Nos. CV 14-35598, 14-35816
D.C. No.: 10-cv-05018-RBL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Julianne Panagacos, et al.

Plaintiffs-Appellants

v.

John J. Towery, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO FILE *AMICI CURIAE* OF NATIONAL LAWYERS GUILD, A.J. MUSTE INSTITUTE, CAMPAIGN TO BRING MUMIA HOME, GRANNY PEACE BRIGADE, IRAQ VETERANS AGAINST THE WAR, TIME'S UP!, and WAR RESISTERS LEAGUE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Federal Rules of Appellate Procedure 29(b), The National Lawyers Guild, A.J. Muste Institute, Campaign to Bring Mumia Home, Granny Peace Brigade, Iraq Veterans Against the War, Times Up!, and War Resisters League (hereafter "Amici") hereby move this court for leave to file an Amicus Curiae brief in Support of Appellants Julianne Panagacos, et al. , and seeks leave of the court to file within seven days of the filing of Appellants' Reply brief, rather than their opening brief for good cause, as detailed below. Amici sought consent from the parties for leave to file this brief. Appellants granted consent, while appellees declined or took no position.

I. *Identity and Interests of Movants and Desirability of this Brief*

The National Lawyers Guild, Inc. ("Guild") is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The A.J. Muste Institute, Inc. was founded in 1974 to serve and promote activist peace and social justice movements nationally and internationally. It provides office space, grants and fiscal sponsorships to hundreds of grassroots organizations working for social change through nonviolent action many of which have been subjected to disruptive surveillance and/or infiltration by government agents over the past four decades. The right to engage in nonviolent protest to redress grievances is critical to this work, and is protected under the U.S. Constitution and under all internationally accepted principles of human and civil rights. The Institute views government attempts to disrupt nonviolent organizing as a threat to its supported projects, and therefore a threat to its mission and to democracy.

The Campaign to Bring Mumia Home, established in 2013, uses educational activities and direct action advocating for the release of U.S. political prisoner Mumia Abu-Jamal. The Campaign's founding occurred in the wake of the 2008 economic crisis when a spurt of activism arose in response to several events: Occupy Wall Street demonstrations, the execution of Troy Davis, the murder of Trayvon Martin, the release of Michelle Alexander's book *The New Jim Crow*, and the overturning of Abu-Jamal's death sentence. Ongoing and vociferous law enforcement opposition

to the case of Mr. Abu-Jamal leads members of the Campaign to believe their actions are under surveillance.

The Granny Peace Brigade was formed in 2005 by a group of women who went to enlist at the Times Square recruitment center in New York City in place of grandchildren unnecessarily deployed in Iraq. Its mission is to provide education, engage in peaceful protest, and advocate for redirecting war funding toward essential services such as health, education, housing, jobs, and the environment. Members engaging in acts of civil resistance have been arrested, and as an anti-war group it suspects its activities are monitored by the New York Police Department because it is a constant a presence at its actions.

Iraq Veterans Against the War (IVAW) is a nonprofit member-led organization founded by Iraq war veterans in 2004. Its mission is to give a voice to the large number of active duty service people and veterans opposing war. IVAW is committed to social and political change through nonviolent means, and as such organizes anti-war actions. Members of IVAW were targeted in the instant case, and have reason to believe that their work has already been, and may still be, the subject of government and/or law enforcement intrusion. As service members they took an oath to defend the Constitution, and protecting the Constitutional rights of all in this

country has been integral to the organization's work. IVAW values the right to freely meet and work with other post-9/11 veterans who adhere to their values, vision and mission without interference from government appointed persons, who join or otherwise dishonestly associate the for the sake of surveillance and disruption.

Time's Up! is a New York City-based not-for-profit, direct-action environmental group, founded in 1987, that uses events and educational programs to promote a more sustainable city. Its lawful creative and public street actions have attracted the attention of law enforcement officials who have monitored its meetings and gatherings. In 2007 the New York Times reported that at least ten undercover operatives secretly infiltrated, monitored and videotaped bicycle rallies that Time's Up! members attended since the 2004 Republican National Convention. In 2013, news surfaced that two Time's Up! members were listed in secret reports filed by the New York Police Department's Intelligence Division on what the New York Times called "reed-thin evidence" of wrongdoing.

The War Resisters League (WRL) is the United States' oldest secular pacifist organization and has been resisting war at home and war abroad since 1923. WRL affirms that all war is a crime against humanity. It is determined not to support any kind of war, international or civil, and to

struggle nonviolently for the removal of causes of war, including racism, sexism, and all forms of human exploitation. Today, as one of the leading radical voices in the anti-war movement, WRL uses education, organizing, strategy, and nonviolent direct action to sow and grow seeds of peace and liberation in our time. Our work for nonviolent revolution has spanned decades and been shaped by the new visions and strategies of each generation's peacemakers.

The Guild has championed the First Amendment right to engage in unpopular speech, and to associate freely, for nearly eight decades, and has itself been spied on by more than one government agency, and came under attack during the McCarthy era because of the clients the Guild represented.

In 1977 the Guild's Campaign to Stop Government Spying was formed amidst other watchdog and reform entities committed to protecting civil liberties. Since then, the Guild has continued to represent thousands of Americans critical of government policies, from anti-war activists during the Vietnam era to current anti-globalization, peace, environmental and animal rights activists. Guild attorneys have brought and represented clients in many of the key domestic spying cases brought in recent decades including *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001)

and *Handschu v. Special Services Division*, 475 F.Supp.2d 331 (S.D.N.Y. 2007).

The authors of the attached proposed amicus brief have researched and written extensively on the subject of domestic spying, by the military and civilian authorities, and are uniquely qualified to speak to this subject.

Because of its work and its community base, Amici have a vested interest in this area and in strengthening the rights of the people in general and political dissenters in particular from unwarranted government spying and intrusion into their personal and political lives.

Because of the Amici's decades of work and experience on these issues, Amici can and will, if allowed to file this amicus curiae brief, provide a broad perspective on the history of government spying on political activists, and, in particular, what they see as government overreach since September 11, 2001.

A motion for leave to file an amicus should be granted when a potential amicus curiae would assist the court in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is the classic role of amicus

curiae. *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont*., 694 F.2d 203 (9th Cir. 1982).

This is a case with broad public and societal implications and potentially immense impact on First and Fourth Amendment jurisprudence, and the amici herein have the background to cover issues that party counsel cannot in their briefs.

Proposed amici's scholarly and practical background and perspective will be valuable to the court in understanding and evaluating the issues of this case and putting this case in context.

II. *It is Reasonable to Grant leave for this Amicus Curiae to File in Conjunction with the Reply Date*

Pursuant to FRAP 29(e), the Amici move this court for leave to file this brief in conjunction with the time of the filing of Appellants' reply.

While, FRAP 29(e) generally requires that a potential amicus filer do so within seven days of the filing of Appellants' opening brief, 29(e) does allow for late filing for good cause. "A court may grant leave for later filing, specifying the time within which an opposing party may answer." FRAP2 9(e).

Here, as discussed above, allowing the Amici as amicus will add a broader historical and legal context to the case and will bring valuable insights and experience. Counsel apologizes for the late bringing of this motion and the accompanying brief. The additional time was necessary for several reasons: the brief's authors are employed fulltime and had to carve out time to draft complex arguments and to research the issues and history more thoroughly. The authors attempted to obtain copies of Appellants' briefing and could not due to the protective order in place covering those briefs, thus making it more difficult to narrow the issues.

In addition, there was an internal process within the various organizations regarding the filing of this brief, including outreach to other signatory organizations, which represent a broad segment of activist and legal organizations that have a stake in the outcome of this case.

An oral argument date has not yet been set; the court can eliminate any harm caused by allowing this late filing by allowing time for responsive briefing.

The experience and knowledge that Amici brings to the issues of this case, along with the broad perspective of many stakeholders in the decision

of this Court, far outweighs any remaining harm caused by the late filing.

As such, leave to file this amicus should be granted.

Respectfully submitted,

January 27, 2016

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Dated this 27th day of January, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this January 27, 2016, I electronically filed the foregoing *Motion to File* Amici Curiae *of National Lawyers Guild, A.J. Muste Institute, Campaign to Bring Mumia Home, Granny Peace Brigade, Iraq Veterans Against The War, Time's Up!, and War Resisters League* in support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association. It has long championed the First Amendment right to engage in unpopular speech and has defended individuals accused by the government of espousing dangerous ideas, including in hearings conducted by the House Committee on Un-American Activities and other instances of governmental overreaching now popularly discredited. See e.g. *Kinoy v. District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968). From 1940-1975, the FBI, CIA

and other government agencies spied on, infiltrated and disrupted the NLG and its members, even though no alleged or suspected criminal wrongdoing existed to justify governmental intrusion. See *National Lawyers Guild v. Attorney General of the United States*, 225 F.2d 552 (D.C. Cir. 1955). Since then, the Guild has continued to represent thousands of Americans critical of government policies, from anti-war activists during the Vietnam era to current anti-globalization, peace, environmental and animal rights activists.

Iraq Veterans Against the War (IVAW) is a nonprofit member-led organization founded by Iraq war veterans in 2004. Its mission is to give a voice to the large number of active duty service people and veterans opposing war. IVAW is committed to social and political change through nonviolent means, and as such organizes anti-war actions. Members of IVAW were targeted in the instant case, and have reason to believe that their work has already been, and may still be, the subject of government and/or law enforcement intrusion. As service members they took an oath to defend the Constitution, and protecting the Constitutional rights of all in this country has been integral to the organization's work. IVAW values the right to freely meet and work with other post-9/11 veterans who adhere to their values, vision and mission without interference from government appointed

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strategy, and nonviolent direct action to sow and grow seeds of peace and liberation in our time. Our work for nonviolent revolution has spanned decades and been shaped by the new visions and strategies of each generation's peacemakers.

Throughout the decades of its existence, the War Resisters League and/or its members have been subjected to overt and covert unlawful government surveillance at different times by the FBI, CIA, NSA, DHS and NYPD (specifically during the lead up to the 2004 Republican National Convention in New York City.) These instances have had a chilling effect on its nonviolent organizing and have been obstacles to its exercise of free speech.

In this current era of domestic and international state violence, the War Resisters League remains committed to practicing revolutionary nonviolence in accord with the rights guaranteed under the US Constitution, and in pursuit of a vibrant democracy that serves all.

SUMMARY OF ARGUMENT

Amici write to underscore the importance of bringing to trial fundamental issues implicated by covert Army surveillance and infiltration of Americans. Protracted surveillance, infiltration and disruption of civilians

and grassroots civilian anti-war organizations runs counter to long-established precepts that the military must not engage in domestic spying and law enforcement functions. Confronted with clear harm arising directly from such activities, this court must allow a jury to evaluate the real effects on Plaintiffs' ability to exercise their constitutional rights of the cumulative practices of Army personnel, working with a local fusion center, in monitoring and acting against the Plaintiff anti-war group Port Militarization Resistance. The implications of such findings extend far beyond the facts of the instant case.

The harm here is far from abstract or minimal; Defendants have been sued for their actions that resulted in the demise of the primary group they targeted, Port Militarization Resistance (PMR). The lower court granted defendants' motion for summary judgment by taking an unduly limited view of the evidence that individual practices rose to the level of intruding on Plaintiffs' right to associate and engage in protected First Amendment activities and by failing to consider that overlapping and cumulative actions have the effect of creating a unique chill on free speech not suitable to disposition as atomized claims at summary judgment stage.

Plaintiffs have met their summary judgment burden, and the order granting summary judgment should be reversed so this case may proceed to trial.

ARGUMENT

I. INTRODUCTION

This case draws at the core of current issues relating to the delicate balance between longstanding constitutional doctrines and a rigorous national security agenda in 21st Century America. This brief attempts to emphasize how an unexpected glimpse into the Army surveillance of civilians, coordinated with a local fusion center, provides a rare opportunity to revisit in a fresh context the time-worn mantle of issues raised in *Laird v. Tatum*, 408 U.S. 1 (1972).

The instant case provides a singular occasion for the Ninth Circuit to consider the claims raised in *Laird* given that there exists in this case specific objective harm. The Supreme Court dismissed in *Laird* a claim of Army surveillance of lawful political activity that plaintiffs alleged chilled their First Amendment right to engage in political dissent, finding that there was no "objective harm or a threat of specific future harm." *Id*. at 13. But here, dissolution of the anti-war group Port Military Resistance constitutes a direct harm and objective chill to the Plaintiffs, directly resulting from

Defendants' actions over a known period of time. As the Justices aptly noted in *Laird*, "[i]ndeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury . . . ." *Id*. at 15-16.

II. POST-9/11 ARMY SPYING ON CITIZENS EXCEEDS AUTHORITY AND INTRUDES ON THE DEMOCRATIC PROCESS

Courts, legislators, and democratic and legal theorists have long decried military policing of its own citizens. Where either military or civilian law enforcement has overstepped its legitimate role by spying on and interfering with political activity, steps were quickly taken to return their actions to constitutional limits. Although the fear of terrorism and the climate of "endless war" led to some degradation of important principles, the Defendants' actions here overstepped constitutional limits in dangerous ways that should be fully aired and presented to a jury.

A. Courts have long recognized that military policing of civilians is harmful to democratic values

Military spying on civilians runs counter to America's democratic ethos. Since the passage of the Posse Comitatus Act of 1878, 18 U.S.C. §

1385, it has been unlawful for the military to engage in domestic law enforcement except in limited circumstances, such as quelling insurrections.

The Act stands for the principle that in a democracy there must be a complete separation of military from civil law enforcement. *See generally* Roger Hohnsbeen, "Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement," 54 Geo. Wash. L. Rev. 404 (1986).

The exceptional situations, where the military might legitimately operate in the domestic arena, are limited and well recognized. Military leaders, in addition to the courts and commentators, acknowledge the distinction of situations that may require military intervention in civilian-related emergencies:

> Although the public as a whole generally supports and expects federal troops' involvement in some situations, such as evacuations during natural disasters and the protection of property afterward, and replacing coal miners or air traffic controllers during strikes, there exists a fine line recognized by even our forefathers that federal government should not cross—and that is using military personnel to enforce civil laws.

John W. Probst, Lieutenant Colonel and Commander, 90th Missile Security Forces Squadron, F.E. Warren Air Force Base, U.S. Air Force, "The Posse Comitatus Act: What Does It Mean to Local Law Enforcement?" Police Chief, January 2016.

Maintaining the clearly enunciated distinction between responsibilities imbued in the civilian leadership and military personnel must be prioritized, especially during times when the country feels imperiled. Retired Army lieutenant general David Barno, who commanded U.S. and coalition forces in Afghanistan from 2003 to 2005, wrote about the risks of blurring the lines between the two:

> This breach of the proper civilian-military relationship is disruptive and potentially corrosive to our constitutional division of powers. It must be publicly rejected by our uniformed military leadership, who must reassert throughout the ranks the proper role of the military as faithful servants of the nation in the profession of arms. Military leaders must remind their troops that the chain of command represents their outlook to our civilian elected leadership.

David W. Barno, "U.S. War Decisions Rightfully Belong to Elected Civilian Leaders, Not the Military," Wash. Post, Sept. 12, 2013.

Even in the specific area of asserted need to collect information on domestic anti-war activists critical of government practices, landmark legislation, the National Security Act of 1947, set forth a distinction between foreign and domestic intelligence gathering, assigning them to the Central Intelligence Agency and the Federal Bureau of Investigation, respectively. National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 496.

The Supreme Court has recognized the paramount importance of maintaining civilian control over the military. Justice Jackson in *Youngstown*

articulated that the president heads the civilian government and serves as commander in chief in order to guard against military exerting control over the executive office or, implicitly, over the civilian population:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (1952).

A decade later, in his January 17, 1961 farewell address, President Dwight D. Eisenhower warned the nation about the increasing power of the military-industrial complex. Once the military commander of the Allied forces during WWII, the outgoing President urged his successors to strike a balance between a strong national defense and diplomacy in dealing with the

Soviet Union. Eisenhower expressed concerns about the growing influence of what he termed the military-industrial complex:

> In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.
>
> We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.

Dwight D. Eisenhower: "Farewell Radio & Television Address to the American People," Jan. 17, 1961, *reprinted in* The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=12086.

B. Courts and Congress served as a corrective after abuses in an earlier generation

Military spying on the populace, when discovered, has rightfully met with public disfavor, even outrage, signaling its dissonance with cherished values of freedom. In 1968, the Senate Subcommittee on Constitutional Rights learned that the Department of Defense maintained a database of 18,000 citizens it suspected of ideologically supporting "subversive" activities, operated from the military's "domestic war room" and overseen by the Directorate of Civil Disturbance and Planning Operations in the Pentagon's basement. Senate Select Committee, Final Report of the Select

Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Report), 94th Cong., 2d sess., 1976, S. Rep. 94-755, at 546 ("It included 'teachers, writers, lawyers, etc.' who did not actively participate in subversive activity 'but who were nevertheless influential in espousing their respective philosophies.' It was estimated that the total case load increase under the ADEX would be 'in excess of 23,000 cases the first year,' including 17-18,000 individuals who 'are either now being investigated or who have been investigated in the past.'"). The swift legislative response underscores that branch of government's recognition that covert surveillance of innocent Americans had no place in a free society.

Another mechanism arising out of the Church Committee was the 1987 Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1885c, creating the Foreign Intelligence Surveillance Court. The Court oversees requests for surveillance warrants against foreign spies inside the country by federal law enforcement and intelligence agencies, seeking approval of electronic surveillance, physical search, and other investigative actions for foreign intelligence purposes.

Even outside the military context, where authority to operate domestically is not in issue, legal protections against excessive surveillance and governmental involvement in political activity has been condemned and

curtailed when discovered. In 1976 the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee") found that the FBI, through its COINTELPRO program, had engaged in intelligence gathering tactics that offended notions of freedom, with little if any relationship to law enforcement. *See generally*, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, Final Report, Book II, 94th Cong., 2 sess., 1976, S. Rept. 94-755. Also in 1976, Attorney General Edward Levi enacted guidelines to limit the ability of FBI to investigate Americans were enacted with the goal of preventing unjustified monitoring of individuals and groups. Attorney General's Guidelines on Domestic Security Investigations (Apr. 5, 1976), *reprinted in* FBI Statutory Charter: Hearings on S 1612 Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 18-26 (1978).

Public indignation in response to leaked FBI files exposing J. Edgar Hoover's COINTELPRO—or Counterintelligence Program—speaks to the constitutional violations of such programs. A COINTELPRO against the New Left, initiated in 1968, was supplemented by covert Army intelligence, local red squads and the CIA's MHCHAOS program. During that period, the military closely monitored political activists, even occasionally providing

hourly reports on their locations and activities. Christopher H. Pyle, *Military Surveillance of Civilian Politics, 1967-1970*, (New York, Garland Publishing, Inc., 1986), at 70.

The judiciary, likewise, placed limits on intrusive surveillance of anti-war and other political organizations during this period. Although some of those restrictions were reconsidered in the wake of the September 11 terrorist attacks, the essential concern with disruption of First Amendment activity has remained. *See e.g. Alliance to End Repression v. City of Chicago*, 561 F.Supp. 537 (N.D.Ill.1982) (entering consent decree), *modified by*, 237 F.3d 799 (7th Cir. 2001) (modification would not disturb "[t]he core of the decree . . . forbid[ing] investigations intended to interfere with or deter the exercise of the freedom of expression that the First Amendment protects"); *Handschu v. Special Services Division*, 605 F.Supp. 1384 (S.D.N.Y. 1984) (approving settlement of class action and promulgation of *Handschu* Guidelines), aff'd 787 F.2d 828 (2d Cir. 1986), and 679 F. Supp. 2d 488 (S.D.N.Y. 2010) (discussing modified guidelines and granting class counsel's motion for attorney fees).

This case evokes what may be viewed as the new COINTELPRO, blurring the lines between the military and civilian law enforcement. A shift from passive intelligence gathering to offensive counterintelligence is one

manifestation of the difference between civilian law enforcement principles and the military's exclusive focus on defeating perceived enemies through combat, propaganda and covert operations. Rather than protecting the public and upholding the Constitution, the role of the military is to identify the enemy and neutralize them.

C. Long-held principles were wrongfully set aside in a climate of fear after 9/11

New guidelines enacted by former Attorney General John Ashcroft "threaten to return us to the COINTELPRO era when the FBI routinely conducted surveillance without suspicion of criminal conduct, targeted groups for infiltration and disruption based on their ideology, and maintained dossiers on thousands of law-abiding citizens who had expressed political views of which the government disapproved." Nancy Chang, *Silencing Political Dissent*, Seven Stories Press (2002) at 37. However, even in such a climate, the Defendant's actions here went too far in undermining Plaintiffs' ability to engage in constitutionally protected activity.

In response to the criminal attacks on this nation on September 11, 2011, President George W. Bush urged Congress to legislate for the creation of a new Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296 (Nov. 25, 2002). After its creation, the DHS

afforded extraordinary power to the executive, while diminishing the legislative and judiciary's power, in responding to threats to U.S. security.

Importantly, the creation of the DHS marked the initial step in removing the distinction between domestic and foreign intelligence. Connections were established by early 2004 between the 50 states and the National Guard, police, private security and emergency services in major cities. Rhodri Jeffreys-Jones, *The FBI: A History* (Yale Univ. Press, 2007) at 237. In April 2003, Senator Orrin G. Hatch called for the repeal of the sunset provision in the USA PATRIOT Act, by inserting a provision into the Intelligence Reform and Terrorism Prevention Act enabling the FBI to take action against persons who threatened US security but were not agents of a foreign state. *Id*.

As Dr. Peter Kraska, Professor of Justice Studies at Eastern Kentucky University has observed: "By 11 September 2001, then, the stage was thoroughly prepared for a rapid acceleration of the military-police blur. The mission sprint of the US military into law-enforcement functions involved entirely new levels of cooperation and collaboration between civilian police and the armed forces, and the military has become a central player in a host of homeland security and war-on-terror initiatives." Peter B. Kraska,

Militarization and Policing—Its Relevance to 21st Century Police, 1 Policing: J. of Policy & Practice 501, 510 (2007).

Although *amici* may disapprove of the increase of police powers—indeed, as protections designed to prevent a repeat of COINTELPRO abuses have steadily eroded under successive presidential administrations over the past half a century, it seems likely that the authors of the reforms of a generation ago, or the founders of our republic, would scarcely recognize these current United States—of greater import for the question for this court in this case is that there can be no claim that the military was authorized or needed to engage in domestic law enforcement functions.

D. Anti-Terrorism Agenda Led to Unlawful Creep of Covert Military Spying Beyond the Bounds of What is Acceptable in a Free Society

The expansion of civilian agencies' authority described above nonetheless does not imbue the military with the power to engage in domestic law enforcement or engage in the other abusive practices described in this matter. These developments presaged actions that went even further, and the military was not authorized to do what it did here. Especially where there is some expansion of police authority, the courts must be mindful of

dangers and protective of limitations designed to safeguard First Amendment rights.

The creation of Joint Terrorism Task Forces and fusion centers has accelerated widespread monitoring and secretive sharing of information about Americans, including as in the instant case, covert military tactics. As Erik Dahl, former Navy intelligence officers and now professor at the Naval Postgraduate School noted: "I'm not sure whether the same intelligence agencies, the same intelligence officers who used to spy overseas or spy on the Soviet Navy, I'm not sure whether those organizations and individuals are the right ones to be doing the spying on Americans." Interview with Erik Dahl, Brennan Center for Justice at NYU Law School (June 2, 2014).

The Senate Committee on Homeland Security and Governance has found that fusion centers' sloppy and uneven "intelligence" at times endanger "citizens' civil liberties and Privacy Act protections, occasionally taken from already published public sources, and more often than not unrelated to terrorism." United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, "Federal Support for and Involvement In State and Local Fusion Centers," Majority and Minority Staff Report, October 3, 2012.

Military personnel gather domestic intelligence for "force protection," preventive measures aimed at mitigating hostile actions against Department of Defense personnel and resources. While a military unit spying on anti-war activists was gotten rid of in 2008, nevertheless the Defense Intelligence Agency took over its so-called offensive counterintelligence functions and re-created an intelligence database in 2010. Mike German, "Why Police Spying On Americans Is Everyone's Problem," Force One, December 18, 2014.

Little oversight mechanisms exist to make sure that the law is followed in information sharing on federal and state levels, such as between FBI Joint Terrorism Task Forces, local fusion centers and information sharing networks such as the Navy's Law Enforcement Information Exchange (LinX) and the FBI's eGuardian program. Eugene Fidell, who teaches military law at Yale Law School and is a member of the Defense Department's Legal Policy Board and board member of the International Society for Military Law and the Law of War, called LinX domestic spying: "This sounds like something from a third-world country, where you have powerful military intelligence watching everybody." Mark Flatten, "Navy Database Tracks Civilians' Parking Tickets, Fender-Benders, Raising Fears of Domestic Spying," Washington Examiner, March 21, 2014.

> [M]ilitary intelligence tactics and attitudes rub off on law enforcement personnel assigned to intelligence matters. Most nations outlaw espionage, so foreign intelligence activities have to be carried out through stealth and deception. Avoidance of the law and contempt for the truth can become habitual among intelligence officials, but they simply have no place in a democratic government's interactions with its own citizens. Yet, throughout the history of domestic intelligence operations in the U.S., law enforcement officials have gone to the military intelligence toolbox in selecting their methods.

Mike German, Why Police Spying On Americans Is Everyone's Problem, Force One, December 18, 2014.

Writing for the dissent in *Laird*, Justice Douglas wrote of the paralyzing effect of army surveillance on a free society:

> Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. . . . The First Amendment was designed to allow rebellion to remain as our heritage. The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance.

Laird, 408 U.S. at 28 (Douglas, J., dissenting).

III. OVERLAP AND CUMULATIVE NATURE OF FACTS CREATES A UNIQUE CHILL ON FREE SPEECH NOT SUITABLE TO DISPOSITION AS ATOMIZED CLAIMS AT SUMMARY JUDGMENT STAGE

Military entanglement with civilian law enforcement (leading to arrests and use of force) and long-term surveillance (including making disparaging comments to third parties and infiltrating attorney-client communications) of the kind demonstrated here raises issues too complex for summary judgment. Even the *Laird* Court recognized and approved of precedents that "fully recognize that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights," dismissing the claims in that case only because the plaintiffs failed to "show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action." *Laird*, 408 U.S. at 12-13.

The Plaintiffs can make such a showing, especially when the actions are considered cumulatively. The acts at issue here raise a variety of serious constitutional concerns that must be considered in their totality, and not as atomized claims at the summary judgment stage.

A. Defendants continued extraordinary military policing of civilians long after any emergency, and the practices at issue here should be rejected

Public records indicate that the Army continued to spy on and target activists until at least 2010, a year after Army intelligence analyst John J.

Towery's identity was exposed. Rudd e-mail to Bjornstad 4/6/2010 re: Olympia Police Brutality March – unprivileged. Earlier public records requests found that Towery had, over a two-year period beginning in 2006, infiltrated and spied on the just-formed Olympia antiwar group Port Militarization Resistance (PMR) and several other organizations, including Students for a Democratic Society, the Industrial Workers of the World, and Iraq Veterans Against the War. Original set of Threat Assessments produced by Olympia February 2009-Unprivileged, and documents from Adamson and PCSO produced by Tacoma-labeled Port 8500-8640-Unprivileged.

The Army's infiltration and intelligence gathering against political activists—individually and, certainly, cumulatively—violates the Posse Comitatus Act of 1878, and resembles the COINTELPRO tactics used to monitor the New Left movement in the 1970s by using "high quality informants who are in a position to obtain detailed information regarding the activities an future plans of individuals and organizations." FBI Memorandum, Headquarters to Detroit Field Office, Feb. 17, 1966. For example, Towery shared his "intelligence" with the Washington State Fusion Center, a communications hub of local, state and federal law enforcement, which was then used by local police to target activists for repeated harassment, preemptive and false arrest, excessive use of force, and

malicious prosecution. Documents from Adamson and PCSO produced by Tacoma-labeled Port 8500-8640, Domestic Terrorism Index profiles of Dunn, Berryhill, Cuddeford, and Minjiras-Unprivileged.

In a blatant violation of the attorney-client privilege, Towery administered the PMR email listserv, admitting in court documents to eavesdropping on the privileged, attorney-client listserv of criminal defendants and their legal counsel. Towery Response Brief to 9th Circuit at 40-41-Not Sealed. Towery compounded that constitutional violation by passing sensitive information from the listserv, vital to a pending criminal trial in 2007, on to fusion center officials who shared it with prosecutors, forcing a mistrial. E-mails between TPD/RIG 5 detectives Smith and Fedderson May 4, 2007-Unprivileged. That case was later dismissed for prosecutorial misconduct. Domestic Terrorism Index profiles of Dunn, Berryhill, Cuddeford, and Minjiras-Unprivileged. Records requests also revealed that the fusion center disseminated "domestic terrorist" dossiers on some of the plaintiffs before a 2007 Domestic Terrorism Conference in Spokane. 9th Circuit Memorandum, Panagacos 1, Dec. 17, 2012, at 4.

For these reasons, this case has attracted enormous media attention, especially when the Ninth Circuit rejected the Obama Administrations efforts to dismiss the suit in December 2012. See e.g. Colin Moynihan, "Spy

Suit Against Army Workers Is Cleared," N.Y. Times, Dec. 18, 2012; Colin Moynihan, "Defendant Added to Protesters' Spying Suit," N.Y. Times, June 24, 2013.

The Circuit court ruled that allegations of First and Fourth Amendment violations were "plausible," and ordered the case to proceed to trial. Panagacos et al. v. Towery, et al., No. 11-35527 D.C. No. 3:10-cv-05018-RBL and No. 11-35538 (9th Circuit) Memorandum, Dec. 17, 2012.

B. Advent of social media and level of awareness of surveillance today was unforeseeable in the Laird decision days

In the four decades since the Supreme Court considered *Laird v. Tatum*, technology has dramatically altered the ways in which we communicate as a society. By the 1990s, "the computer had become a portal that enabled people to lead parallel lives in virtual worlds." Sherry Turkle, *Alone Together: Why We Expect More From Technology and Less from Each Other* (2012), at xi. With instantaneous videos available on Facebook, YouTube, Instagram and other media sharing platforms, we share what Sherry Turkle describes as "a fully networked life." *Id*. at xiii.

In this worldwide networked life, with a heightened volume and velocity of news messaging, awareness that the military may be conducting covert surveillance of online communications necessarily has a chilling

impact on how we communicate. A free and open internet is increasingly important for the marketplace of ideas. A Pew Research Center survey found that two-thirds of social media users in the U.S. engaged in at least one "political activity," ranging from reposting and promoting political views of others (engaged in by 38%) to posting "their own thoughts or comments on political and social issues" (34% of all users but more than 40% who identified as either "liberal Democrats" or "conservative Republicans"). Lee Raine et al., "Social Media and Political Engagement," Pew Research Center, October 19, 2012, available at http://www.pewinternet.org/2012/10/19/social-media-and-political-engagement/.

The danger is especially great on listservs created for lawyers to discuss privileged communications related to litigation strategy. Lawyers have expressed consternation about situations in which they suspect that government intelligence agencies might be interested in a case. According to a Human Rights Watch report, they note feeling pressured to adopt new strategies, such as in-person meetings, burner phones and more secure technologies. Most detrimental to society, some attorneys are reluctant to take new cases that might prompt monitoring. Human Rights Watch, *With*

Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy, July 28, 2014.

Widespread awareness that police are stepping up efforts to infiltrate political groups—especially when examples of disruption are shared on the Internet—may dissuade persons from engaging in robust free speech activities. Jim Dwyer of the New York Times reported on an independent media group's video analysis, revealing that police sparked confrontations by arresting police officers who were disguised as activists, both at the Republican National Convention and at Critical Mass bicycle events. Bystanders objected to the false arrests, and the police thus succeeded in creating a conflict and an unruly situation that then justified harsh police intervention. As history has shown, during the McCarthy period and other moments in U.S. history, knowing that political activities could be under scrutiny (and fearing enforcement of statutes such as the Smith Act and Ohio Criminal Syndicalism Act) can intimidate people and discourage them from stepping forward with their political opinions. *See generally*, *NAACP v. Button*, 371 U.S. 415 (1963) ("the threat of sanctions may deter [engaging in First Amendment protected activities] almost as potently as actual application of the sanctions"). The executive director of the Minnesota chapter of the Council on Muslim-American Relations told a reporter that

"[p]eople believe that even talking about foreign policy puts you on some kind of watch list." Michael Crowley, "Obama's 'Extremism' Language Irks Both Sides," Politico.com, Feb. 18, 2015.

C. A jury should evaluate the evidence in this case.

In the instant case, the dovetailing of several factors—covert military and fusion center spying tactics, the chilling effect on free speech, the dissolution of an activist group—presents a unique opportunity for trial review of how this totality of factors impacts, on a very practical level, the ability to engage in constitutionally protected activity.

In the case at hand, the anti-war organization Port Military Resistance (PMR) fell apart after several members were harassed by local law enforcement, and after revelations of surveillance by the military and Fusion Center agencies surfaced. Many plaintiffs actually moved away from the Olympia and Tacoma areas in large part because of police and military actions and animus toward PMR. After 2009, when the identity of John Jacob Towery was made public, no further demonstrations by PMR were held.

This result was certainly foreseeable (and perhaps intended). As discussed above, the military are trained to fight enemies. When turned on

domestic dissenters, aggressive spying, infiltration and disruption tactics—especially when it becomes known that they emanate from the armed forces—has a chilling effect on law-abiding citizens' exercise of First Amendment activities.

Ultimately, the effect of defendants' cumulative actions should be a question for the jury. The plaintiffs have proffered considerable evidence of defendants' misconduct and identified witnesses who can speak to the individual events and the cumulative effect on plaintiffs' ability to exercise their First Amendment rights. A jury should hear this testimony and other evidence. The long-recognized danger of military involvement in domestic surveillance or law enforcement, together with the evidence in this case, is enough, as a matter of law, to send to the jury the question of whether plaintiffs suffered objective harm from defendants' misconduct.

D. The accumulative misconduct in this case reflects the national pattern and practices of unconstitutional "pre-emptive" law enforcement

These practices are directly related to mischaracterizations of, and reliance on, what law enforcement deems as an anarchist threat level. Labeling, stigmatizing and selecting groups of individuals have negative consequences to activists and free speech. The labeling of individuals as

subversive, as was done by the George W. Bush and Obama administrations, is used by intelligence and police agencies to justify a wide range of practices, including issuing subpoenas to get information on others, conducting cover surveillance, and intimidating pressuring activists to inform on others. *See generally*, Lesley J. Wood, *Crisis and Control: The Militarization of Protest Policing* (2014).

Law enforcement infiltration and provocation is by its nature a difficult-to-monitor constraint on free speech. Infiltration and provocation change the tone of protest by initiating violence falsely attributed to protesters. Using provocateurs, police can change the speech that political groups are trying to communicate. In the instant case, John Towery tried to persuade PMR participants to purchase and train with assault rifles, tried to insert an article into Plaintiff Crespo's newspaper justifying the 9/11 hijackings and portraying them sympathetically, and falsely stated that PMR was allegedly planning to engage in several violent acts.

The ACLU of Northern California has documented numerous instances of unconstitutional surveillance. In California, Camille Russell, a Fresno schoolteacher, discovered Peace Fresno was infiltrated while reading an obituary of a sheriff's deputy killed in a motorcycle accident who was a member of the group under another name. ACLU Press Release, Member of

the Fresno County Sheriff's Department's Anti-Terrorism Unit Secretly Attended Anti-War Meetings, January 29, 2004. University administrators at Fresno State University revealed that undercover law enforcement agents attended a campus lecture a well-known animal rights speaker. ACLU Press Release, Fresno State University Students Go On Hunger Strike to Protest Infiltration of Animal Rights Lecture, April 27, 2005.

In March 2007, the New York Times broke the story of widespread covert surveillance of political groups, as New York City police detectives traveled the world to spy on and infiltrate groups that might attend RNC protests. Jim Dwyer, "City Police Spied Broadly Before G.O.P. Convention," New York Times, March 25, 2007.

Concern exists by human rights watchdog agencies that overreaching U.S. police practices were designed to intimate peaceful protesters. Frank La Rue, the United Nations' special rapporteur for the protection of free expression and Maina Kiai, the Special Rapporteur for Freedom of Peaceful Expression, voiced such concern in a letter to the U. S. Secretary of State and released it publicly in connection with the 20th annual U.N. Human Rights Council meeting. The letter noted that in November 2011, groups of peaceful protesters from the "Occupy movement" were subjected to allegedly unnecessary and disproportionate use of force. However, no

criminal investigations have, or are in the process of, being pursued. UN High Commissioner for Human Rights, "Mandates of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association," Dec. 21, 2011, available on https://spdb.ohchr.org/hrdb/20th/UA_USA_21.12.2011_(23.2011).pdf

Abundant documentation exists that American policing is disproportionately and unnecessarily militarized, and therefore undermines personal liberties. *See generally*, ACLU, *War Comes Homes: The Excessive Militarization of American Policing* (2014). As well, post-9/11 crowd control techniques to contain and disperse mass assemblies have the effect of intimidating individuals engaged in protected First Amendment activities across the country at great cost to long cherished values of free speech and association. *See generally*, Lewis Lapham, "Crowd Control," Harper's Magazine (Oct. 2004); National Lawyers Guild, Report, *The Policing of Political Speech* (2012).

CONCLUSION

The creeping expansion of Army and other military involvement in national security represents an unwelcome change in this nation's traditional

law enforcement practices. Permitting the Army, in cooperation with local fusion centers, to monitor, infiltrate and disrupt a local anti-war organization represents a clear violation of the Posse Comitatus Act, and the principles of a democratic society that it was enacted to uphold, including the First Amendment. This Court should allow this case to proceed to trial in order that these issues may be fully aired and decided on by a jury.

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DISCLOSURE STATEMENT

No *amici* are held by any parent corporation and no publicly held corporation owns 10% or more of their stock.

No party or party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

I certify that this brief complies with the type size and typeface requirements of Fed. R. App. P. 32. This brief is 6,690 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this January 27, 2016, I electronically filed the foregoing *Brief* Amici Curiae *of National Lawyers Guild, A.J. Muste Institute, Campaign to Bring Mumia Home, Granny Peace Brigade, Iraq Veterans Against The War, Time's Up!, and War Resisters League* in support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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