Nos. 13-15957, 13-16731

UNDER SEAL

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In Re: NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellee (No. 13-15957),
Petitioner-Appellant (No. 13-16731),

—v.—

ERIC HOLDER, JR., ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION,

Respondents-Appellants (No. 13-15957),
Respondents-Appellees (No. 13-16731).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NOS. 11-CV-2173 SI, 13-MC-80089 SI
HONORABLE SUSAN ILLSTON, DISTRICT JUDGE

BRIEF OF *AMICUS CURIAE* PEN AMERICAN CENTER, INC. IN SUPPORT OF PETITIONER-APPELLEE IN CASE NO. 13-15957 AND PETITIONER-APPELLANT IN CASE NO. 13-16731

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1
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INTEREST OF *AMICUS CURIAE*

PEN American Center, Inc. is a non-profit association of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary agents, and translators ("PEN"). PEN has approximately 3,700 members and is affiliated with PEN International, the global writers' organization with 144 centers in more than 100 countries around the world. PEN International was founded in 1921, in the aftermath of the first World War, by leading European and American writers who believed that the international exchange of ideas was the only way to prevent disastrous conflicts born of isolation and extreme nationalism. Today, PEN works along with the other chapters of PEN International to advance literature and protect the freedom of the written word wherever it is imperiled. It advocates for writers all over the world. The interest of PEN in this case is in protecting the freedoms of writers in the United States under the First Amendment.[1]

SUMMARY OF ARGUMENT

This *amicus* brief is submitted to give voice to the concerns of American writers regarding the extraordinary and unparalleled power granted to the Federal

[1] All parties to this appeal consent to the filing of this *amicus* brief. This brief was authored entirely by counsel for *amicus curiae* PEN. No counsel for any party authored the brief in any part, nor did any party (or any person other than PEN and its counsel) contribute money to fund its preparation or submission. PEN is submitting substantially identical briefs in this consolidated appeal and the appeal in related case No. 13-16732.

Bureau of Investigation ("FBI") under the National Security Letter Statute, 18 U.S.C. § 2709 (the "Statute"). The Statute allows the FBI to collect information about activities protected by the First Amendment – the free expression and free association of citizens – without judicial oversight and adequate procedural safeguards, and to impose what amounts to a perpetual, blanket gag order on any recipient of a National Security Letter ("NSL") seeking such information, with no provision for meaningful judicial review.

As a class of citizens intimately familiar with the effects that gag orders may have both on the press and on speech generally, and the chilling effect that unchecked government intrusion may have on freedom of speech and association, writers have long warned against the perils of allowing a culture of surveillance and secrecy to take root in our society. Too often, writers have witnessed and experienced the consequences of our failing to maintain vigilance against such oppressive behavior, and paid the price that secrecy extracts from free public discourse. Over the last century, American writers have been the targets of government surveillance and even persecution, often in the name of national security. Abuses have occurred not only during the McCarthy era and J. Edgar Hoover's reign at the FBI, but in every administration through the present day. That history deepens the apprehensions of writers at the secretive, unreviewed NSL procedure.

Most recently, in the wake of recent revelations about the National Security Agency, this country has been engaged in fervent public discussion of the proper balancing of national security and individual freedom, in light of the capacities of modern technology and the threat of organized terrorism. The debate echoes historical discussions of security and freedom that date back to the founding of the nation. The fact that the government may secretly seek information about our communications without adequate judicial supervision, and impose a prior restraint barring entities with information about us from even revealing to the public that they have received an NSL, raises public fears of clandestine observation and surveillance, chills free speech, inhibits free association, and prevents entities that receive NSLs from contributing crucial information to the national conversation about security and freedom. By barring people who have first-hand experience with new intelligence mechanisms from speaking, the NSL Statute stifles debate before it can even be joined.

Our country's professional journalists and writers are key to this public debate. They play essential roles as moderators, advocates, antagonists, scholars, critics, and sounding boards. To develop and deliver important messages, writers often must research sensitive issues, have conversations with sources who may espouse radical ideas, and explore uncomfortable and provocative subjects. A culture of secrecy and surveillance prevents vital information from being made

available to the public and generally undermines writers' freedom to play their roles and freely contribute to the public discourse, especially when the public discussion concerns clandestine surveillance itself.

Because their communications may concern controversial or sensitive topics, and because of the unfortunate history of oppression of writers in the name of national security, writers are naturally concerned that they are at heightened risk of surveillance. A recent survey of writers commissioned by PEN confirms that the impact of this new culture of secrecy and surveillance is not hypothetical: writers have changed their behavior because they believe the government is observing them or secretly seeking information about their activities. Writers are curtailing communication with sources and colleagues; they are avoiding writing about certain topics; and they are not pursuing research they otherwise would.

The expectation of privacy that permits the free flow of ideas is essential to democracy, and it is eroded by the government's collection of records of our communications. As the District Court correctly recognized in holding that the NSL Statute could not withstand First Amendment scrutiny, if investigation of U.S. citizens is warranted by national security concerns, the government must justify any resulting intrusion upon free speech. NSLs issued by the FBI under a shroud of secrecy enforced by a prior restraint, without meaningful judicial oversight, cannot be sustained under the Constitution. As writers have warned for

generations, and PEN's survey confirms, people who fear that every move they make is being recorded by a government bureaucracy – even an ostensibly benign one – inevitably censor themselves. PEN is profoundly concerned that, as NSLs deepen the atmosphere of secret surveillance, our private communications will become less frank, our associations will become more limited, the scope of thought will shrink, and our democracy will be debased.

ARGUMENT

I. THE NATIONAL DISCUSSION ABOUT THE IMPACT OF CLANDESTINE SURVEILLANCE ON PERSONAL FREEDOM

A. THE HISTORICAL FRAMEWORK

The proper balance of security and personal freedom has been debated since the dawn of organized societies, and certainly since the founding of this country. As John Locke and others who followed proposed, in forming a government, citizens voluntarily cede some personal liberty in exchange for the protections provided by uniting with others. *E.g.*, *The Second Treatise of Civil Government*, Chapter IX ("Of the Ends of Political Society and Government") (1690). The Preamble to the Constitution uses the phrase "to secure the blessings of liberty" to announce the purpose of our agreement: liberty is not possible without the security that a stable government provides, but a primary goal of providing security is to create the space needed for personal freedom.

Democracies attempt to strike a balance between freedom and security in the face of shifting events, both domestic and foreign. In times of crisis when security concerns are ascendant, personal freedoms may be threatened, often through an insidious "creep" of benign-seeming security measures. As Justice Douglas warned, "[a]s nightfall does not come all at once, neither does oppression." Melvin I. Urofsky and Philip E. Urofsky eds., *Selections from the Private Papers of Justice William O. Douglas* 162 (1987). Similarly, Justice Brandeis cautioned that, even where sacrifices of liberty are sought for legitimate ends, we should not lose sight of the fundamental values at stake: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. … The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

B. WRITERS' ROLES IN THE PUBLIC DISCOURSE ABOUT SECURITY AND FREEDOM

In the United States, writers have always played critical roles as thinkers, investigators, dissenters, and advocates for change. Writers develop ideas through conversations, including exchanges with radicals, dissidents, pariahs, victims of violence, and others who do not wish for their communications to become known. Writers may espouse unpopular ideas, and take positions that serve as lightning rods for hatred or ridicule. Our democracy depends on the ferment of intellectual

debate, and our writers serve as arbiters of, and contributors to, public discourse about a wide range of important issues, including the fundamental issues of security and freedom.

1. WRITERS MUST BE FREE TO EXPLORE SENSITIVE SUBJECTS

To make original contributions to public discourse, writers must be confident they are protected by a zone of privacy. The Constitution safeguards that zone of privacy. The freedom to communicate with whomever one chooses, away from the prying eyes of the state, is an essential condition for creativity and critical writing, and especially for the expression of dissent.

Our Fourth Amendment rights to freedom from intrusion are bound closely to our rights under the First Amendment to freedom of association and freedom of expression. *See, e.g., Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 314 (1972) ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power."). Justice Sotomayor recently echoed this concern: "[a]wareness that the Government may be watching chills associational and expressive freedoms." *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

As PEN member and author Dave Eggers has warned, "The effect of an entire nation of individuals choosing to abstain from certain phone calls, email messages, internet searches, for fear of what could be done with that information in

the future, threatens not just a chill, but a permanent intellectual ice age." Dave Eggers, *US writers must take a stand on NSA surveillance*, Guardian (Dec. 19, 2013). [2] Philosopher Kwame Anthony Appiah, a former president of PEN, also has elucidated some of the dangers that surveillance threatens for writers and society:

> Great moral advances begin often as radical ideas, ideas that would lead those who have them to be subjected to obloquy or even to violence. Serious thinking is done by writing and by exchanges of ideas with others. In a society that lived through the abuses of state power against Dr. Martin Luther King Jr. we cannot think that we will only be endangered if we are in the wrong. I have sometimes thought, myself, as I reflected on issues about the morality of terrorism and our responses to it, that I must censor myself in my most private writings because I cannot be sure that my writings will not be spied upon, misconstrued, used against me.

PEN, *Two Views on How Surveillance Harms Writers* (Sept. 3, 2013).[3] Thus it is not just the knowledge of widespread surveillance that threatens free speech and associational rights, it is also the fact that writers suspect but "cannot be sure" whether spying is occurring in particular instances, and therefore must assume that it is, and operate accordingly. This leads to self-censorship just as surely as actual knowledge of specific surveillance. The use of NSLs, with a total embargo on information about their use, imposes just such a chill.

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[2] *Available at* http://www.theguardian.com/books/2013/dec/19/dave-eggers-us-writers-take-stand-nsa-surveillance.

[3] *Available at* http://www.pen.org/blog/two-views-how-surveillance-harms-writers.

2. WRITERS HAVE WARNED OF THE DANGERS OF CLANDESTINE SURVEILLANCE

Informed by their own experiences of the effect of government surveillance on their work, through the years writers have used the tools of their trade to document and predict its impact on society at large. Writers have richly illuminated, in fiction and non-fiction, these significant threats.

As PEN member David K. Shipler has written:

> Privacy is like a poem, a painting, a piece of music. It is precious in itself. Government snooping destroys the inherent poetry of privacy, leaving in its absence the artless potential for oppression. At the least, if the collected information is merely filed away for safekeeping, a weapon is placed in the hands of the state. If it is utilized, acute consequences may damage personal lives. Even where government is benign and well-meaning – a novelty that neither James Madison nor Tom Paine imagined – the use of everyday information about someone's past to predict his behavior can lead to obtrusive mistakes….

The Rights of the People: How Our Search for Safety Invades Our Liberties 294-95 (2011).

Social scientists have confirmed that a generalized awareness of surveillance reduces the variety of ideas people entertain and express:

> [T]he experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior. Pervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of our character, a blunting and

> blurring of rough edges and sharp lines. But rough edges and sharp lines have intrinsic, archetypal value within our culture. … The condition of no-privacy threatens not only to chill the expression of eccentric individuality, but also, gradually, to dampen the force of our aspirations to it.

Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373, 1425-26 (2000) (citing psychological studies indicating that "lack of privacy makes people less inclined to experiment and less inclined to seek help").

The screenwriter Walter Bernstein, who lived through blacklisting in the 1950s, believes the mass surveillance today has created a climate of fear that necessarily cramps thought: "It's not an atmosphere that helps create creativity or lets the mind run free. You're always in danger of self-censorship…." Larry Siems, *A Blacklisted Screenwriter on American Surveillance* (Aug. 30, 2013).[4] Author Janne Teller concurs: "This idea that somebody can read along with what you write, can keep an eye on everything you do … it inhibits you and makes you, in a way, want to instinctively conform to something that you think will not put you in danger." PEN American Center, *Creative Conscience, Writers on Surveillance, Society and Culture* (April 2, 2014).[5]

[4] *Available at* http://www.pen.org/blacklisted-screenwriter-american-surveillance.
[5] *Available at* http://www.pen-international.org/newsitems/creative-conscience-writers-on-surveillance-society-and-culture.

Authors often create fictional worlds more extreme than reality to warn the public about the prying eyes of a powerful state and to underscore the critical importance of privacy to human creativity. As writer Julian Sanchez observed, when we discuss surveillance and privacy, "we speak a language borrowed from fiction." *On Fiction and Surveillance* (Introduction to PEN World Voices Festival panel: "Life in the Panopticon: Thoughts on Freedom in an Era of Pervasive Surveillance") (May 14, 2012).[6]

The most common literary reference point for state surveillance is, of course, George Orwell's dystopian novel, *1984* (1949). *See, e.g.*, William O. Douglas, *Points of Rebellion* 29 (1969) ("Big Brother … will pile the records high with reasons why privacy should give way to national security, to law and order, to efficiency of operation, to scientific advancement and the like."). By depicting a totalitarian society ruled by an omniscient regime, Orwell vividly illustrated the dangers of a powerful surveillance state.

Other writers have explored the power of surveillance alone, even without Orwellian government repression. The title of the PEN World Voices Festival panel noted above refers to the "Panopticon" devised by British philosopher Jeremy Bentham – a circular prison with a central observation tower permitting guards to see inmates in their cells at all times without letting the inmates ever

[6] *Available at* http://www.pen.org/nonfiction/julian-sanchez-fiction-and-surveillance.

know whether they were being watched. Bentham called it "a new mode of obtaining power of mind over mind, in a quantity hitherto without example." Jeremy Bentham, *The Panopticon Writings* (Miran Bozovic, ed., 1995).

Philosopher Michel Foucault used the concept of the Panopticon as a metaphor to analyze modern power structures in his work *Discipline and Punish* (1975). Like Bentham, Foucault recognized that the mere knowledge that, at any given moment, one *could* be watched is sufficient to achieve the desired effect of control: "Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power." *Id.* at 201. Foucault concluded that individuals subject to the constant possibility of surveillance – whether in a building or in society at large – come to internalize "the constraints of power," censoring themselves and permitting whoever is in authority to exert more and more control with less and less need to exert any physical force. *Id.* at 202-03.

Another literary illustration of the impact of government surveillance is found in the work of Franz Kafka. In *The Trial* (1925), Joseph K. is arrested without explanation and discovers that "[a] vast bureaucratic court has apparently scrutinized his life and assembled a dossier on him. The Court is clandestine and mysterious, and court records are 'inaccessible to the accused.'" Daniel J. Solove, *The Digital Person* 27-55, 36 (2004). He engages in a maddening, largely fruitless

quest to understand the charges against him and who brought them. The "Kafka-esque" danger of secret surveillance is not necessarily that agencies will be "led by corrupt and abusive leaders," but rather that it "shift[s] power toward a bureaucratic machinery that is poorly regulated and susceptible to abuse." *Id.* at 178.

The Panopticon model illustrates how the comprehensive collection of personal information affects society, even if we never know whether any particular record is being collected or examined. The broad power to issue NSLs to companies that maintain our personal data – data that is to some extent beyond our control – places the FBI in the position of a guard in the watch tower, and the nondisclosure provisions prevent us from ever knowing when our data is being "watched." The gag orders thus place citizens – including writers – in the role of Joseph K., unable to learn enough even to guess at the information the government is collecting.

3. THE PEN DECLARATION ON DIGITAL FREEDOM

As an advocate for writers, PEN has long campaigned to counter the inhibiting effects governments can have upon free expression. In light of the history of government oppression of writers, described below, and the dramatic expansion of government surveillance in the digital age, in September 2012, the PEN Assembly of Delegates, representing 20,000 writers, adopted the PEN

Declaration on Digital Freedom (the "PEN Declaration").[7] Government surveillance is the focus of one of the four cardinal principles in the PEN Declaration:

> All persons have the right to be free from government surveillance of digital media.

The PEN Declaration explains why freedom from government surveillance of our electronic communications is crucial:

> a. Surveillance, whether or not known by the specific intended target, chills speech by establishing the potential for persecution and the fear of reprisals. When known, surveillance fosters a climate of self-censorship that further harms free expression.

The Declaration then sets out the implications of this principle for governments around the world:

> b. As a general rule, governments should not seek to access digital communications between or among private individuals, nor should they monitor individual use of digital media, track the movements of individuals through digital media, alter the expression of individuals, or generally surveil individuals.
>
> c. When governments do conduct surveillance – in exceptional circumstances and in connection with legitimate law enforcement or national security investigations – any surveillance of individuals and monitoring of communications via digital media must meet international due process laws and standards that

[7] *Available at* http://www.pen-international.org/pen-declaration-on-digital-freedom/declaration-on-digital-freedom-english.

> apply to lawful searches, such as obtaining a warrant by a court order.
>
> d. Full freedom of expression entails a right to privacy; all existing international laws and standards of privacy apply to digital media, and new laws and standards and protections may be required.
>
> e. Government gathering and retention of data and other information generated by digital media, including data mining, should meet international laws and standards of privacy, such as requirements that the data retention be time-limited, proportionate, and provide effective notice to persons affected.

PEN Declaration ¶ 3.

II. THE EXPERIENCE OF WRITERS DEMONSTRATES THAT CLANDESTINE SURVEILLANCE CHILLS SPEECH

A. THE HISTORY OF ABUSES OF SURVEILLANCE AGAINST WRITERS

The potential for abuse of the powerful NSL mechanism, given the absence of meaningful judicial oversight, is hardly hypothetical. Petitioner's Opening Brief[8] documents the FBI's prior misuse of NSLs, as documented in reports of the Department of Justice Inspector General. Opening Brief at 12-15. The misuse included improper requests for information on First Amendment-protected activity.

[8] References to "Petitioner" are to Petitioner-Appellee in case No. 13-15957, which party is also Petitioner-Appellant in case No. 13-16731. References to "Opening Brief" are to the aforementioned party's Brief filed February 28, 2014 (styled "Answering Brief" in case No. 13-15957 and "Opening Brief" in case No. 13-16731) (Dkt. No. 34).

Id. at 13. The Reports also "linked much of the FBI's abuse problem to a lack of oversight, both outside and within the agency." *Id.* at 14.

This, unfortunately, does not come as a great surprise to writers. Throughout history, writers, artists, and public intellectuals have been particularly susceptible to intrusive surveillance and scrutiny. During the twentieth century, the FBI maintained active surveillance and investigation files on more than 150 writers, including James Baldwin, Truman Capote, Willa Cather, T.S. Eliot, William Faulkner, F. Scott Fitzgerald, Lillian Hellman, Ernest Hemingway, Sinclair Lewis, Henry Miller, Dorothy Parker, Gertrude Stein, John Steinbeck, Tennessee Williams, and Richard Wright. *See* Natalie Robins, *Alien Ink* (1992). As PEN member Natalie Robins concluded, although this practice was often the result of a combination of "paranoia," "conspiracy," "monumental bureaucratic overkill" and agents "simply doing their job," "one thing is certain: most of the writers were watched because of what they thought." *Id.* at 17.

Such abuses have been especially frequent during times of heightened national security concerns. In the United States during the McCarthy era, for example, writers and artists suspected of having Communist leanings were interrogated by Congress and the FBI and blacklisted if they did not inform on their colleagues. Writers like Walter Bernstein were visited frequently by the FBI, often once or twice a month for years. Their neighbors were asked about their

visitors. Their garbage was examined. *See* Siems, *A Blacklisted Screenwriter*; *see also generally* Victor Navasky, *Naming Names* (1980).

Reports of the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee") in 1975 and 1976 contained scathing criticisms of the failures of the executive branch, Congress, and the courts to curb abuses:

> The Constitutional system of checks and balances has not adequately controlled intelligence activities. Until recently the Executive branch has neither delineated the scope of permissible activities nor established procedures for supervising intelligence agencies. Congress has failed to exercise sufficient oversight, seldom questioning the use to which its appropriations were being put. Most domestic intelligence issues have not reached the courts, and in those cases when they have reached the courts, the judiciary has been reluctant to grapple with them.

Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans (Book II), S. Rep. No. 94-755 (1976).

Without proper oversight, abusive intelligence activities directed towards American citizens ran rampant during the periods studied by the Church Committee. The committee detailed "intelligence excesses" found in every presidential administration and described, for instance, how the FBI "targeted Dr. Martin Luther King, Jr., in an effort to 'neutralize' him as a civil rights leader." *See* Brief of Former Church Committee Members and Staff as *Amici Curiae*

Supporting Respondents and Affirmance at 4, 9-13, *Clapper v. Amnesty Int'l*, 133 S.Ct. 1138 (2013) (No. 11-1025).

In light of this history, writers have every reason to worry about the government's collection of sensitive information and its efforts to keep details of that collection secret.

B. THE IMPACT OF MODERN SURVEILLANCE ON WRITERS: THE PEN WRITERS SURVEY

A survey of PEN's members conducted during October 2013 shows how the culture of secrecy and surveillance is already affecting writers and their work. PEN American Center, *The Impact of US Government Surveillance on Writers: Findings From a Survey of PEN Membership* (October 31, 2013) ("PEN Survey"),[9] at 1. An accompanying report summarizes the Survey's findings and includes narrative responses describing writers' experiences and concerns. PEN American Center, *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor* (November 12, 2013) ("PEN Report").[10]

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[9] *Available at* http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf, at 1-10.

[10] *Available at* http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf, at 12-26. While a few survey questions were specific to the NSA's program of mass collection of telephone metadata, most addressed the expansion of government surveillance generally.

The results are sobering. As reported in the *New York Times*, the Survey shows that a large majority of PEN respondents are "deeply concerned about recent revelations regarding the extent of government surveillance of email and phone records, with more than a quarter saying that they have avoided, or are seriously considering avoiding, controversial topics in their work." Noam Cohen, *Surveillance Leaves Writers Wary*, N.Y. Times (November 11, 2013). The Survey reveals that 76% of respondents believe increased government surveillance is particularly harmful to writers because it impinges on the privacy they need to create freely. PEN Survey, at 1-3. Many writers now *assume* that their communications are monitored. *Id.* at 2, 5. 94% of respondents believe that technology companies are collaborating with the government to provide vast amounts of personal information on Americans (raising the specter that the government's order that recipients not disclose the fact that they have received NSLs could be interpreted as "collaboration"). *Id.* at 6, 9. A large majority believe that the gathered data may be mismanaged or abused for years to come. *Id.* at 1, 4.

These beliefs are constraining writers' behavior. Many writers reveal that they have avoided discussing or writing about controversial topics as result of the presumed monitoring. They have curtailed certain types of research; they have taken extra steps to mask their identities and the identities of sources; they have avoided contacting people if those people could be endangered if it became known

that they were speaking to a writer; and some have even declined to meet with people who might be seen as security threats. *Id.* at 3. Their narrative comments provide insight into the reasons for this changing behavior. One writer notes having already "dropped stories … and avoided research on the company telephone due to concerns over wiretapping or eavesdropping." *Id.* at 6. Another indicates that "the writers who feel most chilled, who are being most cautious, are friends and colleagues who write about the Middle East." *Id.* The self-censorship extends not just to writing and speaking but to other activities essential to creative and productive expression, as writers limit their research, steer clear of certain topics, and avoid communicating with sources and colleagues. *See* PEN Report.

> I was considering researching a book about civil defense preparedness during the Cold War: what were the expectations on the part of Americans and the government? What would have happened if a nuclear conflagration had taken place? … But as a result of recent articles about the NSA, I decided to put the idea aside ….
>
> I write books, most recently about civil liberties, and to protect the content of certain interviews, I am very careful what I put in emails to sources, even those who are not requesting anonymity. I'm also circumspect at times on the phone with them—again, even though they may not be requesting anonymity and the information is not classified. …

PEN Survey at 7, 8.

The message is clear: writers are restricting their activities and censoring their own work, in ways that are already damaging free expression. The "insidious encroachment" predicted by Justice Brandeis by zealous and well-meaning protectors of our national security is being felt. As PEN's Executive Director Suzanne Nossel stated upon release of the Survey, "[w]riters are kind of the canary in the coal mine in that they depend on free expression for their craft and livelihood." *See* Cohen, *Surveillance*. Our society depends on the freedom of writers and others to gather information, exchange ideas, and openly express their views. Inhibiting writers deprives the public of necessary voices and undermines democracy. It is impossible to measure the harm we suffer from the loss of stories that writers do not write.

C. THE MODERN DEBATE ABOUT HIGH-TECH SURVEILLANCE

Writers have participated actively in public debates over the extraordinary measures the government has taken to provide additional investigative and enforcement powers to law enforcement and intelligence agencies, including the expansion of the FBI's power to issue NSLs. The scope and technological complexity of the surveillance programs and the deep mantle of secrecy under which they have been maintained have shocked many observers.

One of the insights from the recent debate on high-tech surveillance, as many writers have noted, is that even when the government only collects

"metadata" rather than the content of private communications, as in the case of many NSLs, that hardly obviates the intrusion and the chilling effect on free expression and association. When aggregated, metadata alone – such as the time of a communication, its duration, and the parties involved – can yield extremely private facts and provide a map of personal associations across the country and the world:

> Whom someone is talking to may be just as sensitive as what's being said. Calls to doctors or health-care providers can suggest certain medical conditions. Calls to businesses say something about a person's interests and lifestyle. Calls to friends reveal associations, potentially pointing to someone's political, religious or philosophical beliefs.

Daniel J. Solove, *Five Myths About Privacy*, Washington Post (June 13, 2013) (warning of the possibility of tracking "the entire country's social and professional connections"); *see also* Jane Mayer, *Verizon and the N.S.A.: The Problem With Metadata*, New Yorker (June 6, 2013) (metadata may reveal impending corporate takeovers, sensitive political information such as whether and where opposition leaders may meet, and who is romantically involved with whom).[11]

The government's collection of this type of information has a particular impact on writers and therefore on freedom of expression. Writers often depend

[11] *Available at* http://www.newyorker.com/online/blogs/newsdesk/2013/06/verizon-nsa-metadata-surveillance-problem.html.

on confidential sources to inform their work. Whistleblowers, and indeed any sources who fear retribution, may wish to remain anonymous, and may be less likely to talk to authors if they know data on their communications is being collected and stored. The government's records of communications may permit reprisals or sanctions against writers, or people with whom they speak, here and in other countries where they may be more vulnerable. The prospect that metadata collected through NSLs can reveal to the government the entire web of a writer's associations and interactions thus inevitably limits and deters valuable communications.

By virtue of their widespread use by the FBI to collect private information about U.S. citizens, NSLs are a key topic in the national discussion of growing government surveillance. In order for writers to contribute to the public debate on modern surveillance methods, they need access to the key facts. The nondisclosure provisions of the Statute directly silence service providers, who are precluded from telling their stories about the FBI's data collection efforts and even from disclosing that they received an NSL. The stifling of such sources, and of writers themselves, impoverishes an important public debate.

III. THE NSL ACT VIOLATES THE FIRST AMENDMENT

PEN agrees with Petitioners that the District Court correctly found that the NSL Statute's nondisclosure provision lacks adequate procedural safeguards and is a content-based restriction on speech that cannot survive strict scrutiny.

The District Court took careful note of the "active, continuing public debate over NSLs," as discussed above, "which has spawned a series of Congressional hearings, academic commentary, and press coverage." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1076 (N.D. Cal. 2013) (ER 7-30) (hereinafter, "Opinion"). Information about the use of NSLs is crucial to the discussion, but, as the District Court concluded, the Statute gives the FBI virtually unbridled power to prevent recipients from discussing their NSLs, and

> the recipients are prevented from speaking about their receipt of NSLs and from disclosing, as part of the public debate on the appropriate use of NSLs or other intelligence devices, *their own experiences*.

Opinion at 1071 (emphasis added).

The District Court found this prohibition on speech about NSLs "especially problematic." *Id.* at 1076. Contributing to the court's unease with the essentially blanket nondisclosure order is its across-the-board usage; the government indicated that the FBI imposed nondisclosure in 97% of the thousands of NSLs it has issued. *Id.* at 1074.

Given the importance of even the mere fact of receipt of an NSL to the national debate on the use of modern intelligence devices, PEN believes that the District Court correctly held that "the nondisclosure provision clearly restrains speech of a particular content – significantly, speech about government conduct." *Id.* at 1071 (*citing John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876, 878 (2d Cir. 2008)). As a result, the Court analyzed the statutory nondisclosure provision under the standard of review set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), requiring prior restraints to be narrowly tailored to serve a compelling governmental interest and to satisfy the procedural safeguards set forth in *Freedman*.

PEN emphatically agrees with the District Court that the NSL nondisclosure provisions do not provide those safeguards. First, the Statute permits a restraint on speech of unlimited duration. Opinion at 1075. This is particularly damaging to the public discourse, because it not only prevents current discussion of a topic of national concern, but will also prevent fully informed discussion far in the future, when historians and other writers seek to understand and explain the events of our time in historical perspective. The absence of any provision for expeditious judicial review, which *Freedman* also requires, also raises writers' concerns that public discussion will be impoverished for years to come.

The Statute's failure to place the burden of initiating judicial review on the government, as required by the Supreme Court under *Freedman*, concerns writers as much as it concerned the District Court. Opinion at 1074-75. The need for judicial review and a guide for its application are especially important if the FBI is collecting metadata relating to customers from their service providers because of the privacy concerns it raises. Customers do not use those companies' services with the expectation that their metadata will be shared with anyone else, much less turned over to the government, with its history of misusing information to suppress dissent or embarrassment. Private companies are primarily motivated by profit-making, and, while they may not share the government's interest in suppressing dissent, they may have little incentive to stand in the shoes of a customer and resist disclosure of data, especially if doing so requires affirmatively petitioning for judicial review. Indeed, of the hundreds of thousands of NSLs issued by the FBI, only seven challenges are publicly known to have been filed. *See* Opening Brief at 57 n.17.

PEN further agrees with the District Court that the nondisclosure provisions are not narrowly tailored to serve a compelling governmental interest in national security without unduly burdening speech. Opinion at 1075-77. The statute does not distinguish between disclosing the content of NSLs and disclosing the mere fact that an NSL has been received, thus creating a "blanket" prohibition, not a

narrowly tailored remedy. *Id.* The Court also appropriately found that the unlimited duration of such blanket prohibitions, and their apparent use in 97% of NSLs, underlines the statute's overbreadth. *Id.*

Although the District Court might have gone further and found the underlying authorization for compelled production of records unconstitutional, as discussed below, its decision with respect to the nondisclosure provisions is eminently sound. A restraint on speech on a topic of public concern, without prior meaningful judicial review, is nothing more than a gag order. The Supreme Court has conclusively held that such direct restrictions, historically imposed on the press, violate the First Amendment. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Although "modern" gag orders imposed on individuals, such as participants in lawsuits, may be upheld where there is a compelling public interest (in the litigation setting, often a competing Sixth Amendment interest in a fair trial), they remain disfavored under the law. *See, e.g., U.S. v. Brown*, 250 F.3d 907 (5th Cir. 2001).

A further concern for writers is that, in the rare instances in which a recipient of an NSL who has been ordered not to disclose anything challenges the nondisclosure provision in court, the Statute forecloses any meaningful judicial review. As the District Court found, the statute impermissibly circumscribes the judiciary's ability to apply the correct level of scrutiny, by limiting the

circumstances in which a court may set aside or modify the nondisclosure requirement to situations in which "there is no reason to believe" one of the enumerated harms may occur, and by requiring the court to treat certifications by senior officials as to the likelihood of such harm as "conclusive." Opinion at 18. This excessive deference to the FBI violates the separation of powers and invites the kind of abusive behavior writers have suffered from in the past.

In light of the historical use of gag orders against the press, and against individuals to prevent them from speaking to the press, writers are very familiar with the effects of prior restraints, which rob the public debate of valuable voices. As moderators and participants in the public debate, writers have an important interest in all relevant information being provided to the public, to ensure that the debate is vigorous and thorough.

Finally, although not addressed by the District Court, the absence of effective judicial oversight under the Statute extends not just to the nondisclosure provisions, but also more generally to the primary authority delegated to the FBI to compel private parties to produce records in the first place. Nothing in the Statute prevents the FBI from seeking information reflecting activities protected by the First Amendment, such as the "entire web of a writer's associations and interactions" that might be disclosed by the collection of metadata. As NSLs are issued by the FBI without prior court approval, the only safeguard to ensure that

there is a compelling need for the information that trumps First Amendment interests, and that the request is narrowly tailored, is the latent ability for the recipient to initiate a judicial review of the request, but the judiciary would be constrained.

Yet even if the statute did provide some kind of effective judicial review after the fact, in the context of NSLs it does not. The party whose rights are threatened by disclosure of the information sought by an NSL is not the recipient company, but that company's customer. In most instances, the FBI gags the recipient, who therefore cannot disclose to its customer that a request for records has been made. For the company to vindicate its customer's rights it would either have to challenge the nondisclosure order and then (in the unlikely event that it succeeds) notify the customer, or challenge the underlying records request itself. These enormous disincentives for recipients to bring a challenge, coupled with the possibility that the actual target of the NSL may never have access to the courts at all to bring a challenge, create an additional constitutional infirmity.

The government has acted with impunity for over a decade in issuing NSLs without meaningful judicial oversight, and in virtual secrecy through the use of blanket gag orders. PEN believes that this type of unconstitutional surveillance severely constrains public debate on issues of national importance by muzzling those participants with the most relevant stories to tell, and by forcing writers to

censor themselves, further muting some of our most thoughtful voices at a time when they are most needed.

CONCLUSION

For the foregoing reasons, *amicus curiae* PEN respectfully requests that the District Court's decision be upheld.

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Respectfully submitted,

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,666 words, 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 in Times New Roman Font Style and 14 Point Size for the body of the brief and for the footnotes.

By: /s/Thomas R. Burke
Thomas R. Burke

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief of *Amicus Curiae* PEN American Center, Inc. in Support of Petitioner-Appellant in Case No.13-16732 to be mailed to the Court on April 11, 2014, via overnight next business day delivery, and that the Court will effect service on the parties, in accordance with the Instructions for Prospective *Amici* issued by the Clerk of the Court in this case.

on this 11th day of April 2014.

/s/ Ramiro A. Honeywell
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