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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. CV 13 80 089 MISC

IN RE MATTER OF NATIONAL SECURITY LETTERS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO SET ASIDE NATIONAL SECURITY LETTERS AND NONDISCLOSURE REQUIREMENTS IMPOSED IN CONNECTION THEREWITH

[18 U.S.C. §3511(a), (b), Civil L.R. 79-5, 7-11]

FILED UNDER SEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

I. INTRODUCTION

The National Security Letter statute, 18 U.S.C. § 2709, is a controversial statute that authorizes the FBI to both self-issue administrative letters demanding customer records from Internet and telecommunication providers as well as gag the recipients and prevent them from even revealing that they have received one. Long-criticized for its First Amendment failings, the statute was struck down as unconstitutional by this Court less than six weeks ago in response to Petitioner [redacted] or "Petitioner") separate challenge to an NSL filed in 2011. *See In re National Security Letter*, No. 11-2173 SI, 2013 WL 1095417 (N.D. Cal. Mar. 14, 2013). On [redacted] 2013, [redacted] Petitioner received two additional NSLs from a separate FBI field office demanding that it turn over the same type of customer information about (presumably) another customer. Petitioner asks that the [redacted] NSLs be set aside based on the doctrine of issue preclusion that bars the re-litigation of issues previously adjudicated between the parties. In the alternative, Petitioner asks that the [redacted] NSLs be similarly set aside on the grounds that the NSL statute's gag provision and authority to compel the production of customer records are unconstitutional on their face and as applied and that the statute is not severable.

II. BACKGROUND

On or around [redacted] 2013, Petitioner received two national security letters, both numbered [redacted] and both issued by the Special Agent in Charge of the FBI's [redacted] Field Office (collectively, the "NSLs"). Declaration of [redacted] In Support of Petition to Set Aside National Security Letters and Nondisclosure Requirements Imposed In Connection Therewith ("[redacted] Decl.") Exh. A. The NSLs, each invoking 18 U.S.C. § 2709, demanded subscriber records regarding certain customers and included a nondisclosure requirement preventing it from discussing the matter publicly. *Id.*

A. National Security Letter Statutory History.

The NSL statute invoked here (18 U.S.C. § 2709), and NSL statutes generally, are relatively recent legislative creations that grant the FBI unprecedented powers to obtain, without any judicial oversight, customer records as part of international terrorism and counterintelligence

investigations. The first NSL statutes were passed in 1986,[1] authorizing the compelled disclosure of bank customer records (as part of the Right to Financial Privacy Act (RFPA)) and records regarding telecommunications subscribers (as part of the Electronic Communications Privacy Act (ECPA)). *See* 12 U.S.C. § 3414(a)(5)(A) (1988) (RFPA); 18 U.S.C. § 2709 (1988) (ECPA). Today, five statutory provisions authorize the FBI to issue NSLs to a range of recipients to obtain a variety of types of user information, including: 18 U.S.C. § 2709 (telecommunications providers), 12 U.S.C. § 3414 (financial institutions), 15 U.S.C. §§ 1681u, 1681v (consumer credit agencies), and 50 U.S.C. § 436 (financial institutions, consumer credit agencies, travel agencies).

1. Compulsory Production and the Nondisclosure Requirement in Section 2709.

NSL statutes grant two primary powers to the FBI: (1) authority to compel the production of customer information without any affirmative court oversight; and (2) authority to similarly impose a gag on NSL recipients without court oversight, preventing them from disclosing that they have received an NSL. Prior to the passage of the USA PATRIOT Act in 2001, NSL statutory authority, while still unparalleled in its delegation of authority, was narrowed in terms of both who could be targeted and the requisite standard that must be met in order to mandate the production of records: under pre-PATRIOT NSLs, recipients could be compelled to disclose customer records when a high-ranking FBI official certified that "there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power. . . ." 18 U.S.C. § 2709(b) (1996). Section 505 of the PATRIOT Act, however, significantly lowered even those modest structural limitations in several important respects. First, permission to authorize the issuance of NSLs was expanded and decentralized: instead of requiring the certification by the FBI Director or Deputy Assistant Director, NSL authority was extended to Special Agents in Charge in FBI field offices. 18 U.S.C. § 2709(b) (2006). Second, the scope of records eligible for compelled production were dramatically expanded from records about foreign powers or their agents to records that the

[1] The first "proto-NSL" statutory authority that allowed banks to voluntarily provide customer financial records to law enforcement pursuing counterintelligence and other national security investigations was passed as part of the Right to Financial Privacy Act (RFPA) in 1978. *See* Section 1114, P.L. 95-630, 92 Stat. 3706 (1978); now codified at 12 U.S.C. § 3414(a)(1) (A), (B).

certifying FBI official asserted were "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." *Id.* Third, the requirement of a certification of "specific and articulable" facts to support the FBI's justification was eliminated and replaced by a requirement for certification that the information sought was "relevant" to an authorized investigation. *Id.*

2. The 18 U.S.C. § 3511 Right to Challenge the Legality of NSL Records Requests and Nondisclosure Provisions.

No explicit statutory mechanism by which a recipient could challenge the FBI's NSL authority existed until the NSL statutes were amended in 2006. Newly-added 18 U.S.C. § 3511(a) authorized petitions to modify or set aside an underlying request for records under section 2709 "if compliance would be unreasonable, oppressive, or otherwise unlawful" and 18 U.S.C. § 3511(b) authorized petitions to modify or set aside a gag under section 2709. The right to challenge the scope of a section 2709 gag as articulated in section 3511(b) is conditional, imposing timing limitations about when such challenges can be brought as well as the degree of deference that must be given to FBI certifications regarding possible harms related to the disclosure of the existence of an NSL. *See* 18 U.S.C. §§ 2709(b)(2), (3). As discussed in more detail below, however, those limitations exceed constitutional bounds and are, in part, the subject of this Petition.

B. [redacted] is a provider of long distance and mobile phone services. [redacted]

[redacted]

C. Judge Illston's Decision Striking Down the NSL Statute in *In re National Security Letter*.

previously received an NSL seeking customer information in 2011 and filed a petition under 18 U.S.C. § 3511 asking the district court to set aside the NSL and to find both the underlying authority to issue NSLs and the authority to issue the accompanying gag orders unconstitutional. *See* Petition, *In re Nat'l Sec. Letter*, No. 11-2173 SI (N.D. Cal. May 2, 2011). Judge Susan Illston granted that petition on March 14, 2013, setting aside the specific NSL and granting the facial challenge to the statute, striking down the statutory provisions on constitutional grounds. *In re Nat'l Sec. Letter*, 2013 WL 1095417 (N.D. Cal. Mar. 14, 2013).

The district court made several key legal findings in support of her finding that the statute was unconstitutional. First, the court found that the gag provision of the statute failed to comport with the prior restraint procedural safeguards identified by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). *Id.* at *6. Specifically, the court found that the statute failed to

require the government to initiate judicial review (*id.* at *9) and failed to mandate a specified brief restraint period prior to judicial review (*id.* at *10). Second, the court found that the FBI's gag authority under the statute amounted to a content-based restriction that failed strict scrutiny as "the government has *not* shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs" (*id.*, emphasis in original) and "because [the review provisions] ensure that nondisclosure continues longer than necessary to serve the national security interests at stake." *Id.* at *11. Third, the court struck down the statutorily mandated standard of review of the gag provision found in 18 U.S.C. § 3511(b) and (c) on separation of powers and First Amendment grounds, holding that "the statute impermissibly attempts to circumscribe a court's ability to review the necessity of nondisclosure orders." *Id.* at *12. Fourth, the court found that the gag provision was not severable from the statute and that therefore both the gag authority and the underlying authority to issue NSLs must be struck down. *Id.* at *15. The court ultimately ruled that "The Government is therefore enjoined from issuing NSLs under § 2709 or from enforcing the nondisclosure provision in this or any other case," although it stayed its ruling pending appeal or, absent an appeal, for 90 days. *Id.* at *16.[2]

D. The NSLs Issued to Petitioner.

On [redacted] 2013, [redacted] Petitioner received two additional National Security Letters as described above. [redacted] Decl. Exh. ¶ A. Each NSL explicitly invokes section 2709 as the source of its authority for both the NSL itself and the nondisclosure requirement. *Id.* The NSLs each specifically stated:

> If you wish to make a disclosure that is prohibited by the nondisclosure requirement, you must notify the FBI, in writing, of your desire to do so within 10 calendar days of receipt of this letter. That notice must be mailed or faxed to the [FBI division] with a copy to FBI HQ, attention: General Counsel (fax number: 202-324-5366) and must reference the date of the NSL and the identification number found on the upper left corner of the NSL. If you send notice within 10 calendar days, the FBI will initiate judicial proceedings in approximately 30 days in order to demonstrate to a

[2] While finding that the statute's nondisclosure provision was subject to and failed strict scrutiny, the district court opted not to apply certain aspects of Petitioner's specific proposed prior restraint standard. *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *9. The district court also did not address Petitioner's arguments that the statute granted the FBI unbounded discretion and that the authority to compel the disclosure of customer records without court oversight violated the First Amendment.

> federal judge the need for nondisclosure and to obtain a judicial order requiring continued nondisclosure. The nondisclosure requirement will remain in effect unless and until there is a final court order holding that disclosure is permitted.

Id. The NSLs prohibit Petitioner from disclosing information about them to affected customers, to most of its employees and staff, to the press, to members of the public, and to members of Congress. They likewise prohibit Petitioner from engaging in any kind of specific public criticism about this controversial FBI power, including that it has repeatedly challenged its legality in court.

E. The FBI Has a Documented History of Abusing NSLs.

Petitioner's concern about the NSL statute's inclusion of a permanent, extrajudicial gag is based, in part, on the well-documented history of FBI abuse of NSLs. As part of the reauthorization of the PATRIOT Act in 2006, Congress directed the Department of Justice Inspector General to investigate and report on the FBI's use of NSLs. In three scathing reports issued between 2007 and 2010, the IG documented the agency's systematic and extensive misuse of this form of legal process.[3] The Inspector General concluded that "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." 2007 OIG Report 124.

Among other findings, the OIG reports concluded:

- FBI NSL requests surged from about 8,500 NSL requests in 2000, the year before the PATRIOT Act was passed, to 39,000 in 2003, after the PATRIOT Act relaxed the standards required to issue an NSL, to more than 48,106 NSL requests in 2006 alone.[4] 2007 OIG Report 120; 2008 OIG Report 107.[5]

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[3] Department of Justice, Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (March 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf ("2007 OIG Report"); Department of Justice, Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* (March 2008), *available at* http://www.usdoj.gov/oig/special/s0803b/final.pdf ("2008 OIG Report"); 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* (January 2010), *available at* http://www.justice.gov/oig/special/s1001r.pdf ("2010 OIG Report").

[4] The report distinguishes NSL requests from NSL letters, because a single NSL letter may contain multiple requests for information. 2007 OIG Report 120. For example, the FBI issued nine NSL letters in one investigation requesting subscriber information on 11,100 different phone numbers. 2007 OIG Report 36.

[5] Many of these figures are, unfortunately, only the OIG's best estimate, as the FBI's NSL recordkeeping system was poor during the time period covered by the reports, and the available

(footnote continued on following page)

- The possible intelligence violations reported within the FBI between 2003 and 2006 included improperly authorized NSLs, improper requests under NSL statutes, and unauthorized information collection through NSLs. 2007 OIG Report 66-67; 2008 OIG Report 138-143.

- The FBI's improper practices included requests for information based on First Amendment protected activity including acquisition of reporters' and news organizations' telephone toll billing records and other calling activity information. 2010 OIG Report 6, 89-122.[6]

- Pursuant to Executive Order, all intelligence agencies, including the FBI, must report intelligence violations to the Intelligence Oversight Board ("IOB"), an independent, civilian intelligence-monitoring board that reports to the President. Despite this, the OIG's review of 2003-2005 investigative files at four FBI field offices revealed that 22% contained one or more possible violations that had never been reported, 2007 OIG Report 78, representing an overall possible violation rate of 7.5 percent, 2008 OIG Report 76. According to the OIG, these findings suggested "that a significant number of NSL-related possible [IOB] violations throughout the FBI have not been identified or reported by FBI personnel." March 2007 OIG Report 84.

- The FBI issued hundreds of NSLs for "community of interest" or "calling circle" information to obtain multiple toll records in response to an individual NSL. 2010 OIG Report 75. These were issued without the knowledge or approval of authorized NSL signers and without any determination that the telephone numbers were relevant to authorized national security investigations. *Id.* at 60, 75-76.

- The FBI dismissed many NSL infractions as mere "administrative errors," a substantial number of which "involved violations of internal controls designed to ensure appropriate supervisory and legal review of the use of NSL authorities." 2008 OIG Report 100. The OIG expressed concern that the FBI's attitude toward these matters "diminishes their seriousness and fosters a perception that compliance with FBI policies government the FBI's use of its NSL authorities is annoying paperwork." *Id.*

The OIG reports linked much of the FBI's NSL abuse problem to a lack of oversight within the agency. 2010 OIG Report 213-214, 279-285. Oversight outside of the agency was also lacking. The OIG determined in 2007 that the FBI failed to report nearly 4,600 NSL requests to Congress between 2003 and 2005, almost all of which were issued under section 2709. 2007 OIG Report 33. The OIG reports also document lack of oversight from the companies receiving the

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(footnote continued from preceding page)
data significantly underestimated the number of NSL requests that had been made. 2007 OIG Report 34. In fact, the OIG estimated that "approximately 8,850 NSL requests, or 6 percent of NSL requests issued by the FBI during [2003-2005], were missing from the database." *Id.*

[6] The OIG stated, "We believe that these matters involved some of the most serious abuses of the FBI's authority to obtain telephone records." 2010 OIG Report 285.

NSLs. For example, telecommunications employees who processed FBI requests for information did not request separate legal process for requests for community of interest records, records regarding whom contacts of targets were themselves in contact with. 2010 OIG Report 59. And in over half of all NSL violations submitted to the Intelligence Oversight Board, the NSL recipient either provided more information than requested or turned over information without receiving a valid legal justification from the FBI.[7] As one phone company employee who was embedded with the FBI stated, "Personally, it wasn't my place to police the police." 2010 OIG Report 42.[8]

The NSL statute's gag provision contributes directly to the FBI's lack of accountability. Recipients of NSLs believed to be improper are prevented from sharing their experiences with the public and the press. In this case, the gag imposed by the NSLs received by Petitioner prevent it from participating in the ongoing public debate about the appropriateness of NSLs, specifically and in the abstract, and from effectively petitioning legislators to fix the law.

III. ARGUMENT

The NSL statute remains unconstitutional. The gags imposed by the NSLs issued to Petitioner conditioning speech — here, about the FBI's unilateral attempt to compel without court permission records about Petitioner's customers — are a speech licensing scheme and prior restraint. Under the First Amendment, the content-based gags are subject to strict scrutiny, a standard that the Government cannot satisfy. The speech-licensing scheme must also satisfy clear procedural protections to ensure that even if strict scrutiny is met, shortcomings in an established review process don't themselves undermine the First Amendment rights at stake. Moreover, the underlying authority to compel the production of potentially sensitive customer records without any court oversight violates both the First Amendment as well as procedural due process requirements. Even without these constitutional infirmities, the Government must still support its

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[7] *Patterns of Misconduct: FBI Intelligence Violations from 2001 - 2008*, Electronic Frontier Foundation (Jan. 2011), page 8, available at https://www.eff.org/sites/default/files/EFF-IOB-Report_2.pdf.

[8] While the FBI claims to have taken steps to mitigate the problems discovered by the OIG, the OIG has stated, "[w]e believe it is too soon to conclude whether the new guidance, training, and systems put into place by the FBI in response to our first NSL report will fully eliminate the problems with the use of NSLs that we identified and that the FBI confirmed in its own reviews." 2008 OIG Report 49.

records requests and the accompanying gag orders with sufficient, specific evidence, something that it has not yet done. Both the NSLs here and the underlying NSL statute must be set aside.

A. The Government Is Precluded from Arguing for the Constitutionality of the Statute Under the Doctrine of Issue Preclusion.

Because the government has already litigated the issue of the constitutionality of the statute and lost, it may not re-argue it here. A "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49 (1897). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U. S. 147, 153 (1979) (citing *Parklane Hosiery Co. v. Shore*, 439 U. S. 322, 326 n. 5 (1979)). The government is immune from non-mutual collateral estoppel. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). However, here the Petitioner is the same party that obtained the prior ruling.

Three factors must be satisfied for issue preclusion (formerly called collateral estoppel) to apply. *Richey v. U.S. I.R.S.*, 9 F.3d 1407, 1410 (9th Cir. 1993) (citing *Montana v. United States*). First, the Court must determine whether the "question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged" adversely to the Government. *Montana*, 440 U.S. at 157 (quoting *United States v. Moser*, 266 U. S. 236, 242 (1924)). The issues in this litigation — the constitutionality of section 2709 and the standard of review 3511(b) — were precisely the ones raised and resolved in *In re National Security Letter*. Second, the controlling facts and applicable legal rules must remain unchanged. *See id.* at 160-61. All relevant facts and law have remained the same between the Court's order in *In re National Security Letter* on March 14, 2013, and now. Finally, the Court must determine whether "the particular circumstances of this case justify an exception to general principles of estoppel." *Id.* at 162. "[W]hen issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate." *Id.* However, here the subject matter at issue is directly related: the FBI's attempt to use national security letters to obtain customer information and to prevent the Petitioner from disclosing anything about that fact.

While the Government may elect to appeal the district court's finding in *In re National Security Letter*, that possible decision does not affect the applicability of issue preclusion. *See Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) ("The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal . . . . To deny preclusion in these circumstances would lead to an absurd result: Litigants would be able to refile identical cases while appeals are pending, enmeshing their opponents and the court system in tangles of duplicative litigation.") (citations omitted).

B. The NSL Statute's Nondisclosure Provision Violates the First Amendment.

Even assuming that the Government could not re-litigate these issues, Judge Illston's finding that the statute is unconstitutional is sound and should be followed again here. There can be no dispute that the nondisclosure provision creates a prior restraint as the NSLs prohibit communications that would otherwise occur. *See Alexander v. United States*, 509 U.S. 544, 550 (1993). A prior restraint on free speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any prior restraint on expression comes to [a court] with a heavy presumption against its constitutional validity," and "carries a heavy burden of showing justification." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). Accordingly, analysis of the gag provision starts with the prior restraint doctrine.

1. The NSL Statute Fails the *Pentagon Papers* Test for Prior Restraints in the Context of National Security.

The first test for prior restraints, applicable in the context of claims of national security, is substantively laid out in the "*Pentagon Papers*" and should be applied here. In *New York Times v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971), a prior restraint arose in a much more difficult situation than this one; the contents of a classified study of U.S. foreign policy and military operations in Vietnam, was leaked to the press. The Vietnam war was still ongoing and there a strong claim of national security risk to the country. In *Pentagon Papers*, the Supreme Court, in a brief *per curiam* decision, nonetheless denied the United States' request for an injunction preventing the *New York Times* and *Washington Post* from publishing the contents of a classified historical study of U.S. policy towards Vietnam on the ground that the government failed

to overcome the heavy presumption against the constitutionality of a prior restraint on speech. Under *Pentagon Papers*, which arose in a much more difficult situation than this one where documents had been leaked to the press and a strong claim of national security risk to the country, the Supreme Court still required the government to demonstrate that disclosure of national security information will "surely result in direct, immediate, and irreparable harm to our Nation or its people" before the information could be suppressed constitutionally. 403 U.S. at 730 (Stewart, J. joined by White, J., concurring).[9]

The NSL statute plainly fails this demanding standard. An NSL authorized by the statute is based on a written certification by the Director of the FBI or his designee that "the information sought is *relevant* to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. §§ 2709(a)-(b) (emphasis added). The FBI may then prohibit the recipient from speaking about the NSL so long as the FBI certifies that a disclosure "*may result* [in] 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) (emphasis added).

These statutory standards unequivocally do not come close to the requirements of *Pentagon Papers*, that the speech at issue poses a "specific, articulable risk of direct, immediate and irreparable harm." Instead of "direct" harm, the statute requires only that the information be "relevant to an investigation," and there is no mention of immediacy or that the harm be irreparable. In the context of the nondisclosure provision, the statute only requires that a "danger" to national security or "interference" with other activities "may result," with no requirement of harm, much less direct, immediate, or irreparable harm. Requiring "immediate" harm ensures that prior restraint is the last resort, that there is no time to pursue "less restrictive alternatives." *Nebraska Press*, 427 U.S. at 571 (Powell, J., concurring).

Importantly, the *Pentagon Papers* Court articulated this test in the context of speech that

[9] The Stewart-White concurrence is the holding of the case because, of the six Justices who concurred in the judgment, Justices Stewart and White concurred on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds") (internal quotation omitted).

several justices agreed would likely cause harm to national security. *See Pentagon Papers*, 403 U.S. at 763. Justice Stewart concurred with the decision despite being "convinced that the Executive was correct with respect to some of the documents involved." *Id.* at 730. Justice White concurred, expressing confidence that disclosure "will do substantial damage to public interests." *Id.* at 731. Nonetheless, the Supreme Court refused to allow publication to be enjoined. As Justice Stewart noted, "I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us." *Id.* at 730. *See also* White, J. concurrence at 732. As the statute does not require any the showing prior to imposing a national security-related prior restraint required by the First Amendment, and the NSLs themselves don't demonstrate one, both the NSL statute and the NSLs must be set aside.

2. The Statute Lacks Procedural Safeguards Mandated by the First Amendment.

Regardless of whether this Court now strikes down the statute's gag provision by applying the *Pentagon Papers* test, this Court should confirm its prior holding that Section 2709(c) lacks the procedural protections required of prior restraints. *See In re Nat'l Sec. Letter*, 2013 WL 1095417 at *6. In *Freedman*, 380 U.S. at 85, the Supreme Court articulated three core procedural protections that must exist before expression can be conditioned on government permission: (1) any restraint imposed prior to judicial review must be limited to "a specified brief period"; (2) any further restraint prior to a final judicial determination must be limited to "the shortest fixed period compatible with sound judicial resolution"; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government. *Doe v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (citing *Freedman*, 380 U.S. at 58-59; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002)). Furthermore, any prior restraint scheme must provide narrow, definite and objective standards to cabin the government's discretion. *See, e.g., FW/PBS*, 493 U.S. at 222 (holding that a licensing scheme may be unconstitutional due to of lack of procedural safeguard *or* unbridled discretion). The *Freedman* Court's concern over the danger of prior restraints because of the institutional bias towards administrative censorship is clearly demonstrated in the NSL context: the FBI has

demanded nondisclosure in 97% of the NSLs it has issued.[10] As the appropriate First Amendment procedural protections are absent from the statute, it is unconstitutional.

(a) The NSL Statute Violates the Third Prong of the *Freedman* Test.

The NSL statute violates the third prong of *Freedman* in two ways. First, instead of requiring the Government to go to court to seek permission to suppress speech, section 2709(c) turns the requirement on its head by allowing issuance of NSLs without judicial review and instead requires the recipient of an NSL, under 18 U.S.C. § 3511(b), to petition for an order modifying or setting aside the nondisclosure requirement.

Second, the NSL statute fails to place the burden on the Government when the matter is brought to court and deprives a court of any meaningful authority to exercise its constitutional oversight duties. Instead, a court may only modify the nondisclosure requirement if it finds there is "*no reason to believe* that disclosure may endanger national security, interfere with an investigation or diplomatic relations, or endanger any person." 18 U.S.C. § 3511(b) (emphasis added). In determining whether the disclosure may endanger national security, interfere with an investigation or diplomatic relations, or endanger any person, a court is not permitted to evaluate the facts, but instead is required to blindly accept the FBI's representations: if, at the time of the petition, the FBI "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." 18 U.S.C. § 3511(b)(2)-(3). And, of course, there is no procedure for factual review by the Court wherein the Court could even determine whether such certification was made in bad faith. As this Court held in *In re National Security Letter*, this presumption of conclusiveness is unconstitutional. 2013 WL 1095417 at *12; *see also Muskasey*, 549 F.3d at 884 ("as written, the statute impermissibly attempts to circumscribe a court's ability to review the necessity of nondisclosure orders.").

[10] *See Statement of Inspector General Glenn Fine Before the Senate Committee on the Judiciary concerning Reauthorizing the USA Patriot Act* at 6 (Sept. 23, 2009), http://www.justice.gov/oig/testimony/t0909.pdf ("Fine Statement") ("In the random sample of NSLs we reviewed, we found that 97 percent of the NSLs imposed non-disclosure and confidentiality requirements and almost all contained the required certifications. We found that some of the justifications for imposing this requirement were perfunctory and conclusory[.]").

(b) The NSL statute Violates the First and Second Prongs of *Freedman*.

The nondisclosure provisions of the NSL statute also fail *Freedman*'s first and second prongs by failing to impose appropriate time restraints regarding the evaluation of the appropriateness of the nondisclosure requirement: gags are not limited to "a specified brief period" prior to a judicial proceeding, and gags are similarly not limited to "the shortest fixed period compatible with sound judicial resolution" once a judicial challenge has been brought. *See, e.g.*, *In re Nat'l Security Letter*, 2013 WL 1095417 at *10 (finding that the NSL statute violated the first *Freedman* prong as its "provisions do not provide any limit to the period of time the nondisclosure order can be in place prior to judicial review.").[11] Instead, the statute imposes an indefinite restraint, with no requirement whatsoever to raise the issue with a court, subject only to a petition by the provider that can only be brought annually. 18 U.S.C. § 2709(c). This failure to build such temporal protections into the statute lies at the heart of the concerns voiced by the *Freedman* court; namely, that even with the existence of a substantive First Amendment rights, those interests are still at risk of harm as a result of inefficiency or administrative inattention. The statute's lack of *any* kind of provisions to ensure a prompt judicial evaluation of a prior restraint renders it unconstitutional under *Freedman*. *See, e.g.*, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, Tennessee*, 274 F.3d 377, 403 (6th Cir. 2001) (rejecting an argument that a statute preserving the status quo of a business (*i.e.*, allowing it to continue to operate) while a licensing decision was being made violates *Freedman*: "Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme must assure a prompt judicial decision.") (internal quotations omitted).

(c) The NSL Statute's Nondisclosure Provision Fails to Set Forth "Narrow, Objective, and Definite Standards" Guiding the Discretion of the FBI.

Another First Amendment flaw that Petitioner urges the Court to address is the unfettered discretion that the nondisclosure provision of 18 U.S.C. § 2709(c) vests in executive officers to silence speakers about government activities. The statute allows the government to gag a recipient merely on a certification that disclosure "*may result* [in] a danger to the national security of the

[11] The district court in *In re Nat'l Security Letter* did not make a finding regarding whether the second *Freedman* prong was satisfied by the NSL statute.

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)(emphasis added). Without any articulable statutory guidance cabining this executive discretion, the statute cannot survive constitutional scrutiny.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Supreme Court considered a local ordinance that allowed city officials to refuse a parade permit if "the public welfare, peace, safety, health, decency, good order, morals or convenience" so required. *Id.* at 149-50. Because the ordinance gave city officials "virtually unbridled discretion and absolute power" to deny a permit, the Court found the ordinance unconstitutional, noting that an ordinance that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.* at 150-51.

Any statutory licensing scheme must necessarily limit the discretion of the censor to "narrow, objective, and definite standards" to protect against the indiscriminate and unlawful deprivation of First Amendment rights. *Id.* at 150. As the Supreme Court observed in *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 131 (1992), "if the permit scheme involves the appraisal of facts, the exercise of judgment and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." (citations omitted).

The nondisclosure provision of the NSL statute lacks the "narrow, objective, and definite standards" necessary to limit the exercise of executive authority. Rather, it authorizes an FBI official to prohibit disclosure of an NSL if that official believes—under his or her own criteria that disclosure "may result" in, for example, "danger" to national security or interfere with a counterterrorism investigation. This sort of unfettered discretion vested in an executive branch official to determine whether speech can occur has repeatedly been struck down by both the Supreme Court and the Ninth Circuit. In *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769 (1988), the Supreme Court noted: "it is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit

application." In *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 803 (9th Cir. 2008), the Ninth Circuit confirmed that an "open-ended standard, combined with the absence of a requirement that officials articulate their reasons or an administrative-judicial review process, vests the Seattle Chief of Police with sweeping authority . . . The First Amendment prohibits placing such unfettered discretion in the hands of licensing officials." Moreover, the absence of clear standards allows "post hoc rationalizations" and "the use of shifting or illegitimate criteria" that make it difficult for courts to assess the statute's effects on a case-by-case basis. *City of Lakewood*, 486 U.S. at 749. This problem is especially serious in the NSL context where targets are not notified and few challenges are ever brought by service providers.

C. The Nondisclosure Provision is a Content-Based Restriction on Speech That Fails Strict Scrutiny.

Even if the nondisclosure requirement could survive the substantive and procedural prior restraint tests discussed above, the statute still must meet strict scrutiny review as it is a content-based restriction on speech. *See In re Nat'l Security Letter*, 2013 WL 1095417 at *10 ("as a content-based restrictions on speech, the NSL nondisclosure provisions must be narrowly tailored to serve a compelling governmental interest"). Indeed, the Government has previously "conceded that strict scrutiny is the applicable standard" for a review of the nondisclosure provision. *Mukasey*, 549 F.3d at 878. As a content-based restriction subject to strict scrutiny, the NSL is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). To survive strict scrutiny review, the Government must show that a restriction on free speech is "narrowly tailored to promote a compelling Government interest," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000), and 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). As this Court held in *In re National Security Letter*, it cannot.

The nondisclosure provision fails strict scrutiny in three ways. First, the statute's failure to adhere to the *Freedman* procedural safeguards means that it is not narrowly tailored. *Mukasey*, 549 F.3d at 881 ("in the absence of Government-initiated judicial review, subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards . . . [and] does not survive either traditional strict scrutiny or a slightly less exacting measure of such scrutiny"); *see also In re*

Nat'l Sec. Letter, 2013 WL 1095417 at *4 (citing *Mukasey*). Second, the nondisclosure provision impermissibly permits the FBI to gag recipients about not only the *content* of the NSL, it also permits gags as "to the very fact of having received one." *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *10. As this Court noted:

> [T]he government has not shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs. The statute does not distinguish—or allow the FBI to distinguish—between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The statute contains a blanket prohibition: when the FBI provides the required certification, recipients cannot publicly disclose the receipt of an NSL.

Id. Third, the nondisclosure provision is invalid as it authorizes overly long prior restraints. Even if the Court decides that the prior restraint is justified, it cannot tailor the duration of the prior restraint to the circumstances. As this Court held "[b]y their structure . . . the review provisions are overbroad because they ensure that nondisclosure continues longer than necessary to serve the national security interests at stake." *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *11 (citing *Doe v. Gonzales*, 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007).

D. The Standards of Judicial Review of the Nondisclosure Requirement in 18 U.S.C. § 3511(b) are Excessively Deferential and Thus Violate Separation of Powers and Due Process.

As held by this Court in *In re National Security Letter*, independent judicial review of NSLs is impossible because sections 3511(b)(2) and (3) substitute an extremely deferential standard of review for the constitutionally required standard of review, and separately because section 3511(b) precludes courts from making an independent determination of the facts — *i.e.*, the likelihood of harm — used to justify the prior restraint. Specifically, the statute allows the gag to end only if the court:

> finds that there is *no reason to believe* that disclosure may endanger 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.

Sections 3511(b)(2) and (3) (emphasis added). The statute further requires that if any one of a long list of government officials so certifies, "such certification shall be treated as *conclusive* unless the court finds that the certification was made in bad faith." *Id.* This Court has already determined that: "the Court can only sustain nondisclosure based on a searching standard of review, a standard

incompatible with the deference mandated by Sections 3511(b) and (c)." *In re Nat'l Sec. Letter,* 2013 WL 1095417 at *12. By baldly preventing courts from performing their proper role in First Amendment review, Congress "impermissibly threatens the institutional integrity of the Judicial Branch" in violation of the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 851 (1986)). Petitioner asks that the Court rule as it did before and find that the standard of review in section 3511(b) violates separation of powers and due process principles.

E. The NSL Statute's Compelled Production Provision Violates the First and Fifth Amendments.

Separate from the unconstitutionality of the gag provision (and not addressed by the district court in *In re National Security Letter*, the underlying 18 U.S.C. § 2709 authority to compel the production of records implicates the identities and private associations of telecommunications subscribers — without any court oversight — and violates both the First and Fifth Amendments. While not all of the information sought pursuant to NSLs enjoys constitutional protection, some clearly does. The NSL statute on its face permits the FBI to unilaterally obtain non-public information such as [redacted] with no judicial oversight to ensure "that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States," or that the investigation was not simply a pretext. 18 U.S.C. § 2709(b). Similarly, the statute allows no judicial oversight that would prevent the FBI from seeking to obtain the identity of [redacted] without a warrant or any other judicial process. *See, e.g.*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 509 (S.D.N.Y. 2004) *vacated sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) ("§ 2709 imposes a duty on ISPs to provide the names and addresses of subscribers, thus enabling the Government to specifically identify someone who has written anonymously on the internet."). Given the obvious potential for violations of these protected interests, coupled with the absence of any meaningful ability for the court (or even the target, through his or her only remaining "proxy" — the NSL recipient) to protect the target from constitutional harm, the statute as written cannot stand.

The lack of adequate procedural protections in the statute permits the FBI to compel

protected records from any covered communications provider, although [redacted] — to the FBI without a judge having the opportunity to put the FBI's rationale to any test.

Investigations that "intrude[] into the area of constitutionally protected rights of speech, press, association and petition" are subject to heightened First Amendment scrutiny. *Gibson v. Fla. Legislative Invest. Comm.*, 372 U.S. 539, 546 (1963). Courts have long recognized protection under the First Amendment for the right to engage in anonymous communication — to speak, read, listen, and/or associate anonymously — as fundamental to a free society. The Supreme Court has consistently defended such rights in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that an "author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"). Similarly, the Supreme Court has long held that compelled disclosure of membership lists and other associational information may constitute an impermissible restraint on freedom of association. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (compelled identification violated group members' right to remain anonymous; "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association"); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982) ("The right to privacy in one's political

associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest.'") (citing *NAACP*, *Gibson* (internal citations removed)). Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce such anonymity are subject to heightened scrutiny, requiring the demonstration of a compelling need and a showing that the demand is narrowly tailored. Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999). Given the structure of the NSL statute, the judicial branch is unable to play the vigilant role that it must if the statute is to survive constitutional scrutiny.

1. The First Amendment Requires *Ex Ante* Process as NSL Recipients In Most Circumstances Cannot or Will Not Adequately Represent the Interests of Its Customers.

No level of scrutiny, heightened or otherwise, can be met without the availability of meaningful court review. The statute's unique mix of a self-issued mandatory process with a self-issued gag on recipients makes that impossible. Unlike most other mechanisms compelling an individual or entity to disclose information to the government, NSLs require no process of any kind from a court. *Compare*, *e.g.*, Fed. R. Crim. Proc. 41 (probable cause warrant); Fed. R. Crim. Proc. 17 (grand jury subpoena); 18 U.S.C. § 2703(d) (ECPA "d" order); 18 U.S.C. § 2516 (wiretap order); 18 U.S.C. § 3123 (pen register/trap and trace order); 50 U.S.C. 1861 (FISA "215" order). And unlike all other generally comparable investigative authority, such as subpoena power delegated to administrative agencies, NSL statutes alone provide to the government a Executive-authorized gag provision barring the person whose records are sought from learning about the investigation and hence being able to initiate a judicial process by which the court can evaluate the legality of the agency's exercise of authority. *See, e.g., Doe v. Ashcroft*, 334 F. Supp. 2d at 485.

The structure of the statute ensures that in all but the most rare of cases, the constitutional interests of the subscriber will never be considered by an impartial court.[12] While an NSL

[12] The PATRIOT Act amendments slightly limited the scope of investigations and provided that the government must certify that the NSL was not issued "solely" on the basis of First Amendment protected activity, although such a limitation, even if it satisfied the First Amendment in theory, is *(footnote continued on following page)*

recipient — for example, a telecommunications company or Internet service provider — may initiate a challenge, such companies typically have neither information about their subscribers and their activities and associations on which to challenge the legality of the NSL nor the incentive to do so. DOJ statistics bear this out. Based on the OIG reports mandated by Congress as part of the 2006 amendments, it is known that the FBI issues a high volume of NSLs every year: nearly 200,000 NSLs were issued in the period between 2003 and 2006 alone. Yet this challenge is one of only five that are publicly known ever to have been filed, representing a tiny fraction of the total NSLs issued. As the court noted in *In re National Security Letter*, and as the *Mukasey* court showed in 2008, this dearth of challenges was not because the statute is so plainly constitutional. Instead, with neither specific information about the underlying investigation nor a business incentive, NSL recipients are inadequate proxies to protect the constitutional interests of their customers.

The Supreme Court has previously rejected schemes that deny a speaker the ability to challenge a restriction on First Amendment rights and only permit third party stand-ins to challenge the restriction. In *McKinney v. Alabama*, 424 U.S. 669 (1976), a bookseller was convicted of selling obscene material but was not permitted to litigate the obscenity determination of the material in question that had been decided in a separate *in rem* proceeding, a proceeding for which the bookseller had not been given notice or an opportunity to appear. The state argued that the *in rem* proceeding was an "adversary judicial proceeding" in compliance with First Amendment requirements, including *Freedman v. Maryland*, but the Supreme Court disagreed:

> Our difficulty with this argument is its assumption that the named parties' interests are sufficiently identical to those of petitioner that they will adequately protect his First Amendment rights. There is no indication that they are in privity with him, as that term is used in determining the binding effects of judgments. *See Litchfield v. Goodnow's Adm'r,* 123 U.S. 549, 551, 8 S.Ct. 210, 211, 31 L.Ed. 199, 201 (1887). And we recognized in *Freedman* that individual exhibitors as well as distributors may be unwilling, for various reasons, to oppose a state claim of obscenity regarding certain material. 380 U.S., at 59, 85 S.Ct. at 739, 13 L.Ed.2d at 655. Such parties may, of course, make their own determination whether and how vigorously to assert their own First Amendment rights. The Constitution obviously cannot force

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(footnote continued from preceding page)
empty in practice, especially where the FBI can make its own certification that a court need not review.

> anyone to exercise the freedom of expression which it guarantees. Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to do so and lost.
>
> But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. Nonparties like petitioner may assess quite differently the strength of their constitutional claims and may, of course, have very different views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose.

424 U.S. 669, 675-76. In *McKinney*, even a nominally adversarial hearing in which a court reviewed similar First Amendment interests to those that could have been brought by the not present bookseller was insufficient to protect those interests. With most NSLs, subscribers don't even enjoy that minimal level of protection: the FBI can obtain customer records without a court ever being made aware of the compelled production. Because NSLs cannot protect their own First Amendment interests, and because in the vast majority of cases, NSLs recipients can't or won't step forward and do so themselves, the NSL authority to compel the production of potentially First Amendment protected information should be struck down.

2. The Fifth Amendment Similarly Requires *Ex Ante* Process.

For the same reasons that it fails First Amendment scrutiny as described above, the compelled production provision violates the Fifth Amendment as well: the lack of a meaningful process by which the First Amendment and privacy interests of NSL targets (*i.e.*, subscribers using NSL recipients' telecommunications services) may be protected from FBI overreach violates their procedural due process rights. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court articulated a balancing test by which the government's interest in continuing a particular proceeding is weighed against an individual's interest in the adequacy of that process that he or she is due prior to the deprivation of any recognized Fifth Amendment interests in life, liberty, or property. Under *Mathews*, the adequacy of process is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U.S. at 335. The *Mathews* test further requires a balancing of these concerns, evaluating "the risk of an erroneous deprivation" of the interest if the process were reduced and the "probable

value, if any, of additional or substitute safeguards." *Id.* The NSL process fails this test.

Though relevant to the balancing test, the government's assertion of "relevancy" to a national security matter does not end the inquiry. Indeed, the Supreme Court rejected such an argument in *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004), noting the need to balance that interest against the interest of those whose liberty was erroneously or otherwise incorrectly curtailed. 542 U.S. 507, 530 (2004) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). The statute permits the government to obtain, without court oversight, private subscriber information that may implicate First Amendment-protected rights such as the right to speak and associate anonymously, purportedly in support of a valid national security investigation, on a bare self-certification of "relevance." At minimum, given the inability of NSL recipients to fully represent the interests of their customers, procedural due process requires some *ex ante* process by a neutral decision maker prior to the compelled production of records to protect against their improper disclosure and the irreparable loss of customers' constitutionally protected rights.

F. The Government Must Make a Sufficient Factual Showing for the Court to Review.

Even if the constitutional defects in the statute could be overlooked, the Court must perform a searching inquiry in response to this Petition to evaluate the legality of the NSLs issued here. Section 3511 allows the court to modify or set aside the underlying request if compliance would be "unreasonable, oppressive or otherwise unlawful." 18 U.S.C. § 3511(a). Similarly, as discussed above, the overly-deferential standard of review regarding the propriety of any imposed gag violates separation of powers and due process principles; instead a Court must independently review the specific gag and determine if it supported by actual evidence. Whatever the Government's purported justifications for either its need for the information or for the gag, such justifications must be supported by a factual showing subject to judicial evaluation.

As the Supreme Court reaffirmed in *Hamdi v. Rumsfeld*, the suggestion of a "heavily circumscribed role for the courts" in traditional judicial matters where the government also has a national security interest is incorrect. 542 U.S. at 535-36 (plurality opinion). Instead, the Supreme Court noted that "the United States Constitution . . . most assuredly envisions a role for all three

branches when individual liberties are at stake." *Id.* at 536. That role here is to carefully evaluate the factual showing made by the Government. The Government may not simply unilaterally assert that its motivations are proper and justified without the Court reviewing the basis for its claims. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power") (citing *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)).

G. The Unconstitutional Portions of the NSL Statute are Not Severable.

If this Court finds that either the statute's nondisclosure provisions or the underlying authority to compel the production of customer records are unconstitutional, it must — as it did in *In re National Security Letter* — invalidate the statutory scheme as a whole because the two sets of provisions are not severable. *See In re Nat'l Sec. Letter,* 2013 WL 1095417 at *15. Severability "is essentially an inquiry into legislative intent." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006) (question is whether "the legislature [would] have preferred what is left of its statute to no statute at all"). A court must strike down additional provisions of a statute in the face of the unconstitutionality of particular elements of it when "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (citation omitted).

Here, there can be only one conclusion: the provisions are not severable. Not only did Congress enact the two sets of provisions together, Congress amended the nondisclosure provisions in an attempt to save the NSL statute, leading to its present form, after the initial district court decisions in the *Mukasey* litigation held that the nondisclosure provisions were unconstitutional.[13] *See In re Nat'l Sec. Letter*, 2013 WL 1095417 at *15; *Mukasey*, 549 F.3d at 866-68. And as Petitioner has shown, the amended nondisclosure provisions were crafted to make it

[13] *Doe v. Ashcroft*, 334 F.Supp.2d at 494-506, *vacated by Doe v. Gonzales* 449 F.3d 415 (2nd. Cir. May 23, 2006) (Finding substantive provisions unconstitutional. The case was vacated because the Reauthorization Act of 2006 made changes to the statute and the case was remanded to address the First Amendment issues presented in the revised statute); *id.* at 511-525 (finding nondisclosure provision unconstitutional); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 73-75, 82 (D. Conn. 2005) (finding probability of success that nondisclosure provision was unconstitutional and preliminarily enjoining enforcement).

unconstitutionally easy for the FBI to gag providers and unconstitutionally hard for providers to challenge the gag. Congress's attempt to preserve the FBI's ability to protect the secrecy of NSLs after multiple judicial invalidations makes its intent clear, especially when Congress did not include a severability clause. As the *In re National Security Letter* court observed:

> The Court also finds that the unconstitutional nondisclosure provisions are not severable. There is ample evidence, in the manner in which the statutes were adopted and subsequently amended after their constitutionality was first rejected in *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004) and *Doe v. Gonzales*, 386 F.Supp.2d 66 (D.Conn. 2005), that Congress fully understood the issues at hand and the importance of the nondisclosure provisions. Moreover, it is hard to imagine how the substantive NSL provisions—which are important for national security purposes—could function if no recipient were required to abide by the nondisclosure provisions which have been issued in approximately 97% of the NSLs issued.

2013 WL 1095417 at *15.

Congress could not have intended the substantive NSL provisions to operate absent the nondisclosure provisions. Without some secrecy provision, a provider could immediately disclose the fact of the NSL's issuance to the targeted individual or individuals. Even for Government demands for information from providers that raise no national security concerns, the Stored Communications Act authorizes the Government to obtain judicial nondisclosure orders. 18 U.S.C. §§ 2705(a), (b). Absent the nondisclosure provisions, however, the NSL statute contains no vehicle that can preserve a more narrowly tailored degree of secrecy consistent with the First Amendment. Accordingly, the substantive NSL provisions cannot be severed from the nondisclosure provisions.

IV. CONCLUSION

Petitioner respectfully requests that the NSLs be set aside. The doctrine of issue preclusion prevents the Government from again arguing that the statute is constitutional, having lost that argument against Petition in the prior litigation discussed above. Even assuming the Government could again raise a defense to the statute, the prior holdings of this Court are sound and should be upheld: the NSLs should be set aside because the gag provision is facially unconstitutional and the statute is not severable. Moreover, the statute violates the First and Fifth Amendments as it authorizes the FBI to potentially violate the anonymous speech and associational rights of telecommunications subscribers without any oversight by the judicial branch.

DATED: April 22, 2013

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