Nos. 13-15957, 13-16731

UNDER SEAL

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In Re: NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellee (No. 13-15957),
Petitioner-Appellant (No. 13-16731),

—v.—

ERIC HOLDER, JR., ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION,

Respondents-Appellants (No. 13-15957),
Respondents-Appellees (No. 13-16731).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NOS. 13-CV-2173 SI, 13-MC-80089 SI
HONORABLE SUSAN ILLSTON, DISTRICT JUDGE

BRIEF OF *AMICI CURIAE* FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION AND FIRST AMENDMENT SCHOLARS IN SUPPORT OF THE PARTIES UNDER SEAL

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CORPORATE DISCLOSURE STATEMENT

None of the *amici* has a parent corporation and no corporation owns 10% or more of any of the *amici*'s stock**.**

STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE* AND CONSENT TO FILE

Amici Curiae are the Floyd Abrams Institute for Freedom of Expression at Yale Law School and First Amendment Scholars Bruce Ackerman, Jack Balkin, Jane Bambauer, Margot Kaminski, Neil Richards, and David Schulz. *Amici* have an interest in preserving robust constitutional protections against prior restraint in the online and new media environment. A description of each *amicus* is provided in the Appendix. This brief is filed with the consent of all parties pursuant to Rule 29(a).

ARGUMENT

The nondisclosure orders that routinely accompany National Security Letters ("NSLs") prohibit individuals who have received NSLs from publicly saying anything at all about them. Under the statute, these gag orders are presumptively permanent. The court below was correct to invalidate the statute under the First Amendment, but its reasoning was incorrect insofar as it held that NSL gag orders are not akin to "classic prior restraint[s]" and therefore not subject to the "extraordinarily rigorous" First Amendment standards applicable to such prohibitions on speech. *In re Nat'l Sec. Letter* ("*In re NSL*"), 930 F. Supp. 2d 1064, 1071 (N.D. Cal. 2013). The Second Circuit's 2008 decision upholding the same statutory provisions, upon which the government relies, also refused to treat the nondisclosure orders as prior restraints and instead sought to rehabilitate the

statute by tempering its most egregious procedural flaws. *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008).

Both courts erred. NSL gag orders bear all the indicia of classic prior restraints: they preemptively forbid core protected speech about the government's activities; prohibit far more speech than constitutionally justified; are imposed by executive fiat; and operate in obscurity, shielding their censorious effects from public scrutiny. Moreover, NSL recipients have a significant interest in speaking about NSLs in order to reassure their customers, to expose government overreaching, or in their capacity as media companies and content providers. *See infra* Section I.

As a "system of prior restraints," the NSL gag order scheme "comes to this Court bearing a heavy presumption against its constitutional validity." *N.Y. Times v. United States* ("*Pentagon Papers*"), 403 U.S. 713, 714 (1971) (per curiam); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976). While prior restraints must be subject to procedural safeguards, *see infra* Section II, procedural protections like those devised by the Second Circuit cannot remedy the scheme's failure to abide by the First Amendment's substantive limits on government authority to impose prior restraints. In particular, the First Amendment forbids prior restraint unless the government makes the most stringent showing that the restraint is necessary to avoid grave and all but certain harm to the nation, and no less restrictive means are

available. The NSL statute fails this test. It empowers the FBI to impose a complete gag—and requires the courts to uphold one—on the strength of the FBI's assertion of the mere possibility that disclosure might cause harm. The First Amendment's fundamental antipathy to prior restraint cannot be so easily overcome. *See infra* Section III.

I. NSL NONDISCLOSURE ORDERS ARE CLASSIC PRIOR RESTRAINTS AND ARE PRESUMPTIVELY UNCONSTITUIONAL.

The nondisclosure provisions of the NSL statute bear all the hallmarks of classic prior restraints. Prior restraints are "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). The key attributes of prior restraints are that (1) they prohibit speech before it takes place, rather than through subsequent punishment; (2) they sweep too broadly, subjecting far more speech to government control than could be lawfully accomplished through subsequent punishment; (3) they vest the government with vast discretion to censor speech at will; (4) they forbid individuals from speaking unless and until permitted by a government official or a judge, such that the government enjoys the benefits of inaction and inertia at the expense of the speaker and her audience; and (5) they operate in secret or opaque ways, rendering the scheme's censorial effects less transparent and accountable to the public than a scheme of subsequent punishment. *See generally* Thomas I.

Emerson, *The System of Freedom of Expression* 506 (1970). The NSL nondisclosure scheme bears all these attributes of classic prior restraints and should be treated as such.

A. NSL Gag Orders Are Classic Prior Restraints Because They Prohibit Speech Before Its Communication.

The NSL gag orders possess the chief characteristic of prior restraints: they impose a "previous restraint upon publication" rather than *post hoc* censure. *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931) (quoting 4 William Blackstone, *Commentaries* *151). The FBI may unilaterally prohibit NSL recipients from disclosing to anybody other than their lawyers that the government has sought or obtained information using an NSL. 18 U.S.C. § 2709(c)(1). Recipients are thereby forbidden from stating that they have received an NSL or saying anything about its contents. They cannot discuss the manner or circumstances in which the FBI approached them or even inform fellow citizens about the general categories of information that the FBI regards as "electronic communication transactional records" subject to compulsory disclosure via NSL. *Id.* § 2709(a). This sweeping prohibition on speech accompanies 97% of the FBI's NSLs. *In re NSL*, 930 F. Supp. 2d at 1074.

NSL recipients typically include communications service providers, both large and small, who have significant interests in speaking about NSLs: to reassure their customers, to act as whistleblowers if they believe NSLs are being misused,

or because they are in the business of producing news. *See infra* Section I.F. Such communications companies—Facebook, Google, Yahoo, and many others—are in many respects the media organizations of the 21st century. But the recipients of the NSLs challenged here—and thousands like them—are "forbidden [from] say[ing] what they wanted to say" in public. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). This is the essence of a prior restraint.

B. NSL Gag Orders Are Classic Prior Restraints Because They Subject Far More Speech to Executive Control Than Is Otherwise Permitted.

Prior restraints are "likely to bring under government scrutiny a far wider range of expression" than subsequent punishments because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn." *Nebraska Press*, 427 U.S. at 589 (quoting Emerson, *supra*, at 506, and *Conrad*, 420 U.S. at 559). "The First Amendment…accords greater protection against prior restraints than it does against subsequent punishment" precisely because the former poses "'risks of free-wheeling censorship [that] are formidable.'" *Id.* at 589 (quoting *Conrad*, 420 U.S. at 559). NSL gag orders share this feature of classic prior restraints because they indiscriminately prohibit much legitimate speech that poses no national security concern.

The NSL statute prohibits the recipient of an NSL gag order from sharing *any* information about that NSL, including the bare fact that the recipient has

received one. 18 U.S.C. § 2709(c)(1). As the lower court observed, the statute "does not distinguish—or allow the FBI to distinguish—between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents." *In re NSL*, 930 F. Supp. 2d at 1076. As a result, recipients are forbidden from saying anything about the NSL, even when there is no reason to prohibit them from discussing certain matters. For instance, while it may be appropriate to prohibit disclosure of an ongoing investigation's *target*, the recipient in such a case would be forbidden from describing the bare fact of receipt or the types of records sought, even if that information would not reveal the target.

Indeed, the government has acknowledged that NSL gag orders are overbroad. Since 2013 it has permitted some companies to disclose the aggregate number of NSLs received per year within bands of a thousand, even though disclosing such information would otherwise be prohibited. *See* Letter from Deputy Att'y Gen. James Cole (Jan. 27, 2014) ("Cole Letter").[1] The FBI has also agreed, albeit after years of litigation, that certain NSL recipients can identify themselves. *See, e.g.*, Stipulation and Order of Dismissal, *John Doe, Inc. v. Holder*, No. 04-cv-2614 (S.D.N.Y. July 30, 2010).

[1] http://www.uscourts.gov/uscourts/courts/fisc/misc-13-03-04-05-06-07-notice-140127.pdf

NSL gag orders are thus, on their face, substantively overbroad, subjecting far more speech to executive prohibition and control than could be justified in a scheme of subsequent punishment. In this respect, the NSL gag scheme is akin to the classic prior restraints that the Supreme Court has invalidated in the past. *See, e.g.*, *Pentagon Papers*, 403 U.S. at 714 (rejecting government application to enjoin the publication of *any* part of the 7,000 page study).

C. NSL Gag Orders Are Classic Prior Restraints Because They Vest the Executive with Significant Discretion To Censor Speech.

The NSL gag order scheme is typical of prior restraints insofar as it grants officials broad discretion to suppress speech prior to judicial review. As this Court has explicitly recognized, "government censorship" is "[a]mong the risks that the prior restraint doctrine seeks to minimize." *Kreisner v. City of San Diego*, 1 F.3d 775, 807 (9th Cir. 1993); *see also Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("[A]n ordinance which…makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official…is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.").

The NSL statute gives FBI officials enormous discretion to impose gag orders. FBI officials may issue a gag order simply by certifying that disclosure "may result" in any of various harms. 18 U.S.C. § 2709(c)(1). The standard is so

capacious that, as mentioned above, gag orders accompany 97% of NSLs. *In re NSL*, 930 F. Supp. 2d at 1074.

When the FBI issues a gag order, it does not specify which of the available grounds forms the basis for the gag, and does not otherwise provide any rationale for the gag. Rather, inspection of NSLs that have been partially disclosed following litigation suggests that, when issuing NSL nondisclosure orders, the FBI either provides no reason at all for the gag, or parrots the relevant statutory provision in its entirety.[2] This practice highlights the lack of meaningful limits on the discretion enjoyed by the FBI.

The FBI's discretion is not meaningfully tempered by judicial review, not only because such review is rare but also because the statute directs the court to "treat as conclusive" an FBI certification that the gag is justified, unless the court finds the certification was made in bad faith. 18 U.S.C. § 3511(b)(2)-(3). Even under the Second Circuit's reinterpretation, the FBI would be required only to provide the court with a "good reason" that an enumerated harm "may result." *Doe*, 549 F.3d at 876. The court "is not to…second-guess[]" an Executive Branch "judgment on matters of national security" so long as the court "receive[s] some

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[2] *See* NSL to Internet Archive (Nov. 19, 2007), https://www.eff.org/node/55601; NSL to Library Connection, Inc. (May 19, 2005), https://www.aclu.org/files/images/nationalsecurityletters/asset_upload_file924_25995.pdf; NSL to Nicholas Merrill (2004), https://www.aclu.org/files/assets/4610_001_redactednsl.pdf.

indication that the judgment has been soundly reached." *Id.* at 882. This extraordinarily deferential judicial review so constrains the role of the judiciary in protecting the First Amendment that it leaves the decision to gag speech in the hands of the executive branch.[3]

This is all the more troubling since the government has actually deployed the NSL gag order scheme in ways that demonstrate precisely the dangers of censorship that the Constitution's prohibition of prior restraints was meant to address. While continuing to attach a complete nondisclosure order to nearly every NSL, the government has begun to craft *ad hoc* and seemingly arbitrary exceptions prescribing what companies may say about the NSLs they have received in the aggregate. Worse, it appears to have granted these special dispensations unequally to different speakers.

In March 2013, Google appears to have been the first company to report aggregate data about the number of NSLs it received, rounded to the nearest 1000. This disclosure was apparently permitted by private agreement with the

[3] For similar reasons, NSL gag orders cannot be justified by analogy to grand jury secrecy rules. *Accord Doe*, 549 F.3d at 876-77; *In re NSL*, 930 F. Supp. 2d at 1072. Grand jury witnesses free to speak by default, Fed. R. Crim. P. 6(e), and courts have invalidated secrecy rules unless they are strictly limited in scope and duration solely to protect the integrity of the proceeding. *See Butterworth v. Smith*, 494 U.S. 624 (1990); *Hoffman-Pugh v. Keenan*, 338 F.3d 1136 (10th Cir. 2003). NSLs, by contrast, are unlimited in scope and duration, are imposed unilaterally by an executive official, and are not issued in the context of any official proceeding.

government. *See* Richard Salgado, *Transparency Report: Shedding More Light on National Security Letters* (Mar. 5, 2013).[4] It appears the government forbade Yahoo from publishing exactly the same kind of aggregate statistics. *See* Lorenzo Franceschi-Bicchierai, *Yahoo Publishes First Transparency Report*, Mashable (Sep. 6, 2013) ("[T]he government would not authorize us to [publish aggregate NSL data] even though the government allowed other providers to do so in the past.").[5] The discrepancy in the treatment of Google and Yahoo raises the troubling prospect that the government has chosen favorites and discriminated based on the identity of the speakers.

It appears that the government has now adopted a uniform position regarding how NSL statistics may be reported, but this carve-out remains arbitrary: companies can choose either to report the number of NSLs in bands of 1000 (*e.g.*, 0-999) or else report "the total number of national security process received, including all NSLs and FISA orders" in bands of 250. *See* Cole Letter. These parameters were established not by any regulation or judicial decision, but, apparently, by letter addressed to the general counsels of five technology companies as part of an agreement to settle lawsuits in the Foreign Intelligence Surveillance Court, where those companies sought permission to report similar

[4] http://googleblog.blogspot.com/2013/03/transparency-report-shedding-more-light.html

[5] http://mashable.com/2013/09/06/yahoo-transparency-report/

statistics about FISA production orders. *Id.* The rules described in the letter could, presumably, be changed at any moment.

These *ad hoc* arrangements precisely illustrate the dangers of a prior restraint regime. The government has enormous discretion to decide what may be said about NSLs and thus effectively to seize the power to shape public discussion. Even while the government permits speech about the approximate aggregate number of NSLs a company has received, it forbids speech that is likely to be much more illuminating, such as information about the raw volume of information produced in response to NSLs, the number of NSL orders a recipient has challenged or refused, or the categories of records the FBI regards as "electronic communications transactional records" subject to an NSL order. Like classic prior restraints, the NSL nondisclosure regime produces "unbridled discretion" that invites "government censorship" and "self-censorship by speakers." *Kreisner*, 1 F.3d at 807.

D. NSL Gag Orders Are Classic Prior Restraints Because They Permanently Forbid Speech by Executive Fiat Unless and Until a Judge Decides Otherwise.

Classic prior restraints are characterized by the permanent or indefinite character of the speech prohibition, which ends only if an official or judge subsequently intervenes. For instance, the injunction struck down in *Near v. Minnesota* permanently barred a newspaper from producing any future "malicious,

scandalous and defamatory" publication. 283 U.S. at 701. *See also, e.g. Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (vacating indefinite injunction forbidding leafleting). The NSL scheme suffers from the same defect.

The NSL statute includes no provision for time limits or sunsets on gag orders. 18 U.S.C. § 2709(c). Instead, the gagged party bears the burden of challenging the order in court. *Id.* § 3511(b). The government has no obligation to initiate review, whether in court or internally. Moreover, the recipient may challenge each gag order only once per year. *Id.* § 3511(b)(2). As a result, an individual without the resources or mettle to sue the federal government will remain gagged permanently, even after any justification for the order passes. Even a person able to mount yearly challenges—and *amici* are aware of nobody who has done so—could remain gagged for many months after the basis for the gag lapsed. *See In re NSL*, 930 F. Supp. 2d at 1076 ("Nothing in the statute requires or even allows the government to rescind the non-disclosure order once the impetus for it has passed.").

Even short speech prohibitions raise significant First Amendment concerns. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) ("A delay of even a day or two may be of crucial importance in some instances."). Restraints that are presumptively permanent, like those routinely imposed upon NSL recipients, raise truly grave concerns.

The fact that NSL gag orders remain in place unless successfully challenged by the recipient drastically shifts the burden of action onto the speaker. This burden raises a concern that "inform[s] all of [the Supreme Court's] prior restraint cases:…the unacceptable chilling of protected speech." *Alexander*, 509 U.S. at 572. As both this court and the Supreme Court have recognized, prior restraint, which places the burden of proving the right to speak on the would-be speaker, can intimidate parties into self-censorship. *Kreisner*, 1 F.3d 807 (quoting *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 757-59 (1988)).

E. NSL Gag Orders Are Classic Prior Restraints Because They Operate in Secrecy, Shrouding Their Operation and Effects From Public Scrutiny and Encouraging Their Overuse.

The NSL nondisclosure scheme suppresses public discussion about not only the government's use of NSLs, but also the operation of the gag order scheme itself. This is a key feature of classic prior restraints: they render government suppression of speech less transparent and thus less accountable. *See* Marc A. Franklin et al., *Cases and Materials on Mass Media Law* 95 (7th ed. 2005) ("[M]uch of the special hostility to traditional prior restraints has concerned the context in which they historically operated: one was prohibited from publishing without the approval of a professional censor who usually operated in secret and with great discretion.").

The FBI's decisions to impose gag orders are made entirely behind closed doors; even court challenges are conducted largely under seal. The gag order

scheme is thus shrouded in secrecy, allowing the issuance of tens of thousands of NSL gag orders to remain invisible to the public. Worse still, the scheme forbids the people who know the most about the operation of the NSL gag regime to speak about it. This veil of secrecy insulates the government's actions from scrutiny by the American people and lowers the political costs of these restrictions, heightening the danger that protected speech will be unnecessarily and improperly suppressed.

F. Attempts To Distinguish the NSL Gag Order Scheme from Other Classic Prior Restraints Fail.

Both the court below and the Second Circuit in *Doe v. Mukasey* summarily rejected the argument that the NSL gag order scheme amounts to a classic prior restraint. Neither court's rationale withstands scrutiny.

The Second Circuit contended that NSL gag orders do not constitute "classic" prior restraints because (1) they are not "imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies"; and (2) "although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of receipt of an NSL and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions." *Doe*, 549 F.3d at 876. Both conclusions are incorrect.

It is incorrect that NSL recipients do not "customarily wish to exercise rights of free expression." In any case, the First Amendment is hostile to distinctions based on the type of person or organization speaking. NSL recipients have repeatedly sought to speak in order to inform their customers and to alert the public about the FBI's activities. Indeed, these concerns motivated three NSL recipients who have successfully challenged their gag orders: Library Connection, a library consortium concerned with patrons' privacy; the Internet Archive, a non-profit digital library; and Nicholas Merrill, a privacy activist and president of an Internet company with a mission to protect its clients' privacy.[6] Even the nation's largest online service providers—Google, Yahoo, Facebook and others—continue to chafe against the prohibition on providing their customers even basic information regarding the NSLs they receive. *See, e.g.*, Richard Salgado, *Shedding Some Light on Foreign Intelligence Surveillance Act (FISA) Requests*, Google Official Blog (Feb. 3, 2014) ("[W]e still believe more transparency is needed so everyone can better understand how surveillance laws work and decide whether or not they serve

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[6] *See* ACLU, *Librarians' NSL Challenge* (May 26, 2006), https://www.aclu.org/national-security/librarians-nsl-challenge; ACLU, *Internet Archive's NSL Challenge* (Apr. 29, 2008), https://www.aclu.org/national-security/internet-archives-nsl-challenge; Nicholas Merrill, *How the Patriot Act Stripped Me of my Free-Speech Rights*, Op-Ed, Wash. Post, Oct. 25, 2011.

the public interest.").[7] Many of these online services now also provide news and other content, reflecting changes in the 21st century media landscape. The notion that NSL recipients have no desire to speak is unfounded.

It is also irrelevant. Even if only one recipient desired to reveal the fact that she had received a request, her First Amendment right of free expression could not be diminished because others were content to live in a less free and open society.

The First Amendment simply does not permit the extent of speech protection to turn on the speaker's identity or viewpoint. The First Amendment guards the speech rights of media organizations, non-media organizations, and individuals alike. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."). The First Amendment does not allow the speech rights of NSL recipients to be regarded as categorically inferior to those of individuals, like pamphleteers or journalists, who have previously been targets for speech restrictions.

The Second Circuit's impression that NSL recipients are not people who "customarily wish to exercise rights to freedom of expression," may have arisen because it has not previously been customary for the government to impose routine,

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[7] http://googleblog.blogspot.com/2014/02/shedding-some-light-on-foreign.html

indiscriminate, and permanent gag orders on those from whom it demands information. The government may not evade First Amendment prohibitions on prior restraint simply by targeting a class of citizens that it has not previously thought to censor.

The Second Circuit cites *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), to suggest that NSL gag orders are "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Doe*, 549 F.3d at 876. But *Seattle Times* only holds that information exchanged in discovery between parties to civil litigation can sometimes be protected from further dissemination. NSL recipients do not ask for the information they receive when served with an NSL, nor is the NSL issued within any court-supervised process. Moreover, NSL gag orders forbid speech about government activity, which is central to the First Amendment, *see infra* Section III.C, unlike discovery protective orders, which often cover information primarily of private concern. What is at stake in this case is whether the government may compel citizens who are not otherwise subject to any proceeding to disclose information and simultaneously bind them to complete secrecy.

The Second Circuit also erred when it attempted to distinguish the NSL prior restraint scheme on the grounds that it targets a "far more limited" category of information "than the broad categories of information that have been at issue with

respect to typical content-based restrictions." *Doe*, 549 F.3d at 876. As explained, NSL gag orders forbid recipients from any discussion regarding the gag orders they receive. They cannot explain to their fellow citizens how NSLs are being used or what kinds of records the FBI demands pursuant to an NSL—which would reveal the kinds of information the FBI believes are subject to warrantless search using an NSL. The gag order scheme has, in effect, created a population of Americans with knowledge of the FBI's use of NSL and gag-orders, but who are collectively forbidden from sharing what they know with the public.

This is not a narrow restraint. And the importance of this kind of speech could hardly be clearer than at this moment, when vigorous public debate about domestic surveillance is underway. *See* Remarks of the President on Review of Signals Intelligence (Jan. 17, 2014) ("For ultimately, what's at stake in this debate goes far beyond a few months of headlines, or passing tensions in our foreign policy. When you cut through the noise, what's really at stake is how we remain true to who we are in a world that is remaking itself at dizzying speed.") (discussing NSLs, among other surveillance authorities); President's Review Group on Intelligence and Communications Technology, *Liberty and Security in a Changing World* 89-94 (Dec. 12, 2013) (discussing NSLs).

The court below adopted the Second Circuit's flawed analysis in holding that the NSL gag scheme was not a "classic prior restraint." *In re NSL*, 930 F.

Supp. 2d at 1071. The reasons it articulated for that conclusion, however, belie a misunderstanding of the crucial features of prior restraint. Immediately after holding that NSL gags "may not be a 'classic prior restraint,'" the district court observed that "the nondisclosure provision clearly restrains speech of a particular content—significantly, speech about government conduct"; that "the FBI has…the unilateral power to determine, on a case-by-case basis, whether to allow NSL recipients to speak about the NSLs"; and that "recipients are prevented from speaking about their receipt of NSLs and from disclosing, as part of the public debate on the appropriate use of NSLs or other intelligence devices, their own experiences." *Id.* Far from revealing that NSL gags are not "typical," these observations demonstrate that NSL gags are paradigmatic instances of prior restraint: broad, content-based restrictions on speech, *supra* Sections I.A-B, that are imposed at will by the executive, *supra* Sections I.C-D, and that operate shrouded in secrecy, *supra* Section I.E. The district court erred simply in failing to follow its observations to their appropriate conclusion: that the NSL nondisclosure scheme constitutes a classic system of prior restraint.

II. THE NSL GAG ORDER SCHEME LACKS THE PROCEDURAL SAFEGUARDS REQUIRED OF PRIOR RESTRAINTS.

As prior restraints, NSL gag orders must include stringent procedural safeguards. But even if the statute included adequate procedural protections—which it does not, *see In re NSL*, 930 F. Supp. 2d at 1073-75—it would remain

unconstitutional for failing to meet the substantive standards applicable to prior restraints. *See* Part III, *infra*.

The First Amendment imposes both procedural safeguards and substantive limits on prior restraint. *See, e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965). Required procedures include, notably, that if the government wishes to censor speech, it must quickly initiate judicial review and bear the burden of proof. *Id.* at 58-59; *accord Pentagon Papers*, 403 U.S. 713 (seeking judicial injunction); *Nebraska Press*, 427 U.S. 539 (same). The NSL statute does not include any such protections. *See In Re NSL*, 930 F. Supp. 2d at 1073-75. Even the prophylactic procedures suggested by the Second Circuit—now, apparently, adopted nationwide by the government—do not require the government to initiate review as a matter of course as required by *Freedman*, but instead to do so only if the recipient objects to the gag order within a short period. *Doe*, 549 F.3d at 879.

These procedural defects are sufficient to invalidate the NSL scheme. But procedural safeguards are merely a necessary—rather than sufficient—condition for the constitutionality of a scheme of prior restraint. Where, as here, a prior restraint targets protected speech, it must also comport with the stringent substantive guarantees of the First Amendment. *See, e.g.*, *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1358 n.9 (9th Cir. 1984) ("Because we strike down the…ordinance on substantive grounds, we need not resolve the

procedural issue here."). Thus, even if this Court were to hold that the procedures devised by the Second Circuit are consistent with both the statute and the First Amendment, the resulting scheme would remain unconstitutional for exceeding the First Amendment's substantive limits on the FBI's authority to impose prior restraints.

III. THE NSL GAG ORDER SCHEME FAILS THE STRINGENT SUBSTANTIVE TEST APPLICABLE TO PRIOR RESTRAINTS.

The Supreme Court has long held that a prior restraint "comes to [a court] bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and "carries a heavy burden of showing justification," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). This burden does not fall away in the face of national security considerations. Quite the contrary: the Supreme Court addressed a prior restraint sought on national security grounds in *Pentagon Papers*, and it applied the most stringent constitutional test even in that context. 403 U.S. at 714; *see also Nebraska Press*, 427 U.S. at 561.

A. Prior Restraints Are Unconstitutional Unless Disclosure Would Certainly Result in Grave Harm, There Are No Less Burdensome Means To Prevent Such Harm, and the Restraint Would Be Effective in Preventing the Threatened Harm.

The Supreme Court has repeatedly held that prior restraints may be sustained only in extraordinary circumstances: "Even where questions of allegedly urgent national security or competing constitutional interests are concerned…we have

imposed this 'most extraordinary remed[y]' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (alteration in original) (citations omitted) (quoting *Nebraska Press*, 427 U.S. at 562).

In *Pentagon Papers*, the government sought to enjoin publication of a classified study of U.S. involvement in the ongoing Vietnam War. The government argued that disclosure would impair the conduct of the war and endanger American lives. The Court squarely rejected the government's position, holding, *per curiam*, that, as a prior restraint, the injunction "bear[s] a heavy presumption against its constitutional validity," and despite the ongoing war effort, the government failed to carry the "heavy burden of showing justification for the imposition of such a restraint." 403 U.S. at 714.

While "every member of the [*Pentagon Papers*] Court, tacitly or explicitly, accepted the…condemnation of prior restraint as presumptively unconstitutional," the Court's reasoning was fractured. *Nebraska Press*, 427 U.S. at 558. Justices Black and Douglas would have erected an absolute bar against prior restraints. *Pentagon Papers*, 403 U.S. at 715 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring). Justice Brennan took a slightly less absolute view: that "the First Amendment's ban" on prior restraint could be "overridden" only "when the Nation is at war" and only upon "governmental allegation and proof that publication must

inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." *Id.* at 726-27 (Brennan, J., concurring) (internal quotation omitted).

Justice Stewart, joined by Justice White, articulated the "narrowest grounds" for concurring in the judgment and his rationale should therefore be regarded as the Court's holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Specifically, he rejected the prior restraint on the ground that he "[could not] say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730 (Stewart, J., concurring). Unlike the others, Justice Stewart's opinion neither rules out the possibility of future prior restraint, nor explicitly limits prior restraint to wartime. Therefore, under *Marks*, its test authoritatively explains the "heavy burden of showing justification" that the government must meet to justify prior restraint. *Id.* at 714 (per curiam).

Outside the national security context, the Court has articulated similarly strict standards for overriding the presumption against prior restraint. Thus, in *Nebraska Press*, the Court considered whether a prior restraint could be justified on the grounds that publicity regarding a criminal trial jeopardized the defendants' right to a fair and impartial jury. 427 U.S. at 545. The Court recognized "[t]he thread running through all [previous] cases is that prior restraints on speech and

publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. Accordingly, in order to determine whether the prior restraint was constitutional, it examined (a) "the nature and extent of" the speech in question, (b) "whether other measures would be likely to mitigate the effects" of disclosure, and (c) "how effectively a restraining order would operate to prevent the threatened danger." *Id*. at 562. The Court found the prior restraint unconstitutional because of a failure to examine alternatives that might have addressed the asserted harm, and a failure to demonstrate that the prior restraint would have effectively addressed the threatened harm. *Id.* at 564-67.

The NSL prior restraint system at issue here is subject to both the *Pentagon Papers* standard for assessing alleged national security harms from speech (permitting prior restraint only where direct, immediate, and irreparable damage would surely result from disclosure) and the *Nebraska Press* scrutiny of prior restraints in general (requiring that the harm be grave, that there be no alternative or less restrictive means to address the harm, and that the chosen means to address the harm be effective).[8]

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[8] The court below erred in suggesting that "narrow . . . tailor[ing] to serve a compelling government interest" is the correct substantive standard to apply, *In re NSL*, 930 F. Supp. 2d at 1075-77, rather than the more precise and stringent requirements of *Pentagon Papers* and *Nebraska Press*. The court below also appears to suggest that the Second Circuit's approach may satisfy the substantive

B. The NSL Gag Order Scheme, On Its Face, Cannot Satisfy the Scrutiny Applicable to Prior Restraints.

The NSL gag scheme, on its face, does not meet the tests laid out in *Pentagon Papers* and *Nebraska Press*: NSL gag orders may be issued without establishing that they are necessary to prevent harm, and they are issued as a matter of routine without consideration of less restrictive alternatives.

1. NSL gags can be issued upon the mere possibility of harm, in violation of *Pentagon Papers* and *Nebraska Press*.

In order to impose and subsequently defend a gag, the NSL statute requires an FBI official only to certify that any of the specified harms "may result." 18 U.S.C. § 2709(c)(1); *id.* § 3511(b)(2)-(3) (courts must "treat[] as conclusive" certification to this effect by an appropriate official). The statute does not require the FBI to explain why the alleged harm "may" exist, nor even to identify which of the various specified harms a particular NSL threatens. Instead, on the strength of the bare assertion of the possibility of unspecified harm, the FBI may impose a complete ban on all speech regarding an NSL.

A determination that harm "may result" fails by definition to meet the *Pentagon Papers* standard, which requires that disclosure will "surely result" in "direct, immediate, and irreparable damage." 403 U.S. at 730. "May" simply does

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requirements of the First Amendment. *Id.* at 1078. But that approach falls far short of what the First Amendment requires. *See infra* Section III.B & note 9.

not capture the certainty *Pentagon Papers* requires. *See also Nebraska Press*, 427 U.S. at 569-70 (striking down prior restraint because assertion of likely harm did not "possess the requisite degree of certainty to justify restraint").

It also fails the *Nebraska Press* requirement that there be no alternative measures and that the restraint "effectively…operate to prevent the threatened danger." *Id.* at 562. A determination that harm "may result" provides no assurance that the speech prohibition is the least burdensome means to prevent the harm, nor that the prohibition would effectively prevent the harm.[9]

Moreover, the NSLs statute's broadly-worded grounds for issuing gag orders invite their use in circumstances where specific justification is lacking. The FBI can issue a gag order where disclosure may result in (1) "danger to the national security of the United States"; (2) "interference with a criminal, counterterrorism, or counterintelligence investigation"; (3) "interference with diplomatic relations"; or (4) "danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1). But merely requiring the possibility of "interference" does not capture the "direct,

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[9] The Second Circuit reinterpreted the NSL statute to require the FBI, when challenged to defend an NSL in court, to provide a "good reason." *Doe*, 549 F.3d at 875. Under this standard, "upholding of nondisclosure does not require the certainty, or even the imminence of, an enumerated harm," only that "some reasonable likelihood [of harm] must be shown." *Id.* at 875. This standard plainly does not meet the *Pentagon Papers* requirement that "direct, immediate, and irreparable harm" will "surely result," or the *Nebraska Press* requirement that any restraint must be effective to prevent certain harm.

immediate, and irreparable harm" required to justify a prior restraint under *Pentagon Papers*. The notion of "interference" is simply too elastic to justify prior restraints. Similarly, requiring only a possibility of an unspecified degree of "danger" to national security is unlikely to suffice.

For these reasons alone, the NSL gag scheme cannot be justified under the standards applicable to prior restraints, and must be invalidated.

2. NSL gags forbid recipients from saying anything about the NSL, whether or not specific disclosures pose a risk in a particular case.

The gag scheme makes no effort to tailor orders to individual, case-by-case circumstances as required by *Pentagon Papers* and *Nebraska Press*. Instead, the gag *categorically* forbids any disclosure about the NSL, and thereby fails to limit its application to information necessary to preserve national security. *See, e.g.*, *Nebraska Press*, 427 U.S. at 565 (striking down prior restraint due to insufficient consideration of alternative, less restrictive measures to protect the specified interests); *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993) (striking down gag on defense attorneys because prior restraints must be "no broader than necessary" to ensure a fair trial).

This categorical ban fails both logic and necessity. It simply cannot be that disclosing the existence of an NSL would alert the target of an investigation in all or even the majority of cases. Many NSL recipients are large online service providers, each of whom has millions of subscribers. Permitting disclosure of

NSLs without the name or identifying details of the target would appear to mitigate, in most circumstances, any harm to the government's interests in investigation, national security, diplomatic relations, or public safety.

At minimum, the one-size-fits-all nature of the NSL prior restraint scheme means it fails the requirement of *Pentagon Papers* and *Nebraska Press* that there must be no alternative or less restrictive means to mitigate the specified harm. The FBI may not prohibit disclosures where those restrictions are unnecessary to protect national security interests.

C. In Operation and Effect, the NSL Gag Order Scheme Censors Public Discussion of the FBI's Use of NSLs.

The NSL gag scheme turns prior restraint doctrine on its head. Instead of conforming to the extremely narrow circumstances in which constitutionally protected speech might be prohibited in advance, the NSL statute treats the issuance of indefinite prior restraints as a default rule that applies nearly every time the FBI issues an NSL. In some circumstances, it may be possible to justify certain prohibitions—for instance a time-limited restriction on identifying the target of an investigation. But the scheme prohibits far more speech than could conceivably be justified to protect national security, foreign relations, public safety, or the integrity of FBI investigations. Instead, in operation and effect, the gag order regime permits the FBI to compel citizens to produce information—to the tune of tens of

thousands of secret orders per year—while forbidding the public from speaking or learning about the government's activities.

Beyond its violation of the limits on prior restraint, this scheme strikes at the core of the First Amendment, a central "purpose of [which] was to protect the free discussion of governmental affairs" including "the manner in which government is operated or should be operated." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Such speech occupies "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

Currently, the public is deprived of information from NSL recipients, who best understand how this powerful tool is wielded by the government. For instance, recipients may not discuss the categories of information subject to collection—a valuable insight where the relevant statute does not provide, and the government has not offered, even a generic definition of the "electronic communication transactional records" subject to NSL requests. Recipients also cannot blow the whistle if the FBI appears to be abusing the statute, as it has done in the past. *See, e.g.*, Dep't of Justice, Office of Inspector General, *A Review of the FBI's Use of National Security Letters* (Mar. 2007). Instead, the government has dictated, by fiat, that recipients may only provide rough, aggregate statistics that do little to illuminate how the government is using NSLs.

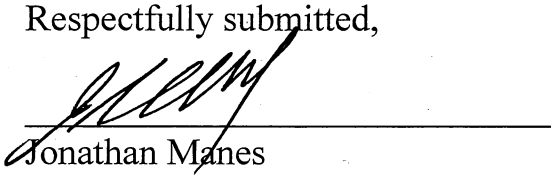
This is plainly inadequate. As Justice Stewart explained, the "only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." *Pentagon Papers*, 403 U.S. at 728 (Stewart, J., concurring).

The First Amendment simply does not permit the government to conscript thousands of citizens into its investigative efforts, and at the same time force them to submit *en masse* to a permanent oath of secrecy. The scheme operates—through the accretion of thousands upon thousands of individual gag orders—to censor public discussion and controversy over the government's domestic surveillance. It cannot be reconciled with the Constitution.

CONCLUSION

Because the NSL gag order scheme is an unconstitutional system of prior restraint, this Court should affirm the lower court's judgment and invalidate the NSL statute under the First Amendment.

Respectfully submitted,



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Dated: March 28, 2014

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[10] This brief has been prepared and joined by an organization and individuals affiliated with Yale Law School, but it does not purport to present the school's institutional views, if any. Counsel wish to thank Vera Eidelman, Samuel Kleiner, and Rebecca Wexler for their outstanding assistance in preparing this brief.

APPENDIX (List of Amici Curiae)[11]

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, and access to information as informed by the values of democracy and human freedom. The Institute's mission is both practical and scholarly, supporting litigation and law reform efforts as well as academic scholarship, conferences, and other events on First Amendment and related issues.

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This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure because it is 6,975 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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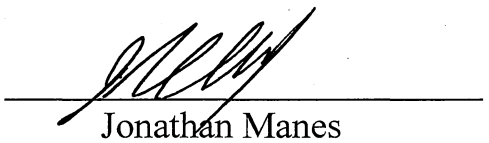

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Dated: March 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing brief to be mailed to the Court on March 28, 2014, and that the Court will effect service on the parties, in accordance with the Instructions for Prospective Amici issued by the Court in this case.

Jonathan Manes

Dated: March 28, 2014