Nos. 16-16067, 16-16081, 16-16082 & 16-16190

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. 11-cv-02173-SI; 13-mc-80089-SI; 13-cv-01165-SI
Honorable Susan Illston, United States Senior District Judge

BRIEF OF *AMICI CURIAE* FIVE MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS-APPELLANTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Congresswoman Zoe Lofgren represents California's Nineteenth District in the 114th Congress. She was elected to her first term in 1994. She serves on the House Committee on the Judiciary, the Committee on Science, Space, and Technology, and the Committee on House Administration. Congresswoman Lofgren champions government oversight and transparency. She co-sponsored H.R. 3361, the USA FREEDOM Act introduced in 2013, and voted in favor of H.R. 2048, the USA FREEDOM Act of 2015.

Congressman F. James Sensenbrenner represents the Fifth District of Wisconsin in the 114th Congress. He is a long-time member of the House Judiciary Committee, and served as Chairman of the Committee from 2001-2007. During this time, he has established a strong record of supporting legislation balancing privacy and national security. To those ends, he was the primary author of both the USA PATRIOT Act and the USA FREEDOM Act.

Congressman John Conyers, Jr. represents Michigan's Thirteenth District in the 114th Congress. He was first elected to the House in 1965. Congressman Conyers serves as the Dean of the House of Representatives and the Ranking Member of the

[1] This brief is filed with the consent of all parties. It was not written in whole or part by current counsel for any party, though the undersigned attorney served as counsel for one of the petitioners in the district court while employed as a senior staff attorney at the Electronic Frontier Foundation. She currently holds an honorary, uncompensated position as Special Counsel to EFF. No person or entity other than undersigned counsel or *Amici* has made a monetary contribution to the preparation or submission of this brief.

House Committee on the Judiciary. He was the lead Democratic sponsor of both H.R. 3361 and H.R. 2048.

Congresswoman Anna G. Eshoo represents California's Eighteenth District in the 114th Congress. She was elected to her first term in 1992. She is a senior member of the House Energy and Commerce Committee and is the Ranking Member of the Communications and Technology Subcommittee. Congresswoman Eshoo served on the House Permanent Select Committee on Intelligence from 2003-2009. She was an original cosponsor of H.R. 3361 and voted in favor of H.R. 2048.

Congressman Ted Poe represents the Second District of Texas. He is a former County Judge, and serves on the House Judiciary Committee. Since coming into Congress he has been an advocate for protecting the privacy and Constitutional rights of Americans while at the same time keeping the country safe from terrorism and other threats. Congressman Poe co-sponsored H.R. 3361 and voted against H.R. 2048.

INTRODUCTION

Congress passed the USA FREEDOM Act of 2015 in a bipartisan effort to clarify the scope of the government's surveillance authority. Among other reforms, Congress endeavored to remedy troubling constitutional defects that the courts

identified in the National Security Letter (NSL) statutes, particularly 18 U.S.C. §§ 2709 and 3511.[2]

The USA FREEDOM Act was the product of a spirited public debate among lawmakers, government officials, industry representatives, civil society groups, and ordinary citizens. However, it was not without flaws. No legislation is immune to misinterpretation by the agency charged with upholding it. The Department of Justice has failed to properly implement constraints on NSL nondisclosure orders. As a result, the concerns that NSL recipients continue to voice can only be fully heard and addressed by the courts.

In the USA FREEDOM Act, Congress required the Attorney General to create procedures for (1) reviewing nondisclosure obligations imposed on NSL recipients at "appropriate intervals," and (2) terminating those obligations where the facts no longer support nondisclosure. Congress enacted this requirement with the intent of correcting certain First Amendment shortcomings recognized by the judiciary. Unfortunately, the procedures adopted by the Attorney General failed to achieve the intent.

[2] Though not at issue in this case, several other statutes also allow the FBI to serve NSLs on particular types of businesses. *See, e.g.*, 12 U.S.C. § 3414, 15 U.S.C. §§ 1681(u) and 1691(v), 50 U.S.C. § 3162. *See also* Charles Doyle, Senior Specialist, American Law Division, Congressional Research Service, *National Security Letters in Foreign Intelligence Investigations: A Glimpse at the Legal Background* 6-7 (Jan. 3, 2014), https://www.fas.org/sgp/crs/intel/RS22406.pdf.

Although Congress recognizes that the Executive branch is entitled to deference in matters of national security, the FBI's NSL authority is bound by the law and constitutional limits. It is *Amici*'s view that the rules currently in place for reviewing NSL nondisclosure orders do not meet the requirements of the USA FREEDOM Act and are unconstitutional.

ARGUMENT

I. The Procedures for Reviewing and Terminating NSL Nondisclosure Orders Do Not Satisfy the Statutory Requirements of the USA FREEDOM Act.

The USA FREEDOM Act instructs that nondisclosure orders issued with NSLs must be time-limited and reviewed regularly, a reform which Congress intended to address certain deficiencies identified in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and create a "constitutionally sound process." H.R. Rep. No. 114-109 at 24 (2015).

The legislative history of the Act shows that Congress based these nondisclosure limits on reforms proposed by President Obama in remarks accompanying Presidential Policy Directive 28 on signals intelligence activities. In those remarks, President Obama directed the Attorney General to "amend how we use National Security Letters *so that [their] secrecy will not be indefinite, and will terminate within a fixed time unless the government demonstrates a real need for further secrecy*." *Id.* at 25 (emphasis added). This underscores that Congress intended to ensure that nondisclosure orders accompanying NSLs would be regularly reviewed, limited in

duration, and that the burden would be on the government to show the need to extend a nondisclosure order.

Congress built these requirements into two distinct provisions of the USA FREEDOM Act. First, Congress made clear that nondisclosure obligations should have fixed durations when it modified 18 U.S.C. § 3511(b)(3), which sets out the standard for judicial review of nondisclosure orders. The USA FREEDOM Act amended the judicial review process to require, among other things, that a court "shall issue a nondisclosure order or *extension thereof* ... if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement *during the applicable time period"* may result in an enumerated harm. 18 U.S.C. § 3511(b)(3), amended by Pub. L. No. 114-23, § 502(g)(3), 129 Stat. 268, 289 (emphasis added).

This language shows that Congress intended nondisclosure obligations to last for a fixed amount of time by default. Nondisclosure obligations of unlimited length have no "applicable time period." That phrase indicates that each nondisclosure order was expected to have an express time limit with a definite end. *See* Charles Doyle, Senior Specialist, American Law Division, Congressional Research Service, *National Security Letters in Foreign Intelligence Investigations: A Glimpse at the Legal Background* 6 (July 31, 2015) (the phrase "applicable time period" "seems to contemplate that the

petition will propose a time limit on any nondisclosure order or at least the court will impose one.").[3]

Likewise, Congress provided for the courts to "issue a nondisclosure order or *extension thereof,*" which shows that such orders were expected to have a fixed duration. If nondisclosure orders were meant to apply indefinitely, there would never be a need for a court to "extend" an order. An extension would only be necessary if a time limit would otherwise expire. The only plausible reading of the statute is that these phrases were meant to refer to a fixed time period of time. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (a court must "give effect, if possible, to every clause and word of a statute") (quoting *Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883)).

Second, Congress specifically required the Attorney General to "adopt procedures with respect to nondisclosure requirements [issued to NSL recipients] ... to require ... review at appropriate intervals ... and termination ... if the facts no longer support nondisclosure[.]" Pub. L. No. 114–23, title V, § 502(f)(1), 129 Stat. 288 (codified at 12 U.S.C. § 3414 note).

In response, the Attorney General adopted procedures providing that the FBI will review an NSL nondisclosure order at two points: (1) on the three-year anniversary of the initiation of the full investigation in which the NSL was issued, and (2) at the close of that investigation. During those reviews, the FBI is directed to terminate the nondisclosure obligation unless the Bureau determines that one of the

[3] Available at https://www.fas.org/sgp/crs/intel/RS22406.pdf.

statutory standards justifying nondisclosure continues to be satisfied. *Termination Procedures for National Security Letter Nondisclosure Requirement* at 2-3 (Nov. 24, 2015) ("Review Procedures").[4]

The Review Procedures are inconsistent with the USA FREEDOM Act because they do not require reassessment of a nondisclosure obligation at "appropriate intervals," which means multiple reviews separated by fixed periods of time. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016) (defining an "interval" as "an amount of time between events, especially of uniform duration separating events in a series").[5]

According to the procedures, "appropriate intervals" is at most two times: three years after the initiation of a full investigation and then "the time between the last review and the close of the investigation," which could range from days to decades. Review Procedures at 2. Although the word "appropriate" indicates that the FBI is to exercise a degree of discretion to determine what the "intervals" should be, the timeline in the procedures does not fulfill Congress' effort to ensure regular, periodic review. By way of analogy, if parents ask their 16-year-old to provide updates at "appropriate intervals" about the teen's expected time home, they do not expect that their child will check in at 9 p.m. and then again at 11 a.m. the next morning.

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

[5] Available at https://ahdictionary.com/word/search.html?q=interval&submit.x=0&submit.y=0.

Indeed, prior to the adoption of the Review Procedures, one court considered the question of what review at "appropriate intervals" means in the context of the USA FREEDOM Act. That court determined that the FBI should review the nondisclosure order at issue every 180 days. *In re National Security Letter*, No. Civ. JKB–15–1180, 2015 WL 10530413, at *2 (D. Md. Sept. 17, 2015).

The Review Procedures fail to provide the regular, periodic review of nondisclosure obligations that Congress envisioned when it passed the USA FREEDOM Act.

II. The Procedures for Reviewing and Terminating NSL Nondisclosure Orders Are Unconstitutional.

In addition to being inconsistent with the letter of the law and intent of Congress, the Review Procedures violate the First Amendment because they fail to meet strict scrutiny and do not include sufficient procedural safeguards.

To survive constitutional scrutiny, a content-based speech restriction must, at a minimum, be narrowly tailored to achieve a compelling governmental interest with no less restrictive alternatives available, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 804 (2000), and must comply with the procedural safeguards of *Freedman v. Maryland,* 380 U.S. 51 (1965). Through the USA FREEDOM Act, Congress endeavored to bring the NSL statutory regime into better alignment with these constitutional standards and reduce the harm that an NSL recipient suffers when the

FBI imposes a nondisclosure order. Pub. L. No. 114-23, § 502(f)-(g), 129 Stat. 268, 288-89.

Amici recognize that this harm is substantial. The loss of the right to speak "for even minimal periods of time[] unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Nicholas Merrill, who operates an Internet service provider that received an NSL in 2004, successfully won the right to speak about his experience in 2010. He described his reaction as one of great relief: "After six long years of not being able to tell anyone at all what happened to me—not even my family—I'm grateful to finally be able to talk about my experience of being served with a national security letter." Kim Zetter, *'John Doe' Who Fought FBI Spying Freed from Gag Order After 6 Years*, WIRED (Aug. 10, 2010).[6]

Indefinite nondisclosure orders also prevent NSL recipients from meaningfully participating in the long-running public debate about the FBI's NSL authority and sharing their experiences with Congress. Indeed, when Congress debated and ultimately voted to reauthorize certain provisions of the USA PATRIOT Act in 2006, the government refused to lift a nondisclosure order to allow affected Connecticut librarians to voice their concerns about the NSL provisions. *Supreme Court Keeps Gag*

[6] Available at https://www.wired.com/2010/08/nsl-gag-order-lifted/.

Intact As Appeals Court Set to Hear PATRIOT Act Challenge, American Civil Liberties Union (Oct. 7, 2005).[7]

And the number of speakers subject to these nondisclosure orders is not small. While the precise number of nondisclosure orders served with NSLs is not publicly reported, we do know the FBI issued over 48,000 NSLs between 2013 and 2015.[8] By the Justice Department's own estimate, 97% of NSLs may be accompanied by nondisclosure orders. Statement of Glenn Fine, Inspector General, U.S. Dep't of Justice, Before the Senate Judiciary Committee Concerning Reauthorizing the USA PATRIOT Act at 6 (September 23, 2009).[9] *Amici* believe that Congress and the courts play an especially critical role in ensuring that the FBI's power to silence service providers is used within constitutional limits, given the Bureau's well-documented history of overbroad use of NSLs.[10]

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[7] Available at https://www.aclu.org/news/supreme-court-keeps-gag-intact-appeals-court-set-hear-patriot-act-challenge/.

[8] Office of the Director of National Intelligence, *Statistical Transparency Report Regarding Use of National Security Authorities: Annual Statistics for Calendar Year 2013* at 5 (June 26, 2014), https://www.dni.gov/files/tp/National_Security_Authorities_Transparency_Report_CY2013.pdf; Office of the Director of National Intelligence, *Statistical Transparency Report Regarding Use of National Security Authorities: Annual Statistics for Calendar Year 2014* at 5 (April 22, 2015), https://www.dni.gov/files/icotr/CY14 Statistical Transparency Report.pdf; Office of the Director of National Intelligence, *Statistical Transparency Report Regarding Use of National Security Authorities: Annual Statistics for Calendar Year 2015 Regarding Use of National Security Authorities* at 9 (April 30, 2016), https://www.dni.gov/files/icotr/ODNI CY15 Statistical Transparency Report.pdf.

[9] Available at https://oig.justice.gov/testimony/t0909.pdf.

[10] *See generally* Dep't of Justice Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (March 9, 2007) (re-released Feb.

A. The Procedures Restrict Speech for Longer than Necessary and at the FBI's Broad Discretion, Which Cannot Withstand Strict Scrutiny.

A content-based speech restriction can survive constitutional scrutiny only if it is narrowly tailored to achieve a compelling governmental interest, and no less restrictive alternatives are available. *Playboy Entertainment Group, Inc.*, 529 U.S. at 804; *Levine v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985). The Review Procedures do not meet this exacting standard because they are not narrowly tailored and less restrictive alternatives exist.

First, the procedures are not narrowly tailored because they may continue to impose nondisclosure obligations even when a compelling governmental interest no longer exists. In some cases, the government's interest in secrecy will dissipate over time, becoming less compelling. *See, e.g.*, *John Doe, Inc. v. Holder*, Stipulation and Order of Dismissal, 1:04-cv-2614-VM (S.D.N.Y. July 30, 2010) (ECF No. 204) (releasing NSL recipient from a nondisclosure obligation where "due to a change in circumstances the FBI no longer believes that non-disclosure of the identity of the recipient of the NSL is necessary"). As one court recently pointed out, the procedures create "several large loopholes" that make it possible for nondisclosure orders to

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20, 2016), https://oig.justice.gov/reports/2016/NSL-2007.pdf; Dep't of Justice Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* (March 2008) (re-released Oct. 22, 2014), https://oig.justice.gov/reports/2014/s1410.pdf; Dep't of Justice Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* (Jan. 2010) (re-released Nov. 24, 2014), https://oig.justice.gov/reports/2014/o1411.pdf.

remain in effect indefinitely, regardless of the circumstances. *In re National Security Letters,* No. 16-518 (JEB), slip op. at 4 (D.D.C. July 25, 2016). Under the procedures, a nondisclosure order that is deemed justified at the end of an investigation may remain in place forever—even if the need for secrecy diminishes over time, after the investigation is done. Imposing a perpetual nondisclosure obligation when there is no potential countervailing harm is incompatible with the narrow tailoring requirement of the strict scrutiny standard.

Second, the procedures do not satisfy strict scrutiny because they give the FBI substantial discretion to decide when to review and terminate NSL nondisclosure obligations, which is not the least restrictive means of furthering the FBI's interest. Specifically, there is only one point when the FBI will have to review a nondisclosure order with no discretion over the timing—three years after the investigation is initiated. Review Procedures at 2-3. The other point of review—the close of the investigation—depends upon factors entirely within the FBI's control, which leaves the Bureau a great deal of leeway to decide when the review occurs. Although the FBI Domestic Investigations and Operation Guide says that an "investigation must be closed upon all investigative activity being exhausted," § 7.12.2, that point may not come for decades, and may have nothing to do with the factors upon which the speech restriction was premised.[11]

[11] And FBI investigations can stay open for decades. Just last month, the Bureau closed its investigation of the D.B. Cooper skyjacking, which occurred in 1971.

A less speech-restrictive alternative exists: requiring regular, periodic reviews of nondisclosure orders to cabin the FBI's discretion. This approach would achieve the governmental interest while reducing the burden on the NSL recipient's speech. As currently written, however, the Review Procedures cannot withstand strict scrutiny and fail to meet First Amendment requirements.

B. The Procedures Fail To Incorporate Adequate Procedural Checks Because the Onus Remains Too Much on the NSL Recipient to Initiate Judicial Review.

Courts have long been wary of giving government officials significant discretion to curtail speech. "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freedman*, U.S. at 57-58; *see also Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969).

As such, a system of government censorship must include at least three procedural safeguards to pass constitutional muster: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available;

Farida Fawzy, *D.B. Cooper: FBI Closes the Books 45 Years After Skyjacking Mystery*, CNN (July 14, 2016), http://www.cnn.com/2016/07/12/world/d-b-cooper-fbi-closes-case/. If the current Review Procedures were applied to a national security investigation of the same length as the Cooper investigation, a hypothetical nondisclosure order issued to an NSL recipient would be reviewed—absent an affirmative challenge from the recipient—three years after the initiation of the investigation, and then again forty-two years later.

and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas v. Chi. Park Dist.,* 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (O'Connor, J., joined by Stevens, and Kennedy, JJ.) (numbering and ordering follows the Supreme Court's discussion of *Freedman* in *FW/PBS, Inc.*).

Freedman notes that if the process of seeking judicial review is made "unduly onerous" for the speaker, the nondisclosure order "may in practice be final." 380 U.S at 58. There is a strong likelihood of that outcome under the Review Procedures. Those rules require the FBI to review a nondisclosure order on the Bureau's own initiative at two pre-determined points to determine whether it should continue. Otherwise, it is up to the NSL recipient to contact the FBI to initiate judicial review or petition the court directly under section 3511, regardless of whether the nondisclosure order has been in place for a month, a year, or a decade. Even where the government's interest in secrecy fades over time or evaporates altogether, the responsibility remains on the NSL recipient to seek to establish their right to speak.

Requiring express time limits and periodic reviews of nondisclosure orders would help to minimize the onus on speakers to initiate review and keep the burden squarely on the government, where it constitutionally belongs. Thus, the Court should require a process with appropriate procedural safeguards to secure First Amendment rights.

CONCLUSION

Amici respectfully ask this Court to find that the Review Procedures fail to meet the requirements of the USA FREEDOM Act and are unconstitutional.

Dated: September 26, 2016

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify as follows:

1. This brief is 3,388 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). It therefore complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

2. This brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). It was written in Garamond typeface with 14-point font.

Dated: September 26, 2016

/s/ *Marcia Hofmann*
Marcia Hofmann

CERTIFICATE OF SERVICE

I 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Marcia Hofmann*
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