No. 13-30077

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL ALLAN DREYER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington, Seattle
Case No. 2:12-cr-0119-MJP-1 (Hon. Marsha J. Pechman)

EN BANC BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Electronic Frontier Foundation, American Civil Liberties Union of Washington and National Association of Criminal Defense Lawyers state that they do not have a parent corporation, and that no publicly held corporation owns 10 percent or more of the stock of any amici.

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STATEMENT OF AMICI CURIAE[1]

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect digital rights. With over 25,000 active donors and dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. EFF is particularly concerned with protecting electronic privacy at a time when technological advances have resulted in increased Internet surveillance by the government. EFF has served as counsel or *amicus curiae* in key cases addressing the Internet and electronic surveillance by the government. *See, e.g., Jewel v. National Security Agency*, 673 F.3d 902 (9th Cir. 2011) (counsel); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (amicus).

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy and other freedoms at stake in civilian use of the Internet. The ACLU has often acted to support a strong suppression remedy as a deterrent to statutory and Constitutional violations by law

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored this brief in whole or in part or contributed money toward the preparation of this brief. Neither party opposes the filing of this brief.

enforcement entities, whether civilian or military. The ACLU has participated in numerous cases involving the suppression remedy, as *amicus curiae*, as counsel to parties, and as a party itself. The interests of the ACLU's members are at stake in this case given the history of violations of civil liberties which have occurred when the military intrudes into civilian law enforcement, and the fact that the NCIS agent here monitored "*every* computer in the state of Washington." *United States v. Dreyer*, 767 F.3d 826, 834 (9th Cir. 2014).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in the Supreme Court, this Court, and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION

From the very beginning of this Republic, this country's founders worried about the military's encroachment into domestic affairs. Listed among the grievances in the Declaration of Independence was not only the English crown's insistence on quartering army officers within the colonies, but the military's superiority to civilian authority. The framers passed protections in the Constitution designed specifically to limit military involvement in the lives of civilians, and yet in the years following the American Revolution, and in the Reconstruction years following the Civil War, the military disregarded these limitations by acting as a police force to break up labor disputes, execute search and arrest warrants and to maintain order at the polls. These actions prompted Congress to pass the Posse Comitatus Act ("PCA") in 1876 to reinforce the Constitutional separation between military and civilians.

Yet despite the Constitution and the PCA's clear prohibition against military involvement in domestic affairs, in this case, a Naval Criminal Investigative Service ("NCIS") agent conducted extensive computer surveillance not designed in any way to limit their intrusion into civilian activities. As noted by the panel, this surveillance is "extraordinary." *United States v. Dreyer*, 767 F.3d 826, 836 (9th Cir. 2014). Despite the Constitutional and statutory limitations described above, "it has become a routine practice for the Navy to conduct surveillance of all the

civilian computers in an entire state to see whether any child pornography can be found on them, and then to turn over the information to civilian law enforcement when no military connection exists." *Id.* As Judge Kleinfeld noted in his concurrence, this case "amounts to the military acting as a national police force to investigate civilian law violations by civilians," something "more 'widespread' than any military investigation of civilians in any case that has been brought to our attention." *Id.* at 837 (Kleinfeld, J., concurring). The panel opinion correctly found this activity violated the PCA and that suppression of evidence obtained from this widespread Internet surveillance was the necessary remedy for the PCA violation in this case.

The *en banc* court should affirm the panel opinion. There is a close tie between the PCA and the Constitutional protections designed to keep the military out of civilian life. The threat to liberty posed by the military's involvement in civilian affairs is borne out by a long history of repeated military misconduct in investigating civilians. And that threat will only increase with technological advancements, as demonstrated vividly by NCIS' unfettered investigation into civilian computers and online activity here. Suppression of evidence obtained in violation of the PCA is not only an available remedy to courts confronting egregious PCA violations, like the one in this case, but is also a necessary one

given the lack of adequate alternative remedies and the need to protect against future abuses.

The panel's opinion should be affirmed.

ARGUMENT

I. SUPPRESSION OF EVIDENCE IS A PROPER REMEDY FOR POSSE COMITATUS ACT VIOLATIONS.

The PCA states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385. Congress has buttressed the PCA's protections by directing the Secretary of Defense to issue regulations that prohibit "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." 10 U.S.C. § 375. The result of these two statutes and defense regulations is to ultimately prohibit "military personnel from participating in civilian law enforcement activities." *United States v. Chon*, 210 F.3d 990, 993 (9th Cir. 2000) (citing Department of Defense regulations); *United States v. Khan*, 35 F.3d 426, 431 (9th Cir. 1994) (same).

As all panel members agreed, there is no question that the Navy violated the PCA in this case. *See Dreyer*, 767 F.3d at 835 ("we hold that Agent Logan's broad investigation into sharing of child pornography by *anyone* within the state of

Washington, not just those on a military base or with a reasonable likelihood of a Navy affiliation, violated the regulations and policies proscribing direct military enforcement of civilian laws.") (emphasis in original); *see also id*. at 837 (Kleinfeld, J., concurring) ("We all agree that the Navy conduct in this case violated the Posse Comitatus policy provisions"); *id.* at 839 (O'Scannlain, J., concurring in part and dissenting in part) ("Like my colleagues, I conclude that Agent Logan violated the PCA"). And in its *en banc* brief, the government has challenged only the remedial portion of the panel opinion on whether suppression is an appropriate remedy for PCA violations. *See* Government's *En Banc* Brief, ECF No. 51, at 1 ("The United States believes that the Panel's application of the exclusionary rule to a violation of the regulations extending the Posse Comitatus Act . . . warrants review by this Court *en banc*.").

The only issue before this Court then, is whether suppression is available to remedy the "exceptional" and "extraordinary" PCA violations here. Given the Constitutional foundations of the PCA, the clear answer is yes.

There are close ties between the PCA's restrictions on military participation in civilian law enforcement activities and the significant Constitutional interests in limiting the power of the military, as reflected both in the Constitution's structure of government and the Third Amendment. As discussed below, despite protections enshrined in the Constitution to guard against the military intrusions into civilian

affairs that occurred in this country before the Revolutionary War, in the years following that war, the U.S. military became more involved in policing civilian affairs. This came to a head in the Reconstruction years following the Civil War when the military was often used as a domestic police force. In direct response to this activity, Congress enacted the PCA to codify Constitutional limitations on military power.

As a result, when the PCA—and ultimately the underlying Constitutional interests protected by the PCA—are violated, suppression of evidence obtained in violation of the statute is a proper remedy. This case vividly highlights the precise scenario the Constitution and the PCA intended to prohibit: dragnet surveillance of the general public by the military for purposes of civilian law enforcement. Even if this Court finds the PCA does not implicate Constitutional values, it could nonetheless exclude evidence under its supervisory powers.

A. The Posse Comitatus Act Protects Constitutional Rights.

The "history and tradition" of the United States "rebel at the thought that the grant of military power carries with it authority over civilian affairs." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 (1952) (Douglas, J., concurring). "The interest in limiting military involvement in civilian affairs has a long tradition beginning with the Declaration of Independence and continued in the Constitution, certain acts of Congress, and decisions of the Supreme Court." *Bissonette v. Haig*,

776 F.2d 1384, 1387 (8th Cir. 1985).[2] The Constitution limits military power in three ways: through federalism, separation of powers and specific restrictions on military power in the Bill of Rights.[3]

The Constitution's designation of powers, both within the federal government and between the federal government and the states, were motivated in part by the desire to limit the use of armed forces in enforcing civilian law. *See* Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 Mil. L. Rev. 86, 91 (2003). Through its federated structure of governments, the Constitution strictly limits the role of the federal government and designates to the states the authority to "to enact legislation for the public good," and—subject only to limited situations where Congress can enact and enforce criminal laws—the power to punish criminal acts. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995) (quotations omitted); *id*. (citing *Cohens v. Virginia*, 6 Wheat. 264, 428 (1821) and *United States v. Fox*, 95 U.S. 670, 672 (1878)).

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[2] The Declaration of Independence lists as grievances the fact the British had "kept among us, in times of peace, Standing Armies without the Consent of our legislatures," "affected to render the Military independent of and superior to the Civil power" and "Quarter[ed] large bodies of armed troops among us." *See* Declaration of Independence, paras. 11, 12, 14 (U.S. 1776), *available at* http://www.archives.gov/exhibits/charters/declaration_transcript.html.

[3] All websites cited were lasted visited on April 28, 2015.

Similarly, the Constitution's separation of powers within the federal government places control over the military in both the Executive branch, where the President is the Commander in Chief of the Armed Forces, and in Congress, which is tasked with establishing, maintaining and regulating the armed forces and dictating when the military may be used.[4] This ensures that military decisions cannot be made unilaterally and that a legislative body elected by the public can act as a check on the rash use of the military for civilian law enforcement purposes. As Supreme Court Justice Jackson noted, "[t]hat military powers of the Commander-In-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history." *Youngstown*, 343 U.S. at 644 (Jackson, J. concurring); *see generally* Charles Doyle & Jennifer K. Elsea, Cong. Research Serv. R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* at 25 (2012) (citing U.S. Const. Art. I, § 8, cls. 12-16, 18) (hereinafter "Doyle, *The Posse Comitatus Act and Related Matters*").[5]

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[4] *See* U.S. Const. Art. II, § 2 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States"); U.S. Const. Art. I, § 8, cl. 12-15 (granting Congress power to "raise and support armies . . . ," "provide and maintain a navy," "make rules for the government and regulation of the land and naval forces," and "provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions").

[5] *Available at* https://www.fas.org/sgp/crs/natsec/R42659.pdf.

Finally, the protections in the Bill of Rights reflect the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird v. Tatum*, 408 U.S. 1, 15 (1972).[6] That is most clearly reflected in the Third Amendment's prohibition of quartering soldiers in civilian homes without consent,[7] which embodies the Framers' intent to prohibit "the projection of military power" into the home and other areas of civilian life. Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 Washburn L.J. 179, 179-80 (2014); *see also Padilla v. Rumsfeld*, 352 F.3d 695, 714-15 (2d Cir. 2003), *overruled on other grounds* 542 U.S. 426 (2004) (Third Amendment "reflected the Framers' deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life."). As one district court within this Circuit recently noted, the Third Amendment "protects private citizens from incursions by the military into their property interests, and guarantees the military's subordinate role to civil authority." *Mitchell v. City of Henderson*,

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[6] *See* Doyle, *The Posse Comitatus Act and Related Matters* at 21 ("… it is possible to see the protrusions of a larger, submerged Constitutional principle which bars the use of the Armed Forces to solve civilian inconveniences in the Second, Third and Fifth Amendments, with their promises of a civilian militia, freedom from the quartering of troops among us, and the benefits of due process.").

[7] The Third Amendment states in full: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

No. 2:13-cv-01154-APG, 2015 WL 427835, *18 (D. Nev. Feb. 2, 2015) (unpublished) (citing Avery, *The Third Amendment*, 53 Washburn L.J. at 192).

The Third Amendment is not limited to protecting property interests; the Supreme Court explained in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that the Third Amendment—like the First, Fourth, Fifth and Ninth Amendments—is one of the Constitutional "guarantees [that] create zones of privacy." *Griswold*, 381 U.S. at 484; *see also Poe v. Ullman*, 367 U.S. 497, 549 (1961) ("the privacy of the home receives explicit Constitutional protection" in the Third Amendment). Just two years later in the seminal Fourth Amendment case *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court noted that different Constitutional provisions "protect personal privacy from other forms of governmental invasion," including the Third Amendment. *Katz*, 389 U.S. at 350, n. 5; *see also Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) ("The Third Amendment was designed to assure a fundamental right to privacy.").

The PCA reflects this Constitutional framework and was designed to protect the Constitutional interests described above. In the years following the Civil War, the military was used as a police force to break up labor disputes, collect taxes, execute search and arrest warrants and maintain order at the polls. *See generally* Doyle, *The Posse Comitatus Act and Related Matters* at 54 (citing 5 Cong. Rec. 2113 (1877); 6 Cong. Rec. 294-307, 322 (1877); 7 Cong. Rec. 3538, 3581-582,

3850, 4245 (1878)). This encroachment into civilian affairs was precisely what the Constitution aimed to eliminate, and Congress passed the PCA expressly to constrain military power to align with Constitutional limitations. The PCA was never intended "to do all the work" in limiting military involvement with civilian affairs, but rather to supplement the existing Constitutional restrictions on military involvement with civilian affairs. Felicetti & Luce, *The Posse Comitatus Act*, 175 Mil. L. Rev. at 91. When the PCA was under consideration by Congress, "several senators expressed the opinion that the Act was no more than expression of constitutional limitations on the use of the military to enforce civil laws." *United States v. Walden*, 490 F.2d 372, 375 (1974) (citing 7 Cong. Rec. 4240 (1878) (remarks of Senator Kernan) and 7 Cong. Rec. 4243 (1878) (remarks of Senator Marrimon)); *see also Dreyer*, 767 F.3d at 829 n. 7.

The PCA is thus merely a statutory reflection of a longstanding Constitutional principle: the military should not be involved in civilian law enforcement except in limited situations specifically authorized by Congress.

B. <u>Suppression Is a Proper Remedy for Statutory Violations Tied to Constitutional Rights.</u>

The purpose of the suppression remedy "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). After all, a "ruling admitting evidence in a criminal trial . . . has the necessary effect of

legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). The suppression remedy has been applied "primarily to deter constitutional violations." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348-49 (2006). But that does not preclude its use as a remedy for statutory violations. *See, e.g., United States v. Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir. 2000) ("We do not limit the exclusionary rule to use as a remedy for constitutional violations alone."). Suppression can be applied for statutory violations "where the statute specifically provides for suppression as a remedy or the statutory violation implicated underlying constitutional rights." *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006).

This Court has repeatedly suppressed evidence obtained in violation of a statute or procedural rule that is tied to Constitutional interests. For example, in *United States v. Soto-Soto*, 598 F.2d 545 (9th Cir. 1979), this Court excluded evidence obtained as a result of an illegal "border search." There, an FBI agent purported to conduct a search of a truck in violation of 19 U.S.C. § 482, which limits the authority to conduct a border search to "officers or persons authorized to board or search vessels." *Soto-Soto*, 598 F.2d at 548 (citing 19 U.S.C. § 482). After finding that the FBI agent was not authorized to conduct a border search under the statute, the Court excluded the evidence, reasoning the FBI agent

"ignored the divisions of authority which Congress carefully legislated," which were intended to "protect the balance between sovereign power and constitutional rights." *Soto-Soto*, 598 F.2d at 550.

Similarly, in *United States v. Negrete-Gonzales*, 966 F.2d 1277 (9th Cir. 1992), this Court explained that evidence obtained in violation of Federal Rule of Criminal Procedure 41—which governs the issuance and execution of search warrants—was subject to suppression. The Court distinguished between "fundamental errors," which result "in clear constitutional violations" and are clearly subject to exclusion, and "technical errors," which are nonetheless subject to the exclusionary rule in some instances. *Negrete-Gonzales*, 966 F.2d at 1283 (citing *United States v. Freitas*, 856 F.2d 1425, 1433 (9th Cir. 1988)).

Because the PCA "implicates underlying constitutional rights," *Abdi*, 463 F.3d at 556, and falls within the parameters of other statutes that have resulted in suppression, exclusion of evidence obtained in violation of the statute is a proper remedy. That is particularly necessary in a case like this, involving egregious violation of the PCA—and ultimately the Constitutional limitations on military investigations into civilians—that result in NCIS surveillance of potentially all civilian computers in a state.

C. **Even if the PCA Does Not Implicate Constitutional Concerns, Suppression Is an Authorized Remedy for PCA Violations Under this Court's Supervisory Powers.**

"Federal courts may use their supervisory power in some circumstances to exclude evidence taken from *the defendant* by 'willful disobedience of law.'" *United States v. Payner*, 447 U.S. 727, 735 n. 7 (1980) (quoting *McNabb v. United States*, 318 U.S. 332, 345 (1943) (emphasis in original)). The Supreme Court explained that this supervisory power allows courts "to establish and maintain 'civilized standards of procedure and evidence' in federal courts," even in the absence of any protected Constitutional interest. *Corley v. United States*, 556 U.S. 303, 307 (2009) (quoting *McNabb*, 318 U.S. at 340). This Court has noted that the supervisory power to exclude evidence is "justified only when a recognized right has been violated," which is generally the case when there is a violation of the "Constitution, a federal statute or procedural rule." *United States v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985).

McNabb is illustrative. There, the Supreme Court was considering a violation of the federal statute that codified the "presentment" rule, which requires officers to bring an arrested individual before the magistrate as soon as reasonably possible. *See McNabb*, 318 U.S. at 342 (citing former version of 18 U.S.C. § 595

(1940)).[8] Federal agents had violated the requirement by interrogating several murder suspects for days until they had confessed before taking them to the magistrate. *McNabb*, 318 U.S. at 334-38. The defendants moved to suppress the confessions and the government countered that the confessions were not rendered unconstitutionally involuntary simply because of the delay in bringing the suspects before the magistrate. *Id.* at 339.

The Supreme Court found it was "unnecessary to reach the Constitutional issue" because it could rely on its power to supervise "the administration of criminal justice in the federal courts" which "implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.* at 340. Under that supervisory power, *McNabb* determined confessions obtained during unreasonable presentment delay should be excluded. *Id.* at 345. That was because it found a "plain disregard of the duty enjoined by Congress upon federal law officers." *Id.* at 344.[9]

This Court has similarly found suppression to be an appropriate remedy for some statutory violations not rising to the level of constitutional error. *United*

[8] The presentment requirement is now codified in Federal Rule of Criminal Procedure 5. *See Corley*, 556 U.S. at 307-08; *see also Upshaw v. United States*, 335 U.S. 410, 411 (1948); *Mallory v. United States*, 354 U.S. 449, 451-52 (1957).

[9] In 2009, the Supreme Court upheld *McNabb*'s exclusionary rule in the face of a Congressional statute that purported to make the rule inapplicable to confessions given within six hours of arrest. *See Corley*, 556 U.S. at 322 (interpreting 18 U.S.C. § 3501(c)).

States v. Doe, 170 F.3d 1162 (9th Cir. 1999) noted that some violations of 18 U.S.C. § 5033—which require officers to inform parents of an arrested juvenile of the minor's *Miranda* rights—can result in suppression even though a § 5033 violation was not necessarily a "due process violation." *Doe*, 170 F.3d 1162, 1168. In *United States v. LaChapelle*, 869 F.2d 488 (9th Cir. 1989), this Court explained that evidence obtained from a foreign search or seizure could be suppressed under a court's supervisory power if the circumstances surrounding the search and seizure "are so extreme that they 'shock the [judicial] conscience.'" *LaChapelle*, 869 F.2d at 490 (brackets in original); *see also United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995).

This Court has also suggested that the federal courts' supervisory power could be used to suppress violations of the PCA and its implementing regulations. Although the Court, in *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986), refused to apply the exclusionary rule to evidence gathered in violation of the PCA, it followed the Fourth and Fifth Circuits, reserving the right to apply the exclusionary rule when "'widespread and repeated violations' of the Posse Comitatus Act demonstrated the need for such a remedy" to deter future violations. 779 F.2d 565, 568 (9th Cir. 1986) (quoting *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979) and citing *Walden*, 490 F.2d at 377). While these decisions do not specifically reference the Court's supervisory powers to exclude evidence, they

implicate federal courts' power to maintain "civilized standards of procedure and evidence" in criminal trials. *McNabb*, 318 U.S. at 340. That is particularly true where here, as in *McNabb*, the Court is confronted with a "plain disregard of the duty enjoined by Congress upon federal" officials. *Id.* at 344.[10]

In short, given the Constitutional protections safeguarded by the PCA and the Court's power to exclude illegally obtained evidence to maintain the administration of criminal justice, exclusion is a proper remedy for extraordinary PCA violations. That is particularly true for PCA violations like the one here, that demonstrate a clear disregard for Constitutional protections and have the potential to taint criminal trials with evidence taken in clear violation of carefully drawn Congressional limitations on military power.

While suppression may be seen as a "last resort," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), it is nevertheless appropriate here given, as discussed below, evidence of widespread and repeated violations of the PCA, and the likelihood

[10] It is seemingly this "supervisory power" that state courts have called upon to exclude evidence obtained in violation of the PCA. *See Dreyer*, 767 F.3d at 837 n.15. In *State v. Pattioay*, 78 Haw. 455, 896 P.2d 911 (1995), the Hawaii Supreme Court found suppression of PCA violations necessary "because to ignore the violation and allow the evidence to be admitted would be to justify the illegality and condone the receipt and use of tainted evidence." *Pattioay*, 78 Haw. at 469, 896 P.2d at 925. Other courts have reached similar results and suppressed evidence obtained in violation of the PCA. *See, e.g., People v. Tyler*, 854 P.2d 1366, 1370 (Colo. App. 1993), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994); *Taylor v. State*, 645 P.2d 522, 524-25 (Okla. Crim. App. 1982).

these violations will continue in the future. Requiring suppression here is the only way to ensure military personnel are deterred from engaging in further civilian law enforcement in violation of the PCA.

II. THE EXTENSIVE MILITARY SURVEILLANCE OF CIVILIANS IN THIS CASE, COMBINED WITH THE THREAT OF FUTURE POSSE COMITATUS ACT VIOLATIONS ENABLED BY EMERGING TECHNOLOGIES, SUPPORTS SUPPRESSION HERE.

This Court has already noted that the exclusionary rule would be appropriate in the face of "widespread and repeated violations" of the PCA and to deter future violations. *Roberts*, 779 F.2d at 568 (internal quotations omitted). Based on the facts of this case, other documented instances of inappropriate military involvement in civilian affairs, and the real possibility that emerging technologies will only increase the risk of PCA violations, suppression is a proper remedy for the PCA violation that occurred in this case. That is particularly true because exclusion of evidence is the only effective remedy for the kind of egregious PCA violations that occurred here.

A. The PCA Violations Here Go Beyond Dreyer's Specific Case.

The facts of this case clearly demonstrate why suppression is necessary in some cases to deter PCA violations. As the panel found, the NCIS agent here, stationed in Georgia, testified his "standard practice" was "'to monitor[] any computer IP address within a specific geographic location,' not just those 'specific to U.S. military only, or U.S. government computers.'" *Dreyer*, 767 F.3d at 836.

Nor did the agent "try to isolate military service members within a geographic area" because he believed, contrary to the PCA, that he was a "'U.S. federal agent'" who could "investigate violations of *either* the Uniform Code of Military Justice or federal law." *Id.* (emphasis in original).

This sort of pervasive and improper Internet surveillance did not just interject military investigators into Dreyer's home; as the NCIS agent testified, it was "his 'standard practice to monitor all computers in a geographic area,' here, every computer in the state of Washington." *Id.* at 834. Even worse, it appears that the NCIS Internet surveillance that took place here was not an isolated incident. The specific agent here testified that he "was monitoring another computer" when he identified Dreyer as a target, that he was involved in at least twenty other Internet based investigations, and that at least two other NCIS agents carried out similar searches months before Dreyer was identified as a suspect. *Id.* at 836.[11]

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[11] Additionally, as noted by the panel, the Sixth Circuit recently confronted a similar factual scenario in *United States v. Holloway*, 531 Fed.Appx. 582 (6th Cir. 2013) (unpublished) when an NCIS undercover agent in Washington state was investigating child pornography in a Yahoo! chat room without imposing any restrictions intended to limit the investigation into only military personnel. *Holloway*, 531 Fed. Appx. at 583; *see also* Brief for Defendant-Appellant James L. Holloway, 2012 WL 681120, at *8; *Dreyer*, 767 F.3d at 836 n. 14. Her investigation led to the defendant, who was ultimately charged in federal court in Louisville, Kentucky. *Holloway*, 531 Fed.Appx. at 583.

Because the surveillance in this case is not an isolated incident but representative of a pattern of NCIS dragnet surveillance of civilian activities online, suppression is an appropriate response.

B. The Documented Widespread and Repeated Posse Comitatus Act Violations of the Past Will Only Continue in the Future Because of Emerging Technologies.

That military investigators would so brazenly conduct wide ranging Internet surveillance almost certain to result in the gathering of evidence for purposes of civilian law enforcement should, sadly, come as no surprise. The military's involvement in civilian affairs is neither new nor exclusive to Internet surveillance, and the historical record unfortunately demonstrates that the type of military surveillance that occurred in this case is not an anomaly.

As explained earlier, the PCA was passed specifically because of concerns over the use of the military to enforce civilian laws during reconstruction. *See generally* Doyle, *The Posse Comitatus Act and Related Matters* at 54. But passage of the PCA has done little to deter military officers from investigating civilians. This is demonstrated by the fact there are numerous criminal cases from throughout the country finding violations of the PCA and suppressing evidence obtained from the violation. *See Pattioay*, 78 Haw. at 469, 896 P.2d at 925; *Tyler*, 854 P.2d at 1370; *Taylor*, 645 P.2d at 524; *see also Roberts*, 779 F.2d at 568 (finding a PCA violation but refusing to suppress); *Taylor v. State*, 640 So.2d

1127, 1136-37 (Fla. Dist. Ct. App. 1994) (same). Other documented violations of the regulations separating between military and civilian law enforcement exist but have not been addressed in the courts.

In the 1970s, Congress held hearings to address concerns about the Army's domestic surveillance programs aimed at political groups. *See generally Laird*, 408 U.S. at 6-7. These surveillance programs consisted of the collection and retention of data about organizations in computer databases and the dissemination of that information from Army intelligence headquarters to Army posts around the country. *Id.* at 6. After taking extensive testimony, the final Congressional report concluded that the Army had become "a runaway intelligence bureaucracy unwatched by its civilian superiors, eagerly grasping for information about political dissenters of all kinds and totally oblivious to the impact its spying could have on the constitutional liberties it was sworn to defend." Staff of the S. Comm. on Constitutional Rights of the S. Comm. on the Judiciary, 93rd Cong., Military Surveillance of Civilian Politics: A Report 10 (Comm. Print 1973). The Army ultimately agreed to "a significant reduction" in the scope of its intelligence gathering and destroyed files. *Laird*, 408 U.S. at 7.

Yet military encroachment into the civilian sphere continued well past the 1970s. In 2009, as a result of a Freedom of Information Act lawsuit, a number of federal agencies began releasing hundreds of pages of records concerning reports

of misconduct made to the Intelligence Oversight Board ("IOB").[12] Those reports detailed numerous violations in the years following the September 11, 2001 terrorist attacks.[13]

For example, in the run up to the winter Olympics held in Salt Lake City in 2002, the U.S. Joint Forces Command, a now disestablished collaboration between numerous branches of the Armed Forces, collected and disseminated information on Planned Parenthood.[14] In 2004, Army Counterintelligence personnel improperly attended a University of Texas Law School conference on Islamic law to conduct intelligence activity on civilians within the United States.[15] Around that same time, NCIS investigators infiltrated a civilian organization in violation of

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[12] The Intelligence Oversight Board is part of the President's Intelligence Advisory Board and is tasked with ensuring the intelligence community complies with the Constitution and federal laws, executive orders and directives. *See generally* Exec. Order No. 12,334, 3 C.F.R. 200 (1981); *see also* "The President's Intelligence Advisory Board and Intelligence Oversight Board," https://www.whitehouse.gov/administration/eop/piab.

[13] *See generally* Jennifer Lynch, "Newly Released Documents Reveal Defense Department Intelligence Violations," Electronic Frontier Foundation, September 22, 2011, *available at* https://www.eff.org/deeplinks/2011/09/newly-released-documents-reveal-defense-department; Nathan Cardozo, "Pentagon Discloses Hundreds of Reports of Possibly Illegal Intelligence Activities," Electronic Frontier Foundation, February 25, 2010, *available at* https://www.eff.org/deeplinks/2010/02/pentagon-discloses-hundreds-reports-possibly.

[14] http://www.eff.org/files/filenode/intel_oversight/20100202_dod_PT1.pdf at PDF p. 98.

[15] https://www.eff.org/files/ut_investigation.pdf.

Department of Defense regulations.[16] In 2007, an Army reserve officer was found to be routinely collecting data on U.S. persons exercising First Amendment rights.[17] In 2008, Army Cyber Counterintelligence officers were found to have attended without prior authorization the Black Hat computer security conference in Las Vegas without disclosing their Army affiliation.[18]

Similar to this case, the released records also revealed widespread Internet and electronic surveillance abuses that could easily impact civilians. In 2008 for example, the Air Force Office of Special Investigations established a "honey pot"—essentially a computer trap intended to lure malicious attackers to a particular computer to identify the attackers—in violation of the Foreign Intelligence Surveillance Act ("FISA") and an order of the Foreign Intelligence Surveillance Court (FISC).[19] In another example, an Army Intelligence officer improperly issued a national security letter ("NSL"), a method of obtaining telephone and transaction toll records from telecommunication providers, which

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[16] https://www.eff.org/files/dod_fbi_collaboration.pdf.

[17] https://www.eff.org/files/filenode/intel_oversight/20100202_dod_pt3.pdf at PDF p. 112.

[18] https://www.eff.org/files/filenode/intel_oversight/20100202_dod_pt4.pdf at PDF p. 66.

[19] https://www.eff.org/files/filenode/intel_oversight/20100202_dod_pt4.pdf at PDF p. 173.

was honored despite the fact the NSL statute only authorizes the FBI to issue them. *See* 18 U.S.C. § 2709(b).[20]

These examples demonstrate that military encroachment into civilian affairs is not hypothetical or isolated; it has been widespread and repeated throughout the 21st century. Most problematic, technological advancement will only exacerbate the risk of military investigation into civilians as it becomes easier for the military to engage in the type of dragnet Internet surveillance at issue here. With online surveillance, military investigators can cast a large net that touches civilians regardless of where they are located, and unless a defendant challenges this activity in court as Mr. Dreyer has done here, these investigators can easily hide their tracks from public view. This case highlights that dramatically: an NCIS officer stationed in Georgia ultimately investigated Dreyer, a Washington resident. *Dreyer*, 767 F.3d at 827.[21] The Internet's ability to connect far-flung people allows the military to engage in large scale, indiscriminate collection of personal information. Without appropriate filtering and clearly defined practices tailored to restrict military investigators to conduct only military related investigations or investigate military personnel for wrongdoing, there is a real risk that civilians will inevitably end up with military intrusion into their lives.

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[20] https://www.eff.org/files/army_nsls.pdf.

[21] Similarly, in *Holloway*, an NCIS investigator in Washington was able to investigate a civilian in Kentucky. 531 Fed.Appx. at 583.

As these violations accumulate and the risk of future violations increases, the only effective remedy in cases like this to deter military personnel from straying outside of their investigative lanes is to impose the penalty of suppression.

C. Suppression Is the Only Effective Remedy for Affected Civilians.

The only effective remedy for a civilian affected by a PCA violation is prohibiting the evidence obtained from that person to be used against them in a criminal proceeding. The PCA contains no civil right of action, so a lawsuit against the military is simply not possible. In his concurring opinion, Judge O'Scannlain raised three considerations explaining why suppression is not a proper remedy for PCA violations:

> (1) the fact that Congress could have provided for exclusion had it thought such a remedy was appropriate; (2) the PCA provides for its own enforcement through criminal sanctions, *see* 18 U.S.C. § 1385; and (3) "the [PCA] express[ ] a policy that is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants"

Dreyer, 767 F.3d at 841 n. 3 (O'Scannlain, concurring) (quoting *Walden*, 490 F.2d at 377). But none of these considerations should lead to this Court rejecting suppression as a remedy for the PCA violation that occurred in this case.

First, as explained earlier, Congress' refusal to provide a suppression remedy in the statute is not dispositive. Exclusion is proper for statutes that implicate Constitutional rights—as the PCA does—and alternatively, this Court can exercise its "supervisory power" to exclude evidence obtained illegally,

particularly in cases involving "widespread and repeated violations" that show the need to deter future violations. *Dreyer*, 767 F.3d at 836; *Roberts*, 779 F.2d at 568.

Second, while the PCA is a criminal statute and the U.S. Attorney could theoretically bring a criminal case against a military officer who violated its terms, the reality is that there has never been a criminal prosecution brought under the statute in the 138 years since it was enacted. *See* Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 Yale L. & Pol'y Rev. 383, 405, n. 143 (2003) (citing H. R. Rep. 97-86 at 5 (1981)); *see also* Doyle, *The Posse Comitatus Act and Related Matters* at 62 n. 367. The statute is not even listed in the statutory index for the United States Sentencing Guidelines—which provide a recommended sentence for courts to follow federal felonies—despite the fact a PCA violation is a felony offense. *See* 18 U.S.C. § 1385 (maximum punishment of two years prison); 18 U.S.C. § 3559(a)(5) (crime with maximum punishment of more than one year but less than five years is a class E felony).[22] The threat of criminal enforcement cannot serve to deter military personnel from violating the PCA if the threat is merely hypothetical.

Finally, there is no meaningful distinction between a right intended to "benefit . . . the people as a whole" and the "personal rights of defendants."

[22] The Statutory Index is Appendix A of the Sentencing Guidelines, *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/Appendix_A.pdf.

Walden, 490 F.2d at 377. One of the most important legal protections for criminal defendants is the Fourth Amendment, which protects the "right of the *people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). On first blush, this Constitutional right would also seem to be a "benefit" to the people while saying nothing of criminal defendants specifically. But the Supreme Court has made clear that the exclusionary rule applies to the benefit of individual criminal defendants when the need arises to protect the public from future Fourth Amendment violations. *United States v. Calandra,* 414 U.S. 338, 348 (1974) (exclusionary rule a "a remedy designed to safeguard Fourth Amendment rights *generally* through its deterrent effect") (emphasis added). Indeed, the Supreme Court has stated that exclusion is "'not a personal constitutional right'" nor "designed to 'redress the injury' occasioned by an unconstitutional search." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976)). Nonetheless, suppression of evidence is appropriate for individual criminal defendants because the Fourth Amendment's protections would be a "valueless" set of words without a remedy to deter future violations. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Similarly, permitting exclusion of evidence obtained in violation of the PCA is the way of deterring military officials from violating the PCA in the future.

Though that may inure to the benefit of an individual criminal defendant, it also benefits the public as a whole, who have been promised by the constitution and the PCA that military personnel will not engage in civilian law enforcement activities. Thus, suppression of evidence is a proper remedy for PCA violations.

CONCLUSION

The PCA is not simply a statute but rather a codification of important Constitutional limitations on military entanglement in civilian affairs. Given the extraordinary military surveillance that occurred here, this Court has the power to suppress the evidence obtained as a result of the PCA violations. The panel's opinion suppressing that evidence should be affirmed.

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Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This En Banc Brief of *Amici Curiae* Electronic Frontier Foundation, American Civil Liberties Union of Washington, and National Association of Criminal Defense Lawyers in Support of Defendant-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,787 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: April 29, 2015 */s/ Hanni Fakhoury*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 29, 2015.

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.

Dated: April 29, 2015 *_/s/ Hanni Fakhoury_*
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