Nos. 16-16067, 16-16081, 16-16082, 16-16190
UNDER SEAL

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In re: NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellant (No. 16-16067),
Petitioner-Appellant/Cross-Appellee (Nos. 16-16081, 16-16190),
Petitioner-Appellant (No. 16-16082),

—v.—

LORETTA E. LYNCH, Attorney General,

Respondent-Appellee (No. 16-16067),
Respondent-Appellee/Cross-Appellant (Nos 16-16081, 16-16190,
Respondent-Appellee (No. 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* 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.

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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 nine 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(a).

PRELIMINARY STATEMENT

The nondisclosure orders that routinely accompany National Security Letters ("NSLs") have long prohibited individuals who receive them from publicly saying anything about the NSLs. These gag orders are imposed by the Federal Bureau of Investigation ("FBI") tens of thousands of times annually and, as permitted under 18 U.S.C. § 2709(c), they typically continue for an indefinite, unlimited time. Even the FBI has recognized that NSL gag orders prohibit speech far longer than conceivably needed, and it has adopted new regulations designed to allow most NSL recipients to speak after three years or once an investigation ends. This is still an indefensibly long period, and the government still claims the right to decide unilaterally and in secret to retain a gag in place indefinitely. The FBI-issued orders at issue in this appeal have already gagged the appellants for over five years.

The district court correctly concluded that the FBI must satisfy the procedural safeguards set out in *Freedman v. Maryland*, 380 U.S. 51 (1965),

before it issues an NSL gag order to prevent private citizens and corporations from speaking. It erred, however, in concluding that such an NSL gag order barring speech is not akin to a "classic prior restraint," and therefore is exempt from the "extraordinarily rigorous" First Amendment standards governing such direct government prohibitions on speech. *In re Nat'l Sec. Letter* ("*In re NSL*"), 2016 WL 4501210, *12–13 (N.D. Cal. Mar. 29, 2016). There is no escaping the fundamental fact that the gag orders being unilaterally imposed by the FBI with nearly every NSL that is issued 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).

In deciding that the NSL gag orders do not impose a classic prior restraint, the district court mistakenly relied upon a 2008 Second Circuit opinion construing an earlier version of the statute authorizing NSL gag orders. In *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008), the court declined to treat NSL gags as prior restraints and instead sought to salvage the statutory nondisclosure authority by interpreting its provisions to temper the law's most egregious procedural flaws. Subsequent amendments to the statute intended to address the constitutional concerns identified by the Second Circuit do not alter the basic speech-prohibiting

effect of an NSL gag, and do not cure the First Amendment conflict the Second Circuit unsuccessfully sought to avoid.

The district court is simply wrong in concluding that First Amendment restrictions on prior restraints do not apply to NSL gag orders. The court got off on the wrong foot by reasoning that the free speech concerns raised by NSL gags are minimal because most NSL recipients do not typically exercise First Amendment rights. This premise is baseless. NSL recipients are typically communications service providers, who frequently have a significant interest in speaking about the NSLs they are issued in order to reassure their customers and to expose government overreaching. They also often function as media companies and content providers in their own right.

The court compounded this error by presuming that the restrained speech is "far more limited" than the content typically enjoined by a classic prior restraint. There is no factual basis for this assumption and, as a matter of law, the effort to distinguish among speech restraints based on the importance of the information communicated is improper. To the extent the law has differentiated between "classic" and other prior restraints, the distinction arises from the relationship of the enjoined party to an ongoing judicial process, not to the content of the speech. The fundamental First Amendment concerns about injunctions on speech are overcome only in those limited circumstances relating to the use of information

obtained in the course of ongoing litigation, where the parties are subject to robust judicial oversight.

NSL gag orders—even after recent amendments to the authorizing statute—do impose a classic prior restraint, and exhibit all of their chief traits: 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 censorious effects from public scrutiny. 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.

While prior restraints are also subject to strict procedural safeguards, the procedural protections now codified in the amended statute do not remedy the scheme's failure to satisfy the substantive First Amendment prerequisites for a governmental restraint on speech. The district court erred in holding that the executive need not meet this constitutional burden when it issues NSL gag orders.

ARGUMENT

I.
NSL GAG ORDERS ARE CLASSIC PRIOR RESTRAINTS AND ARE PRESUMPTIVELY UNCONSTITUTIONAL

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). Despite fixes by the legislative and executive branches intended to remedy the worst failings of the previous version of the NSL gag provisions, the nondisclosure regime continues to exhibit each trait of the classic prior restraint. In addition, the district court's proposal that NSL gags are not "classic prior restraints" because NSL recipients do not "customarily wish to exercise rights of free expression" has no basis in law or fact, and its attempt to distinguish between "classic" and other prior restraints is based on faulty reasoning and no clear precedent.

A. NSL Gag Orders Exhibit the Chief Traits of Classic Prior Restraints Despite Statutory Amendments and New Procedures

The key attributes of prior restraints are that they (1) prohibit speech before it takes place, rather than through subsequent punishment; (2) sweep too broadly, subjecting far more speech to government control than could be lawfully accomplished through subsequent punishment; (3) vest the government with

unfettered discretion to censor speech at will; 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, USAFA codified a "reciprocal notice" procedure the Second Circuit had imposed in *Doe* as constitutionally required. 18 U.S.C. § 3511(b)(1)(A)–(C) (2016). The USAFA amendments also 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. In spite of 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 impose a "previous restraint upon publication" rather than *post hoc* penalty—the distinctive characteristic of prior restraints. *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931) (quoting 4 William Blackstone, *Commentaries* *151). The FBI unilaterally prohibits NSL recipients from disclosing to anybody other than their lawyers that the government has sought or obtained information from them. 18 U.S.C. § 2709(c)(1). Recipients are forbidden by executive fiat from disclosing that they received an NSL, identifying anything

about its contents, or opining about the FBI's conduct or motives in issuing it. *Id.* § 2709(a). These sweeping prohibitions on speech accompany 97% of the NSL issued administratively by the FBI. *In re NSL*, 930 F. Supp. 2d 1064, 1074 (N.D. Cal. 2013).

NSL recipients typically include communications service providers, both large and small, who have significant interests in speaking about NSLs. They want to reassure their customers about the security of their data and to act as whistleblowers when NSLs are being misused, and many are in the business of producing news. *See* Section I.B, *infra*. These 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).

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

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 formidable "'risks of free-wheeling censorship.'" *Id.* at 589 (quoting *Conrad*, 420 U.S. at 559).

NSL gag orders broadly forbid recipients from any discussion regarding the orders they receive. They cannot explain to their fellow citizens how NSLs are being used or what kinds of records the FBI is sweeping up with its NSL authority—information essential to understand the kinds of information the FBI considers subject to warrantless search using an NSL. The gag order scheme has created a population of Americans with knowledge of the FBI's use of NSL authority, but who are collectively forbidden from sharing what they know with the public, even when there is no real reason to prohibit discussion of a matter. For instance, while it may be appropriate to prohibit disclosure of an ongoing investigation's *target*, an NSL gag recipient in such a case is forbidden from describing the bare fact of receipt of the order or the types of records sought, even if that information would not reveal the target.

That the government now selectively grants permission to recipients of NSLs to disclose publicly certain categories of information prohibited by the NSL gag orders themselves merely confirms that NSL gag orders are overbroad. *See* 50 U.S.C. § 1874. In *Merrill v. Lynch*, 151 F. Supp. 3d 342 (S.D.N.Y. 2015), only after years of litigation and after it became statutorily required to provide a certification justifying non-disclosure, did the government concede that an NSL

recipient may disclose the categories of information demanded by the FBI. *See id.* As the court observed, this behavior certainly "lends credence to Merrill's argument that, for years, the non-disclosure requirement enforced against him was overly broad and could not be supported by a 'good reason.'" 151 F. Supp. 3d at 352.

NSL gag orders suppress discussion not only about specific NSLs, but also about the policy and legal rationales supporting or undermining the gag order scheme itself. The FBI's decisions to impose gag orders are made entirely behind closed doors; even court challenges are conducted largely under seal. Apart from the vague and generic aggregate statistics that recipients may disclose in pre-approved formats, *see infra* Section I.A.3, the people who know the most about the operation of the NSL gag regime are utterly forbidden to speak about it. This is not a narrow restraint.

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

The NSL gag order scheme grants officials broad discretion to suppress speech prior to any judicial review, and thus heightens the risk of "government censorship." *Kreisner v. City of San Diego*, 1 F.3d 775, 807 (9th Cir. 1993). Under Section 2709(c), FBI officials may issue a gag order simply by certifying that disclosure "may result" in certain harms. 18 U.S.C. § 2709(c)(1). As the district court recognized in 2013, this capacious standard enables the FBI to gag

97% of NSL recipients. *In re NSL*, 930 F. Supp. 2d at 1074. Inspection of NSLs that have been disclosed in whole or in part suggests that when it issues a gag order the FBI routinely provides no reason at all for barring speech or simply parrots the relevant statutory provision in its entirety.[1]

The FBI's discretion is not meaningfully tempered by judicial review, because such review seldom occurs and because the statute imposes a highly deferential standard of judicial review of FBI certifications. 18 U.S.C. § 3511(b)(2)-(3). Even as amended by the USAFA, the statute requires the FBI only to provide the court with a "reason to believe" that an enumerated harm "may result." 18 U.S.C. § 3511(b)(3). Under the Second Circuit's interpretation, this means a court "is not to…second-guess[]" an Executive Branch "judgment on matters of national security" so long as the court "receive[s] some indication that the judgment has been soundly reached." *Doe*, 549 F.3d at 882. This extraordinarily deferential standard of review effectively leaves the decision to gag speech to the virtually unfettered discretion of the executive branch.

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[1] *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; NSL to Yahoo! (Mar. 29, 2013), https://s.yimg.com/ge/tyc/Redacted_NSLs.pdf.

Moreover, while the USAFA's amendments may appear at first blush to remedy the worst failings of the NSL gag order scheme, they actually underscore the arbitrary manner in which the government imposes and maintains gag orders. After USAFA, the government continues to impose a comprehensive nondisclosure order on nearly every NSL recipient, and has only begun to permit partial exceptions to nondisclosure requirements by prescribing both the form and content of what recipients may say about the NSLs received. Under the amended statute, the gagged recipients of NSLs may now report semiannually the number of NSLs they have received in bands of 500 or 1000 and the total number of national security process received in bands of 250; or an annual report that aggregates the total number of national security process received in bands of 100. 50 U.S.C. §§ 1874(a)(1)-(a)(4).

That NSL recipients may now acknowledge, in a seemingly arbitrary form dictated by the government, some aspects of their experience does not render the NSL gag order scheme less offensive to the Constitution. Under the mechanisms for disclosure of "aggregate statistics" permitted by USAFA, NSL recipients may only engage in limited speech whose content and form is pre-approved by the government. USAFA's narrow mechanism for disclosure hardly safeguards protected speech, but rather plainly interferes with the unfettered exercise of First Amendment rights.

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"). Classic prior restraints are characterized by the permanent or indefinite character of the prohibition on speech, which ends only if an official or judge intervenes. 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 either challenging the order in court or informing the government that it wishes to do so. *Id.* § 3511(b).

In November 2015, the Department of Justice published procedures for review and termination of NSL gag orders. *See* Dep't of Justice, TERMINATION PROCEDURES FOR NATIONAL SECURITY LETTER NONDISCLOSURE REQUIREMENT (Nov. 24, 2015) ("Term. Proc.").[2] Those procedures, which explicitly do not create any enforceable rights, require FBI to review and terminate an NSL gag order "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. *Id.* at 2, 4. Under the Termination Procedures, the government's

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

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.

As one federal judge recently recognized, the Termination Procedures "leave several large loopholes." *In re National Security Letters*, No. 16-518, at *4 (D.D.C. July 25, 2016).[3] First, the procedures require only a single instance of review at each of these temporal points, "meaning that where a nondisclosure provision is justified at the close of an investigation, it could remain in place indefinitely thereafter." *Id.* Second, the procedures apply only to "investigations that close and/or reach their three-year anniversary date after the effective date of these procedures." *Id.* (quoting Term. Proc. at 3). As a result, even these new procedures do not require review and termination of each and every gag order.

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 imposed upon NSL recipients, raise truly grave concerns. *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) ("[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment.").

[3] http://www.dcd.uscourts.gov/sites/dcd/files/16-518Opinion_Redacted.pdf

Moreover, the fact that NSL gag orders remain in place unless successfully challenged by the recipient drastically shifts the burden of action onto the speaker. The only recourse remains for an individual NSL recipient to engage in lengthy rounds of litigation in order to vindicate its own rights. 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)).

B. Attempts to Distinguish the NSL Gag Order Scheme from Other Classic Prior Restraints All Fail

Notwithstanding that NSL gags have all the hallmarks of a prior restraint, the district court adopted the Second Circuit's flawed logic and held that they 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) the nondisclosure order "is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions." 2016 WL 4501210, at *12, *quoting Doe*, 549 F.3d at 876. Each premise is incorrect.

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

The district court was wrong to assume that NSL recipients do not "customarily wish to exercise rights of free expression." NSL recipients have repeatedly sought to lift restrictions on their own speech 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; Nicholas Merrill, a privacy activist and president of an Internet company with a mission to protect its clients' privacy; and Microsoft.[4]

In a broader sense, internet companies are increasingly seeking to speak out concerning surveillance and transparency; both Twitter and Microsoft have brought lawsuits asserting their First Amendment right to speak about the surveillance orders they receive.[5] Even the nation's largest online service

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[4] *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/.

[5] *See 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.

providers—Google, Yahoo, Facebook and others—continue to chafe against the prohibition on providing their customers even basic information about the NSLs they receive. *See, e.g.,* Chris Madsen, *Yahoo Announces Public Disclosure of National Security Letters*, Yahoo! Global Public Policy (Jun. 1, 2016) ("We believe there is value in making these documents available to the public to promote an informed discussion about the legal authorities available to law enforcement.");[6] 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 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 do not customarily want to speak is unfounded.

In any case, the First Amendment is hostile to distinctions that either award or confiscate constitutional protection depending on the identity of the speaker. The First Amendment guards the speech rights of media organizations, non-media

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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).`

[6] https://yahoopolicy.tumblr.com/post/145258843473/yahoo-announces-public-disclosure-of-national

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

organizations, and individuals alike. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010) (institutional press has no "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 pamphleteers or journalists who have previously been targets for speech restrictions.

Indeed, the Supreme Court has long instructed that "[t]he identity of the speaker is not 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"). And it has repeatedly recognized that it is impermissible to restrain the First Amendment rights of a broad array of actors, including Jehovah's Witnesses, *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938); union organizers, *Thomas v. Collins*, 323 U.S. 516 (1945); paperback publishers, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); community advocacy organizations, *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971); "adults-only" businesses, *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980); and investment advisors, *Lowe v. S.E.C.*, 472 U.S. 181 (1985). The government may not evade prohibitions on prior restraint simply by

targeting a class of citizens that has not previously won recognition of its First Amendment rights.

2. NSL gag orders are content-based restraints that broadly bar speech on categories of information.

The district court also erred in accepting the Second Circuit's mistaken effort 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." 2016 WL 4501210, at *12. As noted above, NSL gag orders forbid recipients from any discussion regarding the facts and circumstances surrounding the NSL orders they receive. They cannot discuss how NSLs are being used, or the kinds of records the FBI believes are subject to warrantless search with an NSL.

NSL gag orders are content based injunctions that target speech of intense public concern. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). The importance of the gagged speech could hardly be clearer than now, when vigorous public debate is underway about whether Congress should expand the scope of the FBI's authority to acquire electronic communications transactional records with NSLs. *See, e.g.*, Ellen Nakashima, *FBI wants access to Internet browser history without a warrant in terrorism and spy cases*, WASH. POST (June

6, 2016);[8] Steven Nelson, *Senate Falls 1 Vote Short of Giving FBI Access to Browser Histories Without Court Order*, U.S. NEWS & WORLD REPORT (June 22, 2016, 1:25 PM).[9]

By preventing NSL recipients from taking part in this important current debate, the overbroad NSL gag provisions have prevented the type of "informed and critical public opinion which alone can here protect the values of democratic government." *Pentagon Papers*, 403 U.S. at 728. This veil of secrecy insulates the government's actions from scrutiny by the American people, lowers the political costs of these restrictions, and heightens the danger that protected speech will be unnecessarily and improperly suppressed.

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 district court was mistaken in attempting to distinguish the NSL gag orders at issue from a "classic prior restraint" based on the content of the speech. To the extent that courts have recognized a distinction between presumptively invalid "classic prior restraints," and restraints that are not "classic" and therefore

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[8] https://www.washingtonpost.com/world/national-security/fbi-wants-access-to-internet-browser-history-without-a-warrant-in-terrorism-and-spy-cases/2016/06/06/2d257328-2c0d-11e6-9de3-6e6e7a14000c_story.html.

[9] *https://*www.usnews.com/news/articles/2016-06-22/senate-falls-1-vote-short-of-giving-fbi-access-to-browser-histories-without-court-order.

permitted, they have held that *judicial* restraints on dissemination of certain classes of information, such as restrictions imposed by protective orders on the fruits of discovery in civil litigation, are not "classic prior restraints." *See*, *e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). This distinction is inapplicable here.

While the district court correctly recognized that the issues raised in *Rhinehart* are "manifestly not the same as the concerns raised in this case," 2016 WL 4501210 at *13, it nonetheless expressly adopted the reasoning in *Doe*, 549 U.S. at 876, which relied upon *Rhinehart* as support. Indeed, *Rhinehart* is the primary source of the distinction drawn in the appellate courts between "classic prior restraints" and other restraints on expression.[10] *Rhinehart* found no First Amendment prohibition on judicial orders issued to protect confidential material judicial process in the course of civil discovery. Its holding is limited to restrictions on speech concerning information obtained in the litigation. It rests upon the fact that such information is obtained "only by virtue of the trial court's

[10] The district court appears not to have relied on a separate line of decisions related to city ordinances requiring permits for expressive activity in which this Circuit has distinguished between "classic prior restraint cases" and "classic 'time, place, and manner' cases. . . . " *Rosen v. Port of Portland*, 641 F.2d 1243, 1249–50 (9th Cir. 1981); *see also Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009).

discovery processes" so that restrictions on speech concerning this category of information "does not raise the same specter of government censorship that such control might suggest in other situations." *Rhinehart,* 467 U.S. at 32.

Plainly, the logic of *Rhinehart* does not properly apply when recipients of NSLs are bound by gag orders that are unlimited in scope and duration, are imposed unilaterally by an executive official, and are issued outside any official proceeding and without judicial oversight. Indeed, when the District of Connecticut considered the constitutionality of an NSL gag order issued to Library Connection in 2005, it recognized that the type of protective order at issue in *Rhinehart* "differs greatly from a law barring disclosure of the use of the government's authority to compel disclosure of information." *Doe v. Gonzales*, 386 F. Supp. 2d 66, 75 (D. Conn. 2005).

For similar reasons, the court below correctly recognized that NSL gag orders cannot be justified by analogy to grand jury secrecy rules. 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). Nor is an NSL gag order analogous to the CIA's enforcement of a secrecy agreement entered into as a condition of employment, as in *McGehee v. Casey*. 718 F.2d

1137, 1141 (D.C. Cir. 1983). Indeed, as the D.C. Circuit recognized in *McGehee*, where the executive branch seeks to *restrain* publication of classified information, "it would bear a much heavier burden" than where it simply seeks to enforce a contractual secrecy agreement. *Id.* at 1148, n.22.

Although the district court ostensibly rejected the government's proposed analogies between NSL gag orders and protective orders, secrecy agreements, or grand jury secrecy requirements, it nonetheless adopted the Second Circuit's flawed distinction between "classic" and other prior restraints. The district court erred in failing to follow its observations to their logical conclusion: that the NSL nondisclosure scheme constitutes a classic system of prior restraint that is presumptively unconstitutional.

II.
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. 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. 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).[11]

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

[11] The district court erred in suggesting that "narrow . . . tailor[ing] to serve a compelling government interest" is the correct substantive standard to apply, *In re NSL*, 2016 WL 4501210, at *13, rather than the more precise and stringent requirements of *Pentagon Papers* and *Nebraska Press*. The district court also appears to suggest that the Second Circuit's approach may satisfy the substantive requirements of the First Amendment. *Id*. But that approach falls far short of what the First Amendment requires. *See infra* Section II.B & note 9.

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, maintain, or 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) (requiring courts to issue nondisclosure orders if there is "reason to believe" that an enumerated harm "may result"). 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 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). 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." *Id.* at 562. For these reasons alone, the NSL gag scheme cannot be justified under the standards applicable to prior restraints, and must be invalidated.

Although this statute plainly fails to satisfy the demands of the First Amendment, alternative legislation could potentially permit more limited use of NSLs by the FBI without treading on First Amendment rights. A statute authorizing the FBI to impose a gag where disclosure of an NSL would necessarily interfere directly with an ongoing national security investigation, for example, might satisfy the "direct, immediate, and irreparable harm" standard set out in *Pentagon Papers*. 403 U.S. at 730. Stated differently, authority to issue an NSL gag that was more demanding, narrower in scope, and shorter in duration could 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). Instead, NSL recipients may acknowledge, in specific formats preapproved by the government, certain "aggregate statistics" related to their receipt of NSLs.

In essence, the NSL statute on the one hand imposes a complete bar on a recipient's ability to speak about specific NSLs, while on the other permitting disclosures of certain generic categories of information selected arbitrarily by the government. At a minimum, the fact that NSL recipients are barred from acknowledging that a single NSL has been received but are permitted to say that 0-499 NSLs have been received suggests that, in many cases, disclosure poses no real risk, let alone the risk of "direct, immediate, and irreparable damage" required by the First Amendment. Likewise, 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.

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

The FBI imposes an indefinite prior restraint as a default rule nearly every time it issues an NSL. In some circumstances, it may be possible for the government to meet its burden to justify certain prohibitions—for instance, a time-limited restriction on identifying the target of an investigation. But by issuing NSL gag orders as a matter of course, the FBI prohibits far more speech than could conceivably be justified to protect national security, foreign relations, public safety, or the integrity of FBI investigations. Instead, 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 preventing the public from speaking or learning about the government's activities.

The current regime deprives the public of information from precisely those people who understand firsthand how the government exercises its authority to issue NSLs. NSL recipients are barred from discussing the categories of information subject to collection, or from blowing 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). Information about these practices, if released, would foster an "informed and critical public opinion" regarding the FBI's use of its legal authorities. *Pentagon Papers*, 403 U.S. at 728 (Stewart, J., concurring). Instead, through the accretion of tens of thousands of individual gag orders, the NSL scheme systematically suppresses political speech, which 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). The First Amendment does not permit the government to conscript thousands of citizens into its investigative efforts, and at the same time to squelch public discussion and controversy by forcing them to submit *en masse* to a permanent oath of secrecy.

III.

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

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). As prior restraints, NSL gag orders must include these stringent procedural safeguards but, as the district court recognized, the revised gag provisions still fail to do so. *See In Re NSL*, 2016 WL 4501210, at *15–16. For instance, the district court did not consider whether the deferential standard of review set forth in 18 U.S.C. § 3511(b)(3) is compatible with *Freedman*'s requirement that speech restrictions be "necessary." *Id.* at *16. In fact, based on its erroneous finding that the NSL gag is not a prior restraint, the district court concluded that the Constitution "does not require automatic judicial review." *Id*. at *15.

This procedural defect alone is 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 in the amended statute are consistent with 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.

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.

Respectfully submitted,

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Dated: September 26, 2016

[12] 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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This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure because it is 6,992 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: September 26, 2016

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I, Samantha Collins, hereby certify that on September 26, 2016, 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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