No. 13-16732 UNDER SEAL

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,

Respondents-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

BRIEF OF NSL RECIPIENTS WHO HAD CHALLENGED THEIR NSL'S AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae Internet Archive is a § 501(c)(3) nonprofit corporation, has no parent companies, and no persons or entities own it or any part of it.

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INTEREST OF *AMICI CURIAE*[1]

The *amici*—the Internet Archive, Peter Chase, George Christian, and Nicholas Merrill—had all received National Security Letters, and then proceeded to successfully challenge them. They believe that their experiences offer them a particularly good perspective on how 18 U.S.C. § 2709 imposes an unconstitutional restriction on First Amendment freedoms.

1. The Internet Archive was founded in 1996 to build a free and permanent "Internet library" for the benefit of researchers, historians, scholars, artists and the public. The Archive stores electronic data (including a vast range of Internet pages), and digitizes physical data that it gets from, among other sources, libraries, educational institutions, and private companies. The Archive collaborates with institutions such as the Library of Congress and the Smithsonian to preserve a record for future generations.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

All parties have consented to the filing of this brief.

In November 2007, the Internet Archive received a National Security Letter from the FBI seeking a user's name, address, and any electronic communication transactional records pertaining to the user. The letter instructed the Archive not to disclose the existence of the letter. The Archive's founder was even unable to discuss the letter with other members of the Archive's Board of Directors.

The Archive responded in December 2007 by suing to challenge the constitutionality of the letter's non-disclosure obligations and the FBI's authority to demand user information without judicial review. Following months of negotiation, the FBI withdrew the NSL and lifted its non-disclosure requirement. Thereafter, a redacted version of the letter was made public.[2]

2. In 2005, Peter Chase was the Vice President and George Christian was the Executive Director of Library Connection Inc., a non-profit corporation formed by 27 libraries in the greater Hartford, Connecticut area to provide the libraries with computer and telecommunications services. Library Connection received a National Security Letter de-

[2] U.S. Dep't of Justice, Federal Bureau of Investigation, Letter to Internet Archive, Nov. 19, 2007, https://www.eff.org/node/55601.

manding certain library patron information. The Executive Board of Library Connection—Chase, Christian, and two other officers—sued to have the NSL set aside. All four were subjected to a gag order with regard to the NSL, and were unable to discuss the matter with anyone. Among other things, they were not able to testify before Congress, which was then considering extending the USA Patriot Act.

Chase was at the time the Chair of the Intellectual Freedom Committee of the Connecticut Library Association. He received many invitations to speak at public events to explain why librarians opposed the Patriot Act, but had to refuse all of them because he was concerned that something he said in the discussion or the questions and answers might run afoul of the gag order.

While the case was on appeal, and several weeks after the Patriot Act extension was signed, the Justice Department released Chase and Christian from the gag order.[3] Because of the changes to the Patriot Act and the removal of the gag order, the Second Circuit Court ruled that

[3] Alison Leigh Cowan, *Four Librarians Finally Break Silence in Records Case*, N.Y. Times, May 31, 2006.

Chase's and Christian's case was moot. *Doe v. Gonzales*, 449 F.3d 415, 421 (2d Cir. 2006).

3. In 2004, Nicholas Merrill was the President of Calyx Internet Access Corp., a web hosting and security consulting company that received a National Security Letter from the FBI. He has been under a § 2709 gag order for 10 years, and is still not allowed to disclose to anyone exactly what happened. Only after nearly seven years of expensive and time-consuming litigation challenging the gag order was he allowed to disclose the bare facts that he was the "John Doe" in the case that became *Doe v. Mukasey*, 549 F.3d 861, 881 (2d Cir. 2008), and to state that he got the NSL.[4]

SUMMARY OF ARGUMENT

The National Security Letter statute, 18 U.S.C. § 2709, severely burdens the freedom of speech. First, § 2709 lets the government gather a vast trove of information about people's connections to various ideologi-

[4] Kim Zetter, *'John Doe' Who Fought FBI Spying Freed from Gag Order After 6 Years*, Wired, Aug. 10, 2010 (noting that Merrill "has finally been partially released" from the order, and "can now identify himself and discuss the case, although he still can't reveal what information the FBI sought").

cal, political, and religious groups—far more information than that involved in leading associational privacy cases such as *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Shelton v. Tucker*, 364 U.S. 479 (1960). Section 2709 thus chills association at least as much as the government actions held unconstitutional in those cases.

Second, as the District Court correctly concluded, the gag order provision of § 2709 directly restricts speech—and directly restricts petitioning the government for redress of grievances—based on content. When most of us are subject to government action that we think is improper (whether or not we think the action is legally unauthorized), we can complain. We can complain to our Senators or Representatives. We can complain to the media, and to the public through the media.

We can complain to party leaders, urging them to make our experience an issue in an upcoming campaign. We can complain to state and local politicians, who can in turn relay our concerns to their political allies in Congress. Criticism of government action, by those who have the closest experience with that action, is a necessary part of democratic self-government and of the checks and balances that the First Amendment imposes on the government.

And we can make our criticism concrete and therefore more persuasive only by explaining exactly what was done to us. Specific, fact-based arguments are what it takes to persuade. Airy generalities that say "the government makes some people do this thing, and I think that's wrong, but I can't give any specific examples of this happening" do not suffice. The National Security Letter statute forecloses such concrete, persuasive arguments—essentially preventing effective criticism of the statute itself.

To be sure, national security concerns may justify some kinds of burdens on expressive association and on speech. But the Supreme Court has repeatedly made clear that even in the rare circumstances in which the government has good reason to impose some such burdens, the burdens must be kept narrow, and must be accompanied by adequate procedural safeguards.

Section 2709 fails to comply with these requirements. Section 2709 involves executive action that suppresses speech without the safeguards—such as broad judicial review—that *Freedman v. Maryland*, 380 U.S. 51 (1965), requires for such action. Section 2709 imposes a speech restriction aimed at fighting terrorism, but one that does not of-

fer the alternative channels for speech that *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), repeatedly pointed to as vital even when national security is involved. And though the government tries to justify § 2709 by analogy to grand jury secrecy provisions, Gov't Opening Br. 3, 36, NSLs lack the judicial supervision that has traditionally cabined grand jury secrecy.

ARGUMENT

I. Section 2709 Seriously Interferes with People's Right to Associate

"Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Thus, in *NAACP* the Supreme Court quashed a subpoena that demanded disclosure of the NAACP's membership; any such coercive gathering of information about group membership, the Court held, was unconstitutional unless it was narrowly tailored to a compelling government interest. *Id.* at 455, 463-66.

Likewise, in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court held that even government employees could not be compelled to reveal all the associations to which they belonged. "[T]o compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Id.* at 485-86. And this was said in a context—government employment—in which the government generally has much greater power than it has when regulating the public at large.

The danger of infringing the right to free association is even greater in this case. In *NAACP*, the government merely sought a list of members of an organization, and in *Shelton* a list of organizations to which an employee belonged. But under § 2709, the government can demand an association's telephone records, which can link the association to its members, to its sympathizers, and indeed to anyone who had ever communicated with the association by telephone. And it can demand an individual's telephone records, which the government can use not only to reconstruct that individual's affiliations—which would include con-

tacts with political, social, and religious groups—but also to extrapolate the affiliations of people in the target's social network.[5]

Since 2007, the FBI has used § 2709 to gather transactional information that identifies numbers dialed by telephone service subscribers, email addresses contacted by Internet Service Provider users, and the dates of such communications.[6] Aggregating several years' worth of such data may easily reveal a person's every civic or political interest and relationship.[7] Patterns of frequent phone calls to people who work at groups such as the National Rifle Association or Emily's List indicate extensive involvement in those groups, whether as an employee or as a volunteer.

Likewise, knowing that a person does not use his telephone on Saturdays would indicate that he is likely an observant Jew or Seventh-Day Adventist. A person who calls a mosque often, and who is not a

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[5] Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, N.Y. Times, Sept. 9, 2007.

[6] Michael J. Woods, *Counterintelligence And Access to Transactional Records: A Practical History of The USA Patriot Act Section 215*, 1 J. Nat'l Security L. & Pol'y 37, 41 (2005).

[7] Declaration of Professor Edward W. Flynn, at 15-16, *American Civil Liberties Union v. Clapper*, No. 13-CV-03994 (S.D.N.Y. Aug. 26, 2013).

vendor or other business associate, is probably a Muslim. Conversely, aggregate data on all phone calls to local mosques can yield a list of many of the area's Muslims.

Moreover, the data collected under § 2709 includes information not only about the targeted individual, but also about everyone whom the person has called. Thus, even an NSL validly targeting a person who does threaten national security may give rise to other NSLs targeting people who are not threats. "If a targeted individual belongs to a terrorist organization, a political organization, and a religious organization, . . . and those organizations have overlapping memberships," a review of the data "might mistakenly categorize a member of the legitimate political organization as a member of the terrorist organization merely because the two people shared some contacts."[8]

Such § 2709 data collection is likely to chill speech even more than the subpoena in *NAACP* or the employer demands in *Shelton* did. Getting involved in a political or religious group usually involves interacting with the group's members via phone, e-mail, or another form of elec-

[8] Katherine J. Strandberg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741, 762 (2008).

tronic communication. People concerned that the FBI will gather a full dossier of their political and religious activities may be deterred from joining, or even contacting, groups that criticize the government or that might otherwise be targets of government disapproval.

This concern will be greater still for people with certain kinds of political or religious affiliations that are often perceived as risk factors for terrorist activity, and that law enforcement might be able to deduce using the information obtained under § 2709. Individuals might decide not to associate with minority causes or communities, such as mosques, fearing that they will be targeted for investigation. Section 2709 is thus a grave burden on the right of expressive association.

II. Section 2709 Presumptively Violates the Free Speech and Petition Clauses by Preventing NSL Recipients from Effectively Lobbying for Changes to the NSL Program

The First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances." *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969) (Petition Clause protects the right of protesters who marched from city hall to the mayor's residence to lobby for desegregation of public schools); *Empress LLC v. City & County of S.F.*, 419 F.3d 1052, 1054, 1056 (9th Cir. 2005) (Petition Clause immun-

izes from civil liability a request that city administrator make a particular zoning decision); *In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1309-10 (8th Cir. 1985) (Petition Clause protects sending a letter to a Congressman about an ongoing investigation and distributing copies of it to people with a "legitimate interest" in the investigation). Likewise, the right to freedom of speech protects the right to air one's grievances to the public more broadly.

But the rights to petition and to speak mean little without the right to make concrete, specific, fact-based arguments in those petitions or statements. Listeners' judgment about general problems is deeply influenced by specific examples, whether the listeners are government officials, voters, or newspaper reporters deciding whether to cover a matter about which they have heard a complaint. Any side that is barred from giving concrete, detailed examples will thus be seriously handicapped in public debate. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 Stan. L. Rev. 1095, 1156 (2005).

By way of analogy, consider lawsuits, which are themselves petitions to courts for redress of grievances. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Courts routinely dis-

miss complaints that lack specific factual claims supporting the legal allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts generally disfavor party briefs that make sweeping legal arguments not tethered to the facts of the case (except in the rare situations in which a facial challenge is allowed). No court would be convinced by an argument that a law is unconstitutional as applied, unless it sees facts about how the law was applied.

What is true of judges is true of public servants in other branches, and of intelligent and influential members of the general public. Barring people from giving specific details about their grievances is in practice a denial of the right to petition for redress of those grievances. Yet this is exactly what § 2709 does by forbidding any disclosure of details about a National Security Letter—a content-based restriction on speech that is critical to vital national debates. *See Cohen v. Cowles Media Co.,* 501 U.S. 663, 670 (1991) (characterizing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which struck down a restriction on communicating specific facts—in that case, the names of rape victims—as a case in which "the State itself defined the content of publications that would trigger liability"); *In re National Security Letter*, 930 F. Supp. 2d 1064, 1072 (N.D.

Cal. 2013) (concluding that, while § 2709(c) is not "a 'typical' content-based restriction," "the nondisclosure provision clearly restrains speech of a particular content—significantly, speech about government conduct").

To be sure, 18 U.S.C. § 3511(a) provides two limited mechanisms for review of the NSL itself and for the accompanying nondisclosure requirements. First, it lets NSL recipients petition a court to have the NSL modified or set aside, but only on the grounds that "compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* This is an extremely limited remedy, because it substantially constrains the arguments a court may consider in ruling on any challenge to an NSL. It is not clear, for instance, that a recipient could challenge the underlying claims leading to the issuance of the NSL—such as the government's conclusion that a vast range of information about a person and his contacts needs to be turned over—so long as it would be easy for the service provider to comply with the NSL.

Nor would the remedy allow NSL recipients to effectively argue that § 2709 is too broad, or that it strikes an improper balance between security and privacy. And it is no answer to say that such arguments should

instead be directed to legislators and other citizens, since § 2709 limits the efficacy of such public arguments by preventing the use of concrete evidence to support them. The combination of § 2709 and § 3511(a) prevents NSL recipients from mounting an effective challenge either in court or in the public sphere. Moreover, as Part III.A will discuss, the § 3511 remedy lacks the procedural protections required for judicial review of administrative orders.

Judicial review of the gag order (as opposed to the NSL itself) under 18 U.S.C. § 3511(b) is even more limited. Such a requirement attached to an NSL may be modified only if a court "finds that there is *no* reason to believe that disclosure *may* endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* (emphases added).[9] Thus, so long as there is even the slightest possibility that national security *might* be jeopardized, a court cannot lift the nondisclosure requirement.

[9] This is the standard for all review of any NSL for a year after it is issued, and for review of an NSL even after that year if a high government official concludes that the NSL should remain in effect. 18 U.S.C. § 3511(b).

This is an extraordinarily demanding standard, apparently more demanding even than proof beyond a reasonable doubt, though here cutting in favor of the government.

Moreover, if a sufficiently high government official "certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification *shall be treated as conclusive* unless the court finds that the certification was made in bad faith." *Id.* (emphasis added). Whatever the value of this sort of extremely government-friendly procedure may be to national security or law enforcement, the nature of the procedure highlights just how hard the burden on speech is to lift.

Thus, the gag order provisions of NSLs gravely burden the right to free speech and to petition the government, even beyond the burden on expressive association created by NSLs themselves.

III. Section 2709 Lacks the Narrowness and the Procedural Protections That the Supreme Court Has Identified as Necessary for Speech Restrictions to Be Upheld

To be sure, the Supreme Court has on rare occasions upheld substantial burdens on important and constitutionally protected speech and associational rights—but only when such restrictions served sufficiently

important government interests, were suitably narrow, and provided the proper procedural protections. Thus, those precedents just illustrate how unconstitutionally broad and procedurally unsound the current § 2709 scheme is. All the Court's teaching related to prior restraints and narrow tailoring has seemingly been set aside in the drafting and implementation of the NSL statute.

A. Section 2709 Lacks the Procedural Requirements Mandated by the Supreme Court in *Freedman v. Maryland*

To begin with, when speech is restricted by executive action, the restriction must provide for full and prompt judicial review, which the government itself must initiate. *Freedman v. Maryland*, 380 U.S. 51 (1965). This rule was first set forth in the Court's obscenity cases, though it is also applicable outside obscenity law.[10] In the early 1960s, the Court concluded that the government interest in restricting the distribution of obscene material—which the Court has held to be constitu-

[10] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988) (applying the same precedents to licensing requirements for charitable solicitors, aimed at preventing fraud); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (applying the same precedents to an injunction against a demonstration).

tionally unprotected[11]—was strong enough to justify some restrictions on such material. But even restrictions aimed at suppressing constitutionally unprotected obscenity, the Court held in *Freedman*, were invalid unless they included sufficient procedural safeguards. It follows, then, that procedural safeguards are even more important where, as here, the government action suppresses or deters *protected* expression.

Under *Freedman*, orders restricting speech must contain four related procedural safeguards. First, the Court held, "the burden of proving that the [restricted speech] is unprotected expression must rest on the censor." *Id.* at 58. Second, "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* Third, there must be an assurance that the government "will, within a specified brief period," either lift any temporary restraint "or go to court" to get a judicial decision that the speech restriction is permissible. *Id.* at 59. "Any restraint imposed in advance of a final judicial determination on the merits must similarly

[11] *Miller v. California*, 413 U.S. 15, 23 (1973).

be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* And, fourth, "the procedure must also assure a prompt final judicial decision." *Id.*

Moreover, these rules apply both to express speech restrictions (such as the gag order provision discussed in Part II) and to actions that deter speech without expressly forbidding it (such as the coercive surveillance practices discussed in Part I). *Freedman* relied on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1964), in its analysis, 380 U.S. at 57-59, and *Bantam Books* involved a speech-deterring practice—a government commission's sending threatening letters to booksellers—rather than an expressly speech-restricting practice.

Sections 2709(c) and 3511(a)-(b) fail to offer the protections that *Freedman* mandates. They do not require the government to promptly go to court in order to turn a brief temporary speech restriction (or a brief surveillance of people's potentially constitutionally protected associations) into a permanent one. Rather, a speech restriction of potentially indefinite duration is imposed when an NSL is issued. The restriction is not even considered by a judge until the NSL recipient bears the burden of going to court to challenge the NSL. The recipient also bears the

burden of persuading the court that the restriction is justified. And the NSL regime does not assure a prompt final judicial decision.

In both of these respects, the NSL regime is much like the system struck down in *Freedman*. The consequence is precisely the sort of risk of error—and lack of "necessary sensitivity to freedom of expression," 380 U.S. at 58—that the Court has condemned.

B. Section 2709 Lacks the Narrow Tailoring Stressed by *Holder v. Humanitarian Law Project*

Likewise, even *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)—the only current Supreme Court precedent to uphold a content-based speech restriction under strict scrutiny—emphasized that such a speech restriction was allowed only because of the statute's extremely narrow sweep. The Court in *Holder* held that the compelling government interest in fighting terrorism justified a narrow restriction on speech "directed to, coordinated with, or controlled by *foreign* terrorist groups." *Id.* at 2711, 2730 (emphasis added). But the Court repeatedly stressed just how narrow the restriction was—the law left people free to say anything they wanted, so long as they said it independently of the terrorist groups:

> Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. As the Government states: "The statute does not prohibit independent advocacy or expression of any kind."

Id. at 2272-73. The Court went on to reason that,

> We also find it significant [to the narrow tailoring analysis] that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns. . . . [M]ost importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.

Id. at 2726. "[W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations." *Id.* at 2730.

But Section 2709 lacks any such narrowing principle. NSL recipients are barred from speaking about the NSL almost completely and indefinitely, and they have no alternative avenues (such as the independent advocacy available in *Holder*) for expressing their views. All they can report to the public is a very rough approximation of the number of NSLs and similar requests that they have received in a particular

year[12]—far from an adequate substitute for being able to concretely explain why they think the NSLs are unjustified or excessive.

C. Section 2709 Lacks the Limited Duration or Potential for Judicial Supervision That Is Available with Regard to Grand Jury Secrecy

Similarly, there are important procedural protections that cabin the restrictions on grand jury witnesses' revealing what they learned from their questioning. The most significant such protection is the opportunity for substantial judicial supervision of grand jury subpoenas that limits the restriction to only that which is necessary.

In this, grand jury confidentiality rules differ markedly from the nondisclosure requirements imposed by § 2709. As the District Court noted, "While courts have upheld state law restrictions on grand jury witnesses' disclosure of information learned only through participation in grand jury proceedings, those restrictions were either limited in duration or allowed for broad judicial review." *In re National Security Letter*, 930 F. Supp. 2d 1064, 1072 (N.D. Cal. 2013); *see Hoffmann-Pugh v.*

[12] Gov. Notice, Nos. Misc 13-03, 13-04, 13-05, 13-06, 13-07 (FISA Ct. Jan. 27, 2014), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-03-04-05-06-07-notice-140127.pdf.

Keenan, 338 F.3d 1136, 1140 (10th Cir. 2003) (noting that grand jury secrecy rules provide a judicially enforceable mechanism for a witness to obtain a "determination that secrecy is no longer required"). Where there is reason to think that grand jury proceedings are being systematically misused or overused, traditional judicial remedies keep those proceedings in check.

Indeed, as the Second Circuit held in *Doe v. Mukasey*, 549 F.3d 861, 881 (2d Cir. 2008), § 2709 gag orders may well lack the compelling secrecy justifications that support grand jury secrecy:

> Unlike the grand jury proceeding, as to which interests in secrecy arise from the nature of the proceeding, the nondisclosure requirement of subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy.

Id. at 876-77. Prompt judicial review of the sort mandated by *Freedman v. Maryland* is thus necessary to keep § 2709's speech restraints "narrowly tailored," *Mukasey*, 549 F.3d at 881, to a proven need for secret surveillance, rather than just to an Executive Branch assertion of such need.

The Department of Justice argues that blanket secrecy, with no judicial inquiry as to specialized need, is required because "knowledge about the sources and methods that the FBI is using to acquire information" may be used by "terrorist and foreign intelligence organizations even after a particular investigation has ended." Gov't Opening Br. 8. In some cases, some degree of secrecy may indeed be justified. But § 2709 also prevents telecommunications companies from alerting anyone when the FBI wrongly identifies someone as a potential terrorist, or when trends in records requests suggest an abuse of the National Security Letter system. As the court below noted,

> This pervasive use of nondisclosure orders, coupled with the government's failure to demonstrate that a blanket prohibition on recipients' ability to disclose the mere fact of receipt of an NSL is necessary to serve the compelling need of national security, creates too large a danger that speech is being unnecessarily restricted.

National Security Letter, 930 F. Supp. 2d at 1076. "[T]he statute does nothing to account for the fact that when no such national security concerns exist, thousands of recipients of NSLs are nonetheless prohibited from speaking out about the mere fact of their receipt of an NSL, rendering the statute impermissibly overbroad and not narrowly tailored."

Id. And, unlike with the judicial review available in the grand jury context, § 3511's minimalist review system is inadequate to protect against such overbreadth.

Like all human institutions, the Justice Department and the FBI make mistakes—and, as with most human mistakes, such mistakes are most likely when the humans realize that they are operating with minimum oversight. The Department of Justice itself, for instance, has reported that 7.5% of NSLs issued between 2003 and 2006 were likely to been issued in violation of the Justice Department's own internal procedures.[13] The evidence suggests these violations were both underidentified and underreported.[14] Moreover, "some of the justifications for

[13] U.S. Dep't of Justice, Office of the Inspector General, *A Review of the FBI's National Security Letters: Assessment of Corrective Action and Examination of NSL Usage in 2006*, at 158 (Mar. 2008), *available at* http://www.justice.gov/oig/special/s0803b/final.pdf.

[14] U.S. Dep't of Justice, Office of the Inspector General, *Statement of Inspector General Glenn Fine, Inspector General, U.S. Department of Justice, Before the Senate Committee on the Judiciary Concerning Reauthorizing the USA Patriot Act*, at 4-5 (Sept. 23, 2009), *available at* http://www.justice.gov/oig/testimony/t0909.pdf.

imposing [the confidentiality] requirement were perfunctory and conclusory."[15]

Furthermore, the FBI relied heavily—particularly from 2003 to 2006—on an "emergency" procedure that allowed for the issuance of "exigent letters," which were never subject to § 2709's internal process.[16] And the Inspector General has found that this informal procedure was used even when there was clearly no emergency, and supervisors were signing off on such letters without knowing whether or not such circumstances really existed.[17] Indeed "FBI officials and employees . . . unquestioningly issue[d] hundreds of these improper and inaccurate letters over a 3-and-a-half year period."[18]

Thus, as recent history demonstrates, much speech and association will be unnecessarily constrained if courts take the FBI's certifications

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[15] *Id.* at 6.

[16] U.S. Department of Justice, Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records*, at 65-67 (Jan. 2010), *available at* http://www.justice.gov/oig/special/s1001r.pdf.

[17] *Id.* at 66.

[18] *Id.* at 66-67.

regarding national security relevance as conclusive—as § 3511(b) tells courts to do, absent a rare finding of "bad faith" on the part of high government officials. Indeed, such risk of error is a big part of why the Supreme Court found independent judicial review to be critical to protecting the First Amendment. *Freedman*, 380 U.S. at 59. And this risk of error is only exacerbated by the confidentiality of the process, and the resulting absence of public scrutiny and political review of particular gag order decisions.

CONCLUSION

Section 2709 imposes grave burdens on the political and religious association of people who are being surveilled using the NSLs. It imposes grave and content-based burdens on the speech of NSL recipients. And it does both of these things without the procedural protections and the narrow tailoring that the Supreme Court requires of such burdens.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Word 2010 in 14-point New Century Schoolbook.

Dated: Mar. 31, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by mailing the brief to the Court on April 1 ~~March 31~~, 2014. The Court will effect service on the parties.

Dated: April 1 ~~March 31~~, 2014

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