SELF-KNOWLEDGE (Princeton, NJ: Princeton University Press 2001).

Given the Cartesian–Lockean connection between privacy and individual personhood, it is hardly surprising that we place immense value on the privacy of information and of our thoughts in particular. Imagine, for example, that I could telepathically read all your conscious and unconscious thoughts and feelings—I could know about them in as much detail as you know about them yourself, and further, that you could not, in any way, control my access. You do not, in other words, share your thoughts with me as you would with a friend; I take them. There is no question that such an act of mental invasion would be wrong and harmful. And reflection on what makes it so illustrates why invasions of informational privacy in the more ordinary sense are also wrong.

2. **Violations of Information Privacy Can Contingently Harm Liberty**

Reflection on the above case—of a loss of privileged access to one's thoughts in both of the senses just defined—illustrates that the harms incurred by losses of informational privacy come in two forms: contingent and intrinsic. The contingent harm consists in the fact that to the degree I lose informational privacy, my liberty can be adversely affected. In the extreme case just imagined, for example, where your mind is literally an open book to me, I would know immediately how the outside world affects you, what scares you, what makes you act in the ways you do. And that means I could not only know what you think, but that it would be much easier to impact what you *do*, because I would know how you would react to stimuli. This leads to potentially dramatic impacts on your personal liberty. Moreover, if you then came to *discover* my intrusions, you would no doubt attempt to self-censure your thoughts and the actions that follow from them, and again, your liberty would be curtailed.

We can draw some immediate lessons from this simple thought experiment, because our imagined loss of mental privacy is only an extreme case of more obvious losses of informational privacy that have frequently concerned the courts such as those incurred by eavesdropping or loss of private medical information. To be sure, the same contingent harm—namely, the loss of liberty incurred by an intrusion on informational privacy—can occur in a slightly less extreme case. That is precisely the situation presented in this lawsuit. Here, the government, through its acquisition of the metadata for all of one's telephone calls, can learn a great deal about the way in which the outside world affects its citizens. It can learn who, how frequently, and for what duration I talk on the phone. Indeed, given the pervasive nature of the data collection, the government can glean a significant amount about the content of telephone communications, even if they do not actually listen to the actual phone call. *See* Pl. Br., Dkt. 26, 16-19; Prof. Edward W. Felten Decl., Dkt. 27, at ¶¶ 9-19, 38-64.

Due to the importance of informational privacy, a right to that privacy is well understood. In American law, for example, the seminal 1890 discussion of Warren and Brandeis follows directly on the notion of informational privacy discussed by Descartes, Locke, and others generations prior. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In *The Right to Privacy*, Warren and Brandeis explained that the law "secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." *Id.* at 198; *see also id.* at 198 n.2 (citing *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769) ("It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.")). This "right of the individual to be left alone," Warren and Brandeis realized, is the manifestation of the "principle of . . . an inviolate personality." *Id.* at 205.

Moreover, it is commonly recognized—again starting with Warren and Brandeis—that technological advances can threaten informational privacy and set up conditions that could inhibit liberty in ways that were previously impossible. *Id.* at 195-196.[1] For example, were the government (and potentially other entities) to request the identity of a person connected to some phone records or Internet searches that the government has access to, that knowledge could be used to manipulate and control the person, thereby adversely affecting that person's liberty.

In the end, where government has access to and obtains this privileged material, and we come to discover that fact it will cause some to alter their behavior—indeed, as has now happened with regard to the NSA's sweeping surveillance programs—in response to the prospect of being under surveillance. More specifically, whistleblowers, for example, will be less willing to come forward if they know that any of the organizations they may approach are themselves subjects of surveillance. Likewise, organizations who investigate the various forms of fraud or misconduct to which whistleblowers might turn will be less able—and in some instances completely unable—to do their work because the fact of surveillance fatal to their ability to investigate. *See* Steven R. Shapiro Decl., Dkt. 29, at ¶8; Christopher Dunn Decl., Dkt. 30, at ¶ 9. More personally, patients may be deterred from contacting their physicians, psychologists, or other sorts of health and medical support providers should they know that their contact with these professionals is being monitored. *See, e.g.*, Felten Decl., Dkt. 27, at 38-46. These are direct and worrisome limits to liberty.

[1] *See also Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (noting that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," and therefore framing the issue before the court as "what limits there are upon this power of technology to shrink the realm of guaranteed privacy"); *In re Application of the United States for an Order Authorizing the Release of Historical Cell-Site Information*, 809 F. Supp. 2d 113 (E.D.N.Y. 2001) (noting that the "advent of technology collecting cell-site-location records has made continuous surveillance of a vast portion of the American populace possible: a level of Governmental intrusion previously inconceivable").

3. Violations of Information Privacy Intrinsically Harm Personal Autonomy

While a negative if contingent impact on liberty is a serious harm, it is not the most fundamental wrong caused by invasions of informational privacy. Return for a moment to our thought experiment where I telepathically know all your thoughts whether you like it or not. There is something wrong about this invasion of privacy *in and of itself*. The invasion is wrongful no matter what I may do or not do with the information. And it is wrong whether or not it causes you distress—it would still be wrong, for example, even if my telepathic reading of your thoughts was completely unknown to you.

Just this point was made over half a century ago in one of the most cited discussions of the right of privacy. Bloustein argued that what is wrong with such intrusions is

> not the intentional infliction of mental distress but rather a blow to human dignity, an assault of human personality. Eavesdropping and wiretapping, wanted entry into another's home, may be the occasion and cause of distress and embarrassment but it is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality and they are such whether or not they cause emotional trauma.

Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*, 39 N.Y.U. L. REV. 962, 974 (1964).[2] Following what he took as the main point of Warren and Brandies, Bloustein here grounds the right of informational privacy on the intrinsic value of an autonomous person, or what he called "individuality." *Cf.* Warren & Brandeis, *supra*, at 205 (discussing privacy as "an inviolate personality"). The connection, between informational privacy and "individuality," Bloustein explained, was conceptual:

[2] *See also* JANNA MALMUD SMITH, PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE 31-32 (1997) ("Safe privacy is an important component of autonomy, freedom, and love, and thus psychological well-being in any society that values individuals.").

> The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the doctrines of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts.

Bloustein, *supra*, at 973.

Bloustein is surely right that we do, as a matter of definition, associate privacy with the very nature of the individual, autonomous self. The considerations marshaled above illustrate precisely why. The connection between informational privacy and autonomous personhood have deep roots in the very nature of human psychology and therefore in our very conception of ourselves as personal beings. As noted above, part of what makes your individual mind *your* mind is that you have a degree of privileged access to your mental states—the various thoughts and feelings that comprise your individual mind. And that includes, crucially, the ability to control access to the content of those thoughts and feelings; that is, to choose whether and when one shares this information with others. We value having such control because it is a necessary condition for having thoughts that are your own, and therefore a necessary condition for having what Warren and Brandies called an inviolate personality, or a developed autonomous self.

And it is here that we see the danger inherent in systematic and sweeping collection by the government of the private information of citizens—citizens who have neither been charged with, or suspected of, a crime. Such intrusions of informational privacy—whether or not that information is acted upon or whether the intrusion is known—undermine the fundamental value of autonomous personhood, of the distinctive self. Tellingly, these sorts of intrinsic harms were recognized by the Department of Justice decades ago when, President Ford's Attorney General commented that "[t]hroughout its history our society has recognized that privacy is an essential condition for the attainment of human dignity—for the very development of the individuality we value—and for the preservation of the social, economic, and political welfare of the individual." Hon. Edward H.

Levi, Remarks at the Association of the Bar of the City of New York (April 28, 1975).[3] This is because, Attorney General Levi continued, "[i]ndiscriminate exposure to the world injures irreparably the freedom and spontaneity of human thought and behavior and places both the person and the property of the individual in jeopardy." *Id.*

4. Invasions of Privacy Offend Human Dignity

As Bloustein and Warren and Brandeis correctly noted, the harm that invasions of privacy cause to autonomous personhood devalues human dignity. Again, the point can be made starkly by looking back at our telepathic case, where I read your mind without your consent. Suppose this happens again and again over time, in a systematic way. Even if I do not act on this knowledge, and you are unaware of my invasions, it will remain the case that from my perspective, the perspective of the knower, your existence as a distinct person would begin to shrink. Our relationship would be so lopsided that I may well cease to regard you as a full subject—as a master of your own destiny. As I learn what reactions you will have to stimuli, and why you do what you do, you will become like any other object to be manipulated *even if I do not, in fact, manipulate you.* You would be, consequently, dehumanized. *Cf.* SMITH, *supra*, at 32.

The connection between a loss of privacy and dehumanization is a well-known and ancient fact, and one for which we do not need to appeal to science fiction to illustrate. It is employed the world over in every prison and detention camp. *See id.* at 27-29; JEREMEY BENTHAM, THE PANOPTICON WRITINGS (ED. MIRAN BOZOVIC, VERSO, 1995); MICHEL FOUCALT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195-230 (2d Vintage Books ed. 1995). It is at the root of interrogation techniques that begin by stripping a person literally and figuratively of everything they own. *See* RICHARD A. LEO, POLICE INTERROGATION & AMERICAN JUSTICE 51-53 (2008). And it gets to the heart of the harm incurred by invasions of information privacy. Whether or not one

[3] Available at http://www.justice.gov/ag/aghistory/levi/1975/04-28-1975.pdf

does so for good or ill intentions, an invasion of another's privacy is a usurping of their personal autonomy, of their control, however weak, over their private information.

Such acts therefore involve an adoption towards the person invaded of what Sir Peter Strawson called a detached "objective attitude"—the attitude we take towards "something to be understood and controlled." SIR PETER STRAWSON, FREEDOM AND RESENTMENT: PROCEEDINGS OF THE BRITISH ACADEMY 48:1-25 (1962). Where privacy is limited in the detention camp or prison, the adoption of this attitude towards the inmate is of course explicit. The explicit adoption of this attitude—the treating of the person as an object, and not as an autonomous subject worthy of respect—is an intrinsic feature of the enterprise and it is intuitively felt as such by those detained. Crucially, however, it remains implicit in more subtle invasions of privacy—even in cases, such as eavesdropping, or the collection of individual's call records, where the subjects themselves are unaware of the invasion.

The adoption of this attitude by a government towards its citizenry at large—that is, not just those lawfully convicted of crimes, or even suspected of crimes—is in direct tension with the fundamental principles of democratic politics. A democratic government owes its citizens respect as persons. As such it must treat them as subjects with rights, as wellsprings of dignity with control over access to their private information.

5. Current Objections to the Plaintiffs' Position Ignore the Values at Stake in this Lawsuit

The Government argues that the knowledge of any particular individual's private call records is not in fact acted upon, except insofar as such data is a contributing element of a meta-analysis of large amounts of call records. Gov't Btr., Dkt. 33, at 5-6. Hence, one might first argue that the government's surveillance program fails to contingently harm liberty, because an individual's liberty is affected only if knowledge of private information is acted upon directly.

This argument fails. First, as recent disclosures of FISC documents reveal, it is simply not true that the NSA refrains from accessing personal information, including the content of personal emails and calls, obtained via dragnet collection. *See, e.g.*, Memorandum Opinion, [Title Redacted], No. 11 BR [Dkt. No. Redacted], 16 n.14 (FISA Ct. Oct. 3, 2011) (Bates, J.) (noting that the NSA has, on several occasions, mislead the court about what it was searching for in its metadata queries, and noting that this government had "frequently and systemically" violated the rules regarding what standards it can make queries of.").[4] Nor should this be surprising. The massive amount of data the NSA is collecting is akin to the attractive nuisance of an unfenced swimming pool—the pool of data and metadata, once collected, is irresistibly attractive to federal agencies and it leads to them dipping their queries into it for reasons not sanctioned by any court or legislative body. *Cf.* FTC Chairwoman Edith Ramirez, *The Privacy Challenges of Big Data: A View From the Lifeguard's Chair* (Aug. 19, 2013).[5] Consequently, the populace can justifiably expect that information collected by trolling techniques will be used to target individual citizens—since, in fact, it has been. Hence we arrive again at contingent harm: If conditions under which private information is being collected are highly conducive to potential misuse, and this is widely known, an individual may self-censor their own communication, and thereby indirectly limit their liberty.[6]

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[4] *cf.* White House White Paper, *Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act* 5 (Aug. 9, 2013) (noting that there have been a "[s]ince the telephony metadata collection program under Section 215 was initiated, there have been a number of significant compliance and implementation issues," which were, in fact, "violations" of the statute); NSA White Paper, *The National Security Agency: Missions, Authorities, Oversight and Partnerships* 2 (Aug. 9, 2013) (admitting that the content of communications may be acquired by the NSA even where they are not authorized).

[5] Chairwoman Ramirez explains in particular, that the various ways that that the more "big data" gathered by an agency or firm the more attractive that database becomes to use; and that the risk of harm to individuals "increases as the volume and sensitivity of the data grows." *Id.* at 6.

[6] *See, e.g.*, Debra Cassens Weiss, *Groklaw Founder Shuts Down the Blog, Citing Fear of Email Surveillance*, ABA JOURNAL (Aug. 21, 2013) (describing the shutdown of an award winning technology blog "because of fears its email communications could be subject to government surveillance"), *available at*

The government might pose a second possible objection as follows. Some might believe—mistakenly—that harms to human dignity and autonomy, via a violation of informational privacy, occur solely when information is absolutely private. As a consequence, those advocating this position assert that individuals forfeit, writ large, their interest in informational privacy when information is revealed to some on the assumption that it will be used for a limited purpose or never revealed at all. See Gov't Br., Dkt. 33, at 33-34. This argument also fails.

Returning to the core idea that our thoughts, unless otherwise made public, remain *our* thoughts, we retain a right to informational privacy when, and to the extent that, we express an intention to control those thoughts or such an expectation is generally understood. For example, imagine a case where an adult tells her adult brother a worry about a medical condition in light of several conversations with her doctor; that she made clear that this worry should not be disseminated; and the brother obliged. In such a circumstance, the sister would retain a measure of informational privacy in both her worry and its basis. So, if the brother were to share his sister's worry to either their parents or to the universe (via the Internet perhaps), the sister suffers a significant harm to her privacy. And, like the intrinsic harm described above, that harm would inhere even if the sister did not know that the parents (or the universe) knew. Moreover, the sister would suffer a loss to her informational privacy even if the brother gave up the information about the conversations with the doctor (like their time, date, location, and duration), rather than the substance of the medical visits.

In short, given our natural control over our thoughts, disclosure to *one* is not in identical to disclosure to *all*. Again, this was anticipated by Warren and Brandeis, who realized that harms to informational privacy can occur in the both manners described above—(1) in revealing the

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http://www.abajournal.com/news/article/groklaw_founder_shuts_down_the_blog_citing_fear_of_email_surveillance/.

substance of the medical conversations, and (2) in disclosing information about those visits. These harms both occur despite the fact some of this information was disclosed to a third party, because the harm to autonomy occurs even if the information was known to a few. They realized that communication to one, is not publication *en masse*, and that "[n]o other has the right to publish" another's thoughts or "productions in any form, without his consent." Warren & Brandeis, *supra*, at 199.

Warren and Brandeis' aptly described a situation, analogous to the one before the Court in this lawsuit, that captures both harms illustrated above. First, they provide that

> A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence.

Id. at 201. In essence, Warren and Brandeis realize that in writing the letter, the man retained his autonomy over the unflattering secret—just as citizens do when they share information to another for a limited purpose, expecting it not to be shared.[7] Second, Warren and Brandeis continue: "A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written." *Id.* Even assuming that the government—unlike the brother above—does not review the content of the communications subject to its metadata collection, it certainly collects the "list of" the phone calls made by everyone subject to its regime. And this intrusion, given the

[7] *Cf.* Warren & Brandeis, *supra*, at 198 n.2 (quoting *Millar*, 4 Burr. at 2379 (explaining that every man "certainly a right to judge whether he will make them public, or commit them only to the sight of his friends"). More recently, in shutting down the technology blog, the owner of Groklaw, made the same point in the context of email technology after details of the NSA's surveillance came to light: "You don't expect a stranger to read your private communications to a friend. And once you know they can, what is there to say? Constricted and distracted. That's it exactly. That's how I feel." Pamela Jones, *Forced Exposure,* GROKLAW (Aug. 20, 2013), http://www.groklaw.net/article.php?story=20130818120421175.

technology, is of course far greater than anything ever imagined by Warren and Brandeis in the "snail mail" era.

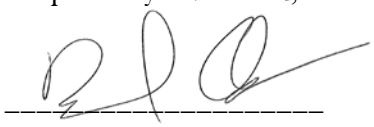
In sum, we can retain autonomy over our thoughts, our actions, the disclosure of private facts about us, etc., even when we have revealed some of that information to others. The operative principle of control, and the one animating our interest in privacy, is something more fundamental than just keeping secrets—it has to do with the fact that privacy is really an extension of our autonomous personhood, and most fundamentally, human dignity.

CONCLUSION

Our natural interest in informational privacy stems from our nature as persons with privileged access to our own thoughts—our hopes, our plans, our fears, and our dreams. Invasions of informational privacy can harm personal liberty, and the government's dragnet acquisition of telephone and email data does just that. But the importance of privacy for the nature of autonomous persons means that there are harms incurred by invasions of information privacy that are not contingent on whether the information so obtained is ever used to limit any particular person's liberty or control their actions. Indeed, the connection between privacy and human dignity illustrates a further fact: that a government that sees its citizen's private information as subject to tracking and collection has implicitly adopted a stance towards those citizens inconsistent with the respect due to their inherent dignity as autonomous individuals. It has begun to see them not as persons, but as something to be understood and controlled. That is an attitude that is inconsistent with the demands of the Constitution and democracy itself.

DATED: September, 4, 2013

Respectfully submitted,



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On behalf of Amicus Curiae Michael P. Lynch

CERTIFICATE OF SERVICE

I, David B. Owens, an attorney, certify that on September 4, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States District Court, Southern District of New York by using the CM/ECF notification and filing system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 4, 2013 By: _____

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