No. 13-16732
UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY LETTER

UNDER SEAL,
Petitioner-Appellant

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR GOOGLE INC., FACEBOOK, INC., MICROSOFT CORPORATION, AND YAHOO INC. AS *AMICI CURIAE* SUPPORTING UNDER SEAL PARTY

Marc J. Zwillinger
ZwillGen PLLC
1900 M. Street, NW, Suite 250
Washington, DC 20036
Telephone: (202) 706-5202

Attorney for *Amicus Curiae*
Yahoo Inc.

Albert Gidari
Eric D. Miller
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000

Attorneys for *Amici Curiae*
Google Inc., Facebook, Inc., and
Microsoft Corporation

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* ... 1

SUMMARY OF ARGUMENT ... 3

ARGUMENT ... 5

A. The First Amendment fully protects the speech that Section 2709(c) prohibits ... 5

B. Section 2709(c) is an unconstitutional prior restraint ... 15

1. A nondisclosure order in an NSL is a prior restraint ... 16

2. The statute does not satisfy the substantive standards governing prior restraints ... 18

3. The statute does not provide the procedural safeguards required for prior restraints ... 19

C. Section 2709(c) is an unconstitutional content-based restriction on speech ... 22

1. A nondisclosure order in an NSL imposes a content-based restriction ... 22

2. The statute does not satisfy strict scrutiny ... 24

CONCLUSION ... 30

TABLE OF AUTHORITIES

Page

CASES

Alexander v. *United States*,
509 U.S. 544 (1993) 16

Bantam Books, Inc. v. *Sullivan*,
372 U.S. 58 (1963) 18

Brandenburg v. *Ohio*,
395 U.S. 444 (1969) 13

Brown v. *Entm't Merchs. Ass'n*,
131 S. Ct. 2729 (2011) 6, 7, 13, 24

Butterworth v. *Smith*,
494 U.S. 624 (1990) 9, 13

Carey v. *Brown*,
447 U.S. 455 (1980) 23

Chaplinsky v. *New Hampshire*,
315 U.S. 568 (1942) 6, 14

Freedman v. *Maryland*,
380 U.S. 51 (1965 .... 15, 17, 20

Frisby v. *Schultz*,
487 U.S. 474 (1988) 25

FW/PBS, Inc. v. *City of Dallas*,
493 U.S. 215 (1990) 20

Goodman v. *United States*,
108 F.2d 516 (9th Cir. 1939) 14

Haig v. *Agee*,
453 U.S. 280 (1981) 24

TABLE OF AUTHORITIES
(continued)

Page

In re Russo,
53 F.R.D. 564 (C.D. Cal. 1971) 11

John Doe, Inc. v. *Mukasey*,
549 F.3d 861 (2d Cir. 2008) 15, 26

Landmark Commc'ns, Inc. v. *Virginia*,
435 U.S. 829 (1978) 29

Madsen v. *Women's Health Ctr.*, Inc.,
512 U.S. 753, 794 (1994) 23

Miller v. *French*,
530 U.S. 327 (2000) 26

Mills v. *Alabama*,
384 U.S. 214 (1966) 28

NAACP v. *Button*,
371 U.S. 415 (1963) 25

Near v. *Minnesota ex rel. Olson*,
283 U.S. 697 (1931) 19

New York Times Co. v. *United States*,
403 U.S. 713 (1971) 15, 19

Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations*,
413 U.S. 376 (1973) 18

R.A.V. v. *City of St. Paul*,
505 U.S. 377 (1992) 29

Reno v. *ACLU*,
521 U.S. 844 (1997) 24, 28

Roth v. *United States*,
354 U.S. 476 (1957) 13

TABLE OF AUTHORITIES
(continued)

Page

S.E. Promotions, Ltd. v. *Conrad*,
420 U.S. 546 (1975) 17

Schenck v. *United States*,
249 U.S. 47 (1919) 14

Seattle Times Co. v. *Rhinehart*,
467 U.S. 20 (1984) 7

Simon & Schuster, Inc. v. *Members of N.Y. State Crime Victims Bd.*,
502 U.S. 105 (1991) 6

Thomas v. *Chicago Park Dist.*,
534 U.S. 316 (2002) 20

Turner Broad. Sys., Inc. v. *FCC*,
512 U.S. 622 (1994) 23

United States v. *Aguilar*,
515 U.S. 593 (1995) 8

United States v. *Alvarez*,
132 S. Ct. 2537 (2012) 6

United States v. *Navarro-Vargas*,
408 F.3d 1184 (9th Cir. 2005) 11

United States v. *Playboy Entm't Grp., Inc.*,
529 U.S. 803 (2000) 24

United States v. *Richey*,
924 F.2d 857 (9th Cir. 1991) 8

United States v. *Stevens*,
559 U.S. 460 (2010) 6, 7, 21

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND RULE

18 U.S.C. § 2709 .... *passim*

18 U.S.C. § 3511 .... 17, 21

Act for the Establishing Forms of Oaths, *reprinted in Acts and Laws of His Majesties Colony of Connecticut, in New-England* 86, 88 (1702), *amended by* Act in Alteration of an Act, intitled, An Act for Prescribing and Establishing Forms of Oaths in this Colony, 1776 Conn. Acts & Laws 421 12

Act Regulating the Appointment and Services of Grand Jurors, ch. 4, 1784 Mass. Acts 135 13

Act to admit Grand Jurors to give evidence, § 2, 1812 Ga. Acts 89, 90 13

Fed. R. Crim. P. 6 .... 13, 14, 15

OTHER AUTHORITIES

Peter Baker and Charlie Savage, *Obama Seeks Balance in Plan for Spy Programs*, N.Y. Times, Jan. 9, 2014 28

4 William Blackstone, *Commentaries on the Laws of England* (1769) 10

Black's Law Dictionary (9th ed. 2009) 25

Book of Oaths (H. Twyford ed., 1689) 10

Earl of Shaftesbury's Case, 8 How. St. Tr. 759 (1681) 11

INTEREST OF *AMICI CURIAE*

Google Inc. is a diversified technology company whose mission is to organize the world's information and make it universally accessible and useful. Google offers a variety of web-based products and services—including Search, Gmail, Google+, Maps, YouTube, and Blogger—that are used by people throughout the United States and around the world. Facebook, Inc. provides a social utility through which users can connect and share with family members, coworkers, and friends. Microsoft Corporation is a provider of electronic communication services and remote computing storage services to individual users, enterprises, educational institutions, and governments worldwide. Yahoo Inc. is a global technology company with hundreds of millions of users around the world. Yahoo is focused on making the world's daily habits inspiring and entertaining across devices. Yahoo provides a host of Internet-related services and products including Yahoo Search, Yahoo Mail, Yahoo Weather, Flickr, Yahoo Sports, Yahoo Finance, and Yahoo News.

Collectively, *amici* have long been committed to the principle of transparency. *Amici* publish transparency reports describing requests

for user data from governments around the world. With each iteration of their reports, *amici* strive to release new and useful information. Each *amicus* provides information about the volume and scope of national security letters (NSLs) that it receives. At the direction of the government, however, that information can be conveyed only in broad ranges. The government limits *amici* to reporting the number of NSLs received in a six-month period, if any, in ranges of 1000, starting at zero to 999, and similar ranges of 1000 for the number of affected accounts.

This appeal involves 18 U.S.C. § 2709(c), which provides that, upon an appropriate certification from the Director of the FBI, the recipient of an NSL is prohibited from disclosing the fact that it has received an NSL. The question presented is whether Section 2709(c) is consistent with the First Amendment. Although *amici* have no interest in disclosing in a transparency report the targets or substance of any particular NSL that they may receive, they do wish to publish more detailed aggregate statistics about the volume, scope, and type of NSLs that the government uses to demand information about their users. Because the government argues that Section 2709(c) allows it to re-

strict any publication of such information, *amici* have a strong interest in the resolution of the question presented, which goes beyond just the prior restraint of provider speech about the receipt of any particular NSL. Just as important to *amici*, whenever the government purports to act in the interests of national security to limit protected speech, it should do so only in compliance with the strict requirements of the First Amendment.[1]

SUMMARY OF ARGUMENT

Under 18 U.S.C. § 2709, the Director of the FBI has the authority to issue a national security letter that not only orders a communication service provider to turn over information about its customers but also prohibits the provider from speaking about the order. That prohibition on speech violates the First Amendment.

The government attempts to sidestep the serious First Amendment issues raised in this case by arguing that there is no First Amendment right to disclose information gained from participation in a secret government investigation. That is incorrect. Most of the cases

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

on which the government relies to establish that proposition involved parties who had sought out confidential information and agreed to keep it confidential as a condition of access. Those cases do not establish that the government may foist a gag order upon the involuntary recipient of an NSL, let alone prohibit the recipient from even reporting periodically the aggregate number of such demands that it receives.

The Supreme Court has held that the categories of speech that do not enjoy First Amendment protection are few and that they are limited to categories of speech that have historically been prohibited. There is no history of restricting speech by parties compelled to participate in government investigations. To the contrary, in the closely analogous context of grand-jury investigations, speech by grand-jury witnesses generally has *not* been restricted.

A nondisclosure order in an NSL represents an administrative determination that certain speech will not be permitted and is made in advance of any judicial determination that the speech is unlawful. In short, it is a prior restraint. Because the statute establishes a prior-

restraint regime, it is subject to extraordinarily demanding substantive and procedural standards, which it cannot satisfy.

Even if the statute were not considered a prior restraint, it would still be subject to strict scrutiny as a content-based restriction on speech. To satisfy that scrutiny, the government must show that the statute is narrowly tailored to promote a compelling interest. While the protection of national security is certainly compelling, the statute is not narrowly tailored to achieve it. Instead, the statute prohibits such a broad range of speech that much of the speech it prohibits is likely to have little or no effect on national security. Worse, it suppresses speech on an important issue of public concern, and it does so in a way likely to distort public debate. The government has sought to participate in public debate over its use of the NSL statute. It should not be permitted to gag those best suited to offer an informed viewpoint in that debate: the parties that have received NSLs.

ARGUMENT

A. The First Amendment fully protects the speech that Section 2709(c) prohibits

The key premise of the government's argument is that "there is no First Amendment right to disclose information learned through

participation in a secret government investigation." Br. 35 (capitalization omitted).[2] That premise is false.

While there are indeed some categories of speech that are not protected by the First Amendment, the Supreme Court has made clear that those categories are "well-defined and narrowly limited." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 (1942). In *United States* v. *Stevens*, 559 U.S. 460 (2010), the Court rejected, as "startling and dangerous," the proposition that "[t]he First Amendment's guarantee of free speech . . . extend[s] only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* at 470; *accord Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."); *United States* v. *Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion). Instead, the categories of unprotected speech are limited to those "historic and traditional categories long familiar to the bar." *Stevens*, 559 U.S. at 468 (quoting *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)

---

[2] References to "Br." are to the government's brief in Nos. 13-15957 and 13-16731.

(Kennedy, J., concurring in the judgment)). Although there may be "'some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law,'" in the absence of "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" *Brown*, 131 S. Ct. at 2734 (quoting *Stevens*, 559 U.S. at 470, 472).

No historical tradition supports denying protection to speech by parties such as the recipients of NSLs, who are compelled to participate in what the government refers to as "a secret government investigation." Because the speech at issue here is not within any traditionally unprotected category, it is entitled to full First Amendment protection. The government's efforts to demonstrate otherwise are unavailing.

1. The government relies (Br. 35) on *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), in which the Supreme Court held that, as a condition of obtaining access to information through civil discovery, a

party may be subjected to a protective order requiring that it preserve the confidentiality of that information. Similarly, the government cites cases holding that government employees or contractors who have been given access to classified information can be prohibited from revealing that information. Br. 37-38; *see also id.* at 39 (citing *United States* v. *Aguilar*, 515 U.S. 593 (1995) ("Government officials in sensitive confidential positions may have special duties of nondisclosure."), and *United States* v. *Richey*, 924 F.2d 857 (9th Cir. 1991) (disclosure of tax information by IRS agent)).

All of those restrictions differ from Section 2709(c) in that they apply to parties who have voluntarily sought out the information at issue and have thereby accepted the attendant limitations on their speech. NSL recipients, on the other hand, have not asked to be sent NSLs. That distinction is critical to the First Amendment analysis: it is one thing to say that a party seeking access to confidential information can be prohibited from disclosing that information, but it is quite another to say that the government may impose a gag order on a party simply because it has also demanded that the party assist in an investigation.

2. Similarly unhelpful to the government is *Butterworth* v. *Smith*, 494 U.S. 624 (1990), in which the Supreme Court struck down a Florida statute prohibiting a grand-jury witness from "divulg[ing] information of which he was in possession before he testified before the grand jury." *Id.* at 632. The government notes (Br. 36) that the Court in *Butterworth* did not consider "information which [the witness] may have obtained as a result of his participation in the proceedings of the grand jury," such as the fact that he received a subpoena, or the questions he was asked—information analogous to that covered by a nondisclosure order in an NSL. 494 U.S. at 632; *see id.* at 637 (Scalia, J., concurring) (noting that the issues raised by a prohibition on the disclosure of such information "are not presented by the narrow question we decide today"). Although the government suggests that the First Amendment does not protect speech that discloses such information, there is no tradition of suppressing it, and the history of the law governing grand-jury witnesses illustrates the lack of support for the government's position.

At common law, grand jurors were required to maintain the confidentiality of grand-jury proceedings. But the recipients of NSLs—

persons whose only role in the government's investigation is that they have been compelled to provide information to it—are more appropriately analogized to grand-jury witnesses, who were not subject to a duty of confidentiality. Blackstone noted that "antiently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision, and liable to be fined and imprisoned." 4 William Blackstone, *Commentaries on the Laws of England* 126 (1769). He made no mention, however, of any similar rule for grand-jury witnesses. Similarly, grand jurors were required to swear that "the Kings Majesties Counsel, your fellows and your own, you shall keep Secret," while witnesses were required to swear only that "[t]he Evidence that you shall give to the Inquest, upon this Bill shall be the truth, and the whole truth, and nothing but the truth." *Book of Oaths* 114 (H. Twyford ed., 1689).

It is not surprising that witnesses were not sworn to secrecy. One major reason for grand-jury secrecy was to protect the grand jury—and the accused—from the undue influence of the Crown, a rationale that

would not have applied to witnesses. Americans of the founding era were familiar with the *Earl of Shaftesbury's Case*, a case from shortly before the Glorious Revolution in which a grand jury had asserted the right to sit in secret, with one of the grand jurors arguing that "the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection." 8 How. St. Tr. 759, 773-774 (1681); *see id.* at 821 (explaining that although the grand jury in that case was not permitted to examine the witnesses in secret, it was permitted to deliberate in secret, and it ultimately refused to indict). As this Court has observed, that case "established grand jury secrecy, which continues to be a crucial element in grand juries serving as an independent screen." *United States* v. *Navarro-Vargas*, 408 F.3d 1184, 1191 (9th Cir. 2005); *see also In re Russo*, 53 F.R.D. 564, 568 (C.D. Cal. 1971) (noting that the grand jury "gradually developed independence of action from the Crown" by "enclosing its proceedings in a veil of secrecy which the Crown was unable to penetrate"). But shielding the grand jury from improper governmental influence does not require gagging those called upon to give evidence.

After the American Revolution, several States codified the obligation of grand jurors to keep their proceedings secret, but no State appears to have codified a rule of witness secrecy. *See, e.g.*, Act for the Establishing Forms of Oaths, *reprinted in Acts and Laws of His Majesties Colony of Connecticut, in New-England* 86, 88 (1702), *amended by* Act in Alteration of an Act, intitled, An Act for Prescribing and Establishing Forms of Oaths in this Colony, 1776 Conn. Acts & Laws 421 (requiring grand jurors to swear that "the Secrets of the Cause, your own, and your Fellows, you [will] duly observe and keep," but requiring witnesses only to swear to tell the truth, with no obligation of confidentiality); Act Regulating the Appointment and Services of Grand Jurors, ch. 4, 1784 Mass. Acts 135 (requiring grand jurors to swear that "the Commonwealth's counsel, your fellows and your own, you shall keep secret," but imposing no obligation of confidentiality on witnesses); Act to admit Grand Jurors to give evidence, § 2, 1812 Ga. Acts 89, 90 (same). Nor, so far as we are aware, did any early American decisions hold that such a rule existed.

To be sure, beginning several decades after the founding era, a handful of States adopted restrictions on disclosures by grand-jury

witnesses—the statute at issue in *Butterworth* is one example. But the Federal Rules of Criminal Procedure expressly reject such restrictions. *See* Fed. R. Crim. P. 6(e)(2)(B) (listing persons, not including witnesses, who "must not disclose a matter occurring before the grand jury"); Fed. R. Crim. P. 6(e)(2)(A) ("No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)."); Fed. R. Crim. P. 6 advisory committee's note (1944) (noting that "[t]he seal of secrecy on witnesses seems an unnecessary hardship"). Under the Federal Rules, a grand-jury witness is free to disclose the questions he or she was asked and the testimony that he or she gave.

In short, the government has not come close to establishing that there is an "American tradition of forbidding" the kind of speech at issue here—that is, speech by involuntary participants in a government investigation about their compelled participation. *Brown*, 131 S. Ct. at 2734. Certainly there is nothing comparable to the kind of historical tradition identified by the Supreme Court in recognizing other categories of unprotected speech, such as obscenity, *see Roth* v. *United States*, 354 U.S. 476 (1957), incitement, *see Brandenburg* v.

Ohio, 395 U.S. 444 (1969) (per curiam), and fighting words, *see Chaplinsky*, *supra*.

3. The government cites one case from this Court (Br. 36-37) for the proposition that grand-jury witnesses may be prohibited from disclosing their testimony. But that case, *Goodman* v. *United States*, 108 F.2d 516 (9th Cir. 1939), predates the Federal Rules and was superseded by Rule 6(e)(2)(B). More importantly, the decision long predates modern First Amendment doctrine. The Court's analysis of the First Amendment question consisted of the assertion that "[t]he contention that the oath [of secrecy] violates the right of the witness to freedom of speech is specious" because "[t]he right is not absolute," supported by a citation to *Schenck* v. *United States*, 249 U.S. 47 (1919), the WWI-era Espionage Act case that was effectively abrogated by *Brandenburg*. The First Amendment holding of *Goodman* is no longer good law. In any event, even if speech by grand-jury witnesses can be restricted in certain circumstances, that would not establish that such speech is categorically unprotected.

The government also cites (Br. 37 n.9) cases from other circuits upholding restrictions on speech by various participants in grand-jury

proceedings. But none of those cases establishes the broad proposition that such speech is unprotected by the First Amendment, or that "there is no First Amendment right to disclose information learned through participation in a secret government investigation." Br. 35 (capitalization omitted). To say that the First Amendment protects speech like that at issue here is not to say that such speech may never be restricted. Restrictions may be permissible, but only when they can satisfy scrutiny under ordinary First Amendment standards. As explained below, Section 2709(c) cannot survive such scrutiny.

B. Section 2709(c) is an unconstitutional prior restraint

The district court concluded that Section 2709(c) "may not be a 'classic prior restraint,'" and that it need not satisfy the rigorous scrutiny of *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). 930 F. Supp. 2d 1064, 1071 (N.D. Cal. 2013) (quoting *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008)); *see Doe*, 549 F.3d at 876 (describing Section 2709's nondisclosure requirement as "in some sense a prior restraint" but also stating that the provision is "not a typical example of such a restriction"). At the same time, the court held that the statute is nevertheless subject to the procedural safeguards for prior restraints set out in *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

930 F. Supp. 2d at 1071-1072. In fact, Section 2709(c) establishes a regime of prior restraint—whether or not characterized as a "classic" prior restraint—and it is subject to the exacting First Amendment scrutiny that applies to such restraints, both as to substance and as to procedure. It cannot survive that scrutiny.

1. A nondisclosure order in an NSL is a prior restraint

In *Alexander* v. *United States*, 509 U.S. 544 (1993), the Supreme Court explained that "[t]he 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." *Id.* at 550 (emphasis and internal quotation marks omitted). Section 2709(c) provides for just such administrative orders. Specifically, the statute authorizes the FBI Director or his designee to prohibit the recipient of an NSL from "disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the Federal Bureau of Investigation has sought or obtained access to information or records" by means of an NSL. 18 U.S.C. § 2709(c)(1). Under the statute, a party who receives such an order and wishes to speak about an NSL must litigate the validity of

the order prior to speaking. 18 U.S.C. § 3511(b)(1). In other words, while the prior-restraint doctrine recognizes that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand," *S.E. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975), Section 2709(c) does the exact opposite.

The prior-restraint regime created by Section 2709(c) is particularly troubling because the orders restraining speech are issued by an Executive Branch official, not by a court. The Supreme Court has observed that "[b]ecause 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*, 380 U.S. at 57-58 (1965). That danger is especially acute in this context because the official who decides whether to restrain speech is the same official whose conduct—that is, the issuance of an NSL—would be the subject of the speech, creating the risk that a gag order will be used to conceal government overreaching.

The nature of Section 2709(c)'s prior-restraint regime is illustrated by the efforts of *amici* to be more transparent with their users in describing government requests for user data. *Amici* provide the public with information about the volume and scope of NSLs that they receive, but they provide that information only in broad ranges. Significantly, *amici* were able to communicate that information only *after* extensive negotiations with the Department of Justice. A regime in which parties who wish to speak about the government's orders must first obtain the government's permission cannot plausibly be described as anything other than a regime of prior restraint. Such a regime creates a grave risk "that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

2. The statute does not satisfy the substantive standards governing prior restraints

"Any system of prior restraints of expression," the Supreme Court has held, is subject to "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963);

see Near v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). The government makes no effort to argue that the statute can survive First Amendment scrutiny if viewed as a prior-restraint regime, and with good reason. As explained more fully below, the statutory standard governing the issuance of a nondisclosure order—that disclosure "may result" in various specified harms, 18 U.S.C. § 2709(c)(1)—is too low to satisfy ordinary strict scrutiny. *A fortiori*, it is insufficient to justify a prior restraint. *See New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (reversing injunction against publication of the Pentagon Papers because "I cannot say that disclosure of any of them will *surely* result in direct, immediate, and irreparable damage to our Nation or its people") (emphasis added).

3. The statute does not provide the procedural safeguards required for prior restraints

The statute suffers from the independent defect that it fails to provide the procedural safeguards required for a prior-restraint regime. The First Amendment requires three safeguards: "(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; 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. *Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (opinion of O'Connor, J.)); *Freedman*, 380 U.S. at 58-59. Here, although judicial review is available, there is no guarantee that it will be "expeditious." And the first and third requirements are entirely absent because there is no "specified brief period" during which an NSL can restrict speech before judicial review, and the government does not "bear the burden of going to court to suppress the speech." Instead, the recipient of an NSL remains subject to a gag order until he or she successfully challenges the order in court.

The government promises (Br. 54) that it will inform NSL recipients "that they can notify the FBI of their opposition to a nondisclosure requirement in an NSL in order to have the FBI initiate judicial review proceedings." That notice, it says (Br. 52-53), will "start a 30-day clock for the Government to initiate judicial review." Setting aside the question whether a ban on speech can permissibly last for an entire month before judicial review has even begun, the more fundamental problem with the government's proposal is that "the First Amendment

protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

The government points out (Br. 54) that its jury-rigged procedure—that is, inviting NSL recipients to ask the government to initiate judicial proceedings against them—is not its own invention but was imposed by the Second Circuit in *Doe* after that court held, correctly, that the *Freedman* requirements apply to Section 2709(c). *See* 549 F.3d at 885. But it is not the role of the court, any more than it is the role of the Executive Branch, to save an unconstitutional statute by enacting the procedures that Congress failed to provide. While the government is correct (Br. 55) that a court should construe a statute to make it constitutional rather than unconstitutional, the procedures required by *Doe* bear no relation to anything set out in Sections 2709 or 3511—even the government concedes (Br. 53), with significant understatement, that they are "not contained within the four corners of the statute." The court in *Doe* therefore erred in concluding that a judicially imposed requirement that the government follow certain pro-

cedures could save the statute from invalidation. Because the statute as written does not satisfy the procedural requirements for a prior restraint, it violates the First Amendment.

C. Section 2709(c) is an unconstitutional content-based restriction on speech

Even if Section 2709(c) is not regarded as a prior restraint, it still violates the First Amendment. As a content-based restriction on speech, the statute is subject to strict scrutiny, and it cannot satisfy that scrutiny.

1. A nondisclosure order in an NSL imposes a content-based restriction

The government attempts to argue (Br. 31-32) that Section 2709(c) does not impose a content-based restriction on speech and is therefore subject only to intermediate scrutiny. That argument lacks merit.

Section 2709(c) imposes a content-based restriction on speech because it prohibits the recipient of an NSL from disclosing "that the Federal Bureau of Investigation has sought or obtained access to information or records." Determining whether speech by the recipient falls within the statute's prohibition requires examining the content of that speech. If the speech is about the fact "that the Federal Bureau of

Investigation has sought or obtained access to information or records," it is unlawful; if it is about something else, it is not. In other words, the applicability of the prohibition turns on the content of the speech. Because "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," the statute is content-based. *Carey* v. *Brown*, 447 U.S. 455, 462 (1980).

According to the government (Br. 31), however, "the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of . . . disagreement with the message it conveys." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) (internal quotation marks and citation omitted). That may be the "principal" inquiry, but it is not the only one. In arguing to the contrary, the government confuses content-based regulations with viewpoint-based regulations. While the latter are particularly suspect, both are subject to strict scrutiny. *Madsen* v. *Women's Health Ctr.*, Inc., 512 U.S. 753, 794 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) ("The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is

not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.") (emphasis omitted).

2. The statute does not satisfy strict scrutiny

As a content-based restriction on speech, Section 2709 is invalid unless the government "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. The narrow-tailoring component of the test requires the government to show that there are no "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997). Under the strict-scrutiny standard, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Section 2709(c) is no exception.

a. There is no doubt that the government has a compelling interest in protecting national security. Br. 27-28; *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). Section 2709(c), however, is not narrowly tailored to promote that interest. Moreover, because NSLs are not or-

dinarily classified, the statute is not narrowly tailored to any interest the government may have in preventing the dissemination of classified information to unauthorized persons. The statute permits the FBI Director to prohibit disclosure whenever he finds that "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). That language falls short of narrow tailoring in two respects.

First, the statute is satisfied whenever the FBI director says that the specified harms "may" occur. That imposes hardly any limit at all, as the word "may" requires only a mere possibility. *See Black's Law Dictionary* 1068 (9th ed. 2009) (defining "may" as "[t]o be a possibility"). Narrow tailoring requires more. *See Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) (narrow tailoring is satisfied "only if each activity within the proscription's scope is an appropriately targeted evil"); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

Second, the enumerated harms in the statute cover far more than harm to national security. For example, "interference with a criminal . . . investigation" could refer to even minor interference with an investigation of a misdemeanor offense having nothing to do with national security. Similarly, as the Second Circuit observed in *Doe*, the "danger to the . . . physical safety of any person" clause "could extend the Government's power to impose secrecy to a broad range of information relevant to such matters as ordinary tortious conduct." 549 F.3d at 874.

Having correctly identified the constitutional problems posed by Section 2709(c)'s broad language, the court in *Doe* mistakenly concluded that they could be avoided by reading the statute to require that there be "an adequate demonstration that a good reason exists reasonably to apprehend a risk of an enumerated harm," 549 F.3d at 882, and that the harm be "related to 'an authorized investigation to protect against international terrorism or clandestine intelligence activities,'" *id.* at 875 (quoting 18 U.S.C. § 2709(b)). Although that reading mitigates the First Amendment problems to some degree, it cannot be reconciled with the statutory text. *See Miller* v. *French*, 530 U.S. 327, 341

(2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.") (internal quotation marks and citation omitted).

In any event, even assuming that the broad statutory language could be read in such a limited way, the Second Circuit's standard, which appears to be akin to the reasonable-suspicion standard of the Fourth Amendment, is not sufficient when strict scrutiny is applicable. To be sure, a prohibition on speech might satisfy strict scrutiny if there were "a good reason . . . reasonably to apprehend a risk" of a very serious harm from the speech. But even as rewritten by the Second Circuit, the statute does not require that the harm be serious—or even more than *de minimis*—only that it be somehow related to a terrorism investigation. That is, it permits speech to be suppressed upon a determination that there is a risk that it might lead to some kind of "interference with [an] investigation" that is in some way related to terrorism, no mater how minimal the interference may be. The statute is not narrowly tailored to promote the interest in national security.

b. The highly restrictive nature of Section 2709(c) provides additional reason to conclude that the provision cannot be the least restric-

tive means of achieving the government's asserted objective. *See Reno*, 521 U.S. at 874. The statute prohibits speech on matters of vital public concern—namely, the government's exercise of coercive authority against the recipients of NSLs. *See Mills* v. *Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *accord Landmark Commc'ns, Inc.* v. *Virginia*, 435 U.S. 829, 838-839 (1978). In that respect, the provision is different from many of the other speech restrictions that the government cites, which apply to information obtained by virtue of a voluntary relationship with the government (such as government employment).

The public interest in the speech that Section 2709(c) prohibits is highlighted by the government's many disclosures about its use of NSLs. The government's use of its authority under the NSL statute is a matter of significant public debate, and the government has engaged in that debate by defending its use of the statute. *See*, *e.g.*, Peter Baker and Charlie Savage, *Obama Seeks Balance in Plan for Spy Programs*, N.Y. Times, Jan. 9, 2014 (FBI Director James Comey described the

NSL statute as "a very important tool that is essential to the work we do"). Some NSL recipients may agree that the government has used the statute appropriately; others may not. Some, like *amici*, while not seeking to disclose individual NSLs if received, have a strong commitment to transparency and want their users to know in the aggregate how many such demands they receive and the number of accounts affected. The nondisclosure provisions impermissibly suppress the speech of those who might be best positioned to offer an informed perspective on the government's position. The First Amendment does not permit the government to silence a key participant a debate about the government's activities. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

Dated: April 4, 2014

PERKINS COIE LLP

By: *s/ Eric D. Miller*

Albert Gidari
Eric D. Miller
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for *Amici Curiae* Google Inc., Facebook Inc., and Microsoft Corporation

Marc J. Zwillinger
ZwillGen PLLC
1900 M. Street, NW, Suite 250
Washington, DC 20036
Telephone: (202) 706-5202

Attorney for *Amicus Curiae* Yahoo Inc.

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

   ☒ this brief contains 5759 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

   ☐ this brief uses a monospaced typeface and contains ________ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Century Schoolbook 14-point type, *or*

   ☐ this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003 with ________ characters per inch in *[name and type style, e.g., Courier 12-point type].*

s/ Eric D. Miller
Eric D. Miller

Dated: April 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on April 4, 2014, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by sending seven copies by Federal Express to:

Susan Soong, Chief Deputy Clerk - Operations
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

The Court will effect service on the parties.

s/ Eric D. Miller