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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY LETTERS.	Case No. 3:13-cv-1165 SI Date: June 14, 2013 Time: 9:00 a.m. Courtroom 10 Hon. Susan Illston **MEMORANDUM IN SUPPORT OF CROSS-PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF NATIONAL SECURITY LETTERS PURSUANT TO 18 U.S.C. § 3511(c), AND IN OPPOSITION TO THE PETITION TO SET ASIDE NATIONAL SECURITY LETTERS** **FILED UNDER SEAL** PURSUANT TO 18 U.S.C. § 3511(d) AND THIS COURT'S ORDER

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PRELIMINARY STATEMENT

This case presents a pressing dispute about the ongoing ability of the FBI to obtain critical intelligence and law enforcement information in the course of national security investigations. Petitioner [redacted] or "petitioner") asks this Court to set aside certain pending National Security Letters ("NSLs") issued to petitioner, and to declare the underlying statutes facially unconstitutional. But, as explained below, there is no merit to petitioner's challenge to compliance with extant NSLs or its facial challenge.

First, this Court's prior decision in another case, *In re NSL*, provides no basis for the relief petitioner seeks. Although the Court held the NSL statute unconstitutional, the Court expressly stayed enforcement of that Order and injunction pending appeal in light of the "significant constitutional and national security issues at stake." *In re NSL*, No. C 3:11-2173-SI (N.D. Cal. March 14, 2013), Slip Op. at 24.

Further, the NSLs petitioner challenges were each issued in compliance with the Constitution. That is because since 2009, the government has complied with the Second Circuit's injunction in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2008), which construed the relevant statutes, 18 U.S.C. §§ 2709(c) & 3511(b), to avoid constitutional concerns. The government has adopted the Second Circuit's construction of the statutes and, as set forth in the record evidence and the Attorney General's Cross-Petition for Judicial Review and Enforcement of National Security Letters, has consistently complied with the procedures enunciated in *Doe*, including in the NSLs at issue here. Because facial challenges are disfavored, and because petitioner has not shown that the NSL statutes are substantially overbroad, [redacted] Petition is properly reviewed as a challenge to the NSLs and NSL statutes as applied. Given the government's strict compliance with *Doe*, the NSL statutes have been lawfully applied to petitioner, and the NSLs themselves comport with the Constitution.

Even if (contrary to law) petitioner were correct that the extant NSLs should be set aside, petitioner should not prevail on its request to have this Court declare that the Federal Bureau of Investigation ("FBI") cannot serve any more NSLs, anywhere in the country. The law does not permit this extraordinary relief. Indeed, petitioner seeks to have this court decide matters not

before it, involving NSLs that are being properly served around the country, including in the Second Circuit where the law is clear that the NSL statute is constitutional.

The Court should thus reject the request for such broad declaratory relief, which is squarely foreclosed by the statute. The NSL judicial review law, 18 U.S.C. § 3511(a)-(b), authorizes a court to provide only limited, specific relief related to extant NSLs; it does not provide for the prospective, declaratory relief that petitioner seeks. Moreover, and critically, the declaration petitioner requests would purport to state the law in any state of the union – including in the Second Circuit where *Doe* is controlling law. The Attorney General has a statutory right to seek enforcement of NSLs in any judicial district where an underlying national security investigation is carried on. The prospective declaration petitioner seeks would thus interfere with the settled law of the Second Circuit. The law of this Circuit, however, forbids a district court from granting relief that purports to bind conduct in another circuit, but would be in conflict with the law of that circuit. And, as the classified declaration of a senior FBI official shows, granting the petition would interfere with compelling and pressing national security interests.

The Court should, therefore, enter an Order compelling petitioner to comply with the information requests in the NSLs and declaring that petitioner is bound by the nondisclosure provisions of 18 U.S.C. § 2709(c), as applied to petitioner here. *See* 18 U.S.C. § 3511(c). Moreover, even if the Court were to agree with petitioner's claims regarding the nondisclosure requirement, there remains no question but that the NSL information requests, standing alone, are within the FBI's authority and entitled to enforcement.

Finally, there is no cause for the Court to consider, in this case, the facial constitutionality of 18 U.S.C. §§ 2709(c) & 3511(b). If the Court nonetheless reaches that question, however, the Court should hold those statutes constitutional. Should the Court find otherwise, then §§ 2709(c) and 3511(b) must be severed from the balance of the NSL statutes, which can operate without them. There is no evidence that Congress would have preferred the FBI be denied the use of NSLs entirely if it could not rely on a statutory nondisclosure requirement; to the contrary, it is plain that Congress intended the FBI be permitted to issue NSLs without benefit of the statutory

nondisclosure requirement should the government so choose in light of the fact that the statute on its face provides that option.

The Court should therefore deny petition and grant the Attorney General's petition for enforcement.

FACTUAL BACKGROUND

A. National Security Letters

The President of the United States has charged the FBI with primary authority for conducting counterintelligence and counterterrorism investigations in the United States. *See* Exec. Order No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg. 59941 (Dec. 4, 1981). In 1986, Congress enacted 18 U.S.C. § 2709 to assist the FBI in obtaining information for such investigations. Section 2709 empowers the FBI to issue an NSL, a type of administrative subpoena. Subsections (a) and (b) of § 2709 authorize the FBI to request "subscriber information" and "toll billing records information," or "electronic communication transactional records," from wire or electronic communication service providers. In order to issue an NSL, the Director of the FBI, or a senior-level designee, must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities . . . ." *Id.* § 2709(b)(1)-(2).

B. Confidentiality of National Security Letters

The secrecy necessary to successful national security investigations can be compromised if a wire or electronic communications service provider discloses that it has received or provided information pursuant to an NSL. To avoid that result, Congress has placed restrictions on disclosures by NSL recipients, contained in 18 U.S.C. § 2709(c). The nondisclosure requirement requires a case-by-case determination of need by the FBI and thus prohibits disclosure only if the Director of the FBI or another designated senior FBI official certifies that "otherwise there may result 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." *Id.* § 2709(c)(1). If such a certification is made, the NSL itself notifies the recipient of the nondisclosure obligation. *Id.* § 2709(c)(2).

C. The FBI's Underlying Investigations

1. The [redacted] Field Office NSL

During the course of an ongoing, authorized national security investigation carried on primarily by agents of the FBI's [redacted] Field Office, the FBI obtained information that led it to conclude that the subject of the investigation was using a particular Internet website in the facilitation of terrorism activities. Cross-Petition ¶ 1; *see also* Classified Declaration of FBI Assistant Director Joseph Demarest, submitted to the Court *ex parte* for *in camera* review pursuant to 18 U.S.C. § 3511(e). The FBI determined that [redacted]

On [redacted], 2013 and pursuant to 18 U.S.C. § 2709 and the Second Circuit's injunction in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2008),[1] the FBI served petitioner with an NSL dated [redacted] 2012, requesting the names, addresses, and length of service and electronic communications transactional records, to include existing transaction/activity logs and all e-mail header information, for the customer of petitioner in question. ("The [redacted] NSL"). *Id.* ¶ 22.

The [redacted] NSL served on petitioner was issued and certified by a Special Agent in Charge in the [redacted] Field Office under the authority of 18 U.S.C. § 2709. *Id.* ¶ 23. Pursuant to 18 U.S.C. § 2709(b), the FBI certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *Id.* The NSL information request was limited to transactional records related to the relevant customer account. *Id.* Pursuant to § 2709(c), the Special Agent in Charge certified in

[1] The injunction issued against the government in *Doe,* as modified by the Second Circuit, remains in force. Accordingly, as the Attorney General informed the Chairman of the Senate Judiciary Committee in a letter dated December 9, 2010, since February 2009, all NSLs are required to include a notice that informs recipients of the opportunity to contest the nondisclosure requirement through government-initiated judicial review. *See* December 9, 2010 Letter from Hon. Eric Holder to Hon. Patrick Leahy ("Holder Letter"), *available at* http://www.judiciary.senate.gov/resources/documents/111Documents.cfm. Since 2009, therefore, in all NSLs issued nationwide that include imposition of a nondisclosure obligation pursuant to 18 U.S.C. § 2709(c), the FBI has complied with the "reciprocal notice" procedures suggested by the Second Circuit in *Doe*, 549 F.3d 861. *See* Unclassified Declaration of Joseph Demarest.

the NSL that disclosure of the NSL's contents could 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 a person. *Id.* Therefore, the NSL informed petitioner that petitioner is prohibited from disclosing the contents of the NSL, other than to an attorney to obtain relevant legal assistance or to those to whom disclosure is necessary to comply with the NSL. *Id.* The letter also notified petitioner that it had a right to challenge the letter pursuant to 18 U.S.C. § 3511(a) and (b) if compliance would be unreasonable, oppressive, or otherwise illegal. *Id.*; *see also* Unclassified Declaration of Joseph Demarest ¶ 26; *id.* ¶¶ 18-25.

The Field Office NSL further advised that, if petitioner informed the FBI within 10 days that petitioner desired to challenge the nondisclosure provision, the FBI would seek judicial review of the NSL within approximately 30 days. *Id.* ¶ 26; Cross-Petition ¶ 24.

2. The Division Investigation

During an ongoing, authorized national security investigation carried on by the FBI's Division Cross-Petition ¶ 25. As part of its ongoing investigative efforts, the FBI issued an NSL pursuant to 18 U.S.C. § 2709 to petitioner on 2013. *Id.* ("The NSL") The NSL requested the names, addresses, length of service, and electronic communication transactional records for certain specified IP addresses and a domain name related to FBI's ongoing investigation. *Id.* The Division NSL was issued and the need for nondisclosure appropriately certified by a Special Agent in Charge in the Division pursuant to 18 U.S.C. § 2709. Cross-Petition ¶ 27. In accordance with 18 U.S.C. § 2709(b), the FBI certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.

The NSL informed petitioner of the prohibition against disclosing the fact that the FBI had sought the information requested in the NSL, certifying, in accordance with 18 U.S.C. § 2709(c), that such disclosure could "endanger the national security of the United States;

interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of a person." *Id.* ¶ 28. The NSL also notified petitioner that, in accordance with 18 U.S.C. § 3511(a) and (b) and the Second Circuit's injunction in *Doe v. Mukasey*, petitioner had a right to challenge the letter if compliance would be unreasonable, oppressive, or otherwise illegal. *Id.* ¶ 29; *see also* Unclassified Demarest Decl. ¶ 26; *id.* ¶¶ 18-25. Consistent with those authorities, the NSL also advised petitioner that if it notified the FBI within 10 days that it desired to challenge the nondisclosure provision, the FBI would seek judicial review of the NSL within approximately 30 days. *Id.* ¶ 26; Cross-Petition ¶ 30.

D. Petitioner's Objections to Compliance with 18 U.S.C. § 2709(c)

In letters faxed to the FBI on 2013, petitioner advised that it was "challenging the nondisclosure requirement for disclosure of customer information" requested in the NSLs. Cross-Petition ¶¶ 31-32. To date, petitioner has not provided the FBI with the information requested in the NSLs, which the FBI continues to need in order to further its ongoing, authorized national security investigations. *Id.* ¶ 33. Moreover, it also remains the case today, as designated FBI officials have certified pursuant to 18 U.S.C. § 2709, that disclosure of the fact that the FBI has sought or obtained access to the information sought by the NSLs to petitioner may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of a person. *Id.* ¶ 34; Classified Demarest Decl. *Accord* 18 U.S.C. § 2709(c)(1).

initiated this civil action by petitioning the Court to set aside the NSLs. On April 26, 2013, the Attorney General cross-petitioned the Court for enforcement of the NSL information requests and nondisclosure requirements pursuant to 18 U.S.C. § 3511(c) and the Second Circuit's *Doe v. Mukasey* injunction.

ARGUMENT

I. The Challenged NSLs Comply With Applicable Law, Including the First Amendment, and So the NSL Statutes Have Been Constitutionally Applied to Petitioner

In this case the Court need determine only whether the NSLs served on petitioner comport with the Constitution; and, therefore, whether the NSL statutes are constitutional as applied to [redacted] on the facts before the Court, not in every conceivable application. Thus, the question before the Court is whether the FBI can obtain the NSL-requested information to further its ongoing national security investigations because the specific NSLs at issue were served in compliance with the law.

Because the government needs and is legally entitled to the information it has sought by NSL, the Attorney General has asked for the aid of this Court in enforcing the specific NSLs with which petitioner has not complied to date. The reasoning of the Court's Order in *In re National Security Letter*, No. C. 3:11-2173-SI (N.D. Cal. March 14, 2013),[2] resolving a facial constitutional challenge, does not apply here. The government has applied the NSL statutes to petitioner consistent with the law in order to obtain information needed for ongoing national security investigations, as discussed in the classified Demarest Declaration. Therefore, this Court should uphold the NSLs and relevant statutes as applied to petitioner.

"As applied challenges are the basic building blocks of constitutional adjudication," and so assessments of constitutional harms including First Amendment burdens should typically be made on consideration of a statute as-applied in a particular case. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Facial challenges are disfavored, *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), and "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may

[2] This Court's ruling is the third decision to reach the merits of an NSL since the underlying statutes were amended in 2006, including *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and *In re National Security Letter,* No. 1:12-mc-007 (AJT/IDD) (E.D. Va. April 24, 2012). In the latter case, the NSL recipient took advantage of the government's offer to initiate judicial review and the government thus asked the district court to enforce an NSL nondisclosure requirement. The Eastern District of Virginia granted the government's request and approved the NSL nondisclosure requirement at issue.

conceivably be applied unconstitutionally to others, in other situations not before the Court," *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). Courts recognize a limit to this rule in the First Amendment context under which a law may be overturned as impermissibly overbroad because a "substantial number" of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (quoting *Broadrick*, 413 U.S. at 615). But courts should not apply the "'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash St. Grange*, 552 U.S. at 450 (citing *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988)). Similarly, the overbreadth exception "has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613 (citations omitted). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (in First Amendment facial challenge, stating that "[a]ny inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.").

Here, the NSL statutes have been applied to petitioner only pursuant to the limiting construction placed on those statutes by the U.S. Court of Appeals for the Second Circuit when that court modified a nationwide injunction by the Southern District of New York. *Doe*, 549 F.3d 861. Through its consistent practice since 2009 and in its papers here, including Assistant Director Demarest's sworn declaration, the government has likewise proffered the same limiting construction to this Court; and the Second Circuit's construction of the NSL statutes is the only manner in which those statutes have been applied to petitioner in the NSLs at issue here. *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."). Petitioner has not argued that the procedures applied to it run afoul of those this Court described as acceptable in *In re NSL*. *Cf. In re NSL*, Slip Op. at 13 (noting that, in that case, the government complied with the requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965)). Nor has petitioner averred anything to show a "substantial number" of the NSL statutes' applications would be

unconstitutional, "judged in relation to the statute[s'] plainly legitimate sweep." *Ferber*, 458 U.S. at 769-71.

The facial constitutionality of the NSL statutes is thus not presented by the case now before the Court. And it is axiomatic that the Court should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange*, 552 U.S. at 450-51 (citation omitted).[3] Rather, this Court should consider the question before it: whether the NSLs to petitioner comply with the law, as it is applied to those NSLs and the facts of this case, and whether the FBI should therefore be provided information necessary to ongoing investigations pursuant to a constitutionally-applied Act of Congress. As explained below, NSLs were served in accordance with law and, accordingly, deserve enforcement by this Court.

II. The NSLs Comport with Constitutional Requirements

Petitioner has made no argument that the NSL information requests contravene any law. Petitioner's quarrel is with the nondisclosure obligation, but the NSL nondisclosure obligations imposed on and applied to petitioner by the NSLs survive the most stringent constitutional scrutiny because they are narrowly tailored to serve compelling interests. *See Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1008-09 (9th Cir. 2003); *Doe*, 549 F. 3d at 878; *In re NSL*, Slip Op. at 9-10.

As Assistant Director Demarest explains in his classified Declaration, providing greater detail to fortify the certifications of need previously made by the senior FBI officials who issued the NSLs, the NSL nondisclosure requirement is applied to petitioner here in order to shield ongoing, authorized investigations and, thereby, protect against a danger to the national security of the United States and/or interference with the investigations. That governmental interest is a

[3] Thus, the question before the Court is whether the nondisclosure order is justified at this time; and as set forth in the Demarest Declarations, it is. This Court or the FBI can determine at an appropriate time when the nondisclosure obligation should be lifted, pursuant to a request by petitioner under 18 U.S.C. § 3511(b)(3) if petitioner wishes. *Doe*, 549 F.3d at 875, 883. Section 3511(b)(3) does not now apply to petitioner, however, and is therefore not now before the Court. *See Wash. State Grange*, 552 U.S. at 450-51

manifestly compelling one. *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation.").

The NSLs at issue here are carefully tailored to advance the public interest, support important ongoing FBI investigations, and protect national security without unnecessarily restricting expression. By its terms, the nondisclosure requirement of the NSLs narrowly applies only to prevent the petitioner's disclosure of the fact that the government "has sought or obtained access to information or records" under 18 U.S.C. § 2709. The NSL does not purport to prohibit petitioner from disclosing any other information, and places no restriction on petitioner's ability to engage in general public discussions regarding matters of public concern. As is plain from the classified Demarest Declaration, the nondisclosure requirement is tailored narrowly to serve the compelling interests described above.[4] Thus, Assistant Director Demarest explains, *inter alia*, why the public disclosure of the fact that has received these NSLs could, in this case, reasonably be expected to cause one of the harms enumerated in 18 U.S.C. § 2709.[5]

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[4] With respect to narrow tailoring, the Supreme Court has warned lower courts not to second guess the government's judgment as to how to further the public interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984). The fit of means to ends need not be perfect. *Ward*, 491 U.S. at 800 ("regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."). A content-neutral restraint on expression is narrowly tailored if the government "could reasonably have determined that its interests would be served less effectively without [the restraint] than with it." *Ward*, 491 U.S. at 801 (considering time, place, and manner restriction). And the nondisclosure requirement on petitioner is content-neutral. *Dish Network Corp. v. FCC*, 636 F.3d 1139, 1145 (9th Cir. 2011) ("the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.") (citations, quotation marks omitted); *id.* at 1146 ("even a statute that facially distinguishes a category of speech or speakers is content-neutral if justified by interests that are 'unrelated to the suppression of free expression.'") (citation omitted).

[5] The FBI does not uniformly seek to prevent companies from disclosing that they have received NSLs. *See, e.g.*, Google Official Blog, "Transparency Report: Shedding more light on National Security Letters," available at http://googleblog.blogspot.com/2013/03/transparency-report-shedding-more-light.html (stating "We're thankful to U.S. government officials for working with

III. Petitioner Seeks Improper and Overly Broad Relief

In its Petition, in addition to properly seeking review of the two NSLs it has received, also seeks broad declaratory relief against the NSL statutes that would purport to apply to NSLs that the government is expressly entitled to submit to the jurisdiction of another competent court. Such relief is unavailable under § 3511 and would also be improper under the law of this Circuit. Indeed, as the Ninth Circuit has clearly stated and as discussed further *infra*, district courts must avoid granting relief that would interfere with the governing law in other jurisdictions.

A. Section 3511 Does Not Provide for Prospective Injunctive or Declaratory Relief

Petitioner seeks relief against the United States explicitly under 18 U.S.C. § 3511(a) & (b) via its petition. *See* Petition at 1. That statute simply does not provide for the prospective, open-ended portion of the relief that petitioner seeks: an "injunction prohibiting the FBI from seeking to enforce" 18 U.S.C. § 2709(c) (apparently against any NSL recipient, anywhere), and a declaration that the entire NSL statutory scheme "must . . . be struck down." Petition at 2. Rather, § 3511 authorizes (but does not require) a court to order only limited relief: the Court "may modify or set aside" the request for information in an extant NSL "if compliance would be unreasonable, oppressive, or otherwise unlawful," *see id.* § 3511(a), and likewise may modify or set aside the nondisclosure requirement of an NSL that has been served, *see id.* § 3511(b). These are the only forms of relief authorized by § 3511, which is the only waiver of sovereign immunity that petitioner has identified. *See 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"); *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992) (party suing the United States must point to "'an unequivocal waiver of [sovereign] immunity.'").

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us to provide greater insight into the use of NSLs."); "Transparency Report," available at http://www.google.com/transparencyreport/userdatarequests/US/; http://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/(similar information published by Microsoft).

Through its petition under § 3511, [redacted] cannot obtain relief any broader than that authorized by § 3511. And § 3511 does not provide for prospective relief, such as an injunction against enforcement of future NSLs. Even if the Court finds merit in the Petition otherwise, it should not step outside of the only waiver of sovereign immunity that has been invoked or the bounds of relief that Congress has authorized.

B. This Court is Foreclosed From Granting Relief That Interferes With the Authority of Other Courts, Including the U.S. Court of Appeals for the Second Circuit

When, *inter alia*, an NSL is served as part of an investigation carried on by the FBI in the jurisdiction of another Court, § 3511 explicitly provides that the Attorney General may seek to enforce the NSL there. 18 U.S.C. § 3511(c). Therefore, the government may seek to enforce an NSL arising out of a Florida investigation in Florida, a Chicago investigation in Chicago, or a New York investigation in New York, where the Second Circuit's *Doe* injunction plainly governs.

In *Doe*, the Second Circuit modified a nationwide injunction of the Southern District of New York. 549 F.3d at 885 (holding "subsections 2709(c) and 3511(b) are construed in conformity with this opinion and partially invalidated only to the extent set forth in this opinion, [and] the injunction is modified as set forth in this opinion"), *overruling in part and affirming in part Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007) (enjoining the government from issuing NSLs or enforcing 18 U.S.C. § 2709(c)). Whatever impact the *Doe* injunction has in this jurisdiction, it is plainly settled law in the Second Circuit. *See United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-73 (9th Cir. 2008) ("Principles of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area."). And under the law of the Ninth Circuit, this Court must not "cause substantial interference with" the "sovereignty" of the Second Circuit within that court's jurisdiction, including by attempting to fashion injunctive or declaratory relief that would purport to apply in the Second Circuit but would be inconsistent with "the law of that geographical area." *Id.* The Court therefore "must be mindful of any effect its decision might have outside its jurisdiction," and "[c]ourts in the

Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of [other] circuits." *Id.*; *see also Apple, Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011) ("In *AMC*, [549 F. 3d at 773], our court remanded the issuance of a nation-wide injunction entered by the district court judge in California because, prior to its issuance, the Fifth Circuit declined to enter a similar injunction in a case with identical issues.").[6] *Accord United States v. Mendoza*, 464 U.S. 154 (1984) (government defendant may relitigate the same issue in different cases against different parties); *AMC*, 549 F.3d at 771-72 ("The 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" and "[i]t is standard practice for an agency to litigate the same issue in more than one circuit" where the circuit has not yet developed precedent).

Consistent with this authority, the Attorney General is therefore not limited to litigating NSLs in only one court and, indeed, is entitled to seek the aid of any appropriate district court where jurisdiction and venue lies under § 3511. 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. *See, e.g., Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, --- F. Supp. 2d ----, 2012 WL 6784498 (C.D. Cal. December 27, 2012) (limiting injunction to Ninth Circuit; following *AMC Ent'mt* to hold that "Courts should not issue nationwide injunctions where the injunction would not issue under the law of another circuit" and stating that other circuits where the law is not yet developed may agree with the Second Circuit rather than the district court). *Cf. Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (in First Amendment facial overbreadth challenge to FEC regulation, holding "the district court abused its

[6] Petitioner has not invoked the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, or any cause of action other than the NSL judicial review statute, so the propriety of relief under such other statutes is not now before the Court. Even if petitioner had invoked the Declaratory Judgment Act, however, under the Ninth Circuit's holding in *AMC Entm't*, this Court could not and should not provide relief that would purport to apply outside this District or Circuit. 549 F.3d at 770-73.

discretion by issuing a nationwide injunction, an injunction that prevents the FEC from enforcing the regulation against any party anywhere in the United States. This injunction is broader than necessary to afford full relief to VSHL. The injunction also encroaches on the ability of other circuits to consider the constitutionality of" the challenged rule.). *Accord United States v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 477-78 (1995), (in First Amendment challenge, holding "that the relief should be limited to the parties before the Court" and stating "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.").

IV. The Compelling Public Interests Involved Support Prompt Denial of the Petition

National security considerations also warrant dismissal of Petition. As set forth in Assistant Director Demarest's classified declaration, the NSLs are necessary to ongoing, authorized national security investigations, and national security concerns weigh heavily in favor of denying the petition. *Cf. In re National Security Letter*, Slip Op. at 3, 24 (recognizing the "weighty" and "significant" national security issues implicated by a challenge to the NSL statutes).

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Accordingly, the Supreme Court has repeatedly stressed that courts should be "reluctant to intrude upon the authority of the Executive in . . . national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (citing cases). Here, the NSL judicial review statute upon which petitioner relies explicitly provides a reviewing court with broad discretion to refrain from acting: it provides only that a court "*may* modify or set aside" NSLs, or NSL nondisclosure requirements, that are, *e.g.*, "unlawful" or unjustified, not that it shall do so. 18 U.S.C. § 3511(a), (b) (emphasis added). Under the circumstances presented in this action, where compelling national security interests weigh heavily against granting the equitable relief requested, this Court should exercise its discretion to expeditiously deny the petition. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496-97 (2001) (courts enjoy "'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief," and moreover "cannot 'ignore the

judgment of Congress, deliberately expressed in legislation.'") (citations omitted); *cf. Friends of the Earth v. Laidlaw Env'tl Servs.*, 528 U.S. 167, 192 (2000) (a district court exercising its equitable discretion "'is not mechanically obligated to grant an injunction for every violation of law'" even where it finds such a violation) (*quoting Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

The sole statute on which petitioner relies, 18 U.S.C. § 3511(a)-(b), is not to the contrary. Congress provided that a Court "*may* modify or set aside" an NSL only when those criteria are met. 18 U.S.C. § 3511(a), (b) (emphasis added). Thus, Congress left the question of whether to grant a petition like in any instance within the sound discretion of the reviewing court. As the Supreme Court held, "Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. . . . 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Romero-Barcelo*, 456 U.S. at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987) (same). This Court therefore retains its equitable discretion to consider the compelling public interests involved and, in light of them, decline to grant petition, even if the Court were to believe is eligible for relief under § 3511.

While the "weighty" and "significant" national security issues involved await definitive resolution in this Circuit, *see In re National Security Letter*, Slip Op. at 3, 24, this Court maintains, and should exercise, its discretion not to deprive the government of information necessary to ongoing, authorized national security investigations, legitimately sought in the NSLs at issue here; and, likewise, not to permit petitioner to reveal information that, if disclosed, would be damaging to national security.

Petitioner has not offered countervailing interests that could override these compelling concerns. As to the information request or administrative subpoena portion of the NSLs, there is no question that the authority to obtain information via NSL, standing alone, is lawful; nor is there any question that the NSLs issued here comply with the law generally governing such

administrative subpoenas, as discussed in Part V *infra*. Petitioner's First Amendment interest in announcing, *e.g.*, the contents of an NSL will not be prejudiced by compliance with the NSL information requests.

V. The Court Should Grant the Attorney General's Petition for Enforcement of the NSLs, Which Comply with the Laws Governing NSLs and Administrative Subpoenas Generally

Because the NSLs issued to Petitioner comply with all pertinent laws, including the Constitution as explained above, the Court should grant the Attorney General's Cross-Petition for enforcement of those NSLs.

A. Standards of Review Applicable to Enforcement of Administrative Subpoenas

An NSL is a type of administrative subpoena authorized by law,[7] and "[t]he scope of the judicial inquiry in an . . . agency subpoena enforcement proceeding is quite narrow." *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*). The district court should determine whether (1) "Congress has granted the [agency the] authority to investigate;" (2) the "procedural requirements have been followed;" and (3) the evidence sought is "relevant and material to the investigation." *Id.* Once the government has demonstrated these three factors, the court should enforce the subpoena "unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome." *Id. See also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (enforcement proper where "inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1946). The NSLs here meet all of these requirements.

[7] *Cf. Doe*, 549 F.3d at 864 (describing an NSL as "a type of administrative subpoena"); *ACLU v. Dep't of Justice*, 265 F. Supp. 2d 20, 29 (D.D.C. 2003) (NSLs are "administrative subpoenas used by the FBI to obtain various kinds of records"); .

B. The NSLs Served On Petitioner Comply With All Applicable Requirements.

1. The FBI is Authorized to Conduct National Security Investigations and to Issue National Security Letters

The President has charged the FBI with primary authority for conducting counterintelligence and counterterrorism investigations in the United States, *see* Exec. Order No. 12333 §§ 1.14(a), 3.4(a), and such investigations often require the FBI to seek information relating to electronic communications, *see* Demarest Decl. To assist the FBI in obtaining such information, in 1986 Congress enacted 18 U.S.C. § 2709, which empowers the FBI to issue NSLs such as the NSLs served on petitioner as part of ongoing, authorized national security investigations. The FBI is, therefore, authorized to conduct its underlying investigation here and to do so using, *inter alia*, the critical law enforcement tool of NSLs like those served on petitioner.

2. The NSLs Served on Petitioner Comply with All Relevant Statutory Requirements.

i. Petitioner is an Electronic Communication Service Provider Subject to 18 U.S.C. § 2709.

Subsections (a) and (b) of § 2709 authorize the FBI to use an NSL in order to request certain information, including "subscriber information," from a "wire or electronic communication service provider." *Id.*§ 2709(a). Petitioner provides to its users and customers the ability to send or receive wire or electronic communications. Cross-Petition ¶ 20; Declaration of [redacted] (filed with the Petition) at ¶ 4. Petitioner is thus a wire or electronic communication service provider and the proper recipient of NSLs pursuant to § 2709. *See* 18 U.S.C.§§ 2510(15), 2711(1); *see also* Cross-Petition ¶ 21.

ii. The FBI Made All Required Findings Before Issuing The NSLs to Petitioner.

In order to issue an NSL, the Director of the FBI, or a designee "not lower than Deputy Assistant Director at Bureau headquarters" or SACs in FBI field offices must certify that the information sought is "relevant to an authorized investigation to protect against international

terrorism or clandestine intelligence activities . . . ." *Id.* § 2709(b)(1)-(2). In addition, when an NSL is issued in connection with an investigation of a "United States person," the same officials must certify that the investigation is "not conducted solely on the basis of activities protected by the first amendment . . . ." *Id.* The FBI complied with these requirements here.

The NSLs served on petitioner were issued by appropriate, senior FBI officials. *See* Demarest Decl. Those officials each certified, in accordance with 18 U.S.C. § 2709(b), that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *Id.* They also certified where appropriate that the underlying investigations are not conducted solely on the basis of First Amendment-protected activities. *Id.* And as Assistant Director Demarest explains in his classified declaration, the FBI has compelling needs for the requested information to further important, ongoing, authorized national security investigations. *Id.*

iii. The NSLs Requested Only Limited Information In Accord With 18 U.S.C. § 2709.

Under § 2709, the FBI is authorized to request information including "the name, address, length of service, and local and long distance toll billing records of a person or entity." 18 U.S.C. § 2709(a), (b)(1). The NSLs sought only such limited, specific information as authorized by § 2709. *See* Classified Demarest Decl; Cross-Petition ¶¶ 9, 21-23, 26.

C. The Information Sought by the NSLs to Petitioner is Relevant to Ongoing National Security Investigations.

As noted, the NSLs to petitioner sought only limited, specific information such as the name, address, and length of service for particular accounts. In his classified declaration, Assistant Director Demarest discusses in detail the underlying, authorized national security investigations, the relevancy of the requested information, and the importance of obtaining that information.

D. The Limited Requests For Information In The NSLs Are Not Overbroad Or Unduly Burdensome.

The Attorney General has established that the NSLs satisfy the standards for enforcement of such administrative requests for information in this Circuit. *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1428. The court should therefore enforce the NSL requests for information unless the recipient "proves the inquiry is unreasonable because it is overbroad or unduly burdensome." *Id.* Here, petitioner has not asserted to the FBI or in its petition to set aside the NSLs that they are overbroad or unduly burdensome. And such an argument would be without merit. As explained above, the NSLs each request limited, specific information. *See also* Classified Demarest Decl. Assistant Director Demarest's classified declaration establishes the relevancy of this limited information to the underlying national security investigations. The NSLs are thus neither overbroad nor unduly burdensome. As discussed further below, they are also not otherwise unlawful. The NSLs are subject to enforcement by this Court pursuant to 18 U.S.C. § 3511(c).

E. The Nondisclosure Requirement of 18 U.S.C. § 2709(c) Lawfully Applies to Petitioner with Regard to the Challenged NSLs

As an electronic communication service provider, petitioner may be subject to a nondisclosure obligation imposed pursuant to 18 U.S.C. § 2709(c). The NSL nondisclosure obligations imposed on petitioner here under the NSLs in question satisfy the requirement that the need for nondisclosure be certified by an appropriate, senior FBI official. Under the NSL statute, 18 U.S.C. § 2709(c)(1), the nondisclosure obligation is imposed on an NSL recipient wire or electronic communication service provider such as petitioner when "the Director of the Federal Bureau of Investigation, or his designee . . . [including] a Special Agent in Charge in a Bureau field office designated by the Director, certifies that otherwise there may result 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." Here, senior FBI officials made the required certification in each challenged NSL. *See generally* Unclassified Demarest Decl. (stating that the certifications were

made); Classified Demarest Decl. (explaining further the need for continued nondisclosure of the NSLs).

As required by statute, the NSLs themselves informed petitioner that the statutory nondisclosure obligation was being imposed under 18 U.S.C. § 2709(c). The NSLs were therefore issued in full compliance with all statutory requirements. Moreover, as discussed further below and in the classified Demarest Declaration, the nondisclosure obligations imposed by the NSLs are narrowly tailored to serve compelling governmental interests and, therefore, also comport with the First Amendment. Indeed, Assistant Director Demarest explains why disclosure of the information could reasonably be expected to damage critical national security interests.

VI. The NSL Statues Are Facially Constitutional, and Section 2709(c) is Severable From the Other Provisions

The Attorney General has explained above why this case presents only the question of whether 18 U.S.C. § 2709 is constitutional as applied to petitioner by the challenged NSLs; that is, as the government has consistently applied the statute since 2009, subject to the Second Circuit's narrowing construction in *Doe v. Mukasey*. Recognizing that this Court previously found 18 U.S.C. §§ 2709 & 3511(b) facially unconstitutional in *In re NSL*, the government submits that decision is in error, and, should the Court consider the facial constitutionality of the NSL statutes, it should find them to pass constitutional scrutiny as the Second Circuit did in *Doe*, for the reasons that the government has previously presented to this Court at length in its now-unsealed papers in *In re NSL*, and which the *In re NSL* Court rejected – namely that the *Freedman* requirements do not apply to the NSL statutes, which do not involve a classic prior restraint, and that the standard of review in § 3511(b) is properly read to comport with extensive precedent regarding appropriate deference to the Executive Branch in the realm of national security. In the alternative, the Court should hold the statutes constitutional for the same reasons they were so held by the Second Circuit as construed in *Doe*.

In addition, the Attorney General respectfully submits that this Court's holding as to severability in *In re NSL*, Slip Op. at 23, is gravely in error, and the Court should thus decline to

reach the same conclusion here. The provisions challenged here and held unconstitutional in that case, §§ 2709(c) and 3511(b), should be severed from the remainder of the statute if they are to fall. *See Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987) ("[a] court should refrain from invalidating more of [a] statute than is necessary."); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976).

The Supreme Court has established clear – and very high – standards for parties seeking to invalidate an entire Act of Congress on the basis of specific invalid provisions. As long as what remains is "fully operative as a law," an invalid provision must be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power." *Alaska Airlines*, 480 U.S. at 684; *United States v. Jackson*, 390 U.S. 570, 585 (1968) (same). The NSL statutes would be fully operative as a law without the provisions this Court found unconstitutional in *In re NSL*: NSLs could be issued absent the statutory nondisclosure provision in § 2709(c), and judicial review could be conducted under the appropriately deferential standards usually applied in national security and law enforcement cases absent the statutory standard of review in § 3511(b).[8]

Nor is it "evident" that Congress would not have enacted the balance of the statute absent §§ 2709(c) & 3511(b). *See Alaska Airlines*, 480 U.S. at 684. In evaluating severability, courts must ask, "Would the legislature have preferred what is left of its statute to no statute at all[?]" *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). Here, Congress has already answered that question and the Court need not speculate: the NSL statutes as written already empower the government to issue NSLs without any nondisclosure requirement. 18 U.S.C. § 2709. Although the government may have issued NSLs absent a § 2709(c) certification relatively infrequently, § 2709 itself proves that Congress intended to, and did, empower the government to issue NSLs without a statutory guarantee of secrecy. And while the *In re NSL Court* stated, based on 2006 data in an Inspector General's report, that this would be the case in only 3% of NSLs, 3% is nonetheless far superior from the government's perspective to a scenario in which it would be permitted to issue NSLs in zero cases as under the *In re NSL*

[8] Indeed, because § 3511(b) applies to judicial review of nondisclosure orders under § 2709(c), the former would be surplussage without the latter.

holding as to non-severability. And, again, it is plain that Congress intended to empower the FBI to issue NSLs without nondisclosure requirements in at least some instances.

As the *In re NSL* Court noted, maintaining the secrecy of NSLs was obviously important to Congress. However, even to the extent the government desires or requires secrecy with respect to a particular NSL, it does not follow that Congress would have preferred to deprive the FBI of the ability to use NSLs altogether if nondisclosure could not be mandated by statute. Indeed, the Attorney General respectfully submits that there is simply no reason to think that Congress would have desired that the entire NSL program fall if there is not a statutory nondisclosure requirement. That is particularly so given the usual presumption in favor of severability. *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (applying presumption favoring severability); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (same); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992) (in holding remainder of Act in question severable, noting "the presumption of severability that is implicit in the *Alaska Airlines* standard"). Instead, it is far more probable that Congress would have preferred the FBI to have the authority contained in § 2709 and to exercise that authority when, in the agency's judgment, the benefits of obtaining information promptly via NSL outweigh the burdens of possible public disclosure, or when the recipient can be relied on to maintain the confidentiality of the NSL on a voluntary basis and the risk of disclosure is thus sufficiently small.

VII. Even If the Court is Inclined to Set Aside the NSL Nondisclosure Requirement, it Should Enforce the NSL Information Requests Pending Appeal.

If the Court is inclined to set aside the NSLs here or otherwise grant any of the relief requested by petitioner, the Court should stay any such Order and permit the NSL statutes to apply and operate while the Court of Appeals considers the issues presented. As discussed below, the Court should therefore order petitioner to provide FBI with the information requested in the two challenged NSLs pending appellate review.

In its Order in *In re National Security Letter*, this Court, recognizing the "significant constitutional and national security issues at stake," provided that "enforcement of the Court's

judgment will be stayed pending appeal, or if no appeal is filed, for 90 days." *Id.*, Slip Op. at 24. If the Court is inclined to grant the relief sought here, it should likewise stay its judgment to preserve the *status quo*. *See* 12-62 JAMES W. MOORE ET AL., FEDERAL PRACTICE - CIVIL § 62.06[1] (3d ed. 2013) (purpose of stay of injunction pending appeal is to preserve the *status quo*). And the *status quo* to be preserved by a stay "is a condition not of rest, but of action," in which the government may continue to obtain information via NSL in ongoing, authorized national security investigations, and pertinent statutes that provide for compliance remain in effect. *See Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116-17 (9th Cir. 2008) (holding that "granting a stay [of injunction] . . . would, in a real sense, preserve rather than change the status quo" where "[i]n the absence of the district court injunction," the *status quo* would include operation of the otherwise-enjoined city ordinance) (quotation marks, citation omitted).

Such a stay would be appropriate under the relevant jurisprudence concerning the appropriate effect of judgments against federal statutes or policies pending appeal. For example, in *Bernstein v. Dep't of State*, 974 F. Supp. 1288 (N.D. Cal. 1997), this Court ruled for the plaintiff in a facial constitutional challenge but largely stayed enforcement of its injunction pending appeal "because the legal questions at issue are novel, complex and of public importance." *Id.* at 1310 (staying injunction as to parties not before the Court). *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). And in *Meinhold v. Dep't of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993), one plaintiff challenged a military policy as unconstitutional. After the district court entered a military-wide injunction against application of the policy, *see id.* at 1458-59, the Supreme Court immediately entered a stay of the injunction pending appeal and allowed the policy to remain in effect. 510 U.S. 939 (1993).[9]

[9] In *Meinhold*, the Supreme Court largely preserved the *status quo* by staying the ruling to the extent that it "grant[ed] relief to persons other than" the individual plaintiff; thus, the individual plaintiff remained in the same position – as a member of the military – while the government continued to enforce its generally-applicable policy. *Meinhold v. Dep't of Defense*, 510 U.S. 939

Here, no less than in *In re NSL*, the "weighty" and "significant" national security issues at stake support a stay of any order adverse to the government pending appeal. The government also meets the traditional standards for a stay pending appeal which would allow the statute to continue to operate and be enforced. *See Leiva-Perez v. Holder*, 640 F.3d 962, 966, 968 (9th Cir. 2011) (per curiam). At a minimum, based on the fact that the Second Circuit would uphold the NSL statutes under Doe as well as the government's showing in this brief and the Demarest Declarations concerning the specific NSLs at issue, the government has raised "substantial legal questions" and has a "substantial case on the merits." *Leiva-Perez*, 640 F.3d at 967-68. Assistant Director Demarest's classified declaration establishes the government will suffer irreparable harm without an order enforcing the NSLs. Moreover, relief against the NSL statutes would also cause irreparable harm and undermine the public interest absent a stay.[10]

There is no reason in this case to deny the FBI information lawfully sought as part of ongoing, authorized national security investigations. In light of the public importance of the FBI's ability to obtain information in service of such investigations, the FBI's adoption of and

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(1993). After holding for the *Meinhold* plaintiff on the merits, the Ninth Circuit nonetheless struck down the injunction as overbroad to the extent that it extended to non-party service members. 34 F.3d 1469, 1480 (9th Cir. 1994) ("relief can be obtained by directing the Navy not to apply its regulation to Meinhold").

[10] Section 2709(c), "like all Acts of Congress, . . . is presumptively constitutional" and "[a]s such, it 'should remain in effect pending a final decision on the merits by [the Supreme] Court." *Turner Broadcasting System, Inc. v. FCC,* 507 U.S. 1301, 1301 (1993) (Rehnquist, J., in chambers); *Maryland v. King*, No. 12A48, 2012 WL 3064878, at *2 (Roberts, C.J., in chambers) (each "time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury") (quoting *New Motor Vehicle Bd. Of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)*; see Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). This is no less true of § 3511(b). Moreover, the "presumption of constitutionality which attaches to every Act of Congress . . . [is] an equity to be considered in favor of [the government] in balancing hardships." *United States v. Comstock*, No. 08A863 (Apr. 3, 2009) (Roberts, C.J., in chambers) (quoting *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, in chambers)). Absent a stay, an injunction or other relief against the government's reliance on an Act of Congress harms these democratic interests, because the policy of Congress "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *cf. United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992).

consistent compliance with the constitutional procedures articulated by the Second Circuit in *Doe v. Mukasey*, the severability of the challenged nondisclosure and standard of review provisions from the administrative subpoena provisions of the NSL statutes, and the fact that the information request provisions of the NSL statutes are, standing alone, plainly constitutional, the Court should not deprive the FBI of the information which it has lawfully sought and to which it is entitled by statute.

The Court should therefore enforce the NSL information requests whatever its holding regarding other portions of the NSL statutes, *i.e.*, 18 U.S.C. §§ 2709(c) and 3511(b).[11]

CONCLUSION

For all the foregoing reasons, the Court should dismiss the petition to set aside NSLs in this action and grant the Attorney General's cross-petition to enforce the NSLs.

Dated: May 17, 2013

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE,
CIVIL DIVISION

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[11] Petitioner's compliance with an Order enforcing the NSL information requests would not moot any appeal petitioner may wish to take concerning those information requests. *See, e.g., Church of Scientology of Calif. v. United States*, 506 U.S. 9 (1992) (court-ordered compliance with IRS information demand did not moot appeal of the relevant order); *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).