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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

U.S. DEPARTMENT OF JUSTICE,
Plaintiff,

v.

[redacted]
Defendant

IN RE MATTER OF NATIONAL SECURITY LETTERS

Case No. 11-cv-2667 SI
Case No. 13-cv-80089 SI
Related Case No. 11-cv-2173 SI

[redacted](1) REPLY IN SUPPORT OF PETITION TO SET ASIDE NSLS, OPPOSITION TO CROSS-PETITION FOR JUDICIAL ENFORCEMENT OF NSLS, AND REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS (IN NO. 13-80089), AND (2) OPPOSITION TO MOTION FOR JUDICIAL REVIEW AND REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS (IN NO. 11-2667)

Judge: Hon. Susan Illston
Date: August 2, 2013
Time: 9:00 am
Place: Courtroom 10, 19th Floor

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I. INTRODUCTION

[redacted] or "Petitioner"[1]), the recipient of three national security letters (NSLs) seeking the disclosure of customer records, files this combined brief in the two above-captioned lawsuits in support of its arguments that the NSLs are unlawful and its requirements cannot be enforced. The first case, No. 11-cv-2667-SI, centers on the government's motion to enforce the NSL issued to Petitioner in [redacted] 2011 and that was already declared unconstitutional and separately set aside by this Court in the related case of *In re Nat'l Sec. Letter*, No. 11-2173, 2013 WL 1095417 (N.D. Cal. March 14, 2013). The second case, No. 13-mc-80089-SI, involves [redacted] petition to set aside two additional NSLs received in [redacted] 2013 along with the accompanying gag orders and the government's subsequent cross-petition to enforce them. Currently on calendar for hearing before this Court on August 2, 2013, are several cross-motions in these two cases as set forth below:

11-2667 SI (action originated on 06/02/11)	**13-80089 SI (action originated on 04/22/13)**
	[redacted] Petition to Set Aside NSLs and Accompanying Gag (filed 04/22/13)
[redacted] Motion to Stay Proceedings (filed 05/23/13)	[redacted] Motion to Stay Proceedings (filed 05/24/13)
Government's Motion for Judicial Review and Enforcement of National Security Letters (filed 06/26/13)	Government's Cross-Petition for Judicial Review and Enforcement of National Security Letters (filed 06/26/13)

Petitioner's argument in both cases and for all three NSLs is the same. The NSLs must be set aside based on the doctrine of issue preclusion that bars the re-litigation of issues previously adjudicated between parties. As the Court is aware, the same issues were litigated by these parties in Case No. 11-2173 and resolved by the Court in *In re Nat'l Sec. Letter*: (1) the NSL statute's gag provision is unconstitutional on its face and as applied, and (2) the statute is not severable. In addition, while the Court has not yet reached the question, the NSL authority to compel the production of customer records is also unconstitutional on its face and as applied. The government has raised no compelling argument that would support the continuation of the use of this

[1] [redacted] is the Petitioner in Case No. 13-80089 and the Defendant in Case No. 11-2667. [redacted] will refer to itself primarily as "Petitioner" in this brief for the sake of simplicity.

unconstitutional tool, especially as applied to the same company. The Court is well aware that Petitioner seeks to discuss its experiences regarding receiving NSLs, a desire that is all the more acute in light of the current conversation about secrecy and government surveillance that has been sparked by recent public revelations about the scope of FBI and NSA surveillance of Americans.

Absent the ability to use NSLs, the government will still be able to pursue national security investigations through other means. The government could, for example, empanel a grand jury and issue a grand jury subpoena and thus have the outside check of a grand jury and much more limited ability to gag Petitioner. It could also seek a court order under section 215 of the USA PATRIOT Act, thus acting in the first instance with judicial approval. *See* 50 U.S.C. §§ 1861, *et seq*. It also could seek to obtain a "(d) order" from a district court pursuant to the Stored Communications Act and, if secrecy was necessary to preserve national security interests, ask the court for a limited gag. *See* 18 U.S.C. §§ 2703(d), 2705. While these alternative procedures have their own shortcomings, each at least avoids one of the most glaring constitutional defects here—lack of prior court oversight—and have been suggested to the government by Petitioner as processes that contain more checks and balances than self-certified NSLs.

II. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background set forth on pages 1-8 of Petitioner's Memorandum of Points and Authorities In Support of Petitioner to Set Aside National Security Letters and Nondisclosure Requirements Imposed in Connection Therewith, filed in Case No. 13-80089-SI on April 23, 2013 ("Petitioner's Brief"), is hereby incorporated by reference.

III. ARGUMENT

The government has already had one opportunity to convince this Court that the NSL statute was constitutional and that NSLs specifically issued to Petitioner were enforceable. This Court held that they were not. The NSL statute is no more enforceable today than it was when this Court struck it down, and the government's opposition does nothing to change that conclusion. Moreover, the government has provided no responses to several of Petitioner's arguments, either in its affirmative motion in 11-2667 or in opposition to the petition in 13-80089, including: (a) that section 2709(c) fails the Supreme Court's test in *New York Times v. United States (Pentagon*

Papers), 403 U.S. 713 (1971) for national security-premised prior restraints; (b) that section 2709(c) constitutes an impermissible licensing scheme that vests executive officers with unfettered discretion to silence speakers about government activities; and (c) that the section 3511(b) standards of judicial review of the NSL nondisclosure requirement are excessively deferential and thus violate separation of powers principles and due process.

Instead, the government repeats several unpersuasive arguments in response to these and other points raised by Petitioner, including: (1) that the statute can be narrowly construed to escape its constitutional shortcomings; (2) that the NSL statute does not permit this (or any other) federal court to evaluate the constitutionality of the statute; (3) that this court is effectively barred from issuing broad declaratory relief even if the statute is found to be unconstitutional because of the Second Circuit's ruling in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008); and (4) that *even if* this Court finds the NSLs to be unlawful—be it because of a failure to meet the statutory requirements or because the statute is unconstitutional—the Court should *still* enforce the NSLs and the accompanying gag orders because of national security interests. Only the last argument is marginally new, but it is shocking in its disregard for constitutional law and separation of powers principles. This Court should find the NSL statute unconstitutional on its face and as applied to the Petitioner, set aside the NSLs at issue here, and enjoin the FBI from issuing future NSLs, at least as to Petitioner.

A. The Doctrine of Issue Preclusion Bars the Government from Arguing for the Facial Constitutionality of the Statute.

In the related case of *In re National Security Letter*, this Court set aside the NSL statute as facially unconstitutional, holding that "the nondisclosure provision of 18 U.S.C. § 2709(c) violates the First Amendment and 18 U.S.C. § 3511(b)(2) and (b)(3) violate the First Amendment and separation of powers principles" and that "the unconstitutional nondisclosure provisions are not severable" from the underlying authority granted by the statute to the FBI to compel the disclosure of customer records. *In re Nat'l Sec. Letter*, No. 11-2173, 2013 WL 1095417 at *15-16. Here, Petitioner raises the same arguments (in addition to others) that the Court has already endorsed in its order in *In re National Security Letter*. *See* Petition to Set Aside National Security Letters in

Case No. 13-80089, filed April 23, 2013 ("Petition") at 1, 2. Indeed, in its separate and unnecessary case (11-2667), the government now asks that the Court to enforce *the very same NSL that was at issue In re National Security Letter.* Accordingly, pursuant to the doctrine of issue preclusion, the government is barred from re-litigating these issues. *See Montana v. United States*, 440 U. S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.") (citing *Parklane Hosiery Co. v. Shore*, 439 U. S. 322, 326 n. 5 (1979)).[2]

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

The government has provided no argument to the contrary, save for its wishful assertion that it is not so: "mutual defensive collateral estoppel does not apply: the government is not litigating 'the *same issue* arising under virtually identical facts against the same party.' ...

[2] The government is immune from non-mutual collateral estoppel. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). However, here the Petitioner is the same party that obtained the prior ruling.

Rather ... the government has applied the NSL statutes to petitioner consistent with the law in order to obtain information needed for an ongoing national security investigation ..." Government's Memorandum in Support of Cross-Petition for Judicial Review and Enforcement of National Security Letters Pursuant to 18 U.S.C. § 3511(c), In Opposition to the Petition to Set Aside National Security Letters, and in Opposition to the Motion to Stay Proceedings, filed June 26, 2013 ("Government's Opposition") at 6 (emphasis in original) (citations omitted). The government's logic is a mystery: the parties are identical, the authority at issue is identical, the context in which that authority has been raised is identical, and the relevant facial legal arguments are identical. That the government additionally argues that its use of the NSL authority *as applied* here may survive constitutional scrutiny does not change the fact that it is barred from re-litigating the facial challenge that it explicitly recognizes is raised by Petitioner here. Government's Opposition at 1. *See, e.g., San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 341 (2005) (barring re-litigation of both facial and as-applied challenges). The law does not allow the government to get subsequent bites at the same apple.

B. The Court Can Consider the NSL's Constitutionality and Grant the Injunctive Relief Sought by the Petitioner.

Even if issue preclusion did not end this matter, the Court can and should again strike down the statute due to its constitutional shortcomings. The government simply seeks to re-litigate its already-rejected arguments that Petitioner cannot challenge the constitutionality of the NSLs by using the statutory process of section 3511(a) because the government has not sufficiently waived sovereign immunity. Government's Opposition at 19-20. Not true. Section 3511(a) expressly allows this Court to modify or set aside the request if compliance would be "unreasonable, oppressive or otherwise unlawful." This waiver is unequivocal, fully meeting the standard for a waiver of sovereign immunity set forth in *United States v. Sherwood,* 312 U.S. 584 (1941), and the other cases cited by the government.

By allowing the Court to consider whether compliance would be "unlawful," the waiver includes whether compliance would be unconstitutional, and the government cites no authority otherwise. The government's attempt to carve out the question of constitutionality from section

3511(a)'s broad waiver permitting consideration of whether the NSL is in any respect "unlawful" is meritless. As this Court found in *In re: Nat'l Sec. Letter*, the plain language of section 3511(a) permits a district court to evaluate the constitutionality of the statute, holding that "[a]s part of determining whether to modify or set aside an NSL—which Petitioner seeks to do in this case—the Court can review the constitutional attack on the statute, because the statute's constitutionality implicates whether an NSL served on a wire or electronic communications provider, including this one, is unreasonable or unlawful." 2013 WL 1095417 at *5. It should do so again here.

Other independent bases exist as well. The Administrative Procedure Act, 5 U.S.C. § 702, waives sovereign immunity for all lawsuits such as this one that are brought against the United States and seek non-monetary relief, whether or not the claims arise under the APA. *See Trudeau v. FTC*, 456 F.3d 178, 185-87 (D.C. Cir. 2006). Further, the Declaratory Judgment Act, 28 U.S.C. § 2201, empowers courts to grant declaratory relief whenever, as here, they are properly seized of jurisdiction. As this Court held, "even without the judicial review provisions in section 3511(a) and (b), the court can exercise its fundamental obligation to determine the constitutionality of the NSL nondisclosure provisions under the Declaratory Relief Act, 28 U.S.C. § 2201." *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *5.

Moreover, the Court has the inherent power to decide and declare whether the NSL statute is unconstitutional. Ever since *Marbury v. Madison*, it has been clear that a court hearing a challenge to the enforcement of a statute may consider the constitutionality of the statute and in the course of doing so must "say what the law is." 5 U.S. 137, 177 (1803). The power to declare a statute unconstitutional at equity goes hand in hand with the Court's inherent power to decide whether a statute is unconstitutional. "'The power of the federal courts to grant equitable relief for constitutional violations has long been established.'" *American Fed'n of Gov't Employees Local I v. Stone*, 502 F.3d 1027, 1038 (9th Cir. 2007) (quoting *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.)). *See also Greenya v. George Washington Univ.*, 512 F.2d 556, 562 n.13 (D.C. Cir. 1975) ("If the Constitution creates a right, privilege, or immunity, it of necessity gives the

proper party a claim for equitable relief if he can prevail on the merits.").[3] Not only can the Court entertain the Petitioner's constitutional claims, it is fully empowered to enjoin the government from exercising unconstitutional authority going forward.

C. The Statute's Gag Provision Does Not Comply With the First Amendment and Cannot Be Narrowly Construed to Do So.

The government argues in the alternative that even if the Court can properly evaluate the constitutionality of the statute, the NSL statute complies with the First Amendment as applied to the Petitioner. The government goes so far as to argue that "[t]he reasoning of the Court's Order in *In re National Security Letter* ... resolving a facial constitutional challenge, does not apply here." Government's Opposition at 6. While the government no doubt would prefer to draw attention away from the facial invalidity of the statute, it cannot. The NSL statute is unconstitutional both on its face and as applied to the Petitioner and must be struck down for at least three reasons: first, it violates the substantive First Amendment requirements in *Pentagon Papers*; second, it violates the procedural requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965); and third, it fails strict scrutiny as a content-based restriction on speech. Moreover, as this Court has already recognized, Petitioner has a [redacted] desire to speak out generally against government exercises of surveillance authority and about its specific experience as a recipient of an NSL. It should be permitted to do so.

1. The Statute Fails to Meet the Substantive and Procedural Requirements of the First Amendment.

First, as discussed in Petitioner's opening brief, the NSL statute violates the substantive First Amendment requirements for issuing national security-related prior restraints. Petitioner's Brief at 10-12. Under the plurality holding of the Supreme Court's *Pentagon Papers* decision, a prior restraint on speech in the context of a government assertion of national security requires that disclosure of the information will "surely result in direct, immediate, and irreparable harm to our

[3] The Supreme Court has held that a "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (internal quotation marks and citation omitted); *accord Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (noting with approval the view that "[All] agree that Congress cannot bar all remedies for enforcing federal constitutional rights.").

Nation or its people," a standard that the NSL statute—requiring only an FBI certification that disclosure "may" result in "danger" to a national security or even simply "interference with a criminal investigation"—cannot meet. *Pentagon Papers*, 403 U.S. at 730 (Stewart, J. joined by White, J., concurring); 18 U.S.C. § 2709(c). The government makes no argument to the contrary.[4]

Second, the statutory scheme fails to comply with First Amendment procedural requirements. As both this Court and the Second Circuit have explicitly held, the gag provision of the statute is unconstitutional on its face in violation of *Freedman vs. Maryland* to the extent that it does not include a requirement for government-initiated court review. *See Freedman*, 380 U.S. at 58; *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *9 ("There is no dispute that the NSL provisions do not require the government to initiate judicial review of NSL nondisclosure orders."); *Mukasey*, 549 F.3d at 883 ("[S]ubsections 2709(c) and 3511(b) are unconstitutional to the extent that they impose a nondisclosure requirement without placing on the Government the burden of initiating judicial review of that requirement...").

[4] This Court declined to apply the *Pentagon Papers* test in its recent *In re National Security Letter* decision without explanation, opining only that "In these circumstances, Court finds that ... section 2709(c) does not need to satisfy the extraordinarily rigorous *Pentagon* test ..." *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *6. Petitioner respectfully disagrees: no authority supports the conclusion that prior restraints of *any* kind can be supported based on the kind of speculative governmental showing permitted by the NSL statute. While specific and factually-supported "national security" concerns can indeed constitute a compelling governmental interest in some circumstances, it is also in such contexts that First Amendment protections should be given full force. *See, e.g.*, *Pentagon Papers*, 403 U.S. at 728 ("[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.") (Stewart, J. joined by White, J., concurring). In any case, the NSL statute allows gags in situations that do not raise security concerns, including where the FBI asserts that disclosure "may" interfere with a criminal investigation or "may" result in a "danger to the life or physical safety of any person." Such speculative harms that *do not have to be connected to national security concerns in any way*. 18 U.S.C. § 2709(c). That is, the statutorily mandated showing required of the FBI before it is permitted to compel the disclosure of the underlying *information* it seeks is not coextensive with the justification required of the FBI to impose the *gag*. The government's invocation of national security interests to satisfy the first (if it can) cannot be used to lower the government's burden for the second.

Moreover, the statute on its face also fails to comply with the remaining two *Freedman* procedural requirements that the government will initiate that court review within a "specified brief period" and that that procedure "must also assure a prompt final judicial decision." *Freedman*, 380 U.S. at 59. *See In re Nat'l Sec. Letter*, 2013 WL 1095417 at *10 ("The NSL provisions do not provide any limit to the period of time the nondisclosure order can be in place prior to judicial review."). *See also* Petitioner's Brief at 12-16 (explicitly arguing that the NSL statute violates all three *Freedman* standards, including the requirement that a final judicial determination be made promptly[5]). And furthermore, by granting the FBI the ability to issue gag orders based on self-certifications that "otherwise there may result a danger" to a variety of interests that reach far beyond national security matters, the statute effectively grants the FBI unbounded discretion, permitting gags based on a standard that courts cannot hope to evaluate. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) (holding that executive discretion must be constrained by "narrow, objective, and definite standards."). None of these requirements are met.

[5] This Court also explicitly declined to reach the question of whether the NSL statute satisfies the *Freedman* requirement that prior restraints can be upheld only when the statute ensures prompt judicial determination. *In re National Security Letter*, 2013 WL 1095417 at *10 n.13. Petitioner respectfully asks the Court to reach this issue here. An additional and fatal problem with the *Mukasey* Court's attempt to conform the NSL statute through a purported narrowing construction is that the second requirement—that the procedure in question "must ... assure a prompt final judicial decision"—is not a factor within the government's control. Where the *Mukasey* Court speculated that "the proceeding would have to be concluded within a prescribed time, perhaps 60 days" in order to satisfy *Freedman*, the NSL statute has no such limitations, and the government cannot voluntarily create such limitations. *Mukasey*, 549 F.3d at 879. In *In re National Security Letter*, this Court—with no statutory mandate to the contrary—issued its opinion 482 days after the hearing on the petition. By contrast, the *Freedman* Court struck down the Maryland film censorship law after finding its existing judicial review requirements insufficient based on much more modest delays: like the NSL statute, the Maryland law had no explicit requirement that judicial review take place promptly, and while judicial review could conceivably take place more quickly, in at least one case "the initial judicial determination has taken four months and final vindication of the film on appellate review, six months." *Freedman*, 380 U.S. at 55. The Court concluded that "the statute would have to require adjudication considerably more prompt than has been the case under the Maryland statute" in order to minimize the "chilling effect of a censorship order" and to comport with the First Amendment. *Id.* at 61. The same is true here.

Third, as it permits content-based restrictions on speech, the NSL statute must also satisfy strict scrutiny, something that the statute fails to do because it is impermissibly broad. *See In re Nat'l Sec. Letter*, 2013 WL 1095417 at *10. As this Court noted,

> [T]he statute does nothing to account for the fact that when no ... national security concerns exist [redacted], thousands of recipients of NSLs are nonetheless prohibited from speaking out about the mere fact of their receipt of an NSL, rendering the statute impermissibly overbroad and not narrowly tailored.

Id., 2013 WL 1095417 at *11. Similarly, the statute does not in any way tailor the duration of an authorized gag, instead imposing an *indefinite* gag if the government makes the appropriate certification that "danger ... may result" if information about the underlying request is disclosed, limiting a recipient's ability to seek relief from the gag to only once per year, and even failing to include a statutory mechanism by which the FBI would itself ask the court to lift the gag order. 18 U.S.C. §§ 2709(c), 3511(b); *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *11 ("By their structure, therefore, the review provisions are overbroad because they ensure that nondisclosure continues longer than necessary to serve the national security interests at stake."). The statute and these NSLs fail to comply with the requirements of strict scrutiny and should be set aside.

2. The Language of the NSL Statute Is Not Susceptible to a Narrowing Construction.

This Court also rejected the argument that the NSL statutes can be saved by the imposition of a narrowing construction. In *Mukasey* (in *dicta* as discussed below), the Second Circuit endorsed a narrowing construction in the form of a "reciprocal notice" procedure whereby the FBI would ask the NSL recipient to indicate whether it objected to the gag provision and then it (the FBI) would subsequently decide whether to promptly initiate legal proceedings seeking a district court's ratification of the gag. The government indicates that "since 2009 ... the government has ... proffered the same limiting construction" and that "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." Government's Opposition at 7.

The NSL statute simply is not susceptible to a narrowing construction of this kind. As the Petitioner noted in its opening brief, while a court may construe a statute narrowly *if possible* to

uphold its constitutionality, it cannot save a statute by construing it to contain limitations that Congress did not include in the first place. *See, e.g., Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988) ("The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements."); *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (declining to construe a statute to deny administrative order any effect until judicial review is completed because "it is for Congress, not this Court, to rewrite the statute").

This Court explicitly rejected the authority relied upon by the *Mukasey* Court to read a limiting construction into the NSL statute for precisely this reason. Unlike in *United States v. Thirty–Seven (37) Photographs*, 402 U.S. 363 (1971), for example, a pre-*Freedman* case that relied upon extensive legislative history recognizing the need for prompt judicial review of a prior restraint to conform the statute to subsequent First Amendment requirements, there is no evidence that Congress intended for NSL recipients to enjoy the protections mandated by *Freedman.* To the contrary, "in amending and reenacting the statute as it did, Congress was concerned with giving the government the broadest powers possible to issue NSL nondisclosure orders and preclude searching judicial review of the same."[6] *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *14. And unlike in *United States v. Booker*, in which the Supreme Court inferred "appropriate review standards from related statutory language, the structure of the statute, and the 'sound administration of justice'" (543 U.S. 220, 260-61 (2005)), "the sorts of multiple inferences required to save the provisions at issue are not only contrary to evidence of Congressional intent, but also contrary to the statutory language and structure of the statutory provisions actually enacted by Congress." *In re Nat'l Sec. Letter*, 2013 WL 1095417 at *15. In short, with neither statutory language nor

[6] Congress in fact has explicitly considered amendments to the NSL statute to fix some of the problems identified by the Second Circuit in *Mukasey* and later by this Court, but no amendments have thus far been passed into law. *See, e.g.*, S. 193, USA PATRIOT ACT Sunset Extension Act of 2011, *available at* http://www.govtrack.us/congress/bills/112/s193/text (last visited July 19, 2013) (*see* Section 6(b): mandating a 30 day deadline by which the Government must apply for a court order to enforce an NSL and gag and compelling a district court to "rule expeditiously" on such an application).

legislative history upon which to base a limiting construction, the statute's facial unconstitutionality is fatal.

3. The Second Circuit's Decision in *Doe v. Mukasey* Does Not Bar this Court from Enjoining the Unconstitutional NSL Statute.

In light of the statute's constitutional shortcomings, Petitioner has asked the Court to declare the NSL statute unconstitutional and enjoin the FBI from seeking to enforce the statute's gag provision. Petition at 2. The government objects that this would amount to "caus[ing] substantial interference" with the "sovereignty" of the Second Circuit and its "plainly settled law": namely, the Second Circuit's opinion in *Mukasey* identifying with approval the use of its proposed "reciprocal notice" procedure. Government's Opposition at 20. Not so.

(a) The *Mukasey* Court's Endorsement of Its "Reciprocal Notice" Procedure Is an Impermissible Advisory Opinion.

First, the *Mukasey* Court proposed and then endorsed its own hypothetical notice procedure—that is, one that was not directly actually at issue in that case. Accordingly, that portion of the Second Circuit's ruling amounted to an impermissible advisory opinion about the constitutionality of behavior not actually before the court. As has been long recognized, a federal court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000) (en banc). *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (invalidating scheme allowing for legislative revision of judgments and holding that the judicial power is "to render dispositive judgments," rulings that "decide" cases, "subject to review only by superior courts in the Article III hierarchy"). It is properly considered non-binding dicta because it is a "passage ... unnecessary to the outcome of the ... case," one that can be "sloughed off without damaging the analytical structure of the opinion." *United States v. Crawley*, 837 F.2d 291, 293 (7th Cir. 1988). Like in *Crawley*, the *Mukasey* dicta is a "passage [that] was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it" and recognized that "the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation." *Id.*

Indeed, the *Mukasey* Court acknowledged the hypothetical nature of what it was proposing throughout its reciprocal notice discussion, noting that it was "*consider[ing]* an available means" of proceeding, that the FBI "*could*" "*perhaps*" proceed with the Court's suggested time limits, that it was "beyond the authority of a court to 'interpret' or 'revise' the NSL statutes" but that "the Government *might* be able to assume such an obligation without additional legislation," that "*[i]f* the Government uses the suggested reciprocal notice procedure," then there "*appears* to be no impediment" including notice to recipients, and so on. *Mukasey*, 549 F.3d at 883-84 (emphasis added). The Court in fact continued its hypothetical scenario by identifying "several options" for completing the reciprocal notice procedure, including "adapt[ing] the authority now set forth in subsection 3511(c) for the purpose of initiating judicial review"—a conclusion that the Court expressly identified as "arguable"—along with counter-suggestions such as "identify[ing] some other statutory authority" and "seek[ing] explicit congressional authorization." *Id.*, 549 F.3d at 884. It moreover "l[eft] it to the Government to consider how to discharge its obligation to initiate judicial review." *Id.*

The portions of the *Mukasey* Court's holding relevant to the constitutionality of the gag provision—statements that were "necessary to the decision" (*Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995))—are properly limited to the following: (1) "subsections 2709(c) and 3511(b) are unconstitutional to the extent that they impose a nondisclosure requirement without placing on the Government the burden of initiating judicial review of that requirement," and (2) "that subsections 3511(b)(2) and (b)(3) are unconstitutional to the extent that, upon such review, a governmental official's certification that disclosure may endanger the national security of the United States or interfere with diplomatic relations is treated as conclusive." *Mukasey*, 549 F.3d 861 at 884.[7] The holding does not extend nearly as far as the government suggests.

[7] Once again, the Second Circuit's additional statement that "With this [reciprocal notice] procedure in place, subsections 2709(c) and 3511(b) would survive First Amendment challenge" operates only as an impermissible advisory opinion. *Mukasey*, 549 F.3d at 884.

(b) This Court Is Not Restricted by the *Mukasey* Court's Modification of the Trial Court's Injunction that Merely Left Open the Possibility that the FBI Might Comply with the First Amendment in the Future.

Second, this Court can enter all appropriate equitable relief upon finding that the NSL statute is facially unconstitutional, including enjoining the statute. Even if any injunction conflicted with the Second Circuit's *Mukasey* holding (which it does not), that order would be permissible as the Second Circuit obviously cannot issue rulings binding on courts outside of its own circuit. *See Hart v. Massanari*, 266 F.3d 1155, 1172-73 (9th Cir. 2001) ("[A]n opinion of our court is binding within our circuit, not elsewhere in the country."). While the government argues that this Court may not "interfere" with the sovereignty of courts of other circuits, it apparently has no qualms about extending the reach of the Second Circuit's power to this district. Indeed, it effectively asks that its erroneous interpretation of the *Mukasey* holding be given nationwide reach: noting that FBI investigations may extend across jurisdictions (including into the Second Circuit), the government argues that granting an injunction that extends outside of the Ninth Circuit (even outside of the Second Circuit) would effectively amount to "interference." Government's Opposition at 20-22. The government is wrong. [redacted] (which itself would not be relevant), and the possibility that the FBI may issue unconstitutional NSLs [redacted] in the future merely underscores the need for expansive relief.

As the government notes, it has tremendous latitude under the NSL statute regarding the venue in which it may petition a district court to compel compliance with an NSL. *See* Government's Opposition at 21; 18 U.S.C. § 3511(c) (permitting the Attorney General to "invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request."). Indeed, it notes that "'[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." Government's Opposition at 21 (quoting *United States v. AMC Entertainment*, 549 F.3d 760, 771-72 (9th Cir. 2008)). That the government engages in forum shopping and hopes to obtain a more

favorable ruling elsewhere is no reason for this Court to decline to broadly enjoin a much-used[8] yet facially unconstitutional prior restraint statute, nor is the government's speculation that other courts "may agree with the Second Circuit rather than" this Court. *Id.* And, in fact, [redacted] does nothing to protect it from future self-issued gags by the FBI when the government would clearly have the incentive to simply seek enforcement of NSLs against Petitioner [redacted]

4. Petitioner Wishes to Fully Engage in the Current Political Debate About the Government's Use of Surveillance Authorities, Including the NSL Statute.

The facial unconstitutionality of the NSL statute notwithstanding, Petitioner has a specific desire to speak out about its receipt of multiple NSLs and the nature of the arguments that the government has made in support of its position, including that it was separately sued by the government who alleged that Petitioner "interfere[d] with the United States' vindication of its sovereign interests in law enforcement, counterintelligence, and protecting national security" by exercising its petition right under 18 U.S.C. § 3511. Complaint, Case No. 11-cv-2667 SI (N.D. Cal. June 2, 2011). [redacted] Declaration of [redacted] filed April 23, 2013, ([redacted] Decl.") at ¶ 7.

Petitioner's voice, as an entity that has engaged in protracted litigation with the government over its surveillance powers, would be of particular importance now. Since the recent disclosure of previously classified details about the government's exercise of other surveillance authorities and several key admissions by the Director of National Intelligence and other governmental officials, a

[8] The FBI has issued as many as 56,000 NSLs in a single year (2004). *See* Department of Justice, Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* (March 2008), *available at* http://www.usdoj.gov/oig/special/s0803b/final.pdf ("2008 OIG Report") at 9.

fierce debate has erupted across the country regarding whether those powers have been abused and whether they should be rescinded. *See, e.g.*, Scott Shane, *Poll Shows Complexity of Debate on Trade-Offs in Government Spying Programs*, N.Y. TIMES, July 10, 2013, http://www.nytimes.com/2013/07/11/us/poll-shows-complexity-of-debate-on-trade-offs-in-government-spying-programs.html (last visited July 19, 2013); Rem Rieder, *Snowden's NSA Bombshell Sparks Debate*, USA TODAY (June 12, 2013, 7:13 PM), http://www.usatoday.com/story/money/columnist/rieder/2013/06/12/rem-rieder-surveillance/2415753/ (last visited July 19, 2013). Multiple lawsuits have been filed, alleging that the government has both exceeded its authority under various surveillance statutes and that those statutes themselves violate the First, Fourth, and Fifth Amendments, as well as separation of powers principles, concerns already being litigated here.[9] Moreover, new legislation has been both discussed[10] and introduced[11] that could dramatically alter the scope of the government's authority.

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[9] *See, e.g.*, *First Unitarian Church of L.A. v. NSA*, No. 13-cv-3287 (N.D. Cal. filed July 16, 2013) (challenging legality of NSA's domestic call records program); *Smith v. Obama*, No. 13-cv-0257 (D. Idaho filed June 12, 2013) (same); *ACLU v. Clapper*, No. 13-cv-3994 (S.D.N.Y. filed June 11, 2013) (same); *Klayman v. Obama*, No. 13-cv-0851 (D.D.C. filed June 6, 2013) (same); *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-04 (U.S. FISC filed June 19, 2013) (motion of Microsoft to disclose aggregate number of FISA orders received); *In re* Motion for Dec. Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Info. About FISA Orders, No. Misc. 13-03 (U.S. FISC filed June 18, 2013) (motion by Google to disclose aggregate number of FISA orders received); *In re* Directives to [Provider] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 105B(g07-01) (U.S. FISC filed June 14, 2013) (petition by Yahoo to disclose opinions and briefs stemming from Yahoo's challenge to FISA surveillance); *Elec. Frontier Found. v. Dep't of Justice*, No. 12-cv-1441 (D.D.C. filed Aug. 30, 2012) (seeking disclosure of FISC opinion holding NSA surveillance unconstitutional); *Elec. Frontier Found. v. Dep't of Justice*, No. 11-cv-5221 (N.D. Cal. filed Oct. 26, 2011) (seeking disclosure of secret legal justification for NSA's call records collection program); *ACLU v. FBI*, No. 11-cv-7562 (S.D.N.Y. filed Oct. 26, 2011) (same).

[10] *See, e.g.*, *Privacy and Civil Liberties Oversight Board Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act*, (July 9, 2013), http://www.regulations.gov/#!documentDetail;D=PCLOB-2013-0005-0001 (last visited June 19, 2013); Sen. Richard Blumenthal, *FISA Court Secrecy Must End*, POLITICO (July 14, 2013, 11:15 PM), http://www.politico.com/story/2013/07/fisa-court-process-must-be-unveiled-94127.html (last visited July 19, 2013); Pema Levy, *Former FISA Court Judge: Secret Court Needs Reform*, INT'L BUS. TIMES (July 9, 2013, 2:28 PM), http://www.ibtimes.com/former-fisa-court-judge-secret-court-needs-reform-1338671 (last visited July 19, 2013).

Petitioner is extraordinarily interested in bringing an informed, experienced perspective to that debate, not merely is an entity that might hypothetically be tasked with responding to a surveillance request but as an *actual* recipient, a fact already recognized by this Court. *In re Nat'l Sec. Letter,* 2013 WL 1095417 at *11 ("[A]t oral argument, Petitioner was adamant about its desire to speak publicly about the fact that it received the NSL at issue to further inform the ongoing public debate"). Gagged pursuant to this NSL authority, even to the extent of identifying that it had simply received NSLs and challenged them in court, its ability to effectively contribute to the current debate is unconstitutionally constrained. *See, e.g., Doe v. Gonzales*, 386 F. Supp. 2d 66, 75 (D. Conn. 2005) ("[Section 2709(c)] has the practical impact of silencing individuals with a constitutionally protected interest in speech and whose voices are particularly important to an ongoing, national debate about the intrusion of governmental authority into individual lives."). Even if the Court found that the statute was not facially unconstitutional, it should at minimum find that the statute is unconstitutional as applied to Petitioner, set aside the respective gags, and allow Petitioner to fully engage in this critical political debate.

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

The standard of review of the gag provision, as previously argued by Petitioner, is also facially unconstitutional. As held by this Court in *In re National Security Letter*, independent judicial review of NSLs is impossible because sections 3511(b)(2) and (3) substitute an extremely deferential standard of review for the constitutionally required standard of review, and separately because section 3511(b) precludes courts from making an independent determination of the facts—

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[11] *See, e.g.*, FISA Court Accountability Act, H.R. 2586, 113th Cong. (2013), http://www.gpo.gov/fdsys/pkg/BILLS-113hr2586ih/pdf/BILLS-113hr2586ih.pdf; Ending Secret Law Act, H.R. 2475, 113th Cong. (2013), http://www.gpo.gov/fdsys/pkg/BILLS-113hr2475ih/pdf/BILLS-113hr2475ih.pdf; FISA Court in the Sunshine Act of 2013, H.R. 2440, 113th Cong. (2013), http://www.gpo.gov/fdsys/pkg/BILLS-113hr2440ih/pdf/BILLS-113hr2440ih.pdf; Ending Secret Law Act, S. 1130, 113th Cong. (2013), http://www.gpo.gov/fdsys/pkg/BILLS-113s1130is/pdf/BILLS-113s1130is.pdf.

i.e., the likelihood of harm—used to justify the prior restraint. Specifically, the statute allows the gag to end only if the court:

> finds that there is *no reason to believe* that disclosure may endanger national security of the United States, interfere with a criminal counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.

Sections 3511(b)(2) and (3) (emphasis added). The statute further requires that if any one of a long list of government officials so certifies, "such certification shall be treated as *conclusive* unless the court finds that the certification was made in bad faith." *Id.* This Court has already determined that: "the Court can only sustain nondisclosure based on a searching standard of review, a standard incompatible with the deference mandated by Sections 3511(b) and (c)." *In re Nat'l Sec. Letter,* 2013 WL 1095417 at *12. By baldly preventing courts from performing their proper role in First Amendment review, Congress "impermissibly threatens the institutional integrity of the Judicial Branch" in violation of the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 851 (1986)).

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

In addition to being unenforceable on severability grounds (see below), the NSL statute's grant of authority to the FBI to compel the disclosure of customer records independently violates the First and Fifth Amendments. The government fails to even acknowledge these arguments, let alone counter them. As discussed more fully in Petitioner's opening brief, the statute on its face permits the FBI to unilaterally obtain non-public information about customers' associations and anonymous expressive activities with no prior judicial oversight to ensure that those rights are protected. Identifying information about [redacted] may be obtained by the FBI through the use of NSLs, even if that acquisition is unlawful. Given the structure of the NSL statute—permitting the FBI to unilaterally compel the disclosure of such protected information and leaving the sole right to challenge NSLs in the hands of gagged intermediaries with neither

sufficient information nor adequate incentive to do so—the judicial branch is unable to play the vigilant role that it must if the statute is to survive constitutional scrutiny.

F. The Court Cannot Elect to Enforce the NSLs If It Finds That the Statute is Unconstitutional.

As a last resort, the government asks this Court to decline to set aside either the specific NSLs or the NSL statute, notwithstanding their unconstitutionality, because the "public interest" demands it. Government's Opposition at 10-12. Such a remarkable request fails on both legal and policy grounds. First, a district court has no ability to enforce a statute that is unconstitutional, as both the gag authority and the NSL authority are. "[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument." *Marbury*, 5 U.S. at 180. This Court has correctly held that the NSLs statutes are unconstitutional, and therefore they are void and unenforceable. It should do so again for the same reasons. Second, as previously discussed, the FBI's NSL gag authority extends well beyond national security matters: under the NSL statute, the government may obtain a gag based not only on speculative justifications (*i.e.*, that disclosure "may result" in "danger" to national security) but also on speculative justifications that extend beyond national security motives (*i.e.*, that disclosure "may result" in "interference" with a criminal investigation). 18 U.S.C. § 2709(c). Whatever the public interest in authority to unilaterally issue gags based on speculative assertions that national security "may" be harmed by a disclosure, the public interest in the FBI's authority to unilaterally issue gags aimed at preventing other categories of harm is certainly lower and cannot be similarly justified. That this Court has stayed its earlier injunction against the use of NSLs does not make the statute constitutional in the interim. And the government's suggestion that it should do so—that the invocation of "national security" constitutes some sort of super public interest that would compel the court to ignore its constitutional duty—is extraordinarily dangerous, contrary to the rule of law, and flatly wrong. Opposition at 14-15. *See, e.g., Sammartano v. First Judicial Dist. Court, in & for Cnty. of Carson*

City, 303 F.3d 959, 974 (9th Cir. 2002) (noting the "significant public interest in upholding First Amendment principles").[12]

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

If this Court finds that either the statute's nondisclosure provisions or the underlying authority to compel the production of customer records are unconstitutional, it must—as it did in *In re National Security Letter*—invalidate the statutory scheme as a whole because the two sets of provisions are interdependent and not severable. *See In re Nat'l Sec. Letter,* 2013 WL 1095417 at *15. Courts should not "rewrite a law to conform it to constitutional requirements, [where] doing so would constitute a 'serious invasion of the legislative domain,' and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (citing *Reno*, 521 U.S. at 884-85); *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n. 26 (1995); *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)). Further, as discussed above, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Stevens*, 130 S. Ct. at 1592.

The NSL statute cannot function as Congress intended without some secrecy provision. Not only did Congress enact the two sets of provisions together, Congress amended the non-disclosure provisions in an attempt to save the NSL statute (leading to its present form) after the initial district court decisions in the *Mukasey* litigation held that the non-disclosure provisions were unconstitutional. *See Mukasey*, 549 F.3d at 866-868. And as Petitioner has shown, the amended

[12] *See also, e.g.*, *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression."); *Iowa Right to Life Comm'e, Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (finding that a district court did not abuse its discretion in granting a preliminary injunction because "the potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms"); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) (stating, in context of a request for injunctive relief, that "[t]he public interest ... favors plaintiffs' assertion of their First Amendment rights"); *G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (noting "it is always in the public interest to prevent the violation of a party's constitutional rights"); *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983) (holding the "strong public interest in protecting First Amendment values" favored preliminary injunctive relief).

non-disclosure provisions were crafted to make it unconstitutionally easy for the FBI to gag providers and unconstitutionally hard for providers to challenge the gag. Congress's attempt to preserve the FBI's ability to protect the secrecy of NSLs after multiple judicial invalidations makes its intent clear, especially when Congress did not include a severability clause.

This is also borne out by the Department of Justice's Inspector General's 2008 review of how the FBI actually uses this authority, which found that fully "97 percent of the NSLs imposed non-disclosure and confidentiality requirements" despite the fact that "some of the justifications for imposing this requirement were perfunctory and conclusory." *Statement of Inspector General Glenn Fine Before the Senate Committee on the Judiciary concerning Reauthorizing the USA Patriot Act* at 6 (Sept. 23, 2009), http://www.justice.gov/oig/testimony/t0909.pdf. Because the balance of the NSL statute "is incapable of functioning independently," Congress could not have intended that "this constitutionally flawed provision ... be severed from the remainder of the statute." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). That the government can identify some marginal cases in which the FBI utilized NSLs without a gag provision does not change this conclusion.

This Court recognized the statute's non-severability in *In re National Security Letter*:

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

2013 WL 1095417 at *15.

And indeed, this is borne out by the government's own declaration in this case. In support of the government's cross-petition for judicial review in Case No. 13-80089, filed on June 26, 2013, Assistant Director of the FBI's Counterintelligence Division Robert Anderson indicated that only in "highly unusual" circumstances would the provisions not operate together:

> By definition, the information sought through an NSL is relevant to an ongoing investigation of international terrorism or clandestine intelligence activities. Thus, only under highly unusual circumstances such as where the investigation is already overt is an NSL sought without invoking the nondisclosure provision. In the vast majority of cases, the investigation is classified and thus disclosure of receipt of an NSL and the information it seeks would seriously risk on of the statutory harms...

Anderson Decl. at 4-5.

Finding these provisions to be non-severable would also be consistent with Supreme Court precedent. As the Supreme Court noted recently in declining to sever a section of a statute that functioned as a prior restraint and instead finding the whole statute unconstitutional, "[i]t is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications." *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010). Here, if the Court finds the non-disclosure provision unconstitutional, it should invalidate the substantive provisions in the NSL statute as well.

H. The Court Should Not Enforce the NSL Information Requests Pending Appeal.

The government suggests that if the Court again finds the statute unconstitutional and non-severable, it should nonetheless stay its order, allowing the government to continue to invoke the unconstitutional NSL gag provision, including as to the NSLs at issue here to the very same party, while still enforcing the struck-down provisions authorizing information requests. The government is incorrect. In *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the Supreme Court listed the factors that a court should consider when entertaining the issuance of a stay of an injunction: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." The Ninth Circuit has further held that a party seeking a stay "must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The government cannot meet these requirements: the statute is unconstitutional and the FBI can simply use other judicially-supervised tools to obtain in secret the same information that it seeks here, including a grand jury subpoena, a "(d)" order (under 18 U.S.C. § 2703(d)), or an order under section 215 of the PATRIOT Act. The

government's warning of "irreparable harm" and its invocation of a uniquely powerful "public interest" that requires the NSL process to remain in force are empty.

I. The Court May Stay All Proceedings Pending the Ninth Circuit's Review of this Court's Previous Order Striking Down the NSL Statute as Unconstitutional.

The NSL statute should be struck down, not only because it is unconstitutional on its face and as applied but because the Court has already decided this particular dispute between these particular parties. As a practical matter, however, the Ninth Circuit will shortly decide whether this Court was correct. Notwithstanding the ongoing harm to Petitioner in the form of the unconstitutional gag, Petitioner has filed motions to stay all proceedings in both of these immediate cases. Petitioner recognizes that even if the Court again sets aside the NSLs as unconstitutional, the accompanying gag will not likely be lifted until the Ninth Circuit has resolved the pending appeal of the 11-2173 order. The shortest and least-burdensome distance to a resolution of the question of whether the respective gags on Petitioner are lifted—for both parties and the Court—seems to be for the parties to focus their efforts on obtaining an expedited order from the Ninth Circuit in the related appeal.

The government appears to disagree, however, implying that—notwithstanding the fact that the 11-2667 NSL has been pending for over two years and that it could have easily obtained the information it seeks through other judicially-supervised means—its need for that information it seeks is now pressing. If the government insists on obtaining a ruling from this Court, the Court should proceed but rule in Petitioner's favor. The government can then decide whether and how it will proceed with a second appeal in light of the Ninth Circuit's other active NSL case.

IV. CONCLUSION

The NSL statute remains unconstitutional, and the NSLs at issue must be set aside. Accordingly, Petitioner respectfully requests that the Court (1) grant its petition in 13-80089, setting aside the NSLs and their gag orders, declaring the statute to be unconstitutional, and enjoining future enforcement of NSLs and accompanying gags; and (2) deny the government's respective motions for judicial review 11-2667 and 13-80089. In the alternative, Petitioner asks

that the Court stay all proceedings in both cases until the Ninth Circuit has had the opportunity to evaluate this Court's prior order that the statute is unconstitutional.

DATED: July 19, 2013

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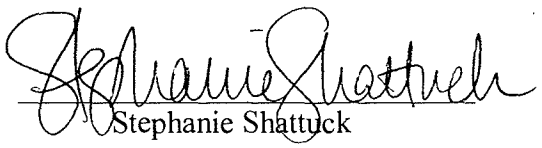
CERTIFICATE OF SERVICE

I, Stephanie Shattuck, do certify that on July 19, 2013, pursuant to prior agreement of the parties, I caused the foregoing to be served electronically on the government's counsel, Steven Bressler, Steven.Bressler@usdog.gov.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 19, 2013, at San Francisco, California.



Stephanie Shattuck