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

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), v. JEFFERSON B. SESSIONS III, Attorney General, Respondent-Appellee (Nos. 16-16067, 16-16081).	In re: NATIONAL SECURITY LETTER UNDER SEAL, Petitioner-Appellant (No. 16-16082), v. JEFFERSON B. SESSIONS III, Attorney General, Respondent-Appellee (No. 16-16082).

On Appeal From the United States District Court
For the Northern District of California

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 20 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS-APPELLANTS URGING REHEARING

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Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), *amici* state 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 *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., Gannett Co., Inc., The McClatchy Company, MPA – The Association of Magazine Media, News Media Alliance, The NewsGuild - CWA, The New York Times Company, Online News Association, PEN America, Radio Television Digital News Association, Reporters Without Borders, The Seattle Times Company, Society of Professional Journalists, and The Washington Post. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[1]

This case concerns the constitutionality of a statute that empowers the government to preemptively gag a wire or electronic communication service provider from speaking about the government's request for information about a subscriber. 18 U.S.C. § 2709(a), (c). The statute at issue concerns National Security Letters ("NSLs") and allows the government to restrain a service provider ("NSL recipient") from disclosing even the mere fact that it has received an NSL. *Id*. § 2709(c) (the "nondisclosure requirement"). Petitioners-Appellants challenge this nondisclosure requirement as an unconstitutional prior restraint.

Two years ago, this Court remanded an appeal by Petitioners-Appellants in this case to the district court for reexamination in light of a June 2, 2015 amendment to the relevant provisions of 18 U.S.C. § 2709 (the "NSL statute").[2] *In re Nat'l Sec. Letter, Under Seal v. Holder*, Nos. 13-15957, 13-16731 & 13-16732 (9th Cir. Apr. 9, 2014). On remand, the district court held that, in light of the legislative changes, the NSL statute satisfied constitutional requirements. *In re*

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief. This brief is filed with the consent of all parties.

[2] RCFP and 18 other media organizations filed an *amicus* brief in this appeal supporting Appellants. *See* Br. *Amicus Curiae* of The Reporters Comm. for Freedom of the Press and 18 Media Orgs. In Support of Pet'r-Appellant, *In re Nat'l Sec. Letter, Under Seal v. Holder*, Nos. 13-15957, 13-16731 & 13-16732 (9th Cir. Apr. 9, 2014).

Nat'l Sec. Letter, Nos. 11-cv-02173, 3:11-cv-2667, 3:13-mc-80089, 3:13-cv-1165, slip op. (N.D. Cal., Mar. 29, 2016; unsealed Apr. 21, 2016) (hereinafter Dist. Ct. Op.).

The case returned to this Court for a second time on appeal, and Appellants argued that, even after the legislative changes, the nondisclosure requirement imposes an unconstitutional prior restraint.[3] A panel of the Ninth Circuit held that the nondisclosure requirement is a content-based restriction subject to strict scrutiny. *In re Nat'l Sec. Letter, Under Seal v. Sessions*, 863 F.3d 1110, 1125 (9th Cir. 2017) ("*In re NSL*"). However, it treated the gag like a licensing scheme rather than a prior restraint on core First Amendment-protected speech and, accordingly, applied a weaker form of strict scrutiny. *See id.* (holding that even though strict scrutiny should apply to the nondisclosure requirement, "narrow tailoring is not perfect tailoring" (citing *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015)). Under this standard, the panel concluded that the nondisclosure requirement satisfied strict scrutiny. *Id*. at 1131.

The panel's decision upholds a prior restraint that stifles discussion on matters of intense public concern—namely, national security and prosecutorial discretion. In *New York Times v. United States* ("*Pentagon Papers*"), 403 U.S.

[3] RCFP filed a second *amicus* brief in support of Appellants. Br. Amicus Curiae of The Reporters Comm. for Freedom of the Press In Support of Appellants, *In re Nat'l Sec. Letter, Under Seal v. Holder*, Nos. 16-16067, 16-16081, 16-16082, 16-16190 (9th Cir. Sept. 26, 2016).

713, 714 (1971), the U.S. Supreme Court emphasized the heavy burden that prior restraints inhibiting public debate and the functions of a free press must satisfy. *Amici*, as news media organizations, write to highlight that the history of the First Amendment, along with the principles articulated in *Pentagon Papers*, require that this Court apply the most rigorous scrutiny to the nondisclosure requirement. Anything less will erode protections for the press and diminish public discourse on matters at the core of First Amendment protected speech.

ARGUMENT

I. Settled First Amendment law imposes a demanding standard for prior restraint.

"The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)). The First Amendment imposes a dauntingly high standard to justify such restrictions. *See Pentagon Papers*, 403 U.S. at 714 (finding that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

The nondisclosure requirement is a prior restraint because it preemptively forbids an NSL recipient from revealing it has received an NSL. The Ninth Circuit panel, however, did not expressly state that the nondisclosure requirement is a prior restraint, instead labeling it a content-based restriction and determining that the standards that govern prior restraint are limited to the context of government censorship and licensing schemes. *See, e.g., In re NSL*, 863 F.3d at 1122, 1131 (discussing "prior administrative restraints"). This narrow view overlooks the history of the prior restraint doctrine, which demonstrates that speech about

government conduct, like the speech at issue in this case, lies at the heart of First Amendment protections.

A. The First Amendment right of freedom of the press springs from a resounding historical rejection of prior restraint.

The First Amendment arose in response to British acts of parliament and proclamations that prevented publication without an official license. *See Respublica v. Oswald*, 1 U.S. 319, 328, 1 L. Ed. 155 (1788) (discussing the "odious restraints, which disgraced the early annals of the British government"). Prior restraints on publication emerged nearly in tandem with the practice of printing itself. Shortly after the first instances of printing, in the 15th century, the English church imposed restrictions. *See* Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 298 (2001). In 1538, King Henry VIII issued the first comprehensive licensing system, which required official preapproval of all texts. *Id*. (citing Fred S. Siebert, Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control 49 (1965)). In 1586, the Star Chamber was created. It issued and enforced strict regulations on printers, requiring licensing for publications and limiting the number of printers. *Id*. at 299–300. To enforce these regulations, the Star Chamber searched for illegal printed materials, destroyed printing presses, and, in at least one instance, tortured and imprisoned suspected printers for contravening

its regulations. *Id*. at 300–01. When the Star Chamber ended, Parliament took over as censor, requiring that all publications be preapproved by parliamentary licensors. *Id*. at 303.

In 1644, John Milton published the *Areopagitica*, considered one of the earliest works to advocate for free expression. *Id*. at 303–04 (citing Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England, *reprinted in* 2 Complete Prose Works of John Milton 793 (1959)). Milton conceded that the government should be allowed to penalize offensive or seditious speech but argued that licensing was a uniquely pernicious practice because it prevented the speech from being expressed in the first place. *Id*. at 304. By the 18th century, an influential treatise on English common law rejected this parliamentary practice and recognized that "liberty of the press . . . consists in laying no *previous* restraints upon publications." 4 William Blackstone, *Commentaries on the Laws of England* 151 (1769). And by the end of that century, "a consensus had developed in England that liberty of the press required the ability to put forth to the world what one wanted, as long as the printer was willing to accept the consequences of punishment for material considered illegal." *See* Meyerson, *supra*, at 311.

This principle carried over to the formation of the United States. During the drafting of the Constitution, Federalists "sought to reassure Anti-Federalist critics

by insisting that the new federal government would have no generally applicable enumerated power to censor or license the press." Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 Cap. U. L. Rev. 503, 506 (2010) (citing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 36 (1998)). James Madison, the author of the First Amendment, explained that "the censorial power is in the people over the Government, and not in the Government over the people." *Id*. (citing 4 Annals of Cong. 934 (Nov. 27, 1794)).

The earliest U.S. cases involving the press reflected the understanding that the First Amendment meant, if nothing else, that the press should be able to publish information about government conduct free from prior restraint. *See, e.g., Commonwealth v. Blanding*, 3 Pick. 304, 313–14 (1825) (finding that the constitutional free press right "was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of their rulers"); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (quoting *Blanding*, 3 Pick. at 313–14).

To be sure, the history of the First Amendment involved debate and disagreement about the scope of its protections. *See* Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 B.Y.U. L. Rev. 1151, 1170

(2015) (describing the "overwhelming impression" of First Amendment history as "one of confusion and uncertainty"). But throughout this debate, freedom from prior restraint was considered the First Amendment's bedrock principle. "There was [ ] widespread consensus on at least one critical principle: Liberty of the press must mean, at a bare minimum, no prior restraint." Meyerson, *supra* at 320–21.

B. Prior restraints on speech about government conduct are subject to rigorous scrutiny and are presumptively unconstitutional.

The Supreme Court relied on the history of the First Amendment in *Near v. Minn. ex. rel. Olson*, when it expressly stated, for the first time, that prior restraints are subject to a demanding standard. 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 reiterated this principle more than forty years later in *Nebraska Press Ass'n v. Stuart*, stating that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. 539, 559 (1976). Because they are uniquely disfavored under the First Amendment, "[a]ny system of prior restraints of expression comes to th[e] Court bearing a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70.

Pentagon Papers is the Supreme Court's greatest expression of this principle. In that case, the government sought an injunction prohibiting *The New York Times* and *The Washington Post* from publishing classified information about

the Vietnam War. The Court held that the government failed to meet the First Amendment's "heavy burden of showing justification for the imposition of such a restraint." *Pentagon Papers*, 403 U.S. at 714 (per curiam). Although the Court's per curiam opinion did not set forth the precise standard by which the government's burden must be weighed, *see id.*, several concurring opinions made clear that the burden is especially high.[4] For example, Justice Brennan concluded that there is at most "a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden"—namely, wartime censorship to shield information about, *inter alia*, "the number and location of troops." *Pentagon Papers*, 403 U.S. at 726 (Brennan, J., concurring). In addition, according to Justice Brennan, even if the government sought a prior restraint to suppress "information that would set in motion a nuclear holocaust," the government would be required to present facts showing that publication of the information at issue "would cause the happening of an event of that nature." *Id*. Moreover, Justices Stewart and White wrote that the government must show that

[4] In addition, two justices, Justices Black and Douglas, wrote in their concurring opinions that prior restraints on core speech are *never* constitutional. *Id*. at 714–19 (Black, J., joined by Douglas, J., concurring); *id*. at 720–24 (Douglas, J., joined by Black, J., concurring).

"disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id*. at 730 (Stewart, J., joined by White, J., concurring).[5]

Several Justices also emphasized in concurring opinions this high standard is especially necessary in cases affecting the news media or hampering debate on matters of public concern. *Id*. at 730–31 (White, J., joined by Stewart, J., concurring) ("[E]xtraordinary protection against prior restraints [is] enjoyed by the press under our constitutional system . . ."); *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) ("[A] press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment."); *id.* at 724 (Douglas, J., joined by Black, J., concurring) (emphasizing that "[o]n public questions there should be 'uninhibited, robust, and wide-open' debate" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964)); *see also Nebraska Press Ass'n*, 427 U.S. at 559

[5] In a decision such as *Pentagon Papers*, the concurrence on the narrowest grounds controls. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining which concurrence controls in a fractured decision). To the extent *Pentagon Papers* established the standard the government must meet to justify a prior restraint, it is the standard Justice Stewart sets forth in his concurring opinion, which, among the concurrences, imposed the lowest burden on the government. *Compare Pentagon Papers*, 403 U.S. at 714–19 (Black, J., joined by Douglas, J., concurring) (prior restraints on core speech are never constitutional); *id*. at 720–24 (Douglas, J., joined by Black, J., concurring) (same); *id*. at 726 (Brennan, J., concurring) (prior restraints might be permissible during wartime); *id*. at 731–40 (White, J., joined by Stewart, J., concurring) (the executive lacked authority to impose a prior restraint); *id*. at 740–48 (Marshall, J., concurring) (same).

(stating that "[t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events").

Accordingly, courts apply exacting review to any prior restraint that inhibits core First Amendment activity, such as speech and news reporting on matters of public concern. *See United States v. Quattrone,* 402 F.3d 304, 310 (2d Cir. 2005) (reviewing a restriction on press coverage of a criminal trial and finding that "courts subject prior restraints on speech or publication to exacting review" when the restraint operates on core First Amendment speech); *see also CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (reviewing an injunction that prevented a broadcasting news company from airing footage and finding that the "most extraordinary remedy" of prior restraint is available "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures" (internal quotations, alterations, and citation omitted)); *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 183–84 (1968) (reviewing an injunction on political party members from holding rallies, and noting that a restraint on First Amendment rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order").

Pentagon Papers also makes clear that prior restraints are not automatically permitted even when the speech concerns national security. The government in

Pentagon Papers argued that the publication of a Defense Department history on U.S. political-military involvement in Vietnam, which could contain "military and diplomatic secrets," would harm national security. *Pentagon Papers*, 403 U.S. at 718–19 (Black, J., joined by Douglas, J., concurring). The Court's per curiam opinion held that the government failed to meet its burden to justify a prior restraint. *Id.* at 714. Justices White and Stewart, concurring, wrote that they were "confident" the disclosure of certain materials would "do substantial damage to public interests," and yet they "nevertheless agree[d] that the United States ha[d] not satisfied the very heavy burden" of overcoming the First Amendment presumption against prior restraint. *Id*. at 731; *see also CBS, Inc.*, 510 U.S. at 1317 (stating that prior restraints are disfavored "[e]ven where questions of allegedly urgent national security" are concerned).

Thus, when the government raises national security concerns, courts must be careful not to relinquish their independent judgment and authority to interpret the First Amendment according to settled law. *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"). "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First

Amendment." *Pentagon Papers*, 403 U.S. at 719 (Black, J., joined by Douglas, J., concurring); *see also id.* at 725 (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture."). In fact, when it comes to prior restraints, speech concerning national security should arguably be subject to stronger rather than weaker protection: "[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the value of democratic government." *Id*. at 728 (Brennan, J., concurring).

II. The erroneous panel decision erodes press protections and meaningful public debate.

A. The panel wrongly de-emphasized *Pentagon Papers* to apply a weaker form of strict scrutiny.

As a prior restraint on speech concerning matters of public concern, the nondisclosure requirement should be subject to the most searching scrutiny. The nondisclosure requirement prevents NSL recipients from informing the press and the public, even in broad strokes, about routine government surveillance through warrantless NSLs—"a subject that has engendered extensive public and academic debate." Dist. Ct. Op. at 20–21. *Pentagon Papers* in no uncertain terms set a high

standard for prior restraints limiting discussion about government conduct, and therefore it should guide this case.[6]

The panel decision, however, mentions *Pentagon Papers* only once, in a single footnote.[7] Rather than apply exacting scrutiny, the panel took a permissive approach by rejecting a "granular focus" on the statute, *In re NSL*, 863 F.3d at 1125 (citing *Williams-Yulee*, 135 S. Ct. at 1671), finding that "narrow tailoring is not perfect tailoring," *id*., and declining to "quibble with the particular ranges" of permissible speech allowed in the NSL statute, *id*. at 1126 (citing *Williams-Yulee*, 135 S. Ct. at 1671). In addition, the panel characterized speech about NSLs not as speech of significant public concern, but rather as "a single, specific piece of information that was generated by the government: the fact that the government has requested information to assist in an investigation addressing sensitive national security concerns . . ." *Id*. at 1128. This approach fails to consider the importance

[6] The Supreme Court has imposed a less stringent standard only in limited cases involving licensing of obscenity or commercial speech. *See, e.g., Kingsley Books v. Brown*, 354 U.S. 436, 441 (1957) (upholding a "closely confined" injunction on obscene booklets); *Central Hudson Gas & Electric Corp. v. Public Serv. Commission of New York*, 447 U.S. 557, 571 n.13 (1980) (stating that in cases of commercial speech and obscenity, the traditional prior restraint doctrine will not apply). The less stringent standard does not apply here because the nondisclosure requirement gags speech on a matter of public concern: namely, the government's conduct in national security investigations.

[7] The footnote dismissed the idea of a heightened burden for the prior restraint in this case by stating, in part: "No Supreme Court or Ninth Circuit opinion has articulated such a test, nor do the three cases cited by the recipients support it. The brief per curiam opinion in [*Pentagon Papers*] did not specify a test that should be applied to prior restraints."

of robust public debate about national security and threatens to erode press freedom in reporting on government surveillance, one of the key controversies of our time.

This departure from *Pentagon Papers* is particularly troubling because, as the panel has interpreted it, the nondisclosure requirement gags *all* speech regarding the existence of an NSL so long as a government official finds "some reasonable likelihood," *In re NSL*, 863 F.3d at 1125 (quoting *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 875 (2d Cir. 2008)), that disclosure "may result" in one of four harms, 18 U.S.C. § 2709(c)(1)(B). Yet when the government claimed to have an inherent power to prohibit disclosure of the document in *Pentagon Papers*, Justice Douglas's concurring opinion found that the Supreme Court had already "repudiated that expansive doctrine in no uncertain terms." *Pentagon Papers*, 403 U.S. at 723 (Douglas, J., concurring).

B. The lower burden for prior restraint applied by the panel will have detrimental effects for the free press and public debate.

The nondisclosure requirement restricts public discourse by silencing NSL recipients who wish to inform the press and the public about government surveillance. Individuals and companies who receive NSLs have persistently tried to engage in meaningful debate about the subject. For example, Nicholas Merrill, the owner of an Internet services company, spent 11 years battling a nondisclosure order. *See* Priyanka Boghani, *Gag Order Gone, Secrets of a National Security*

Letter are Revealed, PBS Frontline (Dec. 2, 2015), https://perma.cc/85YP-LBBS. Major communication service providers have also disclosed information about a limited number of NSLs, when permitted to do so by the government, and stressed the importance of disclosing such information to the public. *See, e.g.,* Chris Madsen, *Yahoo Announces Public Disclosure of National Security Letters*, Yahoo! Global Public Policy (Jun. 1, 2016), https://perma.cc/9ERU-CYSG; Kate Conger, *Twitter releases national security letters*, TechCrunch (Jan. 27, 2017), https://perma.cc/E5H4-VVGP (stating that Twitter, Yahoo, Cloudflare, and Google disclosed NSLs after the FBI lifted nondisclosure orders).

The news media has responded to the public's interest in this subject by reporting what little information is available about NSL practice. *See, e.g.,* Maria Bustillos, *What It's Like to Get a National-Security Letter*, The New Yorker (Jun. 28, 2013), http://bit.ly/1A1TkRm; R. Jeffrey Smith, *FBI Violations May Number 3,000*, Official Says, Wash. Post (Mar. 21, 2007), http://wapo.st/1dtfJBS. For example, *The Intercept* published what it asserted are the FBI's standards for obtaining a journalist's records through an NSL, showing that they diverge significantly from the Justice Department's guidelines on using a subpoena to seek information from members of the news media. *See* Cora Currier, *Secret Rules Make It Pretty Easy for the FBI to Spy on Journalists*, The Intercept (Jun. 30,

2016), https://perma.cc/TN77-5B4X; Cora Currier, *Secret Rules* (Republished), The Intercept (Jan. 31, 2017), https://perma.cc/2GM5-YHMW.

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 only in NSLs, but in the entire U.S. surveillance apparatus. *See, e.g.,* President Barack Obama, Remarks in a Press conference (Aug. 9, 2013), https://perma.cc/WY32-GYXH (stating that the government must "be more transparent" about national security programs to promote "vigorous public debate"). The news media has reported on a dramatic uptick in other types of government requests for data from communication service providers. *See, e.g.,* Spencer S. Hsu and Rachel Weiner, *U.S. courts: Electronic surveillance up 500 percent in D.C.-area since 2011, almost all sealed cases*, Wash. Post (Oct. 24, 2016), https://perma.cc/8SBL-GANK (explaining criminal surveillance tools—such as electronic search warrants—have increased dramatically).

Because of the secrecy shrouding government surveillance programs, the news media must rely on recipients of NSLs and other forms of electronic surveillance orders to share information with them so they can report on this subject. Accordingly, as long as NSL recipients are prevented from disclosing the existence of NSLs, the press is unable to fulfill its constitutionally-recognized role of keeping the public informed about government activities, including the extent of

government surveillance. *See Garrison v. State of La.*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government"). The nondisclosure requirement should therefore be subject to the most exacting review as required by the longstanding constitutional rules against prior restraints. *See* Section I.B, *supra*.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for panel rehearing or rehearing *en banc*.

Respectfully submitted,

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Dated: October 12, 2017
Washington, DC

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that the foregoing brief of *amici curiae*:

1) Complies with the type-volume limitation in Circuit Rule 29-2(c)(2) because it contains 4,198 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-processing system used to prepare the brief; and

2) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

/s/ Bruce Brown
Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Dated: October 12, 2017
Washington, DC

Certificate of Service

I hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on October 12, 2017.

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

Dated: October 12, 2017

/s/ Bruce Brown

Bruce D. Brown, Esq.
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THE REPORTERS COMMITTEE
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APPENDIX A

SUPPLEMENTAL STATEMENT OF IDENTITY 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.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of

current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

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 Center for Investigative Reporting (CIR), founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its https://www.revealnews.org/ website, the Reveal national public radio show and podcast, and various documentary projects - often in collaboration with other newsrooms across the country.

Dow Jones & Company, Inc., is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva;

Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

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.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and

the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

PEN American Center ("PEN America") is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 5,000 members and is affiliated with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

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.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

WP Company LLC publishes The Washington Post, the leading daily newspaper in the nation's capital, as well as the website www.washingtonpost.com, which reaches more than 65 million unique visitors per month.

APPENDIX B

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