NOS. 16-16067, 16-16081, 16-16082, 16-16190

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL SECURITY LETTER, UNDER SEAL, Petitioner-Appellant (Nos. 16-16067; 16-16081) / Cross-Appellee (No. 16-16190), v. LORETTA E. LYNCH, Attorney General, Respondent-Appellee (Nos. 16-16067; 16-16081)/ Cross-Appellant (No. 16-16190).	In re: NATIONAL SECURITY LETTER, UNDER SEAL, Petitioner-Appellant (No. 16-16082), v. LORETTA E. LYNCH, Attorney General, Respondent-Appellee (No. 16-16082).

On Appeal From the United States District Court
for the Northern District of California
Case Nos. 11-cv-02173-SI; 13-mc-80089-SI; 13-cv-01165-SI
The Honorable Susan Illston, United States Senior District Judge, Presiding

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Ninth Circuit Rules of Appellate Procedure, amicus disclose that:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae is The Reporters Committee for Freedom of the Press. 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.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[1]

The Supreme Court has consistently imposed a heavy presumption against prior restraints. In this case, while the District Court recognized that the nondisclosure requirements in 18 U.S.C. § 2709(c), as amended by the USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268 (2015) ("USA FREEDOM Act"), amount to a prior restraint, it applied a lesser level of scrutiny. But this permissive standard is only appropriate in limited circumstances, such as licensing regimes for obscene movies. Section 2709(c), on the other hand, restrains speech on matters of public concern. Discourse about National Security Letters ("NSLs") and news coverage of this controversial government surveillance program sit at the core of speech and press freedoms and warrants greater protection. Though NSLs may involve national security, the First Amendment nonetheless mandates that the more rigorous standard of scrutiny should apply. A ruling by this Court finding the nondisclosure provision is anything less than a classic prior restraint requiring the highest burden on the government will weaken essential and longstanding constitutional protections guaranteeing the free flow of information to the public.

[1] Pursuant to Rule 37.6, *amicus curiae* attests 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, *amicus curiae* attests that they received consent to file this brief from counsel for both sides.

ARGUMENT

I. The District Court erred by not testing the pervasive system of prior restraints contained in § 2709 against the stringent standard of the *Pentagon Papers* case.

This case returns to this Court for a second hearing on Appellants' claims that the nondisclosure provisions of 18 U.S.C. § 2709 impose an unconstitutional prior restraint on recipients. The statute permits a nondisclosure order if its absence "*may* result in (i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1), *amended by* USA FREEDOM Act of 2015, Pub. L. 114-23 § 502(a) (emphasis added).

Two years ago, The Reporters Committee for Freedom of the Press, along with 18 other media organizations, filed an amicus brief in the original appeal supporting Appellants. *See* Brief Amicus Curiae of The Reporters Comm. for Freedom of the Press And 18 Media Org. In Support of Petitioner-Appellant, *In re Nat'l Sec. Letter*, *Under Seal v. Holder*, Nos. 13-15957, 13-16731 & 13-16732 (9th Cir. Apr. 9, 2014). As these arguments in the previous amicus brief remain central to this case and of great concern to the news media, the Reporters Committee files for a second time to reiterate that § 2709, even after recent amendments, cannot escape the strictest prior restraint analysis.

Much of the discussion before the District Court once again concerned whether the restrictions in § 2709 still impose a "classic" prior restraint or a lesser restriction similar to a regulatory scheme. *See In re Nat'l Sec. Letters*, Nos. 11-cv-02173-SI, 3:11-cv-2667 SI, 3:13-mc-80089 SI & 3:13-cv-1165 SI, slip op. at 18-22 (N.D. Cal., Mar. 29, 2016; unsealed Apr. 21, 2016) (hereinafter Dist. Ct. Op.). As the media coalition argued two years ago, gagging speech about how and when the government demands toll or other communications records on the grounds of national security is nothing less than a "classic" prior restraint.

The District Court properly recognized that § 2709 imposes prior restraints on speech, but adopted the Second Circuit's analysis in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Following *Mukasey*, the District Court applied the less strict standard announced in *Freedman v. Maryland*, 380 U.S. 51 (1965). *See* Dist. Ct. Op. at 22-26. While the Supreme Court has applied *Freedman* to certain licensing regimes, it has consistently used the more speech-protective standard from *New York Times v. United States ("Pentagon Papers")*, 403 U.S. 713 (1971) to cases where prior restraints impose limits on public debate.

Because § 2709's nondisclosure requirements stymie public discourse on NSLs, the *Pentagon Papers* standard should apply.

A. The Supreme Court applies a standard of presumed unconstitutionality to prior restraints limiting communications of the press and public discourse.

The term "prior restraint" refers to "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) (emphasis in original) (citation omitted). Generally, courts will not uphold prior restraints because the First Amendment imposes a dauntingly difficult standard for the government to enjoin speech. *See New York Times*, 403 U.S. at 714. Only in limited circumstances, involving a licensing regime, or time, place, and manner restrictions, will courts apply a less strict application of the First Amendment for prior restraints. *See e.g.*, *Freedman*, 380 U.S. at 58-60 (applying test to a licensing regime reviewing films); *Thomas v. Chicago Park District*, 534 U.S. 316, 322-23 (2002) (imposing a time, place, and manner restrictions).

The Supreme Court first applied a demanding standard for prior restraints in *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713 (1931) (citing Blackstone's Commentaries for the proposition that "the liberty of the press . . . consists in laying no previous restraints upon publications"). The Court recognized that this standard was "taken up by the Federal Constitution" and creates an "immunity from previous restraints or censorship." *Id.* at 716. Subsequently, the Court found that "[a]ny system of prior restraints of expression comes to this Court bearing a

heavy presumption against its constitutional validity." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

In *Pentagon Papers*, the Court articulated its greatest expression of this principal. In that case, the government had sought an injunction against the *New York Times* and *Washington Post* for publishing classified information about the Vietnam War. The Court held that the Nixon Administration failed to meet the "heavy burden" the First Amendment required of a government to suppress the speech of its citizens. *New York Times*, 403 U.S. at 714 (per curiam).

In concurring opinions, several Justices emphasized that this high standard is especially necessary in prior restraint cases affecting public debate and the role of the news media. *Id*. at 725 (Brennan J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture."); *id.* at 728 (Stewart, J., joined by White J., concurring) ("[T]he only effective restraint upon executive policy and power . . . may lie . . . in an enlightened citizenry — in an informed and critical public opinion. . . ."); *id*. at 730 (White, J., joined by Stewart, J., concurring) ("[E]xtraordinary protection against prior restraints [is] enjoyed by the press under our constitutional system. . . .").

Five years after *Pentagon Papers*, in *Nebraska Press Ass'n v. Stuart*, the Court reaffirmed that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. 539, 559 (1976). The Court

underscored that this high standard is imperative in cases involving "communication of news and commentary on current events" because in those circumstances "damage can be particularly great." *Id.* When the government constricts discussion about matters of public concern in the press, it creates a less informed citizenry incapable of exercising its constitutional duties integral to full and meaningful participation in a democracy. *See also Near*, 427 U.S. at 548 (citing to the writings of Thomas Jefferson to explain "[o]ur liberty depends on the freedom of the Press, and that cannot be limited without being lost") (internal citations omitted).

In contrast to the Supreme Court's heavy burden for prior restraints inhibiting public debate and the press, it has imposed a less stringent standard in limited, discrete cases involving the licensing of obscenity. *See e.g.*, *Kingsley Books v. Brown*, 354 U.S. 436, 441 (1957) (upholding a state injunction barring further publication of obscene booklets and stating that "the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship"); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 50 (1961) (finding that the obligation of film distributors to submit films for a permit from a censorship board seeking to screen out obscene or other unprotected material was not unconstitutional); *Freedman*, 380 U.S. at 58 (holding "a noncriminal process which requires the prior submission of a *film* to a censor

avoids constitutional infirmity only if it takes place under procedural safeguards. . . .") (emphasis added).

While courts have extended the less stringent *Freedman* standard to licensing programs outside the obscenity context, such as to commercial speech, it has not been applied in cases involving the press and limits on public discourse about current events. *Compare Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 571 n.13 (1980) (stating that in cases of commercial speech and obscenity, such as *Freedman,* the traditional prior restraint doctrine will not apply) *with Nebraska Press*, 427 U.S. at 559 (striking down a court order restraining press coverage of a criminal trial).

B. The standard applied by the District Court falls well short of the required level of protection of speech on matters of public concern.

In this case, the District Court erroneously applied the *Freedman* standard instead of imposing the "heavy burden" required by *Pentagon Papers*. In its arguments before both courts, the government has consistently tried to avoid *any* prior restraint analysis. *See e.g.*, Dist. Ct. Op. at 19-20 (summarizing the government's argument that *Freedman* doesn't apply); *see also* Gov't Supplemental Brief at 8 n.2, *In re Nat'l Sec. Letter, Under Seal v. Lynch*, Nos. 13-15957, 13-16731 & 13-16732 (9th Cir. Jul. 6, 2015) (stating "the *Freedman* requirements are inapplicable").

The District Court made clear it was "not persuaded by [the government's] attempt to avoid application of the *Freedman* procedural safeguards." *See* Dist. Ct. Op. at 20. It acknowledged that this case involves an indisputable instance of restraint on public expression, holding that "the nondisclosure provision clearly restrains speech of a particular content — significantly, speech about government conduct," and that this system of prior restraint "prevent[s] recipients from speaking about their receipt of NSLs and from disclosing, *as part of the public debate* on the appropriate use of NSLs or other intelligence devices, their own experiences." *Id.* (emphasis added).

Despite recognizing these concerns, the District Court declined to apply what it called the "extraordinarily rigorous *Pentagon Papers* test" and deferred to the Second Circuit's analysis in *Mukasey*, 549 F.3d at 876, which applied the *Freedman* standard. *See* Dist. Ct. Op. at 20. In *Mukasey*, the Second Circuit found that "[a]lthough the nondisclosure requirement is in some sense a prior restraint . . . it is not a typical example of such a restriction. . . ." *Mukasey*, 549 F.3d at 876. To support this conclusion, the Second Circuit cited *Seattle Times v. Rhinehart,* 467 U.S. 20 (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 (citing *Seattle Times*, 467 U.S. at 33).

Mukasey's reading of the prior restraint case law is unpersuasive. First, *Seattle Times* is inapplicable because it did not involve restrictions on matters of important public debate. In fact, the District Court correctly distinguished *Seattle Times*, stating that "the concerns that justified restrictions on a civil litigant's pretrial right to disseminate confidential business information obtained in discovery . . . are manifestly not the same as the concerns raised in this case." Dist. Ct. Op. at 20-21. The District Court conceded that, in contrast, "the concern [in this case] is the government's ability to prevent individuals from speaking out about the government's use of NSLs, a subject that has engendered extensive public and academic debate." *Id*. at 21.

Second, the *Mukasey* decision itself showed the limits of the *Freedman* standard. In *Mukasey*, the Second Circuit stated that in cases where "expression is conditioned on governmental permission, such as a licensing system for movies," the *Freedman* standard should apply. *Mukasey*, 549 F.3d at 871. However, § 2709 in no way amounts to a licensing regime, let alone one that concerns a system for movies or obscene materials. Instead, § 2709 is an outright prohibition on speech. In fact, the nondisclosure section of the statute is titled "Prohibition of certain disclosure" and specifies that "no wire or electronic communication service providers that receives a request . . . shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records

under this section." § 2709(c). This is exactly the type of prior restraint long recognized by the courts as demanding the most searching judicial scrutiny.

Moreover, *Mukasey* erroneously concluded that the "typical" prior restraint analysis does not apply because § 2709 does not impose its will "on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies." *Mukasey*, 549 F.3d at 876. That analysis has it backwards because it imposes a burden on prospective speakers to prove their interest in expression rather than putting the burden on the government to justify its interest in suppression. In addition, the nondisclosure provisions under § 2709 create grave restrictions on public discourse and impinge on the role of the news media — thus muzzling speakers who are *exactly* like traditional speakers in public fora. *See* Dist. Ct. Op. at 21 (stating this "subject that has engendered extensive public and academic debate").

In fact, individuals and companies issued NSLs have persistently tried to engage in meaningful debate about the subject. For example, Nicholas Merrill, the owner of an Internet services company who was the "John Doe" in the *Mukasey* litigation, was issued an NSL in 2004 and spent 11 years battling the gag imposed on him. *See* Kim Zetter, *'John Doe' Who Fought FBI Spying Freed From Gag Order After 6 Years*, WIRED, Aug. 10, 2010, http://bit.ly/2d8k1zr; *see also Merrill*

v. Lynch, No. 14-CV-9763 (VM), 2015 WL 9450650 at *11 (S.D.N.Y. Aug. 28, 2015) (lifting nondisclosure order).

More recently, after the District Court's order was published, Yahoo publicly shared information about NSLs it had received and stressed the importance in disclosing such information to the public. *See e.g.*, Chris Madsen, *Yahoo Announces Public Disclosure of National Security Letters*, Yahoo! Global Public Policy (June 1, 2016), http://bit.ly/1XgPzb3 ("We believe this is an important step toward enriching a more open and transparent discussion about the legal authorities law enforcement can leverage to access user data.").

To respond to the public's ongoing interest in this subject, the news media has tried to cover what little information is available about the NSL program. *See, e.g.*, R. Jeffrey Smith, *FBI Violations May Number 3,000, Official Says*, WASH. POST, Mar. 21, 2007, http://wapo.st/1dtfJBS; Kim Zetter, *Google Takes on Rare Fight Against National Security Letters*, WIRED, Apr. 4, 2013, http://bit.ly/2cvs1Pc; Maria Bustillos, *What It's Like to Get a National-Security Letter*, THE NEW YORKER, June 28, 2013, http://bit.ly/1A1TkRm. Since former NSA contractor Edward Snowden's disclosures in June 2013 about the government's data collection programs, there has been considerable public interest not just in the NSL program but in the entire U.S. surveillance apparatus. *See, e.g.*, President Barack Obama, Remarks in a Press Conference (Aug. 9, 2013),

http://1.usa.gov/13pyCLa (stating that the government "can, and must, be more transparent" about its national security programs and that "this 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").

But as long as NSL recipients are prevented from speaking out, and the news media is restrained in what it can cover, many questions will remain unexplored about the extent of government surveillance, leaving the press unable to fulfill its constitutionally recognized role of keeping the public informed. *Garrison v. State of La.*, 379 U.S. 64, 74-75 (1964) (recognizing that "speech concerning public affairs is more than self-expression; it is the essence of self government").[2]

[2] A recent news report has shown that the FBI has developed a specific policy regarding access to journalists' records through NSLs. *See* Cora Currier, *Secret Rules Make It Pretty Easy for the FBI to Spy on Journalists*, THE INTERCEPT, June 30, 2016, http://bit.ly/29ezUWC. These procedures directly affect the free flow of information to the public by endangering confidential relationships between reporters and their sources. Pulitzer Prize-winning journalist Barton Gellman has reported that he was told his phone records had been obtained via an NSL. *See* Darren Samuelsohn, *Barton Gellman Aware of Risks*, POLITICO, Feb. 25, 2014, http://politi.co/2d8jygt.

C. The Supreme Court has consistently applied the *Pentagon Papers* standard in cases involving national security.

It is undisputed that a nation's security is of paramount concern because its very existence depends on it. But the Supreme Court has rejected the idea that the government's mere assertion of "national security" always justifies a sweeping ban on speech, and such general assertions should not shield § 2709(c) from the heavy burden of proof of harm under prior restraint law.

In the *Pentagon Papers* case, though the materials at issue were classified documents detailing the key military decision-making during the Vietnam War, the Court was not persuaded by the government's assertion of a need for censorship. Justice Brennan underscored this point in his concurring opinion:

> Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.

New York Times, 403 U.S. at 726 (Brennan, J., concurring).

Justice Hugo Black further explained that "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Id.* at 719 (Black, J., concurring). Justice Stewart similarly warned that using "national security" to

promote widespread censorship is destructive because excessive secrecy breeds discontent. *Id*. at 729 (Stewart, J., concurring) (stating "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").

When the government raises national security concerns, Article III courts must not relinquish their independent judgment and authority. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (stating "concerns 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"). It is especially important for a court to apply the *Pentagon Papers* standard in national security cases because the need for openness and public debate are at their highest. *See New York Times*, 403 U.S. at 717 (Black, J., concurring) (stating "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) (asserting "[o]pen debate and discussion of public issues are vital to our national health").

In this case, the District Court properly recognized the national security interests at stake but improperly deferred to the government's judgment about the balance between these interests and First Amendment imperatives:

> The Court also agrees with the Second Circuit's statement that "[t]he national security context in which NSLs are authorized imposes on courts a significant obligation to defer to judgments of Executive Branch officials." [*Mukasey*] at 871; *see also Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs.")

Dist. Ct. Op. at 20. The District Court's reliance on *Egan* is misplaced. In that case, the issue before the Supreme Court was whether a body within the executive branch had the authority to review the revocation of a security clearance made by another executive branch body — the Navy. *See Egan*, 484 U.S. at 520. In contrast, this case involves the question whether a congressional statute may impose prior restraints that impede public discourse on one of the country's most pervasive and most secretive surveillance programs.

As stated above, it is essential that judges exercise skepticism when the government cites broad national security justifications to avoid careful review of executive and congressional action in the courts. Here, the NSL statute permits a nondisclosure order if its absence "may result" in a danger to the national security or interference with an investigation. 18 U.S.C. § 2709(c)(1). These restrictions

put at risk fundamental principles of freedom of speech and are more expansive and less concrete than any prior restraint the Supreme Court has justified in the past. They must be searchingly scrutinized for what they are – classic prior restraints under *Pentagon Papers*.

CONCLUSION

For the reasons stated above, *Amicus Curiae* urge this Court to find the nondisclosure provision in 18 U.S.C. § 2709 a prior restraint that is presumptively unconstitutional under the First Amendment.

Dated: September 26, 2016

Respectfully submitted,

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1. Brief of *Amicus Curiae* complies with the type-volume limitation Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4 because this brief contains 3723 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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Dated: September 26, 2016

By: /s/ Bruce D. Brown
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 26, 2016.

Dated: September 26, 2016

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