No. 18-56669

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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WILLIAM P. BARR, Attorney General,
Appellee,

v.

[redacted]
Appellant.

---

On Appeal from the United States District Court
for the Northern District of California

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# BRIEF FOR APPELLANT
# (REDACTED)

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), [redacted] states that it has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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**CONSTITUTION, STATUTES, AND RULES**



**MISCELLANEOUS**

## INTRODUCTION

is committed to providing meaningful transparency to its users and the public about requests it receives to disclose account information or remove content. Since has published a semiannual Transparency Report that, among other things, discloses information about government and nongovernment requests for user data. In addition notifies users, when lawful and appropriate, of such requests. When possible, may provide such notice before

producing user records; in other instances, [redacted] may provide such notice after disclosure.

In this appeal, [redacted] is challenging a content-based prior restraint on its speech imposed in connection with three national security letters (NSLs) issued to [redacted] by the FBI under 18 U.S.C. § 2709. After reviewing the need for continued nondisclosure, the district court ordered that "[redacted] shall comply with the nondisclosure requirements of the three NSLs unless and until the Government informs it otherwise." E.R. 1, 10 (emphasis omitted). [redacted] does not challenge the court's conclusion regarding the need for nondisclosure at this time; rather, it challenges the unlimited duration of the court-ordered nondisclosure requirements imposed upon it.

The nondisclosure requirements at issue in this case are content-based restrictions on speech and prior restraints, subject to strict scrutiny, and therefore they must be narrowly tailored to serve a compelling Government interest. Narrow tailoring requires the Government to show that there are no less restrictive means that would be at least as effective for it to achieve a legitimate and compelling state interest. In other words, as the Supreme Court has held, speech must be restricted

no further than necessary to achieve the Government's goal. Because nondisclosure of *limited* duration is a less restrictive alternative to nondisclosure of *unlimited* duration, the First Amendment requires the former.

In reaching a contrary conclusion, the district court relied principally on this Court's decision in *In re National Security Letter*, 863 F.3d 1110 (9th Cir. 2017), which rejected a facial challenge to the statute authorizing nondisclosure obligations of unlimited duration. But the case before this Court challenges particular nondisclosure provisions as they apply to [redacted] and the Court's analysis in *In re National Security Letter* supports the conclusion that some temporal limit on those speech restrictions is required here.

This Court should vacate the judgment of the district court and direct the court to impose nondisclosure obligations subject to an appropriate time limit.

## STATEMENT OF JURISDICTION

The district court had jurisdiction over the Attorney General's petition to review NSL nondisclosure requirements under 18 U.S.C. § 3511.

The judgment appealed from is a final judgment granting the petition for judicial review and determining that continued NSL nondisclosure requirements remain warranted. E.R. 1. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

The district court's judgment was entered on October 30, 2018. E.R. 1. The notice of appeal was filed on December 19, 2018, E.R. 11, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The district court granted the Attorney General's petition to enforce the nondisclosure obligations of unlimited duration in three NSLs issued to [redacted] The district court's judgment will prevent [redacted] indefinitely from speaking about the NSLs it received. The question presented is whether the district court's enforcement of the nondisclosure obligations of unlimited duration in the three NSLs issued to [redacted] is consistent with the First Amendment.

## STATEMENT OF THE CASE

### A. Statutory Background

1. Under 18 U.S.C. § 2709, the FBI may issue an NSL directing a wire or electronic communication service provider to produce "subscriber information" and "toll billing records information," or "electronic

communication transactional records." 18 U.S.C. § 2709(a). Although the statute refers to an NSL as a "request" for information, the request is in fact a command: a provider "shall comply" with the request, *id.*, and if it does not do so, the Attorney General may seek a court order "requiring the [provider] to comply with the request," *id.* § 3511(c).

Before issuing an NSL, the FBI Director or a designated senior FBI official must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b). The official must also certify that the investigation "is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States." *Id.*

An NSL may be accompanied by a nondisclosure obligation prohibiting the recipient from disclosing the fact that the FBI "has sought or obtained access to information or records." 18 U.S.C. § 2709(c)(1)(A). Specifically, Section 2709(c) authorizes the FBI to impose a nondisclosure obligation when a designated official certifies that "the absence of a prohibition of disclosure . . . may result in— (i) a danger to the national security of the United States; (ii) interference with a criminal,

counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person." *Id.* § 2709(c)(1)(B). The FBI must also notify the provider of its right to judicial review. *Id.* § 2709(c)(1)(A).

A provider receiving an NSL may seek judicial review of the NSL itself or of any nondisclosure requirement that it contains. 18 U.S.C. §§ 2709(d), 3511. Upon receipt of a petition under Section 3511 to review an NSL nondisclosure requirement, the district court must "rule expeditiously" and enter "a nondisclosure order that includes conditions appropriate to the circumstances." *Id.* § 3511(b)(1)(C). While the proceedings are pending, "[t]he applicable nondisclosure requirement shall remain in effect." *Id.* § 3511(b)(1)(B).

2. In 2008, the Second Circuit held that the existing NSL statute was unconstitutional because, "in the absence of Government-initiated judicial review, [it] is not narrowly tailored to conform to First Amendment procedural standards." *John Doe, Inc.* v. *Mukasey*, 549 F.3d 861, 881 (2d Cir. 2008). Congress responded by enacting the USA Freedom Act of 2015, which, among other things, amended Section 3511 to provide that if the recipient of an NSL "wishes to have a court review a

nondisclosure requirement," it may "notify the Government," which must then initiate judicial review by "apply[ing] for an order prohibiting the disclosure of the existence or contents of the relevant request or order." 18 U.S.C. § 3511(b)(1); USA Freedom Act of 2015 (USAFA), Pub. L. No. 114-23, § 502(g), 129 Stat. 268, 288–89. That application must take place "[n]ot later than 30 days after the date of receipt" of the notification. *Id.*

3. The USA Freedom Act also requires the Attorney General to promulgate

> procedures with respect to nondisclosure requirements issued pursuant to section 2709 . . . to require—
>
> (A) the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist;
>
> (B) the termination of such a nondisclosure requirement if the facts no longer support nondisclosure; and
>
> (C) appropriate notice to the recipient of the [NSL] . . . that the nondisclosure requirement has been terminated.

USAFA § 502(f), 129 Stat. at 288. As required by the statute, the Attorney General adopted such procedures. FBI, Termination Procedures for National Security Letter Nondisclosure Requirement (Nov. 24, 2015)

("FBI Termination Procedures"), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf. The FBI Termination Procedures provide for FBI review of NSL nondisclosure requirements at two intervals: (1) at the close of any investigation in which an NSL containing a nondisclosure provision was issued and (2) on the three-year anniversary of the initiation of the investigation for which an NSL was issued. *Id.* at 2. At each of those reviews, the nondisclosure provision will terminate unless the FBI determines that one of the statutory bases for nondisclosure continues to apply. *Id.* Upon termination, "written notice will be given to the recipient of the NSL." *Id.* at 4.

### B. In 2011, the FBI issues NSLs to [redacted] with nondisclosure obligations of unlimited duration

In 2011, the FBI issued three separate NSLs to [redacted] E.R. 42–46, 48–52, 54–58. Each of those NSLs was accompanied by a nondisclosure obligation of unlimited duration. *Id.* [redacted] complied with the NSLs by producing the required information, and it has also complied with the nondisclosure obligations.

### C. At [redacted] request, the Government initiates judicial review of the nondisclosure obligations

In August 2018—that is, seven years after the 2011 NSLs were issued—[redacted] wrote to the Government requesting Government-initiated judicial review of the NSLs. E.R. 60. As required by Section 3511(b)(1)(B), the Government responded by filing a timely petition for judicial review and enforcement of the NSL nondisclosure requirements in the U.S. District Court for the Southern District of California. E.R. 104–43. In its response, [redacted] took no position regarding the Government's request for continued nondisclosure, but it objected to any imposition of nondisclosure obligations of unlimited duration as contrary to the First Amendment. E.R. 25–26.

### D. The district court grants the petition for enforcement

The district court granted the Government's petition to enforce the nondisclosure obligations in the three NSLs, requiring [redacted] to "[comply] with the nondisclosure requirements of the three NSLs unless and until the Government informs it otherwise." E.R. 1, 10. The district court noted that in *In re National Security Letter*, 863 F.3d 1110 (9th Cir. 2017), this Court had rejected a facial challenge to the constitution-

ality of Section 2709. E.R. 5–7. At the same time, the court acknowledged "various cases where courts have found an indefinite duration of a nondisclosure requirement [to be] inappropriate," E.R. 8, and it recognized what it characterized as "a divide" in authority, E.R. 10. It concluded that the nondisclosure obligations of unlimited duration were consistent with the First Amendment because "the procedures in place are sufficient to ensure the nondisclosure requirement does not remain in place longer than is necessary." *Id.*

## SUMMARY OF ARGUMENT

The nondisclosure obligations at issue in this case are both content-based restrictions and prior restraints on speech. This Court has already held that such restrictions are subject to strict scrutiny. *In re Nat'l Sec. Letter*, 863 F.3d at 1123. Under strict scrutiny, the Government must show that the restriction is narrowly tailored to promote a compelling interest, or, in other words, that no "less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997).

This case involves nondisclosure obligations that are, on their face, unlimited in duration. Such restraints cannot be the least restrictive means of achieving the Government's interest. A nondisclosure provision of limited duration would be less restrictive than one that extends without end, and it would be equally effective in achieving the Government's interests because, if those interests continue to exist in the future, the Government will be able to seek an extension of the nondisclosure obligation.

The district court emphasized that the FBI Termination Procedures provide for administrative review of the continued need for nondisclosure, but those procedures do not render the speech restrictions at issue here constitutional. In the circumstances of this case, it is uncertain when, if ever, the FBI Termination Procedures would provide for review. And regardless of whether the FBI Termination Procedures would provide for a review of any of the three nondisclosure provisions at issue in this case, an administrative process that is not codified by statute and that creates no enforceable rights cannot be an adequate mechanism for protecting a speaker's First Amendment rights.

Finally, the district court noted that [redacted] could seek judicial review of the nondisclosure orders in the future. That is irrelevant to the least-restrictive-means analysis, which focuses on the alternatives available to the Government, not the alternatives available to the speaker.

## STANDARD OF REVIEW

The district court's legal conclusions are reviewed *de novo*. *Prete* v. *Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006). Although the court's findings of historical fact are reviewed for clear error, "constitutional questions of fact (such as whether certain restrictions create a 'severe burden' on an individual's First Amendment rights) are reviewed *de novo*." *Id.*

## ARGUMENT

### A. NSL nondisclosure obligations imposed by a district court must be narrowly tailored to serve a compelling interest

This Court has held that a nondisclosure requirement accompanying an NSL is a content-based restriction on speech that is subject to strict scrutiny. *In re Nat'l Sec. Letter*, 863 F.3d at 1123 ("Because we have determined that the restriction imposed by the nondisclosure re-

quirement is content based, we turn to the Supreme Court's strict scrutiny test."). That holding reflects the reality that an NSL nondisclosure obligation prohibits the recipient from engaging in any speech that communicates "that the Federal Bureau of Investigation has sought or obtained access to information or records." 18 U.S.C. § 2709(c)(1)(A). Determining whether speech by the NSL recipient falls within the statute's prohibition requires examining the content of that speech—that is, if the speech is about the fact "that the Federal Bureau of Investigation has sought or obtained access to information or records," disclosure would be unlawful; if the speech is about something else, disclosure would not be. Because "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," the statute is content-based. *Carey* v. *Brown*, 447 U.S. 455, 462 (1980).

A nondisclosure obligation associated with an NSL is also a prior restraint on speech. *See Alexander* v. *United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.") (emphasis, internal quotation marks, and citation omitted). As the Supreme Court

has explained, "[a]ny system of prior restraints of expression" is subject to "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

The Supreme Court and this Court have repeatedly held that strict scrutiny analysis is the *sine qua non* for the lawfulness of both content-based restrictions and prior restraints on speech. *In re Nat'l Sec. Letter*, 863 F.3d at 1123; *In re Dan Farr Prods.*, 874 F.3d 590, 593 n.2 (9th Cir. 2017) ("There is a heavy presumption against prior restraints on speech, and they are subject to the strict scrutiny standard of review."); *see also John Doe, Inc.*, 549 F.3d at 878 (applying strict scrutiny to NSL nondisclosure requirements).

To satisfy strict scrutiny, a restriction on speech must be "justified by a compelling government interest and [be] narrowly drawn to serve that interest." *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). There is no dispute that the interest in national security is compelling. *See Haig* v. *Agee*, 453 U.S. 280, 307 (1981). Instead, this case hinges upon the narrow-tailoring component of the strict-scrutiny test, which requires the Government to show that there are no "less restrictive al-

ternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno* v. *ACLU*, 521 U.S. at 874. The Supreme Court has explained that "[t]he purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes," but instead "to ensure that speech is restricted no further than necessary to achieve the goal." *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). A court applying the test must therefore "ask whether the challenged regulation is the least restrictive means among available, effective alternatives." *Id.* If alternative, less-restrictive regulations would be effective in advancing the Government's interest, then the chosen regulation is not the least restrictive means. *See*, *e.g.*, *Animal Legal Def. Fund* v. *Wasden*, 878 F.3d 1184, 1198 (9th Cir. 2018); *Dex Media West, Inc.* v. *City of Seattle*, 696 F.3d 952, 966 & n.4 (9th Cir. 2012).

Under the strict-scrutiny standard, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). The nondisclosure obligations enforced by the district court are no exception.

### B. Because the nondisclosure obligations at issue are unlimited in duration, they are not the least restrictive means of advancing the Government's interest

In *In re National Security Letter*, this Court recognized that "in order to ensure that the nondisclosure requirement is narrowly tailored to serve the government's compelling interest in national security, a nondisclosure requirement must terminate when it no longer serves such a purpose." 863 F.3d at 1126. In rejecting a facial challenge to the statute, the Court emphasized the important role of judicial review in limiting overly broad nondisclosure orders: "[A]s part of the judicial review process, a court may require the government to justify the continued necessity of nondisclosure on a periodic, ongoing basis, or it may terminate the nondisclosure requirement entirely if the government cannot certify that one of the four enumerated harms may occur." *Id.* at 1127. As the Court explained, "constitutional concerns regarding the duration of the nondisclosure requirement can be addressed by a reviewing court's determination that periodic review should be one of the 'conditions appropriate to the circumstances.'" *Id.* (quoting 18 U.S.C. § 3511(b)(1)(C)).

This Court's analysis in *In re National Security Letter* is controlling here. A nondisclosure obligation that is subject to periodic review is necessarily less restrictive than one that extends forever. And a nondisclosure obligation subject to periodic review would be equally effective in promoting the Government's interest in protecting the disclosure of details of a national security investigation. The Government asserted below that its interest—that is, its need for nondisclosure—is "of indefinite duration." E.R. 17. But as of today, there is no way for the Government to know exactly how long its interest will last. More importantly, as long as that interest continues to exist, the Government should have no difficulty, at appropriate intervals, in persuading the district court to extend the duration of the nondisclosure obligations. Because nondisclosure obligations of unlimited duration are not as narrowly tailored as nondisclosure obligations of limited duration, and because the latter will serve the Government's interest in protecting sensitive information equally as well as the former, the three nondisclosure obligations of unlimited duration enforced by the district court are not consistent with the requirements of the First Amendment.

Courts have recognized that nondisclosure obligations of unlimited duration are unconstitutional in a variety of contexts. *See In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 877–78, 886–87, 895 (S.D. Tex. 2008) (rejecting indefinite nondisclosure provisions that prohibit providers from disclosing a legal demand to their users "until further order of the court" and holding that "[a]s a rule, sealing and non-disclosure of electronic surveillance [demands] must be neither permanent nor, what amounts to the same thing, indefinite"); *see also In re Search Warrant Issued to Google, Inc.*, 269 F. Supp. 3d 1205, 1218 (N.D. Ala. 2017) (imposing a fixed nondisclosure period because nondisclosure orders of unlimited duration "extend beyond the time normally necessary or essential to protect" Government interests); *In re Search Warrant for [Redacted].com*, 248 F. Supp. 3d 970, 982 (C.D. Cal. 2017) (holding that where a gag order "effectively bars [the recipient service provider's] speech in perpetuity," it "manifestly goes further than necessary to protect the government's interest"); *Microsoft Corp.* v. *U.S. Dep't of Justice*, 233 F. Supp. 3d 887, 908 (W.D. Wash. 2017) (Plaintiff adequately alleged that an indefinite gag order issued under 18 U.S.C. § 2705(b) would "fail strict scrutiny

review and violate the First Amendment."); *Lynch* v. *Under Seal*, 165 F. Supp. 3d 352, 355–56 (D. Md. 2015) (modifying NSL nondisclosure provision to avoid nondisclosure requirement of "infinite duration"); *In re Grand Jury Subpoena for: [Redacted]@yahoo.com*, 79 F. Supp. 3d 1091, 1091 (N.D. Cal. 2015) (holding that "an indefinite [gag] order" preventing the disclosure of the existence of a grand jury subpoena "would amount to an undue prior restraint of Yahoo!'s First Amendment right").

Instead, when a nondisclosure obligation is appropriate, courts have determined that such obligation should be limited to a defined time period, subject to Government requests for similarly defined extensions, if needed. *See, e.g.*, *In re Search Warrant for [Redacted].com*, 248 F. Supp. 3d at 983 ("[T]he First Amendment requires that [the court] modify the [gag order accompanying a search warrant] to include a set expiration date."); *In re Search Warrant for: [Redacted]@hotmail.com*, 74 F. Supp. 3d 1184, 1186 (N.D. Cal. 2014) ("Section 2705(b) clearly requires the court to define some end. That end could come in less than 90 days, 90 days exactly or even more than 90 days."); *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d at 895 (holding

that a 180-day sealing period was "short enough to respect the fundamental values at stake, and long enough not to cause an undue burden").

In an order cited with approval in *In re National Security Letter*, the U.S. District Court for the District of Columbia rejected the Government's request for court-ordered nondisclosure of unlimited duration, instead imposing a nondisclosure obligation requiring triennial review. 863 F.3d at 1127 (citing *In re Nat'l Sec. Letters*, No. 16-518 (JEB), 2016 WL 7017215, at *3 (D.D.C. July 25, 2016)). In so doing, the court held that "triennial review fairly balances the specific burdens on the FBI against the countervailing interest that [the service provider] has in avoiding a lengthy and indefinite nondisclosure bar." *In re Nat'l Sec. Letters*, 2016 WL 7017215, at *3. That reasoning is equally applicable here.

### C. The FBI Termination Procedures do not render an unlimited nondisclosure provision constitutional

In reaching a contrary conclusion, the district court relied on *In re National Security Letter* for the proposition that "the current procedures in place have been deemed sufficient to ensure the nondisclosure requirements are constitutional." E.R. 10. That reasoning misunderstands

both this Court's decision in *In re National Security Letter* and the FBI Termination Procedures.

1. The *In re National Security Letter* Court made clear that the case involved a facial challenge to the NSL statute, not an as-applied challenge to particular NSLs or nondisclosure orders. 863 F.3d at 1121 ("[W]e analyze the recipients' challenge as a facial challenge."). That fact was critical to the Court's analysis, for as the Court made clear, a facial challenge is very different from an as-applied challenge.

An as-applied challenge is one that "contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *In re Nat'l Sec. Letter*, 863 F.3d at 1121 (quoting *Foti* v. *City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)). By contrast, "[a] facial challenge is an attack on a statute itself as opposed to a particular application." *Id.* (quoting *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2449 (2015)). The distinction is important because, to prevail on a facial challenge, a party challenging a law must show "that no set of circumstances exists under which [the challenged law] would be valid." *Ctr. for Competitive Politics* v. *Harris*, 784 F.3d 1307, 1314–15 (9th Cir. 2015) (quoting *United States*

v. *Salerno*, 481 U.S. 739, 745 (1987)) (brackets in original). Because the standard for facial challenges is so demanding, a plaintiff's inability to mount a successful facial challenge does not mean that an as-applied challenge will necessarily fail. For that reason, the Supreme Court has recognized that a decision upholding a statute against a facial challenge does not foreclose future as-applied challenges. *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410, 411–12 (2006).

2. As this Court has observed, the FBI Termination Procedures "do not resolve the duration issue entirely" because, in several circumstances, they may permit nondisclosure provisions to remain unreviewed for extended periods of time or indefinitely. *In re Nat'l Sec. Letter*, 863 F.3d at 1126. This case presents such circumstances.

The FBI Termination Procedures provide for FBI review of NSL nondisclosure requirements on only two occasions: at the close of any investigation in which an NSL containing a nondisclosure provision was issued and on the three-year anniversary of the initiation of the investigation for which an NSL was issued. The procedures will apply "only if [the relevant NSLs] are associated with investigations that close and/or reach their three-year anniversary date on or after the effective

date of these procedures." FBI Termination Procedures at 3; *see In re Nat'l Sec. Letters*, 2016 WL 7017215, at *2 (noting that "a large swath of NSL nondisclosure provisions that predate the procedures may never be reviewed and could remain unlimited in duration") (citation and alteration omitted). This case involves NSLs that were issued in 2011. E.R. 42–46, 48–52, 54–58. The three-year anniversary of these NSLs has long since passed, and therefore the only possible application of the FBI Termination Procedures would be at the close of the relevant investigation.

The Government's filings below did not explicitly say whether the investigation (or investigations) associated with these NSLs is still ongoing. If the investigation ended before the FBI Termination Procedures were adopted, then the procedures will provide no relief. If it ended after the procedures were adopted, and if "the government determine[d] that the nondisclosure requirement remain[ed] necessary" at that time, then "the Termination Procedures do not require any subsequent review." *In re Nat'l Sec. Letter*, 863 F.3d at 1126. In other words, "where a nondis-

closure provision is justified at the close of an investigation, it could remain in place indefinitely thereafter." *In re Nat'l Sec. Letters*, 2016 WL 7017215, at *2.

Even assuming that the investigation remains open, the FBI Termination Procedures do not provide for FBI review unless or until the investigation is closed, and FBI investigations can remain open for years or even decades. The next review could be next year, ten years from now, or—practically speaking—never, if the underlying investigation remains unsolved. *In re Nat'l Sec. Letters*, 2016 WL 7017215, at *2 (noting that "there could be an extended period of time—indefinite for unsolved cases—between the third-year anniversary and the close date"); *see also In re Nat'l Sec. Letter*, 863 F.3d at 1126 ("[I]f an investigation extends for many years, the Termination Procedures do not provide for any interim review between the third-year anniversary and the date the investigation closes.").

There is no constitutionally sound basis for an assumption that simply because a long-running investigation remains open, all nondisclosure obligations related to the case remain valid. A nondisclosure obligation can be based on any of four enumerated statutory grounds, not

all of which relate to interference with an investigation. 18 U.S.C. § 2709(c)(1)(B). For example, if a nondisclosure obligation is issued because disclosure may result in "danger to the life or physical safety of any person," *id.* § 2709(c)(1)(B)(iv), that danger could end well before the investigation itself. Even if the obligation is issued because of a risk of "interference with a criminal, counterterrorism, or counterintelligence investigation," *id.* § 2709(c)(1)(B)(ii), that risk may end before the close of the investigation when, for example, the target receives notice of the investigation, dies, or is taken into custody.

3. Even if the FBI Termination Procedures offered adequate safeguards against nondisclosure of unlimited duration, they have not been codified in the statute, and by their terms, they create no enforceable rights. FBI Termination Procedures at 4. The Supreme Court has cautioned that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

Similarly, this Court should not affirm an unconstitutionally broad restriction on speech merely because the Government promises not to exercise this restriction to its fullest extent.

### D. [redacted] ability to seek judicial review in the future is not a basis for upholding the nondisclosure obligations of unlimited duration

The district court noted that "[n]othing prevents [redacted] from seeking judicial review should it deem one necessary." E.R. 10. The court did not explain the significance of that fact, but to the extent the court meant to suggest that the availability to [redacted] of future judicial review is a basis for enforcing the nondisclosure obligations, the suggestion is misplaced.

To satisfy strict scrutiny, the nondisclosure obligations must be the least restrictive means of advancing a compelling Government interest. Crucially, the least-restrictive-means test asks whether *the Government* has some alternative measure that would advance its interests while imposing less of a burden on speech. *Ashcroft* v. *ACLU*, 542 U.S. at 666. It does not ask whether *the speaker* has an alternative available to it. [redacted] ability to bring a future petition under Section 3511 is

therefore irrelevant to the analysis of the constitutionality of these non-disclosure obligations.

## CONCLUSION

The judgment of the district court should be vacated, and the case should be remanded with instructions to impose nondisclosure obligations of appropriately limited duration.

Respectfully submitted,

*s/ Eric D. Miller*

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February 26, 2019

## CERTIFICATE OF RELATED CASES

Counsel is unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

*s/Eric D. Miller*
Eric D. Miller

Dated: February 26, 2019

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**FORM 8. CERTIFICATE OF COMPLIANCE**

**9th Cir. Case Number(s)** 18-56669

I am the attorney or self-represented party.

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** *s/Eric D. Miller* **Date** February 26, 2019
Eric D. Miller

## CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2019, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that [redacted] and the Government have agreed to service of documents via email and that [redacted] has served counsel for the Government with a copy of this Brief via email.

*s/Eric D. Miller*
Eric D. Miller

Dated: February 26, 2019