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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LB

CV 13 1165

Case No. _____

IN RE MATTER OF NATIONAL SECURITY LETTERS

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

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

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I. INTRODUCTION

The National Security Letter statute, 18 U.S.C. § 2709 ("NSL Statute") authorizes the FBI to self-issue administrative letters demanding customer records from Internet and telecommunication providers. The statute also allows the FBI to indefinitely prohibit a provider from revealing that it has received an NSL. Because of the fundamental constitutional shortcomings in the statutory process, and because of its commitment to transparency regarding government attempts to obtain its customers' data, Petitioner brings this challenge not only as applied to the specific NSLs at issue here but facially to the NSL Statute's gag provision authority.

This Petition arises from the service on Petitioner of two NSLs in 2013. The NSLs each demanded that Petitioner turn over the name, addresses, length of service, and transactional records for all services provided to certain account holders. Importantly here, each NSL also gagged Petitioner indefinitely about the NSLs' existence, without any oversight or participation by the judicial branch.

Petitioner's concerns are twofold. First, as part of its business practices and its commitment to transparency, Petitioner ordinarily notifies its customers when their records are sought by the FBI or other government agencies unless ordered not to by a court. Petitioner would also like to publish a transparency report and otherwise participate in the public debate around the standards for government access to information held by communications providers. These business practices are undermined by the NSL Statute's unilateral executive gag orders.

In addition to protecting its business practices, however, Petitioner is concerned about the constitutionality of the statutory process. First, the NSL Statute turns the First Amendment procedural prior restraint doctrine on its head by allowing the executive branch to issue a never-ending gag on its own, then requiring the recipient service provider to undertake a legal challenge. It also improperly limits judicial review of both the gag and the substance of the NSL. Unsurprisingly, the extraordinary power granted by the NSL Statute, the ease with which NSLs can be issued, and the elimination of meaningful judicial oversight has resulted in dramatically widespread use — and misuse — of this tool. Moreover, the FBI's ability to issue extrajudicial gag orders and to shift to the recipient the burden to seek judicial review has all but guaranteed that

the FBI's authority will not be formally challenged in court — and that neither the public nor legislators will be made aware of executive overreach. This Petition is a notable, rare exception.

Petitioner therefore challenges the legality of both the individual NSLs it received as well as the NSL Statute itself. Petitioner seeks a declaration setting aside the NSLs, declaring that the NSL Statute's gag provision is unconstitutional on its face and as applied, and an injunction prohibiting the FBI from seeking to enforce the gag provisions. Petitioner also seeks a declaration that the NSL Statute is not severable, and that as a result of the nondisclosure provision being unconstitutional on its face, the authority to compel NSL recipients to disclose customer records is also unconstitutional. Moreover, even if the statute is not found to be unconstitutional on its face, the Government must support with evidence its need for both the underlying records and for the corresponding gag so that the Court may review the sufficiency of that justification; accordingly, if the Court finds that the Government has not or cannot make its necessary factual showing, Petitioner seeks an order setting aside both the request and the gag.

To avoid violating the gag provisions, Petitioner has filed this Petition under seal.

II. BACKGROUND

On or around 2013, Petitioner or "Petitioner") received two National Security Letters. The first, numbered was dated 2012, and was issued by the FBI's Exhibit A to the Declaration of . The other, numbered was dated 2012, and was issued by the FBI's office NSL," or the two collectively, the "NSLs"). Decl. Exh. B. The NSLs, each invoking 18 U.S.C. § 2709, demanded subscriber records regarding certain customers and included a nondisclosure requirement preventing it from discussing the matter publicly. Decl. Exh. A, B.

A. National Security Letter Statutory History.

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

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

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

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

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

records eligible for compelled production were dramatically expanded from records about foreign powers or their agents to records that the certifying FBI official asserted were "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." *Id.* Third, the requirement of a certification of "specific and articulable" facts to support the FBI's justification was eliminated and replaced by a requirement for certification that the information sought was "relevant" to an authorized investigation. *Id.*

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

No explicit statutory mechanism by which a recipient could challenge the FBI's NSL authority existed until the relevant statutes were amended in 2006. Indeed, until the 2006 amendments, it was unclear whether a recipient even had the right to tell an *attorney* that an NSL had been received. After a successful legal challenge asserting such rights (*see Doe v. Ashcroft*, 334 F. Supp. 2d 471, 491 (S.D.N.Y. 2004), *vacated sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006)), Congress amended the statute to authorize such procedures. In ECPA, the statutory provision at issue here, section 2709(c) was amended to permit disclosure of the existence of an NSL to "an attorney to obtain legal advice or legal assistance with respect to the request." Moreover, a new section — 18 U.S.C. § 3511 — was added that specified the procedures for challenging the FBI's NSL authority: section 3511(a) authorized petitions to modify or set aside an underlying request for records under section 2709 "if compliance would be unreasonable, oppressive, or otherwise unlawful," and section 3511(b) authorized petitions to modify or set aside a gag under section 2709. The right to challenge the scope of a section 2709 gag as articulated in section 3511(b) is conditional, imposing timing limitations about when such challenges can be brought as well as the degree of deference that must be given to FBI certifications regarding possible harms related to the disclosure of the existence of an NSL. *See* 18 U.S.C. §§ 2709(b)(2), (3). As discussed in more detail below, however, those limitations exceed constitutional bounds and are, in part, the subject of this Petition. *See, e.g., John Doe, Inc. v. Mukasey*, 549 F.3d 861, 875 (2d Cir. 2008) (finding that the statutory instruction that certifications regarding potential harms related to disclosure be deemed "conclusive" was unconstitutional).

B.

Petitioner believes that it should ensure that any request for information about its customers fully meets both statutory and constitutional standards. *Id.* at ¶ 7. As transparency is a core concern for both Petitioner and its customers, it is vital to Petitioner that government requests for data be disclosed to customers and discussed in the public debate, and that in the rare situations where a gag may be appropriate, that courts play their necessary and discerning oversight role to ensure that First Amendment and other rights are adequately protected. *Id.* at ¶ 8.

C. The NSLs Issued to Petitioner.

On 2013, Petitioner received two National Security Letters, the and NSLs, as described above. Decl. Exh. ¶ 10. Each NSL explicitly invokes the section 2709 as the source of its authority for the FBI to issue both the NSL itself and the nondisclosure requirement. Decl. Exhs. A, B. The NSL also informed Petitioner that it had a right to challenge the nondisclosure requirement. *Id.* The NSLs each specifically stated:

> If you wish to make a disclosure that is prohibited by the nondisclosure requirement, you must notify the FBI, in writing, of your desire to do so within 10 calendar days of receipt of this letter. That notice must be mailed or faxed to the [respective FBI division] with a copy to FBI HQ, attention: General Counsel (fax number: 202-324-

> 5366) and must reference the date of the NSL and the identification number found on the upper left corner of the NSL. If you send notice within 10 calendar days, the FBI will initiate judicial proceedings in approximately 30 days in order to demonstrate to a federal judge the need for nondisclosure and to obtain a judicial order requiring continued nondisclosure. The nondisclosure requirement will remain in effect unless and until there is a final court order holding that disclosure is permitted.

Id.

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

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

Petitioner's concern about the NSL Statute's inclusion of a permanent, extrajudicial gag is based, in part, on the well-documented history of FBI abuse of NSLs. As part of the reauthorization of the PATRIOT Act in 2005, Congress directed the Department of Justice Inspector General to investigate and report on the FBI's use of NSLs. In three scathing reports issued between 2007 and 2010, the IG documented the agency's systematic and extensive misuse of this form of legal process.[2] The Inspector General concluded that "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." 2007 OIG Report 124.

Among other findings, the OIG reports concluded:

- FBI NSL requests surged from about 8,500 NSL requests in 2000, the year before the PATRIOT Act was passed, to 39,000 in 2003, after the PATRIOT Act relaxed the standards required to issue an NSL, to more than 48,106 NSL requests in 2006 alone.[3]

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

[3] The report distinguishes NSL requests from NSL letters, because a single NSL letter may contain multiple requests for information. 2007 OIG Report 120. For example, the FBI issued nine NSL *(footnote continued on following page)*

2007 OIG Report 120; 2008 OIG Report 107.[4]

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

- The FBI's improper practices included requests for information based on First Amendment protected activity including acquisition of reporters' and news organizations' telephone toll billing records and other calling activity information. 2010 OIG Report 6, 89-122.[5]

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

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

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

The OIG Reports linked much of the FBI's NSL abuse problem to a lack of oversight

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(footnote continued from preceding page)
letters in one investigation requesting subscriber information on 11,100 different phone numbers. 2007 OIG Report 36.

[4] Many of these figures are, unfortunately, only the OIG's best estimate, as the FBI's NSL recordkeeping system was poor during the time period covered by the reports, and the available data significantly underestimated the number of NSL requests that had been made. 2007 OIG Report 34. In fact, the OIG estimated that "approximately 8,850 NSL requests, or 6 percent of NSL requests issued by the FBI during [2003-2005], were missing from the database." *Id.*

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

within the agency. 2010 OIG Report 213-214, 279-285. Oversight outside of the agency was also lacking. The OIG determined in 2007 that the FBI failed to report nearly 4,600 NSL requests to Congress between 2003 and 2005, almost all of which were issued under section 2709. 2007 OIG Report 33.

The OIG Reports also document lack of oversight from the companies receiving the NSLs. For example, telecommunications employees who processed FBI requests for information did not request separate legal process for requests for community of interest records, records regarding whom contacts of targets were themselves in contact with. 2010 OIG Report 59. And in over half of all NSL violations submitted to the Intelligence Oversight Board, the private entity receiving the NSL either provided more information than requested or turned over information without receiving a valid legal justification from the FBI.[6] As one phone company employee who was embedded with FBI stated, "personally, it wasn't my place to police the police." 2010 OIG Report 42.[7]

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

III. ARGUMENT

The standards required by the First Amendment are unequivocal. The gags imposed by the NSLs issued to Petitioner conditioning speech — here, about the FBI's unilateral attempt to compel records about Petitioner's customers without court permission — are a classic speech licensing scheme and prior restraint. Under the First Amendment, the content-based gags are subject to strict scrutiny. The speech licensing scheme must also satisfy clear procedural

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

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

protections to ensure that even if strict scrutiny is met, shortcomings in an established review process itself don't themselves undermine the First Amendment rights at stake. As the statute is non-severable, the First Amendment infirmity of the gag provision also precludes the enforcement of the authority granted to the FBI to compel the disclosure of records at the outset. And even without these constitutional infirmities, the Government must still under the statute support its records requests and the accompanying gag orders with sufficient, specific evidence, something that it has not done. Both the NSLs here and the underlying NSL Statute must be set aside.

A. The Nondisclosure Provision of the NSL Statute Constitutes an Unconstitutional Prior Restraint.

There can be no dispute that the nondisclosure provision of section 2709(c) creates a prior restraint on Petitioner since the NSL prohibits communications that would otherwise occur. *See Alexander v. United States*, 509 U.S. 544, 550 (1993). A prior restraint on free speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any prior restraint on expression comes to [a court] with a heavy presumption against its constitutional validity," and "carries a heavy burden of showing justification." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). Accordingly, analysis of the NSL gag provision starts with the prior restraint doctrine.

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

The first test for prior restraints, applicable in the context of claims of national security, is substantively laid out in *New York Times v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971). The Supreme Court, in a brief *per curiam* decision, denied the United States' request for an injunction preventing the *New York Times* and *Washington Post* from publishing the contents of a classified historical study of U.S. policy towards Vietnam, known colloquially as the "Pentagon Papers," on the ground that the government failed to overcome the heavy presumption against the constitutionality of a prior restraint on speech. Under *Pentagon Papers*, 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 Nation or its people." 403 U.S. at 730 (Stewart, J. joined by White, J., concurring).[8]

The NSL Statute fails this demanding standard. An NSL authorized by the statute is based on a written certification by the Director of the FBI or his designee that "the information sought is *relevant* to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. §§ 2709(a)-(b) (emphasis added). The FBI may then prohibit the NSL recipient from speaking about the NSL so long as the FBI certifies that a disclosure "*may result* [in] a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c) (emphasis added).

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

Importantly, the *Pentagon Papers* Court articulated this test in the context of speech that several justices agreed would cause harm to national security. *See Pentagon Papers*, 403 U.S. at 763. Justice Stewart concurred with the decision despite being "convinced that the Executive was correct with respect to some of the documents involved." *Id.* at 730. Justice White concurred, expressing confidence that disclosure "will do substantial damage to public interests." *Id.* at 731.

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

Nonetheless, the Supreme Court refused to allow publication to be enjoined. As Justice Stewart noted, "I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us." *Id.* at 730. *See also* White, J. concurrence at 732.

As the statute does not require the requisite showing to impose a prior restraint required by the First Amendment, and the NSLs themselves don't make one, both the NSL statute and the NSLs must be set aside.

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

Section 2709(c) also lacks the procedural protections required of prior restraints, rendering both the NSLs and the statute unconstitutional and unenforceable. In *Freedman v. Maryland*, 380 U.S. 51, 85 (1965), the Supreme Court articulated three core procedural protections that must exist before expression can be conditioned on government permission: (1) any restraint imposed prior to judicial review must be limited to "a specified brief period"; (2) any further restraint prior to a final judicial determination must be limited to "the shortest fixed period compatible with sound judicial resolution"; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government. *Mukasey*, 549 F.3d at 871 (citing *Freedman*, 380 U.S. at 58-59; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002)). Furthermore, any prior restraint scheme must provide narrow, definite and objective standards to cabin the government's discretion. *See, e.g.*, *FW/PBS*, 493 U.S. at 222 (holding that a licensing scheme may be unconstitutional due to of lack of procedural safeguard *or* unbridled discretion).

As discussed further below, the NSL Statute has already been found to be unconstitutional by the Second Circuit in *Doe v. Mukasey* due to its failure to provide these First Amendment process protections. While the Second Circuit correctly identified that the procedural prior restraint doctrine applies and is not met by the NSL Statute, as described further in section (c), *infra*, the *Mukasey* court's attempt to save the statute by rewriting key sections and adding in entirely new requirements simply went too far.

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

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

The effects of this transposition are profound, especially in the NSL context, because the entity with the burden to seek judicial review is not the person whose information is sought. Instead, it is a third party who does not know — and likely cannot find out, thanks to the concurrent gag order — whether the FBI is undertaking a legitimate investigation within the confines of the law or is instead, for example, investigating a target solely based on protected First Amendment activity. The recipient may also lack the resources or the facts necessary to challenge the NSL[9] or may simply have no interest in challenging it at all.[10] *See, e.g., McKinney v. Alabama*, 424 U.S. 669, 675-76 (1976) (overturning a bookseller's conviction where the obscenity status of the disputed material was decided in another case with different parties and of which plaintiff had no notice, questioning the "assumption that the named parties' interests are sufficiently identical to those of petitioner that they will adequately protect his First Amendment rights"); *United States v. Afshari*, 446 F.3d 915, 920-21 (9th Cir. 2006) (Kozinski, dissenting) ("It is not at all clear to me that a [First Amendment] challenge that can (maybe) be raised only by a third party in a separate proceeding can ever be an adequate substitute for the procedures specified in *McKinney*."). As

[9] Indeed, in response to another NSL recipient petition currently being litigated by the undersigned counsel, the FBI *sued* a recipient who challenged the records request under section 3511, arguing that the recipient had an affirmative duty to turn over the information even while the challenge was being litigated, couching the recipient's decision to delay turning subscriber information over to the FBI until the district court had ruled on its petition a "failure to comply" with the NSL, a "violat[ion of] federal law, and an "interfere[nce] with the United States' vindication of its sovereign interests in law enforcement and counterintelligence, and protecting national security." *See In re National Security Letter*, Complaint, Case No. 3:11-cv-02667-SI (N.D. Cal. June 2, 2011), *available at* https://www.eff.org/sites/default/files/filenode/complaint-redacted.pdf.

[10] As described further *infra* at section (c), Petitioner agrees with the Second Circuit's finding that the statute violated *Freedman*'s third prong. *Mukasey*, 549 F.3d at 881. But as also described *infra,* Petitioner disagrees with the Second Circuit's conclusion that the statute survives scrutiny with a judicially invented (but not required) "reciprocal notice procedure" which shifts the burden to the provider to object to the NSL. *Mukasey*, 549 F.3d at 883-84.

noted above at page 8, in over half of all NSL violations submitted to the Intelligence Oversight Board, the private entity receiving the NSL either provided more information than requested or turned over information without receiving a valid legal justification from the FBI.

The NSL Statute fails to place the burden on the Government when the matter is brought to court and deprives this Court of any meaningful authority to exercise its constitutional oversight duties. Instead, the Court may only modify the nondisclosure requirement if it finds there is "*no reason to believe* that disclosure may endanger national security, interfere with an investigation or diplomatic relations, or endanger any person." 18 U.S.C. § 3511(b) (emphasis added).[11] In determining whether the disclosure may endanger national security, interfere with an investigation or diplomatic relations, or endanger any person, the Court is not permitted to evaluate the facts, but instead is required to blindly accept the FBI's representations: if, at the time of the petition, the FBI "certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. § 3511(b)(2)-(3). And, of course, there is no procedure for factual review by the Court wherein the Court could even determine whether such certification was made in bad faith. Petitioner agrees with the Second Circuit that this presumption of conclusiveness is unconstitutional. *Mukasey*, 549 F.3d at 884 ("the conclusive presumption clause of subsections 3511(b)(2) and (b)(3) must be stricken").

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

The nondisclosure provisions of the NSL Statute also fail *Freedman*'s first and second prongs by failing to impose appropriate time restraints regarding the evaluation of the appropriateness of the nondisclosure requirement: gags are not limited to "a specified brief period" prior to a judicial proceeding, and gags are similarly not limited to "the shortest fixed period compatible with sound judicial resolution" once a judicial challenge has been brought. Instead, the statute imposes an indefinite restraint, with no requirement whatsoever to raise the issue with a court, subject only to a petition by the provider that can only be brought annually. 18 U.S.C.

[11] In *Mukasey*, the Second Circuit also acknowledged this problem, but, again, as described further *infra* at section (c), improperly rewrote the statute in attempt to avoid the necessary conclusion that the statute is unconstitutional as written.

§ 2709(c).[12] This failure to build such temporal protections into the statute lies at the heart of the concerns voiced by the *Freedman* court; namely, that even with the existence of a substantive First Amendment rights, those interests are still at risk of harm as a result of inefficiency or administrative inattention. The statute's lack of *any* kind of provisions to ensure a prompt judicial evaluation of a prior restraint renders it unconstitutional under *Freedman*. *See, e.g., Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, Tennessee*, 274 F.3d 377, 403 (6th Cir. 2001) (rejecting an argument that a statute preserving the status quo of a business (*i.e.*, allowing it to continue to operate) while a licensing decision was being made violates *Freedman*: "Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme must assure a prompt judicial decision.") (internal quotations omitted).

(c) *Mukasey* Found the Same Constitutional Infirmities But Went Too Far in Rewriting the Statute.

As noted above, the Second Circuit in *Doe v. Mukasey* held that the statute failed these settled constitutional tests. Unfortunately, while acknowledging the problems, and their seriousness, the court attempted to save the statute through a radical reconstruction that included adding significant provisions that Congress did not. While the court's efforts are understandable — a court should be chary of declaring statutes unconstitutional — the *Mukasey* court went too far in rewriting sections 2709 and 3511 to save them from their constitutional defects.

For example, in addressing the *Freedman* requirement that the government initiate judicial review of the gag order, the court held that the statute was unconstitutional: "in the absence of Government-initiated judicial review, subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards." *Mukasey*, 549 F.3d at 881. It then initially recognized that it was "beyond the authority of a court to 'interpret' or 'revise' the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement." *Id.* 549 F.3d at 883. Yet the court went on to do just that, determining that if the

[12] Again, the *Mukasey* Court attempted to resolve this First Amendment violation by inventing a complicated timing structure as part of the "reciprocal notice procedure" that the government could "voluntarily" adopt. *See infra* section (c).

government were to assume such an obligation voluntarily, sections 2709(c) and 3511(b) would survive constitutional challenge. *Id.* at 884.

A court may construe a statute narrowly, if possible, to uphold it as constitutional. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988). A court also may sever parts of a statute that would render it unconstitutional if it is possible to do so while preserving the legislature's original vision, *United States v. Booker*, 543 U.S. 220, 258-59 (2005), or limit the applications of a statute to those that would be constitutional, *United States v. Raines*, 362 U.S. 17, 20-22 (1960). But a court cannot save a statute by construing it to contain limitations that Congress did not include in the first place. *See American Booksellers Assn.*, 484 U.S. at 397. As the Supreme Court noted, "this Court 'will not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (quotation omitted)); *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").[13]

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a case the *Mukasey* court relied on heavily, is not to the contrary. In that case, the Supreme Court considered the constitutionality of 19 U.S.C. § 1305(a), a statute authorizing customs agents to seize obscene materials at the border. *Id.* at 366. The statute required the government to seek judicial review of the seizure, but provided no time limits for the initiation or completion of those proceedings. *Id.* The Court determined that the lack of time limits threatened to render section 1305(a) wholly unconstitutional, and so decided to impose time limits as required by *Freedman. Id.* at 368-69. Critically, the statute's legislative history reflected a strong congressional intent that judicial review be completed promptly. *Id.* at 370-72. Furthermore, Congress had specifically directed that the entire statute should not be found unconstitutional if its application in some cases was found to be unlawful. *Id.* at 372. Ultimately, the Court did not consider itself to be rewriting the statute at all: "We do nothing in this case but construe [section] 1305(a) in its *present form*, fully cognizant

[13] Congress has explicitly considered amendments to the NSL statute to fix some of the problems identified in *Mukasey*, 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 (last visited March 9, 2013) (*see* Section 6: 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).

that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we may then be required to pass." *Id.* at 374 (emphasis added).[14]

The same cannot be said for the Second Circuit's approach in *Mukasey*. The *Mukasey* court determined that sections 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 recognized the lack of a "specified brief period" required by *Freedman*'s first prong. It then found that it did not have judicial authority to "interpret" or "revise" those provisions to impose such a requirement on the government. 549 F.3d at 883.

Yet instead of taking these observations to their rightful conclusion and requiring Congress to fix the constitutional infirmities in the statute, the court proposed a reciprocal notice procedure, along with time limits consistent with *Freedman*, for the government to initiate judicial review of a nondisclosure order, explaining:

> *If* the Government uses the suggested reciprocal notice procedure as a means of initiating judicial review, there appears to be no impediment to the Government's including notice of a recipient's opportunity to contest the nondisclosure requirement in an NSL. *If such notice is given*, time limits on the nondisclosure requirement pending judicial review, as reflected in Freedman, would have to be applied to make the review procedure constitutional. We would deem it to be within our judicial authority to conform subsection 2709(c) to First Amendment requirements, by limiting the duration of the nondisclosure requirement, absent a ruling favorable to the Government upon judicial review, to the 10-day period in which the NSL recipient decides whether to content the nondisclosure requirement, the 30-day period in which the Government considers whether to seek judicial review, and a further period of 60 days in which a court must adjudicate the merits, unless special circumstances warrant additional time.

Id. (emphases added) (citing *Thirty-Seven Photographs*, 402 U.S. at 373-74). The court then went on to set forth "several options for completing the reciprocal notice procedure," *id.* at 884, while noting the process is ultimately a matter of government discretion: "We leave it to the Government to consider how to discharge its obligation to initiate judicial review." *Id.* The court concluded:

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[14] The Supreme Court encountered a similar circumstance in *Booker*, 543 U.S. 220. In that case, the Court severed the judicial review provision of the Sentencing Reform Act and decided that it should "infer[]" a new standard of review based on the statutory text and its determination of Congressional intent. *Id.* at 260. The Court considered a three-factor test in *Pierce v. Underwood*, 487 U.S. 552 (1988) as well as Congress's "initial and basic sentencing intent" before settling on an "unreasonableness" standard. *Id.* at 260-64.

> In view of these possibilities, we need not invalidate the entirety of the nondisclosure requirement of subsection 2709(c) or the judicial review provisions of subsection 3511(b). Although the conclusive presumption clause of subsections 3511(b)(2) and (b)(3) must be stricken, we invalidate subsection 2709(c) and the remainder of subsection 3511(b) only to the extent that they fail to provide for Government-initiated review. The Government can respond to this partial invalidation ruling by using the suggested reciprocal notice procedure. With this procedure in place, subsections 2709(c) and 3511(b) would survive First Amendment challenge.

Id.

The Second Circuit's attempt to save sections 2709(c) and 3511(b) goes far beyond cases like *Virginia v. American Booksellers Association*, 484 U.S. 383, and *United States v. Raines*, 362 U.S. 17, which have limited statutes to avoid constitutional infirmities. A discretionary procedure or limitation voluntarily adopted by the government cannot cure a statute's facial invalidity because nothing binds the government to observe the voluntary practice. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (court is "without power to adopt a narrowing construction of a state statute [offered by the government] unless such a construction is reasonable and readily apparent") (quotation omitted); *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 799 (9th Cir. 2008) (voluntarily adopted factors regarding the application of city's parade licensing statute did not actually cabin discretion of police unless "'the limits the city claims are implicit in its law [are] made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice'") (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988)).[15]

Second, the *Mukasey* court's reliance on *Thirty-Seven Photographs* was misplaced. The circumstances surrounding sections 2709(c) and 3511(b) are unlike those that the Supreme Court relied upon to impose judicial review in *Thirty-Seven Photographs*. There is no indication here

[15] Once the Second Circuit depended on the FBI to voluntarily assume obligations that the court lacked the power to impose by construction, the remainder of the decision became an impermissible advisory opinion, because the court was declaring the constitutionality of facts not presented in an actual case. *See 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"); *see also United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite." (internal quotation marks omitted)).

that Congress contemplated any notice procedure, much less the reciprocal notice procedure invented by the Second Circuit with complex, specified deadlines. Nor, as described further *infra* at section E, is there any indication that Congress intended the NSL statutes to survive in the wake of any unconstitutional applications in some situations. Congress knows how to write savings provisions, and it did not.

The Second Circuit attempted to address these conspicuous absences by concluding that "if Congress had understood that First Amendment considerations required the government to initiate judicial review of a nondisclosure requirement and precluded a conclusive certification by the Attorney General," it "would surely have wanted" the statutes to remain in force even if certain provisions were stricken. *Mukasey*, 549 F.3d at 885. But the court relied on no evidence to support this supposition, unlike the Supreme Court in *Thirty-Seven Photographs*. And in fact, the only evidence of Congress' intent is to the contrary. *See, e.g.*, U.S. House, Joint Explanatory Statement of the Committee of Conference, USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. CONF. REP. 109-333, 96, 2006 U.S.C.C.A.N. 184, 190 (describing the bill as passed that created 18 U.S.C. § 3511 as "recogniz[ing] that the Executive branch is both constitutionally and practically better suited to make national security and diplomatic relations judgments than the judiciary"); U.S. Senate, Proceedings and Debates, 152 Cong. Rec. S1495-02, S1496 (Feb. 27, 2006) (proposing, and ultimately rejecting, amendment to the USA PATRIOT ACT Additional Reauthorizing Amendments Act of 2006 which would have required the district court to act on a petition brought under 18 U.S.C. § 3511 to evaluate a petition to set aside an NSL within 72 hours).

The Second Circuit went too far to reinterpret sections 2709(c) and 3511(b). They are facially unconstitutional, and their constitutional infirmities cannot be cured by a complex court-created judicial review procedure with which the government need only "voluntarily" comply.

(d) The NSL Statute's Nondisclosure Provision Violates the First Amendment as It Fails to Set Forth "Narrow, Objective, and Definite Standards" Guiding the Discretion of the FBI.

The nondisclosure provision of 18 U.S.C. § 2709(c) also must fail because it constitutes a licensing scheme that vests in executive officers unfettered discretion with which to silence speakers about government activities. It allows the government to gag a recipient merely on a

certification that disclosure "may result [in] a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c). Without any articulable statutory guidance cabining this executive discretion, the statute cannot survive constitutional scrutiny.

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

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

The nondisclosure provision of the NSL statute lacks the "narrow, objective, and definite standards" necessary to limit the exercise of executive authority. Rather, it authorizes an FBI official to prohibit disclosure of an NSL if that official believes — under his or her own criteria — that disclosure "may result" in, for example, "danger" to national security or interfere with a counterterrorism investigation. This sort of unfettered discretion vested in an executive branch official to determine whether speech can occur has repeatedly been struck down by both the Supreme Court and the Ninth Circuit. In *City of Lakewood*, 486 U.S. at 769, the Supreme Court noted: "it is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the

statement 'it is not in the public interest' when denying a permit application." In *City of Seattle*, 550 F.3d at 803, the Ninth Circuit confirmed that an "open-ended standard, combined with the absence of a requirement that officials articulate their reasons or an administrative-judicial review process, vests the Seattle Chief of Police with sweeping authority . . . The First Amendment prohibits placing such unfettered discretion in the hands of licensing officials."

Moreover, the absence of clear standards allows "post hoc rationalizations" and "the use of shifting or illegitimate criteria" that make it difficult for courts to assess the statute's effects on a case-by-case basis. *City of Lakewood*, 486 U.S. at 749. This problem is especially serious in the NSL context where targets are not notified and few challenges are brought by service providers.

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

Even if the nondisclosure requirement could survive the substantive and procedural prior restraint tests discussed above, the statute still must meet strict scrutiny review as it is a content-based restriction on speech. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("[T]he most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). Indeed, the Government has previously "conceded that strict scrutiny is the applicable standard" for a review of the nondisclosure provision. *Mukasey*, 549 F.3d at 878. Under the strict scrutiny standard, the NSL is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). To survive strict scrutiny review, a government entity must show that a restriction on free speech is "narrowly tailored to promote a compelling Government interest," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000), and that there are no "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," *Reno*, 521 U.S. at 874. And while the protection of national security is generally recognized as a compelling government interest, the FBI cannot simply "posit the existence of the disease sought to be cured," rather, "it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System*, 512 U.S. at 664 (internal quotation marks and citations omitted). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) (plurality opinion) (same in the national security context).

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

Second, the nondisclosure provision authorizes overly long prior restraints. If the Court decides that the prior restraint is justified, it cannot tailor the duration of the prior restraint to the circumstances. Instead, the prior restraint is permanent unless the gagged provider exercises its right to challenge the nondisclosure obligation once a year, when the government may or may not re-certify that disclosure would cause an enumerated harm. 18 U.S.C. § 3511(b)(3). Even if the Government knows — or the Court would decide, if presented with the pertinent facts — that the restraint on speech is no longer needed or can be modified, the Government has no obligation to notify the Court or the provider or otherwise act to lift or modify the restraint. Because "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438 (1963), the statute's categorical approach to the duration of the prior restraint is not narrowly tailored to the Government's interest.

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

Not only is the NSL Statute's nondisclosure provision substantively and procedurally fatally flawed in granting the FBI the ability to self-impose content-based prior restraints without any meaningful procedural protections to prevent abuse, the statutory mechanism by which a court evaluates the legality of the gag in response to a petition is itself deficient. By preventing courts from performing the independent review of prior restraints that the First Amendment requires, section 3511(b)'s excessively deferential standard of review intrudes upon their proper functioning of the courts in violation of the separation of powers and also violates due process. As explained above, the First Amendment requires courts to exercise independent review of the prior restraint imposed here. That review is impossible because sections 3511(b)(2) and (3) substitute their extremely deferential standard of review for the constitutionally required standard of review, and

separately because section 3511(b) precludes courts from making an independent determination of the facts — *i.e.*, the likelihood of harm — used to justify the prior restraint. Specifically, the statute allows the gag to end only if the court:

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

Sections 3511(b)(2) and (3) (emphasis added). The statute further requires that if any one of a long list of government officials so certifies, "such certification shall be treated as *conclusive* unless the court finds that the certification was made in bad faith." *Id.* 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)). The law further violates Petitioner's due process rights, which require a *de novo* review by an unbiased decisionmaker. *See, e.g.*, *Concrete Pipe & Products v. Construction Laborers Pension Trust,* 508 U.S. 602, 619-20, 626, 629-30 (1993) (due process requires a neutral adjudicator to conduct a *de novo* review of all factual and legal issues).

Prior-restraint jurisprudence requires independent review of the facts, and section 3511(b) attempts to usurp that power from this Court. It may not do so and must be struck down.

D. The Government Must Demonstrate That It Can Meet the Requirements for the Compelled Production of Customer Records as Well as the Nondisclosure Requirement by Making the Appropriate Factual Showing For the Court to Review.

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

As the Supreme Court reaffirmed in *Hamdi v. Rumsfeld*, the suggestion of a "heavily circumscribed role for the courts" in traditional judicial matters where the government also has a national security interest is incorrect. 542 U.S. at 535-36 (plurality opinion). Instead, the Supreme Court noted that "the United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536. That role here is to carefully evaluate the factual showing made by the Government. The Government may not simply unilaterally assert that its motivations are proper and justified without the Court reviewing the basis for its claims. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power") (citing *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)).

The Government has, for example — thus far — made no factual showing of any kind that supports its assertion 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). Similarly, the Government has not attempted to support its conclusion that the underlying information "is not conducted solely on the basis of activities protected by the First Amendment." 18 U.S.C. § 2709(b)(1), (b)(2). The FBI must affirmatively support its contention that both are true. This is true particularly where the target of the NSL is one of Petitioner's customers, customers who include a wide range of entities and individuals with a variety of frequently controversial First Amendment opinions, such as banks, governments, media, organizations representing groups of historically oppressed peoples, major corporations, small business, and individuals. Decl. at ¶ 4. In the present case, the Government's showing must be clear, factual and not conclusory, and Petitioner must be given a meaningful opportunity to oppose.

As to the nondisclosure requirement, the Government must demonstrate to this Court that a good reason exists to expect that disclosure of Petitioner's receipt of the NSL would risk an enumerated harm. The FBI's mere certification that harm might occur upon disclosure of the fact that Petitioner received an NSL is not conclusive. Rather, the FBI must demonstrate to the Court that a good reason exists to expect that disclosure of an NSL would risk an enumerated harm related to an authorized investigation to protect against international terrorism or clandestine

intelligence activities. *Mukasey*, 549 F.3d at 874-76. A speculative statement that disclosure "may" or "could" cause harm is insufficient to justify a prior restraint. *See Pentagon Papers*, 403 U.S. at 725-26 (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press premised upon surmise or conjecture that untoward consequences may result."). Rejecting precisely this argument in adjudicating the constitutionality of an NSL nondisclosure requirement, the district court in *Doe v. Gonzales* noted that "[n]othing specific about this investigation has been put before the court that supports the conclusion that revealing Does' identity will harm it." *Doe v. Gonzales*, 386 F. Supp. 2d 66, 76-77 (*Gonzales I*). That approach should be applied here.

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

If this Court finds that the statute's nondisclosure provisions are unconstitutional, it must invalidate as well the provisions authorizing the FBI to compel production of customer records from telecommunications providers because the two sets of provisions are not severable. Severability "is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006) (question is whether "the legislature [would] have preferred what is left of its statute to no statute at all"). A court must strike down additional provisions of a statute in the face of the unconstitutionality of particular elements of it when "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (citation omitted).

Here, there can be only one conclusion: the provisions are not severable. Not only did Congress enact the two sets of provisions together, Congress amended the nondisclosure provisions in an attempt to save the NSL statute, leading to its present form, after the initial district court decisions in the *Mukasey* litigation held that the nondisclosure provisions were unconstitutional.[16]

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

See Mukasey, 549 F.3d at 866-68. And as Petitioner has shown, the amended nondisclosure 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.

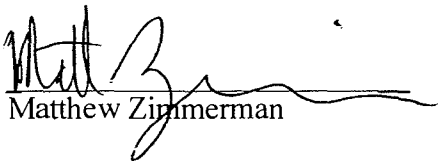
Congress could not have intended the substantive NSL provisions to operate absent the nondisclosure provisions. Without some secrecy provision, a provider could immediately disclose the fact of the NSL's issuance to the targeted individual or individuals. Even for Government demands for information from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

IV. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that the gag provisions of the NSLs be set aside and that the NSL Statute be declared unconstitutional as it allows the FBI to impose a prior restraint without prior judicial review, as well as an injunction prohibiting the FBI from seeking to enforce the gag provisions. Petitioner also asks for a declaration that the nondisclosure provision is not severable and that as a result, the compelled disclosure provision must also be struck down. Finally, Petitioner asks that the Court independently find that the Government has not satisfied its burden to support its asserted need for either the underlying records or for the gag and that as a result, the NSLs should be set aside in their entirety.

DATED: March 14, 2013

ELECTRONIC FRONTIER FOUNDATION

By: 
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