Nos. 16-16067, 16-16081, 16-16082, 16-16090
UNDER SEAL

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In re: NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellant
(Nos. 16-16067, 16-16081, 16-16082),

—v.—

JEFFERSON B. SESSIONS, Attorney General,

Respondent-Appellee
(Nos. 16-16067, 16-16081, 16-16082).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NOS. 13-CV-2173 SI, 13-MC-80089 SI, 13-CV-1165-SI
HONORABLE SUSAN ILLSTON, DISTRICT JUDGE

BRIEF OF *AMICI CURIAE* ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION AND FIRST AMENDMENT SCHOLARS, IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC*

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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.

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INTEREST OF THE *AMICI CURIAE* AND CONSENT TO FILE

Amici Curiae are the Abrams Institute for Freedom of Expression at Yale Law School and 20 First Amendment Scholars. *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 29-2(a).

PRELIMINARY STATEMENT

Nearly every National Security Letter ("NSL") issued by the Federal Bureau of Investigation is accompanied by a nondisclosure order. These gag orders are imposed tens of thousands of times annually. Under the FBI's Termination Procedures for NSL Nondisclosure Requirement ("Termination Procedures"), the FBI reviews these gag orders on only two occasions: after three years, and once an investigation ends.

The panel below erred in concluding that the NSL gag scheme more closely resembles a "governmental confidentiality requirement" than a "government censorship and licensing scheme[]." *In re Nat'l Sec. Letter* ("*In re NSL*"), 863 F.3d 1110, 1128–29 (9th Cir. 2017). This conclusion relies upon faulty analogies to inapposite caselaw.

NSL gag orders exhibit all of the chief traits of prior restraints: They preemptively forbid speech about the activities of government; prohibit far more speech than constitutionally justified; are imposed by executive fiat; and operate in obscurity, shielding their censorial effects from public scrutiny. The panel erred in concluding that rigorous standards applicable to prior restraints do not apply to the prohibitions on speech here. *See In re NSL*, 863 F.3d at 1128.

NSL gag orders constitute the same type of prior restraint on speech that is universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976). As such, 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). The First Amendment forbids prior restraint unless the government makes the most stringent showing that a narrow restraint is essential to avoid grave and all but certain harm to the nation.

ARGUMENT

I.
NSL GAG ORDERS ARE PRESUMPTIVELY UNCONSTITUTIONAL 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). Despite the

panel's conclusion that this binding authority is "not entirely persuasive," *In re NSL*, 863 F.3d at 1127, the nondisclosure regime exhibits each trait of a prior restraint.

A. NSL Gag Orders Exhibit the Chief Traits of Classic Prior Restraints

Prior restraints (1) prohibit speech before it takes place, rather than through subsequent punishment; (2) sweep far more broadly than could be lawfully accomplished through subsequent punishment; (3) vest the government with unfettered discretion to censor; and (4) 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).

In 2015, Congress significantly amended the NSL statutes through the USA Freedom Act ("USAFA"). Among other things, the USAFA amendments required the FBI to adopt procedures for review and termination of NSL gag orders. USA FREEDOM Act of 2015, Pub. L. No. 114-23 § 502(f)(1), 129 Stat 268, 288. The FBI adopted the Termination Procedures in November 2015, and they became effective in February 2016. *See* Dep't of Justice, TERMINATION PROCEDURES FOR NATIONAL SECURITY LETTER NONDISCLOSURE REQUIREMENT (Nov. 24, 2015).[1]

[1] https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf.

Despite these changes, the NSL gag provisions continue to exhibit the key traits of a classic prior restraint.

1. NSL gag orders prohibit speech before its communication.

NSL gag orders still exhibit the distinctive characteristic of prior restraints: they constitute a "previous restraint upon publication" rather than *post hoc* penalty. *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931) (quoting 4 William Blackstone, *Commentaries* *151). An NSL prohibits recipients from disclosing to anybody other than their lawyers that the government has sought or obtained information from them. 18 U.S.C. § 2709. Recipients may not disclose that they received an NSL, identify anything about its contents, or opine about the FBI's conduct or motives in issuing it. *Id.* § 2709(a). These sweeping prohibitions accompany 97% of NSLs. *In re NSL*, 930 F. Supp. 2d 1064, 1074 (N.D. Cal. 2013).

NSL recipients typically include communications service providers who have significant interests in speaking about NSLs, wanting to reassure their customers about the security of their data, and even to act as whistleblowers when NSLs are being misused. *See* Section I.B, *infra*. These communications companies—Facebook, Google, Yahoo, and many others—are the major media organizations of the 21st century, but the NSLs they receive forbid them to "say what they wanted to say" in public. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

2. NSL gag orders are overly broad and content-based.

The panel rightly concluded that "the nondisclosure requirement is a content-based restriction," *In re NSL*, 863 F.3d at 1123, but failed to address the broad sweep of NSL gag orders: Recipients cannot explain to their customers and fellow citizens how NSLs are being used or what kinds of records the FBI is sweeping up with its NSL authority—and cannot describe the kinds of information the FBI considers subject to warrantless search using an NSL. NSL gag orders also suppress discussion about the policy and legal rationales supporting or undermining the gag order scheme itself. The FBI decides to impose gag orders entirely behind closed doors; even court challenges are conducted largely under seal.

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." *Neb. Press Ass'n v. Stuart*, 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 formidable "'risks of free-wheeling censorship.'" *Id.* at 589 (quoting *Conrad*, 420 U.S. at 559).

The panel did not consider the NSL gag provision's overbroad sweep, and resisted applying a "granular focus." 863 F.3d at 1125. But granularity is essential to the constitutional analysis. Because the NSL gag scheme suppresses protected political speech as well as the communication of "sensitive" information, 863 F.3d at 1123, it is necessarily not "narrowly tailored to advance the State's compelling interest through the least restrictive means." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015).

3. NSL gag orders vest significant discretion to suppress speech in the executive branch.

Likewise, the panel erred in declining to consider the FBI's unbridled "discretion to determine who may receive disclosures." 863 F.3d at 1129. The NSL gag order scheme grants officials broad discretion to suppress speech prior to any judicial review, heightening the risk of "government censorship." *Kreisner v. City of San Diego*, 1 F.3d 775, 807 (9th Cir. 1993).

Section 2709(c) permits FBI officials to issue a gag order simply by certifying that disclosure "may result" in certain harms. 18 U.S.C. § 2709(c)(1). The panel asserted that the "may result" language was sufficiently demanding because it incorporates a requirement "that there is 'some reasonable likelihood' that harm will result from the disclosure." *In re NSL*, 863 F.3d at 1125. But the plain text of the statute does not support this reading: Congress expressly declined to adopt that language in the most recent amendments. 18 U.S.C. § 3511(b)(3)

(requiring the government to demonstrate "*reason to believe*" that an enumerated harm "*may result*") (emphasis added).[2] Neither do the FBI's own NSLs reflect these limitations. NSLs that have been disclosed in whole or in part show that the FBI routinely parrots the relevant statutory provision.[3] Moreover, for the reasons set forth below, both of these standards fail to meet the stringent requirements set forth in *Pentagon Papers.* *See infra* II.B.1.

That NSL gag orders seldom undergo judicial review underscores the FBI's extraordinary discretion. That the FBI issues tens of thousands of gag orders on an annual basis, most of which are never justified to any court, illustrates its discretion. The panel erred in concluding that "[t]he fact that some, or even most, NSL recipients do not seek judicial review of a nondisclosure requirement is not relevant" to the constitutional inquiry. 863 F.3d at 1125–26. That NSL recipients engage in "self-censorship" that "derives from the individual's own actions, not an

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[2] This standard is even lower than that articulated in other administrative subpoena statutes, some of which permit the government to seek a judicial order delaying notice if it demonstrates "reason to believe that such notice *will result*" in one of the enumerated harms. 12 U.S.C. § 3409.

[3] *See* NSL to Twitter (June 10, 2016), https://g.twimg.com/blog/blog/attachments/Redacted-NSL-16-422732-Twitter.pdf; NSL to Twitter (Sept. 21, 2015), https://g.twimg.com/blog/blog/attachments/Redacted-NSL-15-418313-Twitter.pdf; NSL to Internet Archive (Nov. 19, 2007), https://www.eff.org/node/55601; NSL to Yahoo! (Mar. 29, 2013), https://s.yimg.com/ge/tyc/Redacted_NSLs.pdf.

abuse of government power" does not mitigate the censorial effects of the statute. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

4. NSL gag orders still appear to be permanent or indefinite.

Even short speech prohibitions raise significant First Amendment concerns. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) ("delay of even a day or two may be of crucial importance"). Permanent or indefinite prohibitions on speech, which end only if an official or judge intervenes, are classic aspects of prior restraints, and the NSL statute includes no durational limits or sunset provisions. 18 U.S.C. § 2709(c). Instead, the gagged party bears the burden of either challenging the order in court or informing the government that it wishes to do so. *Id.* § 3511(b).

Nor do the Termination Procedures meaningfully restrain the duration of NSL gag orders. Those procedures, which create no enforceable rights and require the FBI to review whether to terminate an NSL gag order only twice: "upon the closing of any investigation" in which the NSL was issued, or "on the three-year anniversary of the initiation of the full investigation" in which the NSL was issued. Term. Proc. at 2, 4.[4] Under the Termination Procedures, the government's

[4] *See also In re National Security Letters*, No. 16-518, at *4 (D.D.C. July 25, 2016) (recognizing that the Termination Procedures "leave several large loopholes").

obligation to review the necessity of an NSL gag order is subject to the same discretionary standard which it applies to impose the gag order. *Id.* at 4. Nor does the three-year timeline for termination of an NSL gag order transform the gag into a lawful speech regulation. Restraints that are presumptively years long, like those routinely anticipated in the Termination Procedures, raise grave concerns, when "each passing day may constitute a separate and cognizable infringement of the First Amendment." *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975)

Against this background, the burden on an NSL recipient to engage in lengthy litigation in order to vindicate its own rights is hardly "de minimis." *In re NSL*, 863 F.3d at 1130. The presumption that a gag order will endure for years on end 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. The Supreme Court has recognized that the lengthy duration of legal proceedings itself imposes a burden on those who would wish to speak, but cannot while they wait for legal resolution—another serious defect of NSLs the panel wrongly discounted. *City of Lakewood*, 486 U.S. at 771–72.

B. NSL Gag Orders are Indistinguishable from Other Classic Prior Restraints

NSL gags have all the hallmarks of a prior restraint, although the panel below avoided using the term. *See In re NSL*, 863 F.3d at 1127 (considering

whether NSL gag orders are the type of "content-based restriction on speech which must have the procedural safeguards identified by the Supreme Court in *Freedman v. Maryland*"). Gag provisions need not be a "censorship or licensing scheme" to warrant the exacting scrutiny required for prior restraints. *In re NSL*, 863 F.3d at 1129.

1. NSL recipients frequently seek to engage in protected speech.

The panel's suggestion that NSL recipients do not "intend to speak" about the FBI's activities is baseless. 863 F.3d at 1128, *quoting John Doe, Inc. v. Mukasey*, 549 F.3d 861, 880 (2d Cir. 2008). The largest online service providers—Google, Yahoo, Facebook and others—continue to chafe against the prohibition on providing their customers even basic information about the NSLs they receive.[5] These concerns also motivated four 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; Nicholas

[5] *See, e.g.*, Richard Salgado, *Sharing National Security Letters with the public*, Google Public Policy (Dec. 13, 2016, updated Aug. 10, 2017), https://www.blog.google/topics/public-policy/sharing-national-security-letters-public/ ("[W]e have fought for the right to be transparent about our receipt of NSLs."); Elizabeth Banker, *#Transparency update: Twitter discloses national security letters*, Twitter Official Blog (Jan. 27, 2017) https://blog.twitter.com/en_us/topics/company/2017/transparency-update-twitter-discloses-national-security-letters.html ("Twitter remains unsatisfied with restrictions on our right to speak more freely about national security requests we may receive.").

Merrill, a privacy activist and president of an Internet company with a mission to protect its clients' privacy; and Microsoft.[6] The notion that NSL recipients do not customarily want to speak is unfounded.[7] "[W]e presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 791 (1988).

That NSL recipients are not required to "obtain a license before engaging in business," as the panel suggested, 863 F.3d at 1128, is irrelevant. The Supreme Court has repeatedly held that it is particularly important for the government to bear the burden of litigating prior restraints where the restrained party is "likely to be deterred from challenging the decision to suppress the speech" because it lacks incentives to litigate. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229

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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; Brad Smith, *New success in protecting customer rights unsealed today*, Microsoft | Technet (May 22, 2014), https://blogs.technet.microsoft.com/microsoft_on_the_issues/2014/05/22/new-success-in-protecting-customer-rights-unsealed-today/.

[7] *See also Twitter, Inc. v. Lynch*, No. 4:14-cv-04480 (N.D. Cal. filed Oct. 7, 2014) (asserting First Amendment right to publish the aggregate number of NSLs and FISA orders received in smaller bands); *Microsoft Corp. v. Dep't of Justice*, No. 2:16-cv-00538 (W.D. Wash. filed Apr. 14, 2016) (asserting that gag orders imposed under 18 U.S.C. § 2705(b) are unconstitutional prior restraints).

(1990), *citing Freedman v. Maryland*, 380 U.S. 51 (1965). Nor is "[t]he identity of the speaker . . . decisive in determining whether speech is protected." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) (plurality opinion); *see also First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (the "inherent worth of the speech…does not depend upon the identity of its source, whether corporation, association, union, or individual").

C. NSL Gag Orders Are "Classic Prior Restraints" Because They Are Imposed by the Executive Branch Outside of the Context of Any Judicial Proceeding

The panel's analogy of the NSL gag orders to those "governmental confidentiality requirements that have been upheld by the courts," *In re NSL*, 863 F.3d at 1129, is unpersuasive. Court rulings permitting *judicial* restraints on dissemination of certain classes of information, such as restrictions imposed by protective orders on the fruits of discovery in civil litigation, do not apply to the NSL gag context. *See, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

The panel's description of *Rhinehart* as governing situations in which "the speaker obtained the confidential information from a government source" is misleading. *In re NSL*, 863 F.3d at 1129. *Rhinehart*'s holding concerns restrictions on the dissemination of information obtained from adverse parties who are voluntarily engaged in civil litigation. It rests upon the possibility that litigants

might abuse the discovery process to "obtain — incidentally or purposefully — information that not only is irrelevant but if publicly released could be damaging to reputation and privacy." 467 U.S. at 35. Restrictions on litigants' ability to disclose information gained only through discovery do not "raise the same specter of government censorship that such control might suggest in other situations." *Rhinehart*, 467 U.S. at 32.

Nor do grand jury secrecy rules support the government here. Grand jury witnesses are 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). In *Butterworth*, the Supreme Court affirmed a ruling striking down portions of Florida's grand jury secrecy statute banning witness speech, which extended "not merely to the life of the grand jury but into the indefinite future." 494 U.S. at 635. Here, as there, the "potential for abuse" of the gag provision, "through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent." *Id.* at 635–36. Plainly, neither *Butterworth* nor *Rhinehart* applies to gag orders that are imposed unilaterally by an executive official and are issued outside any official proceeding, without judicial oversight or public participation.

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

Any 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. *Pentagon Papers*, 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

Prior restraints are permissible 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 Supreme Court refused to enjoin publication of a classified study of U.S. involvement in the ongoing Vietnam War, holding, *per curiam*, that, as a prior restraint, the injunction "bear[s] a heavy presumption

against its constitutional validity." 403 U.S. at 714. Despite the ongoing war effort, the government failed to carry the "heavy burden of showing justification for the imposition of such a restraint." *Id.*

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). Justice Stewart 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).

Outside the national security context, the Court has articulated similarly strict standards for overriding the presumption against prior restraint. *Nebraska Press* 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. Noting that "[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, the Court 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 held the prior restraint unconstitutional because of a failure to examine alternatives that might have addressed the asserted harm, and 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 and the *Nebraska Press* scrutiny of prior restraints in general. Nothing in *Pentagon Papers* or *Nebraska Press* justifies the panel's suggestion that the "strict scrutiny test for content-based restrictions on speech" is the correct substantive standard. *In re NSL*, 863 F.3d at 1123.

B. The NSL Gag Order Scheme Does Not Satisfy the Scrutiny Applicable to Prior Restraints

The NSL statutory scheme does not meet the tests laid out in *Pentagon Papers* and *Nebraska Press.* NSL gag orders may be issued without even asserting (much less establishing to a court's satisfaction) that they are necessary to prevent harm, and 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, maintain, or defend a gag, the NSL statute requires an FBI official only to certify that any of the four statutory harms "may result." 18 U.S.C. § 2709(c)(1); *id.* § 3511 (b)(2)-(3) (requiring courts to issue nondisclosure orders if there is "reason to believe" that an enumerated harm "may result").[8] 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.

Moreover, the mere possibility that one of these harms may result does not rise to the level of the "direct, immediate, and irreparable harm" required to justify a prior restraint under *Pentagon Papers*. 403 U.S. at 730. Nor does it satisfy the *Nebraska Press* requirement that there be no alternative measures and that the restraint "effectively…operate to prevent the threatened danger." 427 U.S. at 562. For these reasons alone, the NSL gag scheme cannot be justified under the standards applicable to prior restraints, and must be invalidated.

[8] The NSL statute permits the FBI to issue a gag order when 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).

It is possible to imagine authority to issue an NSL gag that was drawn to be more demanding, narrower in scope, and shorter in duration, so as to comport with the Constitution's limitations. This statute, however, does not.

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

The NSL gag scheme *categorically* forbids any disclosure about specific NSLs, and thereby fails to limit its application to information necessary to preserve national security. *See, e.g.*, *Neb. Press*, 427 U.S. at 565 (striking down prior restraint due to insufficient consideration of alternative, less restrictive measures to protect the specified interests). The harm caused by the specific prohibitions imposed by specific NSLs is not ameliorated by the recipient's right to acknowledge, in specific formats preapproved by the government, certain "aggregate statistics" related to their receipt of NSLs.

Permitting an NSL recipient to say that 0-499 NSLs have been received simply underscores that this categorical ban on disclosure 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.

CONCLUSION

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

October 12, 2017

Respectfully submitted,

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[9] 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.

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The 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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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it is 4,112 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, in 14-point Times New Roman font.

/s/ Hannah Bloch-Wehba

Dated: October 12, 2017

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U.S. Court of Appeals Docket Nos.: 16-16067, 16-16081, 16-16082, 16-16090

I, Samantha Collins, hereby certify that on October 12, 2017, 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.

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Dated: October 12, 2017
New York, New York

/s/ Samantha Collins
Samantha Collins