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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

U.S. DEPARTMENT OF JUSTICE, Plaintiff, v. [redacted] Defendant. IN RE NATIONAL SECURITY LETTERS.	Case No. 11-cv-2667 SI Case No. 13-mc-80089 SI Related Case No. 11-cv-2173 SI Date: August 2, 2013 Time: 9:00 a.m. Courtroom 10 Hon. Susan Illston **REPLY IN SUPPORT OF (1) CROSS-PETITION FOR JUDICIAL ENFORCEMENT OF NSLs (IN NO. 13-80089) AND (2) MOTION FOR JUDICIAL REVIEW AND ENFORCEMENT OF NATIONAL SECURITY LETTERS (IN NO. 11-2667)** **FILED UNDER SEAL** [18 U.S.C. § 3511(d)]

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PRELIMINARY STATEMENT

Petitioner [redacted] or "petitioner") challenge to three National Security Letters is meritless and should be rejected by the Court on several grounds.[1] [redacted] primarily again contends that this Court's prior decision finding the NSL statutes to be facially unconstitutional, *In re NSL*, No. C 3:11-2173-SI (N.D. Cal. March 14, 2013), renders the NSLs served on petitioner unenforceable. But this argument is plainly wrong. The Court stayed enforcement of its Order and injunction in that case pending appeal, in light of the "significant constitutional and national security issues at stake," *see In re NSL*, Slip Op. at 24. Moreover, by granting the relief sought by the Government, the Court would be acting consistently with its recent Order enforcing 19 NSLs in an analogous challenge brought by a different petitioner. *See In re National Security Letters*, No. 3:13-mc-80063 (N.D. Cal. May 28, 2013) (as amended for public release) ("*In re 19 NSLs*"). As in *In re 19 NSLs*, the petitions and motion for enforcement at issue here are properly judged by conducting as-applied reviews on "an NSL-by-NSL basis." *Id.* at 2. And again as in *In re 19 NSLs*, the records in these cases justify enforcement of the NSLs served on petitioner.

Also, to the extent petitioner has raised a new facial challenge to the statute in Case No. 13-80089, any relief in response should be stayed pending appeal, just as it was in *In re NSL*. As explained below, however, such a facial challenge is beyond the scope of review in this action because the NSL statutes have been constitutionally applied to petitioner and review is limited by 18 U.S.C. § 3511. Petitioner's request for a sweeping injunction, moreover, is overbroad and

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[1] *See* [redacted] (1) Reply in Support of Petition to Set Aside NSLs [and] Opposition to Cross-Petition for Judicial Enforcement of NSLs, and . . . Opposition to Motion for Judicial Review, *filed under seal* (July 19, 2013) (hereinafter "Pet's Comb. Opp."). Petitioner's July 19 brief responded in a single filing to both the government's Motion for Judicial Review and Enforcement of National Security Letters in Case No. 11-cv-2667, *filed under seal* (June 26, 2013) (hereinafter "Resp.'s 2667 Br.") and the government's Cross-Petition for Judicial Review and Enforcement of National Security Letters in Case No. 13-cv-80089, *filed under seal* (June 26, 2013) (hereinafter "Resp.'s 80089 Br."). Petitioner's choice to file a single, combined brief in these two cases should not obscure the fact that three NSLs at issue are properly considered individually, on an NSL-by-NSL basis, as they were applied to petitioner . The government will adopt petitioner's convention of filing a single brief, but treat the NSLs separately herein, where appropriate.

would trammel the prerogatives of the Second Circuit in direct contradiction to the law of this Circuit.

Petitioner's suggestion that the doctrine of issue preclusion should bar the government from seeking enforcement of these NSLs is erroneous. Although the subject matter of the Court's prior decision on the facial constitutionality of the NSLs is related to the question of their lawfulness as specifically applied to petitioner, it is not "the same as that definitely and actually litigated and adjudged." *Montana v. United States*, 440 U.S. 147, 157 (1979). For this reason, issue preclusion does not apply. Nor does petitioner's desire to speak about these NSLs as part of a political debate render their nondisclosure provisions unenforceable on an as-applied basis because the non-disclosure provisions of the NSLs are narrowly tailored to satisfy the government's compelling interest in national security while simultaneously permitting petitioner ample opportunity to participate in political debate.

For these reasons, the Court should enter an Order enforcing both the information requests in the NSLs and the associated nondisclosure requirements. *See* 18 U.S.C. § 3511(c).

ARGUMENT

I. The NSLs Served On Petitioner Comply With the Law and are Due Enforcement in this Court.

The central issue now before the Court is whether three individual NSLs served on the petitioner are valid and due enforcement and, as set forth further below, the Court should decline petitioner's invitation to consider the statutes' application to other NSLs not before the Court. Doing so would be plainly unnecessary when [redacted] petition requires and warrants only a narrow application of the law and where the relief [redacted] seeks would be inconsistent with the authority on which its petition relies, as well as the Ninth Circuit's controlling precedent. In light of the government's strict compliance with the Second Circuit's injunction in *John Doe, Inc., v. Mukasey*, 549 F.3d 861 (2d Cir. 2008),[2] the Court should review the lawfulness of these

2 As the government has explained at length, the U.S. Court of Appeals for the Second Circuit placed a limiting construction on the NSL statutes in *Doe*, thereby modifying an injunction entered in the Southern District of New York. In its consistent practice since 2009, the government has followed the same limiting construction. *See, e.g.*, Resp.'s 13-80089 Br. at 7.

NSLs on an as-applied basis, as it did with respect to the challenge to the NSLs at issue in *In re 19 NSLs*. There, this Court noted that "[w]hether the challenged nondisclosure provisions are, in fact, facially unconstitutional, will be determined in due course by the Ninth Circuit" by way of the appeal of *In re NSL*." *In re 19 NSLs*, Slip Op. at 2. Accordingly, faced with a petitioner who, like [redacted] sought "to modify or set aside" individual NSLs pursuant to 18 U.S.C. § 3511, the Court proceeded to "review the arguments and evidence on an NSL-by-NSL basis." *Id.* The Court should take a consistent approach here and enforce the three NSLs directed to [redacted] on their facts.

A. The NSL at issue in Case No. 11-2667 complies with the Law.

There is no dispute in this case that the Second Circuit's construction of the NSL statutes is the only manner in which those statutes have been applied to petitioner through the NSL at issue in Case No. 11-2667 ("2667 NSL"). *See* Classified Declaration of Andrew G. McCabe ("McCabe Decl."), *submitted with* Resp's 2667 Br.; *cf. In re 19 NSLs*, Slip Op. at 2-3. Petitioner's procedural objections to the NSL statutes are therefore not properly considered as part of the as-applied review here.

The nondisclosure requirements imposed on petitioner by the 2667 NSL survive the most stringent constitutional scrutiny. In the course of ongoing, authorized national security investigations, the FBI identified [redacted] Amended Complaint, Case No. 11-2667 ("Am. Compl."), at ¶ 22-23. After confirming that [redacted] *Id.* at ¶ 23-24. The FBI then served the 2667 NSL to obtain the name, address, and length of service [redacted] *Id.* In this context, as FBI Assistant Director McCabe explained, the nondisclosure requirement here is necessary to avoid prematurely revealing the national security investigations to its [redacted], which could cause [redacted] to change [redacted] behavior patterns, including by destroying evidence or expediting plans of attack. *See* McCabe Decl.; *see also* Classified Decl. of former FBI Assistant Director Mark F. Giuliano, *submitted with* Motion to Compel

Compliance with NSL (July 29, 2011). The nondisclosure requirements described by Assistant Directors McCabe and Giuliano manifestly serve a compelling interest. *See* Resp's 2667 Br. at 6-7 (*citing, inter alia*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). As limited on the face of the NSL, the secrecy requirement reaches only to the fact the FBI "has sought or obtained access to information or records," a limitation carefully tailored to protect the precise facts which the Assistant Directors McCabe and Giuliano described an interest in protecting.[3]

B. The NSLs at issue in Case No. 13-80089 comply with the Law.

The nondisclosure requirements imposed in the two NSLs at issue in Case No. 13-80089 ("80089 NSLs") likewise withstand strict constitutional review. As certified by the issuing FBI Special Agent in Charge ("SAC") under the authority of 18 U.S.C. § 2709, and fortified by FBI Assistant Director Anderson's declaration, the 80089 NSLs are issued pursuant to a single, authorized national security investigation and seek certain, limited information related to [redacted] *See* Classified Declaration of Robert Anderson, Jr. ("Anderson Decl."), *submitted with* Resp's 80089 Br. Moreover, as Assistant Director Anderson elaborated, disclosure of the information contained in the 80089 NSLs would both interfere with that national security investigation and reveal sensitive FBI national security sources and methods, ultimately endangering national security. *See id.* For these reasons, the government's compelling interest in the nondisclosure provisions of the 80089 NSLs is at its zenith. *See* Resp's 80089 Br. at 8-9 (*citing Haig v. Agee*, 453 U.S. 280, 307 (1981)).

C. Issue Preclusion Does Not Bar the Government's Motion for Enforcement in Case No. 11-2667 or its Cross-Petition in Case No. 13-80089.

In its opposition, petitioner contends that the NSLs at issue here "must be set aside" and cannot be enforced because "the same issues were litigated . . . and resolved by the Court in *In re NSL*." Pet's Comb. Opp. at 1, 3-5. Although petitioner correctly describes the three-factor legal

[3] As explained previously, revealing a recipient's identity in connection with a matter links a particular electronic communications service provider to a particular NSL served at a particular point in time in a particular geographic area of the United States. A window into the universe of NSLs issued by the FBI would provide a wealth of detailed information to our adversaries, contrary to the structure and intent of the statutory scheme, and would help to facilitate detection and evasion of our intelligence and law-enforcement efforts.

test for issue preclusion, petitioner incorrectly applies it to the facts here. *See* Pet's Comb. Opp. at 4-5 (*citing Richey v. I.R.S.*, 9 F.3d 1407, 1410 (9th Cir. 1993)). The first factor in the *Richey* test is key: whether the "question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged" in the previous suit. Here, it is not.

In the Court's stayed ruling in *In re NSL*, now on appeal, the Court considered whether the NSL statutes are *facially* unconstitutional. *See* Resp.'s 80089 Br. at 1-2, 6. The government's pleadings in these cases, in contrast, ask the Court to determine that the NSLs served on petitioner are lawful *as applied* to petitioner and that enforcement of NSLs is proper while the Court's earlier decision is stayed on appeal. To be sure, in Case No. 11-2667, the government is seeking enforcement of the same NSL at issue in *In re NSL*. In that decision, however, by staying enforcement of its judgment pending appeal, the Court expressly left open the possibility the NSL could be enforced during that stay of judgment. *See In re NSL*, Slip Op. at 24; *id.* at 23 (declining to reach the as-applied challenge in that case). Also in that case, [redacted] acknowledged, through counsel, that the NSL statutes were applied through procedures that satisfy the constitution. *See In re NSL*, Slip Op. at 7 (noting petitioner [redacted] had conceded that the *Doe v. Mukasey* procedures satisfy the constitution, but had argued congressional amendment is necessary to save the statute). In Case No. 13-80089, moreover, the question of whether the NSLs served are lawful as applied could not have been resolved previously because those NSLs were not at issue.

Petitioner's reliance on *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), for the proposition that an as-applied challenge is an issue to be subsumed within a facial challenge for preclusive purposes, is misplaced. In *San Remo Hotel*, the question before the Court was whether a party could relitigate an as-applied challenge actually raised in a prior proceeding (in that case, a parallel state court action). Here, the question before the Court is whether enforcement of the NSLs served on petitioner may be had during the period in which the Court has stayed its injunction on a facial challenge. Because no part of the *In re NSL* decision answers that question, issue preclusion does not apply.

D. Petitioner's Identified First Amendment Interests are Insufficient to Undercut the Lawfulness of the 2667 NSL or the 80089 NSLs as Applied to Petitioner.

Petitioner's attempt to transform a commercial relationships with its customers into a protected First Amendment interest sufficient to offset the national security interests in nondisclosure is also meritless. [redacted] Petitioner's relationships with the users of the [redacted] relevant to the NSLs are commercial, and commercial transactions do not give rise to associational rights. *See, e.g., IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1193 (9th Cir. 1988) (holding that commercial relationship – here between an escort and client – is not protected by freedom of association). The FBI has not sought information concerning someone who engaged in protected speech via [redacted] or at least solely on the basis of First Amendment activity; rather, it seeks only subscriber and toll billing information for [redacted] related to a [redacted] investigation. *See* Anderson Decl.; McCabe Decl.; *cf. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986) (because "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," a statute of general application that imposes an incidental burden on free speech does not implicate the First Amendment.). Nor is there any evidence here that any such associational right would be significantly burdened by the NSL information request, nor any basis to conclude that compliance would result in harassment or discouragement of customers or would otherwise chill First Amendment activities. *See Brock v. Local 475, Plumbers' Int'l Union, AFL-CIO*, 860 F.2d 346 (9th Cir. 1988).[4]

Nor does petitioner's wish to add self-identification "as an entity that has engaged in protracted litigation with the government" over the NSLs at issue substantiate its First

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[4] [redacted]. *Cf. Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99-100 (1982) (discussing risk of harassment for membership in a Communist party during the Cold War).

Amendment claims. Comb. Opp. at 15-16. While there is an ongoing public debate about "various surveillance statutes,"[5] the nondisclosure terms in the NSLs served on petitioner do not place any restriction on petitioner's ability to engage in general public discussions regarding the issues it identifies: "the expanded and relaxed government surveillance powers granted by the Patriot Act"; whether the government has "exceeded its [statutory] authority"; whether various statutes "violate the First, Fourth, and Fifth Amendments"; or "new legislation [that] has been both discussed and introduced." Pet's Comb. Opp. at 15-16. Instead, petitioner is only barred from identifying itself as an NSL recipient by revealing that the government "has sought or obtained access to information or records" under 18 U.S.C. § 2709.

Indeed, petitioner has not been silenced from the public debate, only from adding the limited self-identification as context for its public statements [redacted] [redacted] Moreover, petitioner has combined its voice with those of others who *can* say that they have received NSLs in circumstances where nondisclosure requirements have been narrowly tailored to permit aggregate disclosures. *See, e.g.*, Broad Coalition Seeks Transparency on Surveillance, San Francisco Chronicle (July 19, 2013) *available at*: http://www.sfchronicle.com/technology/dotcommentary/article/Broad-coalition-seeks-transparency-on-surveillance-4673815.php (last accessed July 22, 2013) (petitioner's joint public statement with Google, a known recipient of NSLs, *see* Resp.'s 80089 Br. at n.4). *Cf. First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"). In any event, whatever the incidental First Amendment impact of petitioner's inability to self-identify as an NSL recipient, it is insufficient to outweigh the compelling interest in nondisclosure. *See supra Part I.A*.

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[5] Notwithstanding the public release of opinions in *In re NSL, In re 19 NSLs,* and *Doe*, petitioner's extended footnotes documenting this debate chronicle discussion of the Foreign Intelligence Surveillance Act ("FISA"), the National Security Agency ("NSA"), and related matters, not the FBI's use of the NSL statutes at issue here.

E. Petitioner Does Not Dispute That the Standards For Enforcement Of the Information Requests in the NSLs Are Met.

In the government's motion in Case No. 11-2667, the Attorney General seeks to require [redacted] to produce the information requested in the 2667 NSL while this Court's earlier decision is stayed. Likewise, in the government's cross-petition in Case No. 13-80089, the Attorney General seeks enforcement of the information requests in the two 80089 NSLs. Petitioner's response to these cross-petitions generally does not dispute the arguments set forth in the government's opening briefs as to why the information requests should be enforced.

In sum, the government explained the "quite narrow" scope of a judicial inquiry in a petition to enforce agency subpoenas. *See, e.g.*, Resp.'s 80089 Br. at 15 (*quoting EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*)). The government then outlined how: (1) the FBI is "authorized to conduct its underlying investigation here;" (2) petitioner is "the proper recipient of NSLs pursuant to § 2709;" (3) "[t]he NSLs served on petitioner comply with all relevant statutory requirements;" and (4) the inquiry is not overbroad or unduly burdensome. *See, e.g.*, Resp's 2667 Br. at 11-13; *see Children's Hosp. Med. Ctr.*, 719 F.2d at 1428 (requiring the district court to determine the agency's "authority to investigate," that "procedural requirements have been followed," that the evidence is "relevant and material to the investigation," and not "overbroad or unduly burdensome."); *In re 19 NSLs* (applying this authority).

Of particular importance, the declarations of Assistant Directors Anderson and McCabe, submitted to the Court *ex parte* for its *in camera* review in conjunction with the government's opening briefs, fortified the previous certifications by senior FBI officials that the NSLs are necessary to ongoing, authorized national security investigations and national security concerns weigh heavily in favor of enforcing the NSLs. *See* Anderson Decl.; McCabe Decl.; Resp.'s 2667 Br. at 6-7; Resp.'s 80089 Br. at 18-19. The Assistant Directors also explained that the NSLs each request limited, specific information, and "why disclosure of the information could reasonably be expected to damage critical national security interests." *See, e.g.*, Anderson Decl.; Resp.'s 80089 Br. at 19. Petitioner has not argued that the FBI lacks a compelling need for the

requested information, that the FBI has not met the procedural requirements for issuing the NSLs, or that the NSLs are overbroad or unduly burdensome. Moreover, as the government explained in its prior memoranda and as set forth in the Anderson and McCabe Declarations, the government has established that the NSL information requests at issue here satisfy the applicable standards and that the Court should, therefore, enforce them.

F. Enforcement of the NSLs Is Both Appropriate and Within the Authority of This Court.

Petitioner posits that the Court "has no ability to enforce" the statute during the pendency of the *In re NSL* appeal and petitioner's purported facial challenge to the statute in Case No. 13-80089. Pet's Comb. Opp. at 19. In doing so, petitioner addresses neither the authority cited in the government's opening briefs nor the Court's decision in the comparable as-applied challenge in *In re 19 NSLs*, which, in conjunction with the specific facts pertaining to the NSLs here demonstrate that the Court should order enforcement.

Contrary to petitioner's claim that "[t]he Court cannot elect to enforce the NSLs" during a period in which it "has stayed its earlier injunction," Pet's Comb. Opp. at 19, it is beyond cavil that the purpose of a stay of an injunction pending appeal is to preserve the *status quo*. And as the Court of Appeals has emphasized, the *status quo* to be preserved "is a condition not of rest, but of action," in which the NSL statutes are "presumptively constitutional . . . [and] should remain in effect pending a final decision on the merits" by the appellate Court. *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, J., in chambers); *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116-17 (9th Cir. 2008) (*quoting, inter alia*, *Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co.*, 54 F. 730, 741 (C.C.N.D. Ohio 1893) (W.H. Taft, J.).

The government's opening briefs explained how this inherent power of the Court to preserve the *status quo* is exercised to stay injunctions, particularly where "the legal questions are novel, complex, and of public importance." *Bernstein v. Dep't of State*, 974 F. Supp. 1288, 1310 (N.D. Cal. 1997). In *Bernstein*, this Court ruled for a plaintiff on a facial First Amendment challenge, but rejected plaintiff's entreaty for "a permanent injunction against [the government]

barring nationwide application" of the laws at issue. *Id.* *See also Bernstein v. Dep't of State*, Appeal No. 97-16686 (9th Cir. September 22, 1997) (unpublished order granting government's emergency motion to stay district court injunction in its entirety); *Bernstein v. Dep't of State*, No. C 95-0582 MHP, 2004 WL 838163, *2 (N.D. Cal. April 19, 2004) (noting the district court eventually entered summary judgment for the government in *Bernstein* following a regulatory change). This Court likewise recognized that, given the "significant constitutional and national security issues at stake," a stay of injunction against the NSL statutes – thus permitting the government's continued reliance on those statutes when they are applied constitutionally in individual NSLs – is the appropriate course here. *In re 19 NSLs*, Slip Op. at 24. Indeed, upon review of the government's showing through classified declarations that the 19 NSLs were properly served and that disclosure of their contents was likely to damage national security interests, this Court ordered both enforcement of the information requests in the 19 NSLs at issue *and* that the non-disclosure requirements remain in force, given the pending "review at the Ninth Circuit." *In re 19 NSLs*, Slip Op., at 2 (enforcing 17 of 19 NSLs); see also *id.*, Order dated May 23, 2013 (enforcing the remaining two NSLs). Given the information in the declarations of Assistant Directors McCabe and Anderson, the Court should exercise the same authority to preserve the *status quo* and order full compliance with the 2667 NSL and 80089 NSLs.

While the parties may continue to disagree, and litigate, over whether petitioner has a First Amendment right to disclose any of the contents of those NSLs, the Court should nonetheless permit the NSL statutes to operate while those constitutional issues are adjudicated; the Court should therefore not deprive the government of information needed to further ongoing national security investigations.

II. A Facial Challenge to the NSL Statutes is Not Before the Court and Provides No Basis to Deny Enforcement of the NSLs.

A. The Court Should Not Expand its Review of the Constitutionality of the NSL Statutes Beyond The Application of the NSLs at Issue to Petitioner.

As the government explained in its opening briefs, "as applied challenges are the basic building blocks of constitutional adjudication," because the Court's ability to assess

constitutional harms is best informed by the factual context in which a statute is applied. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). For this reason, facial challenges of the sort sought by petitioner are disfavored, particularly by those "to whom a statute may constitutionally be applied." *Parker v. Levy*, 417 U.S. 733, 759 (1974) (internal quotations omitted). In some instances, a Court presented with a First Amendment challenge to a statute may conclude that the statute is impermissibly broad, *New York v. Ferber*, 458 U.S. 747, 769-71 (1982), but courts should nonetheless avoid invoking the overbreadth exception "when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (citations omitted); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (stating that, in a First Amendment facial challenge, "[a]ny inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.").

Here, where precisely such a limiting construction has been placed on the challenged statutes in their application to petitioner, the Court should tread no more broadly into constitutional law "than is required by the precise facts" of the case. *Wash. State Grange*, 552 U.S. at 450-51; *cf. Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered"). *See* Anderson Decl. (explaining government's compliance with *Doe* in the 80089 NSLs); McCabe Decl. (same as to 2667 NSL).[6] In contrast to its decision on [redacted] facial challenge to the NSL statutes in *In re NSL*, the Court need only address the NSLs as-applied to determine whether to order enforcement.

B. Petitioner's Requests for Broader Relief Are Unavailable In Case No. 13-80089, Which Presents Only a Challenge Pursuant to 18 U.S.C. § 3511.

In objecting to the NSLs in Case No. 13-80089, [redacted] petitions the Court "under 18 U.S.C. §§ 3511(a) and (b) for an order setting aside both NSLs." Petition at 1. This statute expressly provides authority for the Court "to modify or set aside" an NSL request "if compliance would be 'unreasonable, oppressive, or otherwise unlawful.'" Pet's Comb. Opp. at 4

[6] The government has briefed extensively the question of whether the Court should find the NSL statutes facially constitutional and will stand on those arguments here.

(*quoting* 18 U.S.C. § 3511(a)).[7] As the government explained in its opening brief, this language expressly and unequivocally limits the relief available to the specific NSLs challenged by Petitioner. *See, e.g.*, Resp's 2667 Br. at 19-20. Of particular import is that the statute does not authorize either prospective injunctive or declaratory relief, only the modification or displacement of the particular NSLs at issue. 18 U.S.C. § 3511(c).

Petitioner conflates the statutory provisions prescribing the scope of review with those defining the available relief.[8] *See* Pet's Comb. Opp. at 5-6 (suggesting that, because the statute authorizes review of whether the NSL is "unlawful," the language limiting relief to the "modif[ication]" or "set[ting] aside" of an NSL can be ignored). Petitioner's reading, however, is inconsistent with the requirement that courts treat waivers of sovereign immunity narrowly, including as to their limitations on available relief. *See, e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied); *Lane v. Pena*, 518 U.S. 187, 197 (when "a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived.").[9] The appropriate scope of review in these actions is only that set forth in the statute under which they are brought: whether the NSLs at issue should be "modif[ied] or set aside." 18 U.S.C. § 3511(c).

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[7] Case No. 11-2667 similarly arises under the enforcement provision of 18 U.S.C. § 3511(c).

[8] Petitioner has not pleaded claims pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, or the Administrative Procedure Act, 5 U.S.C. § 702, *see* Petition at 1, so its citations to those Acts and to *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 865-67 (9th Cir. 2011), are inapposite.

9 Nor does *Marbury v. Madison*, 5 U.S. 137, 177 (1803), aid petitioner's claim that the Court's "inherent power" authorizes a broad injunction. *Marbury* stands not for the proposition that a party may seek constitutional relief untethered to the facts of a case, but for tailored relief: "if a law be in opposition to the constitution; if both the law and the constitution apply to *a particular case* . . . the court must determine which of these conflicting rules governs *the case*." 5 U.S. 137 at 178 (emphasis added).

C. Under Applicable Ninth Circuit Law, This Court Should Avoid Interference With the Second Circuit Precedent In *Doe*.

The Court should reject petitioner's invitation to grant ~~improper~~ relief that would, contrary to the law of this Circuit, interfere with the law of other Circuits. As discussed in the government's prior briefing, the Second Circuit's modification of a nationwide injunction in *Doe* is settled law in that Circuit, and under the law of this Circuit, this Court should not enter relief that would "cause substantial interference with the established judicial pronouncements of [other] circuits" or the "sovereign[]" prerogatives of other courts. *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-73 (9th Cir. 2008). The nationwide injunction against all NSLs sought by petitioner here would be inconsistent with "the law of [the Second Circuit's] geographical area," and would therefore compromise the "[p]rinciples of comity" essential to the smooth functioning of our judicial system. *Id.* For this reason, this Court should follow *AMC* and provide relief no broader than necessary. *See Fox Television Stations, Inc. v. BarryDiller Content Systems, PLC*, --- F. Supp. 2d ---, 41 Media L. Rep. 1515 (C.D. Cal. Dec. 27, 2012) (applying *AMC* to hold that "Courts should not issue nationwide injunctions where the injunction would not issue under the law of another circuit," and limiting its injunction to the Ninth Circuit).

Disregarding this controlling precedent, petitioner's initial response is to dismiss comity altogether by characterizing the Second Circuit's opinion in *Doe* as "an impermissible advisory opinion." Pet's Comb. Opp. at 12-13. But the *Doe* Court's partial affirmance, partial reversal, and remand in that case for the government "to sustain its burden of proof and satisfy the constitutional standards . . . outlined" is a "pronouncement [that] is the law of that geographical area" and which must be respected under *AMC*. *Doe*, 549 F.3d at 885; *AMC*, 549 F.3d 760, 772.

Similarly, Petitioner's disagreement with the logic of *AMC* does not undermine its status as the correct precedent. Petitioner objects to the Ninth Circuit's analysis that "[t]he courts do not require an agency of the United States to accept an adverse determination . . . by any of the Circuit Courts of Appeals as binding on the agency for all similar cases throughout the United States." 549 F.3d at 771-72. Petitioner's quibble that this is an invitation for "the government [to] engage[] in forum shopping," Pet's Comb. Opp. at 14, ignores the Ninth Circuit's conclusion

that it is petitioner's approach that imposes the true risk of forum shopping. *See AMC*, 549 F.3d at 773 (discussing comity and the risk of "forum shopping"). Thus, the possibility that petitioner may be subject to enforcement of the law elsewhere, including in the Second Circuit, is explicitly contemplated by the applicable precedent and provides no reason for this Court to enter an injunction that would be "in direct conflict with the [Second] Circuit's precedent." *Id.*

CONCLUSION

There is no reason in these cases to deny the FBI information lawfully sought as part of ongoing, authorized national security investigations or to subject the United States to the harms of disclosure of the FBI's information requests. After NSL-by-NSL review, the Court should enforce the information requests and non-disclosure requirements in the 2667 NSL and 80089 NSLs.

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Respectfully submitted,

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