NO. 13-16732

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNDER SEAL,

PETITIONER-APPELLANT,

v.

ERIC H. HOLDER, JR., Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and FEDERAL BUREAU OF INVESTIGATION,

RESPONDENT-APPELLEES

On Appeal from the United States District Court
for the Northern District of California
Case No. 13-cv-1165 SI
Honorable Susan Illston, District Judge

# BRIEF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 18 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER-APPELLANT UNDER SEAL

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## STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing the interests of nearly 850 daily, weekly and student newspapers throughout California. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA has dedicated its efforts to protect the free flow of information concerning government institutions in order for newspapers to fulfill their constitutional role in our democratic society and to advance the interest of all Californians in the transparency of government operations.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

The Daily Beast was founded in 2008 as the vision of Tina Brown and IAC Chairman Barry Diller. Curated to avoid information overload, the site is dedicated to breaking news and sharp commentary. Tina Brown, former editor of Tatler, Vanity Fair, The New Yorker & Talk, author of the 2007 NY Times best-seller The Diana Chronicles and founder of the annual Women in the World summit, serves as editor-in-chief of the site which regularly attracts over 16 million unique

online visitors a month and is the winner of two consecutive Webby awards for 'best news' site.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Fox News Network LLC ("Fox News") owns and operates the Fox News Channel, the top rated 24/7 all news national cable channel, and the Fox Business Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion digital security tools, and crowd-funding.

Gannett Co., Inc. is an international news and information company that publishes more than 80 daily newspapers in the United States – including *USA*

*TODAY* – which reach 11.6 million readers daily. The company's broadcasting portfolio includes more than 40 TV stations, reaching approximately one-third of all television households in America. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States with 30 daily newspapers and related websites as well as numerous community newspapers and niche publications.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include

television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The New York Times Company is the publisher of *The New York Times*, *The Boston Globe*, and *International Herald Tribune* and operates such leading news websites as nytimes.com and bostonglobe.com.

North Jersey Media Group Inc. ("NJMG") is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state's second-

largest newspaper, and the *Herald News* (Passaic County). NJMG also publishes more than 40 community newspapers serving towns across five counties and a family of glossy magazines, including (201) Magazine, Bergen County's premiere magazine. All of the newspapers contribute breaking news, features, columns and local information to NorthJersey.com. The company also owns and publishes Bergen.com showcasing the people, places and events of Bergen County.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

WP Company LLC (d/b/a The Washington Post) publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

## SUMMARY OF ARGUMENT

The presumption against prior restraints lies at the heart of the First Amendment.[1] Journalists in particular know they can count on this protection when providing the public with information about national, state and local government; foreign policy; crime; and other topics. The Northern District of California's decision in *In re National Security Letter* recognized the important interests at stake, but set the bar too low by refusing to recognize that the non-disclosure provision of the National Security Letter statute is a prior restraint on speech of public concern.

Instead of finding the timing of a ban on speech dispositive, the lower court based its decision on a false distinction between a statutory gag, such as the one at issue in this case, and a "classic" prior restraint. This erroneous standard threatens to place many potential speakers outside of the heavy protections that prior restraint law affords. It also ignores the Supreme Court's key policy rationale for making prior restraints presumptively unconstitutional: bans on speech stifle the discourse on important issues that is necessary for an informed democracy. *Amici*, as members of the news media, agree with the lower court that 18 U.S.C. § 2709(c)

[1] Pursuant to Rule 37.6, *amici* attest that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Additionally, *amici* attest that they received consent to file this brief from counsel for both sides.

is unconstitutional. However, *amici* warn that a ruling by this Court finding the non-disclosure provision anything less than a prior restraint will open the door for other courts to create end-runs around key constitutional protections guaranteeing the free flow of information to the public.

News coverage about the NSL program implicates political decision-making and judicial administration, and, therefore, is at the core of speech and press freedoms. Members of the public have a First Amendment right as listeners to receive information about government affairs when there is a "willing speaker" who wishes to disclose that information. Transparency is important not just for its own sake but also because, as recent reports have concluded, fear of government surveillance has deterred sources from speaking with journalists. More knowledge about the scope and contours of the NSL program can give sources and reporters the confidence needed to responsibly report on public affairs.

## ARGUMENT

### I. THE NON-DISCLOSURE PROVISION OF § 2709(c) IS A PRIOR RESTRAINT ON SPEECH THAT RESTRICTS THE PUBLIC'S RIGHT TO KNOW HOW ITS GOVERNMENT OPERATES.

The court below treated the nondisclosure provision of the National Security Letter statute, 18 U.S.C. § 2709(c), as a serious restriction on speech, but stopped short of recognizing it as a true prior restraint. The court held:

> [G]iven the text and function of the NSL statute, Petitioner's proposed standards are too exacting. Rather, this Court agrees with the analysis of the Second Circuit in *John Doe, Inc. v. Mukasey*, and finds that while section 2709(c) may not be a "classic prior restraint" or a "typical" content-based restriction on speech, the nondisclosure provision clearly restrains speech of a particular content—significantly, speech about government conduct.

*In re Nat'l Sec. Letter*, 930 F.Supp. 2d 1064, 1071 (N.D. Cal. 2013).

*Amici* agree with the lower court that the gag provision is unconstitutional. However, the holding ignores the Supreme Court's long-recognized rule that a government ban on speech before it occurs is a prior restraint. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993). Not affording this protection to NSL recipients dilutes the definition of prior restraint, a safeguard on which journalists rely to obtain and publish information necessary for an informed and healthy democracy. Weakening this standard hurts not only the news media but also the public by harming the flow of information in many areas.

### A. The non-disclosure provision is a prior restraint.

Prior restraints are "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander*, 509 U.S. at 297 (internal quotation omitted). Supreme Court precedent shows that the timing of the ban on speech is the key element of a prior restraint. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) ("The relevant question is whether the challenged regulation authorizes

suppression of speech in advance of its expression…"). *See also Alexander*, 509 U.S. at 550-51 (declining to find forfeiture of pornography business a prior restraint because it was a punishment for past behavior and "does not *forbid* petitioner from engaging in any expressive activities in the future"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (explaining that prior restraints are so disfavored 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 that the risks of freewheeling censorship are formidable").

The court below wrongly found that the nature of the speech was determinative even though Supreme Court cases show that the timing alone determines when a restriction is a prior restraint. In doing so, the lower court incorrectly relied on the U.S. Court of Appeals for the Second Circuit's cursory analysis of § 2709(c) in *John Doe, Inc. v. Mukasey*, a separate challenge to the NSL program. The Second Circuit found: "Although the nondisclosure requirement is in some sense a prior restraint…it is not a typical example of such a restriction for it is not a restraint 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." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2nd Cir. 2009). *Mukasey* cited *Seattle Times v. Rhinehart*, 467 U.S. 20, 33 (1984), for the proposition that a "prohibition on disclosure of material obtained

through pretrial discovery" is not a classic prior restraint. *Mukasey*, 549 F.3d at 876.

*Mukasey* erred in creating two types of prior restraints: typical and atypical ones. As *Alexander* held, *any* ban on speech before it occurs is a prior restraint. 509 U.S. at 544. *Mukasey*'s logic ignores that First Amendment rights – such as the right to attend court proceedings or to sue for access to records – are rights that all members of the public share. *See, e.g., Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984) ("Press-Enterprise I") (finding that "everyone in the community" has a First Amendment-based right to attend *voir dire*). It also ignores the tenant of First Amendment law that the value of expression lies in its content, not in the identity of the speaker. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). *See also Near v. Minnesota*, 283 U.S. 697, 713–14 (1931) ("Every freeman has an undoubted right to lay what sentiments he pleases before the public[.]") (internal quotation omitted). *Amici* are concerned that the baseless construction of artificial distinctions will make it easier for other courts to exclude certain speakers from the strong protection that prior restraint law affords.

*Mukasey* wrongly based its conclusion about the nature of the restraint on *Seattle Times*. The holding in that case is limited to a different matter (pre-trial protective orders in a private, civil dispute), and does not involve a wholesale ban on speech. There, the Supreme Court granted a protective order to a religious leader who sued *The Seattle Times* for defamation and sought to prevent the news outlet from printing pre-trial discovery information, such as financial data. *Seattle Times*, 467 U.S. at 22, 36. The Court, however, found that the newspaper could publicize "the identical information covered by the protective order" if it discovered it through independent means. *Id*. at 34. Here, though, there is no way for the public to get information about NSLs because the only people with knowledge of the letters are gagged upon threat of criminal prosecution.

*Seattle Times* also involved very different policy concerns. The Court "limited [the holding] to the context of pretrial discovery," and only granted the protective order because a rule to the contrary would restrict a trial court from "oversee[ing]" its docket. *Id*. at 31, 37. Denying a protective order also would create "significant potential for abuse" by a private party who "incidentally or purposefully" obtains irrelevant information that could damage the other party, the Court found. *Id*. at 34-35.

These concerns lose their force when the government uses its investigatory powers to undertake a criminal inquiry outside of court. The trial court, in a

discussion on another matter, recognized that *Seattle Times* does not control: "The concerns that justified restrictions on a civil litigant's *pre-trial* right to disseminate confidential business information obtained in discovery — a restriction that was upheld by the Supreme Court in *Seattle Times*… — are manifestly not the same as the concerns raised in this case." *In re Nat'l Sec. Letter*, 930 F.Supp.2d at 1072.

When the court below wrongly created two tiers of prior restraints, it found that § 2709(c) "does not need to satisfy the extraordinarily rigorous *Pentagon Papers* test." *Id.* at 1071. However, Supreme Court precedent shows that there is only one type of prior restraint. Section 2709(c), a gag on speech before it occurs, must be subject to that body of law.

### B. The Supreme Court's rationales for affording prior restraints heightened protection go to the very heart of governmental accountability.

Because freedom from censorship is integral to reporting on public affairs, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976). *See also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (finding "heavy presumption" against prior restraint's constitutional validity) (internal quotation omitted) (per curium). The Supreme Court has never upheld a prior restraint against the press, and one reason these

bans are so disfavored is that they freeze in place the speech necessary for self-governance. As constitutional law scholar Alexander Bickel has noted:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss … indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.
>
> Alexander Bickel, *The Morality of Consent* 61 (1975).

Protection from prior restraint is especially important for speech on matters of public concern. *Nebraska Press*, 427 U.S. at 559 ("The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events."). When the government muzzles expression about public affairs, the public becomes less informed and less able to exercise its constitutionally protected duty of participating in democracy. In *Nebraska Press*, the Supreme Court quoted Thomas Jefferson to underscore this point: "'Our liberty depends on the freedom of the Press, and that cannot be limited without being lost.'" 427 U.S. at 548. *See also* Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 152 (1991) (explaining heavy presumption against prior restraint was "designed to facilitate the informed citizen's full participation in the country's government").

Three media challenges to prior restraints – in *Near v. Minnesota*, *New York Times v. United States*, and *Nebraska Press Association v. Stuart* – illustrate the importance to self-government of the heavy presumption against these gags. In

*Near*, when the Supreme Court struck down a law that permitted a state to ban articles critical of public officials, the justices explained that a speaker's rights are especially high when he wants to question or criticize government conduct. 283 U.S. at 717. Forty years later, in *New York Times*, the Court found that an injunction on publication of classified documents on the history of U.S. involvement in Vietnam was unconstitutional. 403 U.S. at 714. Justice Potter Stewart, in concurrence, explained that banning publication of the Pentagon Papers would be counterproductive and abhorrent to the First Amendment because "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry… For without an informed and free press there cannot be an enlightened people." *Id.* at 728. In the third case, *Nebraska Press*, the Supreme Court recognized that the right to free speech is so vital to accountability within the legal system that a defendant's fair trial claim under the Sixth Amendment does not trump it. 427 U.S. at 568-70 (allowing reporters to cover information they had obtained about alleged police confessions because judges have many methods short of censorship to ensure that defendants are not prejudiced). The policy rationales in *Near*, *New York Times* and *Nebraska Press* show that heightened protection is crucial for topics like the NSL program, where the public's trust in judicial and political administration is at issue.

These three cases – which involve coverage of local, state and national politics; foreign affairs; national security; and criminal trials – also show the range of topics that prior restraint law has protected from censorship. News outlets rely on the strong protections that these cases afford to defeat ill-conceived efforts to suppress reporting whenever the government has sought to shield itself from public scrutiny.[2] *Amici* are concerned that improperly applying prior restraint law here will weaken this constitutional protection, and make it more difficult for the media to inform the public in many areas.

### C. Prior restraint analysis is required even when national security concerns are implicated.

[2] *See, e.g.*, Jamie Schuman, *Virginia court vacates prior restraint on witnesses names in murder case*, The Reporters Comm. for Freedom of the Press, Oct. 10, 2013, http://bit.ly/P6hWHQ; Timothy J. Conner, *Florida Court Vacates Prior Restraints*, MLRC MediaLawLetter, Sept. 2013, http://bit.ly/1dvI5Lz; Nicole Lozare, *Order prohibiting journalist from ever writing about Haitian prime minister dismissed; but PM can refile complaint*, The Reporters Comm. for Freedom of the Press, April 9, 2013, http://bit.ly/1loQq6d; Lyndsey Wajert, *Texas judge denies 2nd request for injunction against blog*, The Reporters Comm. for Freedom of the Press, April 21, 2011, http://bit.ly/1he6O6j; Derek Green, *Kentucky Supreme Court strikes down prior restraint*, The Reporters Comm. for Freedom of the Press, Oct. 27, 2010, http://bit.ly/1mwHtZ0; Mara Zimmerman, *Ohio Supreme Court prevents enforcement of gag order*, The Reporters Comm. for Freedom of the Press, April 14, 2010, http://bit.ly/1pc5TWk; Gregg Leslie, *State high court suspends prior restraint on news coverage*, The Reporters Comm. for Freedom of the Press, Jan. 29, 2010, http://bit.ly/1rFuipr; Rory Eastburg, *Tribal court strikes down prior restraint on journalist*, The Reporters Comm. for Freedom of the Press, Sept. 11, 2009, http://bit.ly/1loSgnE.

*Near*, *New York Times* and *Nebraska Press* set strict limits for when, if ever, a prior restraint is permissible. *Near* explained that only in "exceptional cases," such as to prevent disclosure of the "number or location of troops" during wartime, are these bans constitutional. 283 U.S. at 716. Publication of the Pentagon Papers did not meet that threshold, but Justice William J. Brennan, Jr., in a concurrence in *New York Times*, elaborated on the *Near* test: "information that would set in motion a nuclear holocaust" might justify a ban. *New York Times*, 403 U.S. at 726.

Though these proposed exceptions involve national security, they are not a reason to shield § 2709(c)(1) from prior restraint law. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) ("[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role" and courts must "not defer to the Government's reading of the First Amendment, even when such interests are at stake.").

Section 2709(c)(1) is problematic because it uses vague threats of harm to national security to authorize restrictions that are more expansive and less concrete than any prior restraint the Supreme Court has said could be justified. It permits non-disclosure orders if "there *may* result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1) (emphasis added). In

practice, nearly 100 percent of the NSLs issued each year have a non-disclosure order. *In re Nat'l Sec. Letter*, 930 F.Supp. 2d at 1074.

In *New York Times*, the Supreme Court rejected a national security rationale for a sweeping ban on speech. Justice Hugo Black explained: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." 403 U.S. at 719 (Black, J., concurring). Justice Stewart warned that widespread censorship is destructive because excessive secrecy breeds dissent: "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion" *Id.* at 729 (Stewart, J., concurring).

It is especially important that the Court apply the proper standard here because in the area of national security First Amendment rationales for openness are at their height. *Id.* at 717 (Black, J., concurring) (finding "newspapers nobly did precisely that which the Founders hoped and trusted they would do" when they revealed government decisions that led to the Vietnam War). *See also Id.* at 724 (Douglas, J., concurring) ("Open debate and discussion of public issues are vital to our national health.")

The Western District of Wisconsin emphasized this point when it struck down a prior restraint on an article about the construction of hydrogen bombs, and,

instead, limited censorship to "technical information" that could help other countries build the weapons. *United States v. Progressive*, 467 F. Supp. 990, 996 (W.D. Wis. 1979). In ruling against a ban on the entire article, the court emphasized that open debate about nuclear policy is at the heart of what the First Amendment protects. *Id.* Protection from prior restraint is necessary so as not to "impede the defendants in their laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions." *Id.* Similarly, this Court must not impede informed debate about NSLs by allowing § 2709(c) to stand.

## II. BOTH SPEAKERS AND LISTENERS HAVE A FIRST AMENDMENT RIGHT TO EXCHANGE INFORMATION ABOUT THE NSL PROGRAM.

Petitioners in this matter, unidentified telephone service providers, advance their First Amendment right to be heard about their receipt of a National Security Letter.[3] The Supreme Court has found that where there is a willing speaker, the public has a heightened and independent First Amendment right to receive that information. "[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

[3] It is in the public record that petitioners in 13-15957 and 13-16731 are unnamed telephone service providers. As the description of petitioner in case 13-16732 is redacted, the nature of its business is unknown to *amici*.

*Virginia Pharmacy* explained that this precept was "clear from the decided cases," *id.*, such as *Klendienst v. Mandel*, 408 U.S. 753, 762-63 (1972), where again the Court referred to a broadly accepted right to "receive information and ideas," and *Martin v. City of Struthers*, 319 U.S. 141 (1943), where the Court wrote:

> The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.

319 U.S. at 143 (internal citations omitted).

In *Board of Education v. Pico*, which involved a school's attempts to ban library books, the Court called the right to receive information "an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution." 457 U.S. 853, 867 (1982) ("[The] right to receive ideas is a necessary predicate to the *recipient*'s meaningful exercise of his own rights of speech, press, and political freedom.") (emphasis in original). *See also Stanley v. Georgia*, 394 U.S. 557, 563 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). This Court also has recognized the rights of listeners. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011) ("We see no reason why this well-established principle does not apply to a publisher's interest in distributing, and an inmate's corresponding interest in receiving, unsolicited literature.")

Courts often invoke the right to receive information when news media parties challenge gag orders and base their standing to intervene on the public's interest in hearing the information. *See Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2nd Cir. 1988) ("[T]he rights of potential recipients of speech, like the news agencies, to challenge the abridgment of that speech has already been decided.") (internal quotation omitted); *FOCUS v. Allegheny County Court*, 75 F.3d 834, 839 (3rd Cir. 1996) (affirming that third parties have standing to challenge gag orders when the subjects of those orders might fear reprisal by speaking out); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3rd Cir. 1994) ("The Newspapers may have standing notwithstanding the fact that they assert rights that may belong to a broad portion of the public at large.") (internal quotation omitted): *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 927 (5th Cir. 1996) (holding that because the subject of the gag order was newsworthy and of great public interest in the community, the order severely impeded efforts "to discover newsworthy information from potential speakers"). These cases show the media's substantial interest in receiving information from willing speakers, and in transmitting that knowledge to the public.

Here, petitioners' speech can educate the public about the NSL program and the operation of key anti-terrorism initiatives undertaken by the government. While petitioners are willing speakers, other NSL recipients may keep quiet

because violating the gag order can result in a five-year prison term. *See* Kim Zetter, *'John Doe' Who Fought FBI Spying Freed From Gag Order After 6 Years*, Wired, Aug. 10, 2010, http://wrd.cm/1mtnQkA. The plaintiff in the Second Circuit case acknowledged in an anonymous *Washington Post* opinion piece that other NSL recipients would have wanted to speak out against the NSL program after the government, in a 2007 report, admitted to widespread violations of it: "Without the gag orders issued on recipients of the letters, it is doubtful that the FBI would have been able to abuse the NSL power the way it did. Some recipients would have spoken out about perceived abuses, and the FBI's actions would have been subject to some degree of public scrutiny." *My National Security Letter Gag Order*, Wash. Post, March 27, 2007, http://wapo.st/1dq1Xjh. In 2010, the government allowed the plaintiff, internet service provider owner Nicholas Merrill, to reveal his name but he still could not divulge what information the F.B.I. sought from him. *See* Zetter, *John Doe' Who Fought FBI Spying Freed From Gag Order After 6 Years*, *supra*; Ellen Nakashima, *Plaintiff who challenged FBI's national security letters reveals concerns*, Wash. Post, Aug. 10, 2010, http://wapo.st/PYEr2q. *See also* Nicholas Merrill, *How the Patriot Act stripped me of my free-speech rights*, Wash. Post, Oct. 25, 2011, http://wapo.st/1m2Ecxz. Merrill continues to speak publicly about how the non-disclosure provision stymies debate about government policy. *Id.*

Where petitioners have a constitutionally protected interest in communicating with the public, the public has a corresponding constitutional interest in receiving the communications in order to fully realize its own political freedoms. *See Garrison v. State of La.*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government."). This right is especially clear here because, since the media first reported on former NSA contractor Edward Snowden's disclosures in June 2013, there has been considerable public interest not just in the NSL program but in the entire U.S. surveillance apparatus. *See, e.g.*, Transcript of President Obama's Press Conference (Aug. 9, 2013), http://1.usa.gov/13pyCLa ("[T]his is how we're going to resolve our differences in the United States – through vigorous public debate, guided by our Constitution, with reverence for our history as a nation of laws, and with respect for the facts.").

The media has covered what little information is available about the NSL program, but many questions remain unanswered. *See, e.g.*, R. Jeffrey Smith, *FBI Violations May Number 3,000, Official Says*, Wash. Post, March 21, 2007, http://wapo.st/1dtfJBS; Kim Zetter, *Google Takes on Rare Fight Against National Security Letters*, Wired, April 4, 2013; http://wrd.cm/1mNmiC4; Maria Bustillos, *What It's Like to Get a National-Security Letter*, The New Yorker, June 28, 2013, http://nyr.kr/JZGyyY.

Disclosure would give the public a clearer picture of how the government spends its surveillance budget and the types of organizations and individuals it targets. It also would give citizens the knowledge to challenge the administration if it is abusing its power. The public has a right to receive information from willing speakers, and that right is at its highest for matters of public concern, like the NSL program.

## III. THE OVERWHELMING SECRECY ALLOWED BY THIS STATUTE HARMS THE PUBLIC DISCOURSE BY THREATENING THE CONFIDENTIAL RELATIONSHIPS OF REPORTERS AND THEIR SOURCES.

In addition to restricting public knowledge about NSLs, § 2709(c)(1), combined with other U.S. surveillance programs, threatens the free flow of information to the public by discouraging confidential sources from speaking with reporters. Because of the secrecy and size of the NSL program, there is a real threat that letters are targeting or incidentally sweeping up information from reporters or sources.

Numerous journalists have said in recent reports that the threat that the government is accessing their work product has made some confidential sources unwilling to speak with them. As journalists rely on interviews with willing speakers to gather and report the news, quality reporting about a wide range of public issues diminishes when sources dry up. This concern alone shows why the non-disclosure provisions must be examined as a prior restraint.

### A. The scope, structure, and experience of the NSL program lead reporters and sources to fear that their work product is not confidential.

Though much is unknown about NSLs, the little information that is on the public record shows the sweep of the program. The government has issued more than "tens of thousands of NSLs" annually in recent years on employees at internet service providers, financial institutions, libraries, insurance companies, travel agencies, stockbrokers, car dealerships and other companies. *In re Nat'l Sec. Letter*, 930 F.Supp.2d at 1074. Zetter, '*John Doe' Who Fought FBI Spying Freed From Gag Order After 6 Years*, *supra.* The F.B.I. has increasingly used these orders to obtain personal information about U.S. citizens, in addition to foreigners who are terrorist threats. Dan Eggen, *FBI Found to Misuse Security Letters*, Wash. Post, March 14, 2008, http://wapo.st/1fVsq2O. It uses NSLs to obtain data not only of terrorist threats, but also of people with whom that target was in contact. Eric Lichtblau, *FBI cast broad net in secretly tracking Americans' associates*, N.Y. Times, Sept. 8, 2007, http://nyti.ms/1jrLYDO.

The structure of the program offers little safeguard to journalists and sources who are fearful of surveillance. The F.B.I., and not courts, issues NSLs, and the information that the government seeks needs only to be plausibly relevant to a national security investigation. 18 U.S.C. §§ 2709(b), 2709(c)(1). Despite these minimal requirements, the government has misused the program. Eggen, *supra*;

Smith, *supra*. A Justice Department inspector general report disclosed "hundreds of possible violations of law" in the almost 200,000 NSLs that the FBI issued from 2003 to 2006. Eggen, *supra*. These misuses include improper requests, collection of more data than permitted, or improper authorization to proceed with a case. *Id.* In testimony before the U.S. House of Representatives after officials released this audit, F.B.I. General Counsel Valerie E. Caproni said "I think the public should be concerned." Smith, *supra*.

A Justice Department report also revealed that the government used "exigent letters" to obtain telephone records for reporters at *The New York Times* and *The Washington Post* in conjunction with leaks investigations, and that it did not comply with federal guidelines designed to protect journalists' First Amendment rights when doing so. Department of Justice, Office of Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* 89, 91, 102-04 (2010), http://www.justice.gov/oig/special/s1001r.pdf (admitting that officials did not make reasonable attempts to obtain the information from other sources, did not get Attorney General approval, and were unaware of protections for reporters). Additionally, national security reporter Barton Gellman said in a February 2014 speech that he has been told that his phone records were obtained at one point

through an NSL. Darren Samuelsohn, *Barton Gellman aware of legal risks*, Politico, Feb. 25, 2014, http://politi.co/1jRkSpO.

The risk of governmental overreaching is conceded at the highest levels of the administration. In his January speech on NSA surveillance, President Obama acknowledged "the potential for abuse as intelligence capabilities advance and more and more private information is digitalized." Remarks by the President on Review of Signals Intelligence, Jan. 17, 2014. Indeed, government documents released in September 2013 show that the NSA had for years regularly searched call logs of about 15,000 numbers that did not have a reasonable, articulable suspicion of terrorism. Josh Gerstein, *NSA broke rules on call-tracking program, court filings show*, Politico, Sept. 10, 2013, http://politi.co/17UxEJR. Additionally, an internal NSA audit from 2012 revealed that the agency had conducted unauthorized searches of data, including phone records and email, of thousands of Americans dating back to 2008. *See* Barton Gellman, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, Wash. Post, Aug. 15, 2013, http://wapo.st/16SWco2.

Public equivocations by national security leaders exacerbate concerns about the scope of government surveillance. In response to a question at a Senate Committee hearing in March 2013 from U.S. Senator Ron Wyden asking, "Does the NSA collect any type of data at all on millions or hundreds of millions of

Americans?," Director of National Intelligence James Clapper said, "No, sir." Glenn Kessler, *James Clapper's 'Least Untruthful' Statement to the Senate*, Wash. Post, June 12, 2013, http://wapo.st/170VVSu. After the disclosure of the "vast Internet surveillance program run by the National Security Agency," Clapper released a "letter of apology" to Congress that the statements to the Senate were "clearly erroneous." James Risen, *Lawmakers Question White House Account of an Internet Surveillance Program*, N.Y. Times, July 3, 2013, http://nyti.ms/16PNs0q.

### B. Surveillance efforts, such as the NSL program, deter sources from talking to reporters about sensitive subjects.

Equivocations and noncompliance make it impossible for individuals to understand the limits of the surveillance program. This uncertainty is especially problematic for journalists and sources, who rely on promises of confidentiality when conducting interviews on sensitive topics. There is a long history of journalists breaking significant stories through information from confidential sources. For instance, anonymous sources were the foundation of the more than 150 articles *Washington Post* reporters Bob Woodward and Carl Bernstein wrote following the Watergate break-in. *See* David von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, Wash. Post, June 1, 2005, http://wapo.st/JLlYvZ. Confidential sources also led to *The New York Times*' 2006 report on the NSA's illegal wiretapping program, and its

2007 coverage of harsh interrogations that terrorism suspects in U.S. custody have faced. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, http://nyti.ms/neIMIB; Scott Shane, David Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, http://nyti.ms/1dkyMgF.

Since the public has become aware of surveillance programs, many reporters at major news outlets have said that these efforts have made sources less willing to talk with them, even about matters not related to national security. *New York Times* executive editor Jill Abramson explained on CBS's Face the Nation, "The reporters who work for the *Times* in Washington have told me that many of their sources are petrified to even return calls at this point." Face the Nation Transcripts, June 2, 2013, CBS News, http://cbsn.ws/1aGmeyd. Discussing the NSA surveillance programs, *New York Times* investigative reporter and three time Pulitzer Prize winner David Barstow said, "I have absolutely no doubt whatsoever that stories have not gotten done because of this." Jamie Schuman, *The Shadows of the Spooks*, The News Media and the Law, Fall 2013, at 9, http://bit.ly/1f16OaS. *See also* Dylan Byers, *Reporters Say There's a Chill in the Air*, Politico, June 8, 2013, http://politi.co/11znRrJ.

In a study that former *Washington Post* executive editor Leonard Downie Jr. wrote for the Committee to Protect Journalists, numerous journalists said

surveillance programs and leaks prosecutions deter sources from speaking to them. *The Obama Administration and the Press: Leak investigations and surveillance in post-9/11 America*, Comm. To Protect Journalists, Oct. 10, 2013, http://bit.ly/1c3Cnfg. For instance, *Associated Press* senior managing editor Michael Oreskes said: "There's no question that sources are looking over their shoulders. Sources are more jittery and more standoffish, not just in national security reporting. A lot of skittishness is at the more routine level." *Id.*

The Privacy and Civil Liberties Oversight Board, an executive branch body that advises President Obama, reached the same conclusion: "The Board believes that such a shift in behavior is entirely predictable and rational. Although we cannot quantify the full extent of the chilling effect, we believe that these results – among them greater hindrances to political activism and a less robust press – are real and will be detrimental to the nation." Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court, Jan. 23, 2014, at 164, http://bit.ly/1d01flI.

More transparency about the NSL program and other surveillance efforts is needed to restore confidence in reporters and their confidential sources and protect the public's interest in robust and informed scrutiny of these policies.

## CONCLUSION

*Amici* respectfully urge the Court to find 18 U.S.C. § 2709(c) an unconstitutional prior restraint on speech.

Dated: April 8, 2014

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Dated: April 8, 2014

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## CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2014, amici Reporters Committee for Freedom of the Press and 18 other media organizations mailed seven paper copies of this brief to:

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The Ninth Circuit will effect service on the parties because this is a sealed case. Amici also emailed a searchable PDF file of this document on April 8, 2014 to Susan_Soong@ca9.uscourts.gov.

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