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12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 _____)
15 IN RE NATIONAL SECURITY LETTERS)

Case No. 3:13-mc-80089 SI

16) **CROSS-PETITION FOR**
17) **JUDICIAL REVIEW AND**
18) **ENFORCEMENT OF**
19) **NATIONAL SECURITY**
20) **LETTERS PURSUANT TO**
21) **18 U.S.C. § 3511(c)**

22) **FILED UNDER SEAL**
23) **PURSUANT TO**
24) **18 U.S.C. § 3511(d)**

23 Respondent and cross-petitioner Eric Holder, Attorney General of the United States
24 of America, brings this petition for judicial review to enforce compliance with the
25 information request and nondisclosure provisions of two (2) National Security Letters, and
26 states as follows:
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INTRODUCTION

1. As part of an ongoing, authorized national security investigation by the Federal Bureau of Investigation (“FBI”), on [REDACTED] 2013, 2013, the FBI served on and/or issued to petitioner and cross-respondent [REDACTED] [REDACTED] or “petitioner”) two (2) National Security Letters (“the NSLs”), as authorized by statute, 18 U.S.C. § 2709, seeking limited and specific information necessary to the investigation. In each NSL, an authorized FBI official certified to petitioner that disclosure of the fact or contents of the NSL may, *inter alia*, endanger national security. Moreover, disclosure of the fact or contents of the NSLs is prohibited by statute, 18 U.S.C. § 2709, as applied to petitioner.

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2. Petitioner will not voluntarily comply with the NSLs. On [REDACTED] 2013, petitioner provided constructive and actual notice to the FBI that it will not comply with the NSLs absent Court action. However, the FBI needs the information sought by the NSL to further its ongoing authorized national security investigation. Moreover, authorized FBI officials have certified pursuant to law, 18 U.S.C. § 2709(c), that disclosure of the fact or contents of the NSLs may, *inter alia*, endanger the national security of the United States. For those reasons, the Attorney General brings this petition to protect the national security and enforce the law. This Court should enter an Order declaring that the petitioner is bound by the nondisclosure provisions of 18 U.S.C. § 2709(c), as applied to petitioner here, and must comply with the information requests in the NSLs pursuant to 18 U.S.C. § 2709(a) as applied to petitioner here.

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JURISDICTION AND VENUE

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3. The Court has jurisdiction pursuant to 18 U.S.C. § 3511(c), which provides that, when the recipient of an NSL “fail[s] to comply with [the] request for records, a report, or other information,” the Attorney General “may invoke the aid of any district court of the United States

1 within the jurisdiction in which the investigation is carried on or the person or entity resides,
2 carries on business, or may be found, to compel compliance with the request.” The NSL requests
3 at issue here included notification and imposition of the nondisclosure requirement. *Accord* 18
4 U.S.C. § 2709(c)(2) (among other things, an NSL “notif[ies] the person or entity to whom the
5 request is directed of the nondisclosure requirement.”). Under section 3511(c), this Court “may
6 issue an order requiring the person or entity to comply with the request,” including its
7 nondisclosure requirement, and failure to obey the order of the Court may be punished as
8 contempt. *Id.* The Court also has jurisdiction under 28 U.S.C. § 1345.

10 4. Venue lies in the Northern District of California pursuant to 18 U.S.C. § 3511(c)
11 and 28 U.S.C. § 1391.

13 PARTIES

14 5. Respondent and cross-petitioner is the Attorney General of the United States. The
15 Attorney General is the nation’s chief law enforcement officer and the head of the United States
16 Department of Justice, an Executive Agency of the United States of America. The FBI is a law
17 enforcement agency within the Department of Justice.

19 6. Petitioner and cross-respondent [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED] Defendant offers mobile and long-distance telephone services
24 to its customers.

25 STATUTORY BACKGROUND

26 7. Title 18 U.S.C. § 2709 authorizes the FBI to issue NSLs in connection with
27 foreign counterintelligence and counterterrorism investigations. The FBI has similar authority to
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1 issue NSLs under the National Security Act of 1947, the Fair Credit Reporting Act, and the Right
2 to Financial Privacy Act. *See* 12 U.S.C. §§ 3414(a)(1), 3414(a)(5); 15 U.S.C. § 1681u, 1681v;
3 50 U.S.C. § 436.

4 8. Subsections (a) and (b) of § 2709 authorize the FBI to request “subscriber
5 information” and “toll billing records information,” or “electronic communication transactional
6 records,” from wire or electronic communication service providers. In order to issue an NSL, a
7 designated official must certify that the information sought is “relevant to an authorized
8 investigation to protect against international terrorism or clandestine intelligence activities”
9 *Id.* § 2709(b)(1)-(2). When an NSL is issued in connection with an investigation of a “United
10 States person,” the same officials must certify that the investigation is “not conducted solely on
11 the basis of activities protected by the first amendment” *Id.*

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14 9. To protect the secrecy of counterintelligence and counterterrorism investigations,
15 § 2709(c) permits the placement of a nondisclosure obligation on an NSL recipient. Section
16 2709(c) prohibits disclosure when a designated FBI official certifies, prior to the issuance of the
17 NSL, that “otherwise there may result a danger to the national security of the United States,
18 interference with a criminal, counterterrorism, or counterintelligence investigation, interference
19 with diplomatic relations, or danger to the life or physical safety of any person.” *Id.*
20 § 2709(c)(1). When such a certification is made, the NSL itself notifies the recipient of the
21 nondisclosure requirement. *Id.* § 2709(c)(2).

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24 10. Title 18 U.S.C. § 3511 provides for judicial review of NSLs that have been
25 issued. It does not provide for prospective relief, such as a prospective injunction against service
26 of future NSLs.

1 11. Section 3511(a) authorizes the recipient of an NSL to petition a district court “for
2 an order modifying or setting aside the request” for information contained in the NSL.

3 12. Section 3511(b) authorizes the recipient of an NSL to petition a district court “for
4 an order modifying or setting aside a nondisclosure requirement imposed in connection with” the
5 NSL. *Id.* § 3511(b)(1).

6 13. Section 3511(c) authorizes the government to petition a district court for
7 enforcement of an NSL. Section 3511(c) provides that, when the recipient of an NSL “fail[s] to
8 comply with [the] request for records, a report, or other information,” the Attorney General “may
9 invoke the aid of any district court of the United States within the jurisdiction in which the
10 investigation is carried on or the person or entity resides, carries on business, or may be found, to
11 compel compliance with the request.” Where a designated official has certified the need for
12 nondisclosure pursuant to 18 U.S.C. § 2709(c), the NSL “request” includes notification and
13 imposition of the nondisclosure requirement. *Id.* § 2709(c)(2). Pursuant to 18 U.S.C. § 3511(c),
14 a court “may issue an order requiring the person or entity to comply with the request,” including
15 its nondisclosure requirement, and failure to obey the order of the court may be punished as
16 contempt. *Id.*

17 14. In response to the holding of the United States Court of Appeals for the Second
18 Circuit in *John Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (modifying a nationwide injunction
19 by the Southern District of New York), in February 2009 the FBI modified its NSL practices to
20 ensure that government-initiated judicial review is available to all recipients of NSLs that impose
21 a nondisclosure obligation pursuant to 18 U.S.C. § 2709(c). Since February 2009, therefore, all
22 such NSLs are required to include a notice that informs recipients of the opportunity to contest
23 the nondisclosure requirement through government-initiated judicial review.
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1 19. The various communications features that petitioner provides to its subscribers are
2 a “wire” or “electronic communications service” as that term is defined in 18 U.S.C. § 2510(15).
3 Petitioner is the provider of this electronic communications service.

4 **The FBI’s Investigations**

5 20. During the course of an ongoing, authorized national security investigations
6 carried on by the FBI, the FBI determined that it requires certain limited information relating to
7 [REDACTED] The Attorney General will provide a fuller description of
8 those underlying investigations, including the FBI’s legitimate needs for the information
9 requested in the NSLs to petitioner and the need for nondisclosure of the NSL requests, in a
10 classified, *ex parte* submission to the Court for *in camera* review pursuant to 18 U.S.C.
11 § 3511(e).
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13 21. To obtain information to further the FBI’s ongoing, authorized investigation, the
14 FBI issued to and/or served petitioner with the two NSLs on [REDACTED] 2013, requesting, in each
15 case, limited, specific information as authorized by § 2709. The NSLs do not request the
16 content of any communication.
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18 22. The NSLs served on petitioner were issued by an FBI Special Agent in Charge
19 (“SAC”) under the authority of 18 U.S.C. § 2709. The SAC certified in each NSL, in accordance
20 with 18 U.S.C. § 2709(b), that the information sought was relevant to an authorized investigation
21 to protect against international terrorism or clandestine intelligence activities.
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23 23. The NSLs directed petitioner to provide the records requested to the FBI.

24 24. The NSLs also informed petitioner of the prohibition against disclosing the
25 contents of the NSLs, certifying in each case, in accordance with 18 U.S.C. § 2709(c), that such
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1 disclosure could result in an enumerated harm that is related to an “investigation to protect
2 against international terrorism or clandestine intelligence activities.”

3 25. The NSLs each notified petitioner that, in accordance with 18 U.S.C. § 3511(a)
4 and (b), petitioner had a right to challenge the letter if compliance would be unreasonable,
5 oppressive, or otherwise illegal.
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7 26. The NSLs also each advised that petitioner had 10 days to notify the FBI as to
8 whether it desired to challenge the nondisclosure provision. The NSLs each further advised that
9 if petitioner advised the FBI within 10 calendar days that it objects to the nondisclosure
10 provision, the government would initiate judicial proceedings within approximately 30 days
11 thereafter in order to demonstrate to a federal judge the need for nondisclosure pursuant to
12 § 2709(c).
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14 **Petitioner’s Failure to Comply with the National Security Letters**

15 27. Petitioner has actually and constructively objected to compliance with the two
16 NSLs it received on [REDACTED] 2013, including the information requests contained in and
17 nondisclosure obligations imposed by those NSLs. To date, petitioner has not complied with the
18 information requests in the NSLs and, in its filings, has evinced its intent not to comply absent
19 action by the Court.
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21 28. Designated FBI officials have certified pursuant to 18 U.S.C. § 2709 that the
22 information sought in the NSLs at issue here is relevant to authorized investigations to protect
23 against international terrorism or clandestine intelligence activities, and that disclosure of the
24 facts that the FBI has sought or obtained access to the information sought by the NSLs may
25 endanger the national security of the United States, interfere with a criminal, counterterrorism, or
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1 counterintelligence investigation, interfere with diplomatic relations, or endanger the life or
2 physical safety of a person. *See* 18 U.S.C. §§ 2709(b), (c)(1).

3 29. Pursuant to 18 U.S.C. § 3511(e), the Attorney General will make available to the
4 Court *ex parte* and *in camera* further evidence, including classified information, supporting the
5 need for obtaining the information sought by the NSLs to petitioner and the damage reasonably
6 expected to flow from disclosure of the NSLs.
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8 30. Petitioner has demonstrated that, absent Court action, it will not comply with the
9 NSLs lawfully issued pursuant to 18 U.S.C. § 2709.

10 31. Petitioner's failure to comply with the lawfully issued NSLs would violate federal
11 law, 18 U.S.C. § 2709.
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13 32. Petitioner's failure to comply with the lawfully issued NSLs would interfere with
14 the United States' vindication of its sovereign interests in law enforcement, counterintelligence,
15 and protecting national security.
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17 33. The NSL information requests were made of petitioner consistent with the law, 18
18 U.S.C. § 2709(c), are fully authorized and in all other respects are proper and entitled to
19 enforcement by this Court.
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21 **RELIEF REQUESTED**

22 WHEREFORE, the Attorney General of the United States requests the following relief:

23 1. That this Court enter an Order pursuant to 18 U.S.C. § 3511(c) declaring that the
24 petitioner is bound by the provisions of 18 U.S.C. § 2709 as applied to petitioner and the NSLs,
25 including the requirements that the petitioner provide the requested information to the FBI and
26 abide by the nondisclosure provisions of 18 U.S.C. § 2709(c) and the NSLs.
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1 2. That this Court enter an Order pursuant to 18 U.S.C. § 3511(c) affirming that
2 disclosure of the fact or contents of the NSLs served on petitioner may result in a danger to the
3 national security of the United States, interference with a criminal, counterterrorism, or
4 counterintelligence investigation, interference with diplomatic relations, or danger to the life or
5 physical safety of a person; and that the petitioner is bound by the nondisclosure provisions of 18
6 U.S.C. § 2709 as applied to petitioner and the NSLs, including the requirement that petitioner not
7 disclose the fact or contents of the NSLs to any person (other than those to whom such disclosure
8 is necessary to comply with the request or an attorney to obtain legal advice or legal assistance
9 with respect to the request).

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11 3. That this Court order petitioner, in accordance with 18 U.S.C. §§ 2709 and
12 3511(c) as applied here, to promptly provide to the FBI the information requested in the NSLs.

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14 4. That this Court enjoin petitioner, in accordance with 18 U.S.C. §§ 2709(c) and
15 3511(c) as applied here, from disclosing to any person (other than those to whom such disclosure is
16 necessary to comply with the request or an attorney to obtain legal advice or legal assistance with
17 respect to the request) that the FBI has sought from petitioner or obtained access to the information
18 or records requested by the NSLs under 18 U.S.C. § 2709.

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20 5. That this Court grant the Attorney General such other and further relief as may be
21 just and proper.

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1 Dated: May 22, 2013

Respectfully submitted,

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