

NO. 13-16732

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNDER SEAL,

PETITIONER-APPELLANT,

v.

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

RESPONDENT-APPELLEES

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

**REPLY OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS AND 18 MEDIA ORGANIZATIONS TO GOVERNMENT'S
RESPONSE TO MOTION TO UNSEAL THEIR AMICUS BRIEF IN CASES
13-15957, 13-16731, 13-16732**

Bruce D. Brown

Counsel of record for Amici Curiae

Gregg P. Leslie

Jamie T. Schuman

The Reporters Committee for Freedom of the Press

1101 Wilson Blvd., Suite 1100

Arlington, VA 22209

Telephone: 703.807.2100

Facsimile: 703.807.2109

April 23, 2014

Amici Reporters Committee for Freedom of the Press and 18 other media organizations respectfully oppose the Government’s request that the Court defer any action with respect to the unsealing of the *amicus* brief until after May 11, 2014.¹ As the *amicus* brief contains no material subject to a statutory requirement of confidentiality under the National Security Letter statute, 18 U.S.C. § 2709(c), *amici* request that this Court unseal it immediately.

The Government’s position that it has a right to review a brief before allowing unsealing only makes sense when it concerns parties like the plaintiffs in these actions, who actually possess information that they are under a statutory obligation to keep confidential. *Amicus* parties weighing in on a controversial topic in a partially public case before this Court who have no access to the confidential information are under no such obligation and should not be subject to a sealing order on their speech.

Furthermore, the Government acknowledges that it “will support the unsealing of the *amicus* brief if it does not contain any material that should remain

¹ As listed in their *amicus* brief, *amici* are the Reporters Committee for Freedom of the Press; American Society of News Editors; Association of Alternative Newsmedia; California Newspaper Publishers Association; Courthouse News Service; The Daily Beast Company LLC; First Amendment Coalition; Fox News Network, LLC; Freedom of the Press Foundation; Gannett Co., Inc.; The Investigative Reporting Workshop; The McClatchy Company; The Media Consortium; National Press Photographers Association; National Public Radio, Inc.; The New York Times Company; North Jersey Media Group Inc.; Radio Television Digital News Association; and WP Company LLC d/b/a The Washington Post.

under seal,” Response at 2. Because *amici* have never known or possessed information that “should remain under seal,” no such information is in its brief and unsealing it now will not cause any harm to the Government’s interests.

If the Government’s position is that it needs 30 days to make sure *amici* have not *illegally* obtained confidential information (although it has not offered any grounds for such a suspicion), such speculative concerns cannot justify a continuing sealing of the news media *amici* brief.

Furthermore, the Court itself should not accept filings under seal when there is no justification for that sealing, regardless of what the parties below may have agreed to or the Government may impose. As *amici* asserted in the original motion, this brief contains no confidential material that could implicate national security or other concerns that could necessitate redactions. The only information on which *amici* relied in researching and writing this brief is from orders and briefs on this Court’s public website for cases 3-15957, 13-16731 and 13-16732; published court opinions; and published secondary source materials, such as news articles. The sealing order should have only applied to parties who are in possession of information required to be kept confidential.

The *amicus* brief contains media organizations’ opinions on why this Court should find the nondisclosure provision of the National Security Letter statute, 18 U.S.C. § 2709(c), a prior restraint. The 19 members of this media coalition have

all reviewed the brief, and an even larger group was shown the brief to solicit participation. A government order requiring these outlets not to publish the brief, which is already in their possession, is a prior restraint on speech with no compelling interest at stake. As *amici* explained in their brief, prior restraints are presumptively unconstitutional and the Supreme Court has never upheld one against the media. See *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976). See also *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

In short, the position of the *amici* is not that grounds exist to move for *unsealing* this brief, but that there has never been a justification for *sealing* it and imposing an unconstitutional prior restraint in the first place. We ask the Court to remedy this error.

Amici, therefore, respectfully request that this Court unseal their friend-of-the-court brief promptly.

Dated: April 23, 2014

By: _____
Bruce D. Brown
Counsel of record
Gregg P. Leslie
Jamie T. Schuman
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2014, *amici* Reporters Committee for Freedom of the Press and 18 other media organizations mailed one original and three copies of this reply to the Government's response to their motion to unseal to:

Susan Soong, Chief Deputy Clerk - Operations
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103
telephone is 415-355-7990.

The Ninth Circuit will effect service on the parties because this is a sealed case. *Amici* also emailed a searchable PDF file of this document on April 23, 2014 to Susan_Soong@ca9.uscourts.gov.

Dated: April 23, 2014

By: _____

Bruce D. Brown
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for Amicus Curiae