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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY LETTERS.

Case No. 3:13-cv-1165 SI

Date: August 2, 2013
Time: 9:00 a.m.
Courtroom 10
Hon. Susan Illston

REPLY IN SUPPORT OF CROSS-PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF NATIONAL SECURITY LETTERS PURSUANT TO 18 U.S.C. § 3511(c)

FILED UNDER SEAL
PURSUANT TO
18 U.S.C. § 3511(d)
AND THIS COURT'S ORDER

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. The NSLs Served On Petitioner Comply With the Law 2

A. The NSLs served here comply with the law and the Court should review them on an NSL-by-NSL basis 3

B. Petitioner Does Not Dispute That the Standards For Enforcement Of the NSLs Are Met 5

C. Enforcement of the PHD NSL and the Nondisclosure Requirement of the WFO NSL Is Both Appropriate and Within the Authority of This Court 6

II. A Facial Challenge to the NSL Statutes is Not Before the Court and Provides No Basis to Deny Enforcement of the WFO and PHD NSLs 9

A. The Court Should Not Expand its Review of the Constitutionality of the NSL Statutes Beyond The Application of the Two NSLs at Issue to Petitioner 9

B. Petitioner's Requests for Broader Relief Are Unavailable In This Action, Which Presents Only a Challenge Pursuant to 18 U.S.C. § 3511 10

C. Under Applicable Ninth Circuit Law, This Court Should Avoid Interference With the Second Circuit Precedent In Doe 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Bernstein v. Dep't of State,
974 F. Supp. 1288 (N.D. Cal. 1997) 7, 12

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 9

Dep't of the Navy v. Egan,
484 U.S. 518 (1988) 3, 7

EEOC v. Children's Hosp. Med. Ctr.,
719 F.2d 1426 (9th Cir. 1983) 5

FTC v. Anderson,
631 F.2d 741 (D.C. Cir. 1979) 4

Fox Television Stations, Inc. v. BarryDiller Content Systems, PLC,
--- F. Supp. 2d ---, 41 Media L. Rep. 1515 (C.D. Cal. Dec. 27, 2012) 12

Golden Gate Rest. Ass'n v. City and County of San Francisco,
512 F.3d 1112 (9th Cir. 2008) 7

Gonzales v. Carhart,
550 U.S. 124 (2007) 9

Hell's Angels Motorcycle Corp. v. McKinley,
354 F.3d 1000 (9th Cir. 2004), *reprinted as amended* 360 F.3d 930 (9th Cir. 2004) 4

Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 10

John Doe, Inc., v. Mukasey,
549 F.3d 861 (2d Cir. 2008) 3, 11, 12, 13

Lane v. Pena,
518 U.S. 187 .... 10, 11

Lehman v. Nakshian,
453 U.S. 156 (1981) 10

Leiva-Perez v. Holder,
640 F.3d 962 (9th Cir. 2011) 8

Marbury v. Madison,
5 U.S. 137 (1803) 11

In re National Security Letters,
No. 3:13-mc-80063 (N.D. Cal. May 28, 2013) .... passim

New York v. Ferber,
458 U.S. 747 (1982) 9

Parker v. Levy,
417 U.S. 733 (1974) 9

Prescott v. United States,
973 F.2d 696 (9th Cir. 1992) 10

Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co.,
54 F. 730 (C.C.N.D. Ohio 1893) 7

Turner Broadcasting System, Inc. v. FCC,
507 U.S. 1301 (1993) 7

United States v. AMC Entm't, Inc.,
549 F.3d 760 (9th Cir. 2008) 12, 13

United States v. Hall,
269 F.3d 940 11

Va. Soc'y for Human Life, Inc. v. FEC,
263 F.3d 379 (4th Cir. 2001) 12

Veterans for Common Sense v. Shinseki,
644 F.3d 845 (9th Cir. 2011) 11

Veterans for Common Sense v. Shinseki,
678 F.3d 1013 (9th Cir. 2012) 11

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 9

Wash. State Grange,
552 U.S. at 450-51 9

STATUTES

21 U.S.C. § 876(a) 4

18 U.S.C. § 2703(d) 4, 5
18 U.S.C. § 2709(c) 2, 9
18 U.S.C. §§ 3511 ....1, 3, 11
18 U.S.C. §§ 3511(a) 10
18 U.S.C. § 3511(b) 6, 9, 10
18 U.S.C. § 3511(c) 2, 8, 10, 11
5 U.S.C. § 702 11
28 U.S.C. § 2201 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
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27
28

PRELIMINARY STATEMENT

The opposition of petitioner [redacted] or "Petitioner") does little to refute the government's arguments that the two national security letters ("NSLs") served on petitioner comply with applicable law as applied to the facts before the Court. *See* Petitioner's Opposition to Motion to Compel Compliance with NSLs and Reply in Support of Petition to Set Aside NSLs and Nondisclosure Requirements, *filed under seal* (July 3, 2013) (hereinafter "Pet's Opp. Br."). Petitioner again contends that this Court's prior decision in another case, *In re NSL*, No. C 3:11-2173-SI (N.D. Cal. March 14, 2013), renders the NSLs served on petitioner unenforceable. As the Court is well aware, however, the Court stayed enforcement of the Order and injunction in that case pending appeal in light of the "significant constitutional and national security issues at stake." *See In re NSL*, Slip Op. at 24 (quoted in Memorandum in Support of Cross-Petition for Judicial Review and Enforcement of NSLs and in Opposition to the Petition to Set Aside NSLs, *filed under seal* (May 17, 2013) (hereinafter "Resp.'s Br.")). Nothing in the stayed Order and injunction in *In re NSL* warrants granting this petitioner relief that the Court appropriately concluded at the time of its issuance should be stayed pending appeal.

Rather, this Court should follow its recent Order enforcing 19 NSLs in an analogous challenge brought by a different petitioner. *See In re National Security Letters*, No. 3:13-mc-80063 (N.D. Cal. May 28, 2013) (as amended for public release) ("*In re 19 NSLs*"). As in *In re 19 NSLs*, [redacted] petition is properly reviewed as an as-applied challenge to the two NSLs at issue here, which should be judged on "an NSL-by-NSL basis." *Id.* at 2. And, again as in *In re 19 NSLs*, the record in this case justifies enforcement of the NSLs served on petitioner.

Beyond this, the bulk of petitioner's opposition is dedicated to arguing a facial challenge to the NSL statutes that is not properly presented to the Court. As explained in the government's opening brief and elaborated on below, petitioner's facial challenge is beyond the scope of review in this action because the NSL statutes have been constitutionally applied to petitioner and review is limited by 18 U.S.C. § 3511. Petitioner's request for a sweeping injunction, moreover, is overbroad and would trammel the prerogatives of the Second Circuit (which has affirmed the constitutionality of the statute in conjunction with the procedures followed by the

FBI here) in direct contradiction to the law of this Circuit. To the extent petitioner has raised a facial challenge to the statute, any relief in response should be stayed pending appeal, just as it was in *In re NSL*.

Finally, the order recently secured by the FBI in the United States District Court for the Eastern District of Virginia does not obviate the necessity of the government's cross-petition here. *See* Exhibit 1 to the Declaration of Matthew Zimmerman, *submitted* with Pet's Opp. Br. ("E.D. Va. Order"). Having obtained the same information sought by the NSL issued to petitioner by the FBI's Washington Field Office ("WFO NSL"), the FBI has withdrawn the information request portion of that NSL. *See* Government's Notice Regarding Withdrawal of NSL Information Request, filed July 23, 2013. As explained below, however, the national security interests at stake nonetheless require enforcement of the nondisclosure provision of the WFO NSL, and the fact that the government ultimately identified an alternative means to obtain the information does not invalidate the NSL served on petitioner. Moreover, the government continues to seek full enforcement the second NSL at issue in this litigation, served by the Philadelphia Division, ("PHD NSL") as part of a national security investigation into cyber intrusion activity. On the record before the Court, the government has established that it requires, and is entitled to under law, the information still sought by the PHD NSL.

For these reasons, the Court should enter an Order compelling petitioner to comply with the information request in the PHD NSL. The Court should also declare that petitioner is bound by the nondisclosure provisions of 18 U.S.C. § 2709(c), as applied to petitioner here with regard to both the WFO NSL and the PHD NSL. *See* 18 U.S.C. § 3511(c).

ARGUMENT

I. The NSLs Served On Petitioner Comply With the Law.

In the government's cross-petition for enforcement, the Attorney General requests that this Court enforce the PHD NSL as well as the non-disclosure provision of the WFO NSL. Although petitioner seeks to litigate a facial challenge to the constitutionality of the NSL statute, the Court should decline petitioner's invitation to consider the statute's application to other NSLs

not before the Court. Doing so would be unnecessary when [redacted] petition requires and warrants only a narrow application of the law and where the relief petitioner seeks would be inconsistent with the authority on which its petition relies, as well as the Ninth Circuit's controlling precedent.

A. The NSLs served here comply with the law and the Court should review them on an NSL-by-NSL basis.

There is no dispute in this case that the Second Circuit's construction of the NSL statutes, *see John Doe, Inc., v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), is the only manner in which those statutes have been applied to petitioner here. Resp's Br. at 8-9; Classified Declaration of FBI Assistant Director Joseph Demarest ("Demarest Decl."); *cf. In re 19 NSLs*, Slip Op. at 2-3. In light of the government's strict compliance with *Doe*, the Court should review petitioner's challenge on an as-applied basis, as it did with respect to the challenge to the NSLs at issue in *In re 19 NSLs*. There, this Court noted that the question of "[w]hether the challenged nondisclosure provisions are, in fact, facially unconstitutional, will be determined in due course by the Ninth Circuit" by way of the appeal of *In re NSLs* and the holding therein that the NSL statutes are facially invalid. *In re 19 NSLs*, Slip Op. at 2. Accordingly, faced with a petition that, like [redacted] sought "to modify or set aside" individual NSLs pursuant to 18 U.S.C. § 3511, the Court proceeded to "review the arguments and evidence on an NSL-by-NSL basis." *Id.* The Court should take a consistent approach here and review the two [redacted] NSLs on their facts.

Reviewed individually, the nondisclosure requirements imposed on petitioner by the NSLs survive the most stringent constitutional scrutiny. As FBI Assistant Director Joseph Demarest explained, the nondisclosure requirements are necessary here to shield ongoing, authorized investigations and to thereby protect against the danger of revealing national security information to unauthorized persons. *See* Demarest Decl. The nondisclosure requirements therefore manifestly serve a compelling interest. *See* Resp's Br. at 9-10 (*citing, inter alia, Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). And, as limited on the face of the NSLs, the nondisclosure requirement reaches only to the fact the FBI "has sought or obtained access to

information or records," which is carefully tailored to protect the precise information for which Assistant Director Demarest has identified national security harms.[1]

The limited discussion in petitioner's opposition brief related to whether the two NSLs at issue here survive review on an NSL-by-NSL basis focuses on the FBI's ability to pursue alternative means of obtaining the results sought by the NSLs. Pursuant to an application under 18 U.S.C. § 2703(d), the FBI secured a court order from the U.S. District Court in the Eastern District of Virginia on May 24, 2013 requiring [redacted] to produce the same information requested by the WFO NSL (and imposing a non-disclosure requirement comparable to that sought by the WFO NSL). *See* E.D. Va. Order. With court-ordered access to the same information, the FBI then withdrew the information request portion of the WFO NSL on July 23, 2013.

Contrary to Petitioner's suggestion, the FBI's use of this alternative mechanism does not demonstrate that the WFO NSL was not narrowly tailored to the FBI's national security needs. *See* Pet's Opp. Br. at 1-2. When the Washington Field Office chose to use an NSL from among the available options of obtaining the information, it viewed issuance of an NSL -- which is akin to an administrative subpoena -- as the best method to swiftly satisfy its investigative needs. *See FTC v. Anderson*, 631 F.2d 741, 744 (D.C. Cir. 1979) (discussing importance of administrative subpoenas to speedy, efficient investigations). The availability of possible alternatives, however, do not render the FBI's use of an NSL constitutionally suspect any more than the ability of alternatives in a criminal investigation, such as a search warrant, render unconstitutional the use of an administrative subpoena in the same investigation. *See Hell's Angels Motorcycle Corp. v. McKinley*, 354 F.3d 1000 (9th Cir. 2004) (affirming FBI's use of an administrative subpoena pursuant to 21 U.S.C. § 876(a)), *reprinted as amended* 360 F.3d 930 (9th Cir. 2004)).

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[1] As explained previously, revealing a recipient's identity in connection with a matter links a particular electronic communications service provider to a particular NSL served at a particular point in time in a particular geographic area of the United States. A window into the universe of NSLs issued by the FBI would provide a wealth of detailed information to our adversaries, contrary to the structure and intent of the statutory scheme, and would help to facilitate detection and evasion of our intelligence and law-enforcement efforts.

Petitioner's objections and litigation can hardly undo the FBI's *ex ante* conclusion that the typically lengthier process of filing an application with a court under 18 U.S.C. § 2703(d) would not suit its needs and that an NSL was appropriately and narrowly tailored to further the underlying investigation.

Nor does the FBI's withdrawal of the information request portion of the WFO NSL change the analysis of whether the nondisclosure requirement is now tailored to the FBI's compelling interest in nondisclosure. Nondisclosure of the information request remains essential for the reasons set forth in the Special Agent in Charge's certification in the NSL and amplified in Assistant Director Demarest's declaration. *See* Demarest Decl. Indeed, in the E.D. Va. Order, that Court explicitly concluded that revelation of the information sought by the FBI and the Court's order would "seriously jeopardize the ongoing investigation." E.D. Va. Order at 1 (requiring "that [redacted] not disclose the existence of the application of the United States, or the existence of this Order of the Court, to the subscribers . . . or to any other person . . . ").

B. Petitioner Does Not Dispute That the Standards For Enforcement Of the NSLs Are Met.

In the government's cross-petition, the Attorney General seeks enforcement of the two NSLs at issue through an order requiring [redacted] to: 1) comply with the PHD NSL by producing the information requested; and 2) to abide by the nondisclosure provisions in both the WFO and PHD NSLs. Petitioner's response to the cross-petition generally does not dispute the arguments set forth in the government's opening brief. In sum, the government explained the "quite narrow" scope of a judicial inquiry in a petition to enforce agency subpoenas. *See* Resp.'s Br. at 16 (*quoting EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*)). The government then outlined how: (1) the FBI is "authorized to conduct its underlying investigation[s] here;" (2) petitioner is "the proper recipient of NSLs pursuant to § 2709;" (3) "[t]he NSLs served on petitioner comply with all relevant statutory requirements;" and (4) the inquiry is not overbroad or unduly burdensome. Resp's Br. at 17-19; *see Children's Hosp. Med. Ctr.*, 719 F.2d at 1428 (requiring the district court to determine the agency's "authority to investigate," that "procedural requirements have been followed," that the evidence is "relevant

and material to the investigation," and not "overbroad or unduly burdensome."). *See also In re 19 NSLs* (applying these standards).

Of particular importance, the declaration of Assistant Director Demarest, submitted to the Court *ex parte* for its *in camera* review in conjunction with the government's opening brief, fortified the previous certifications by senior FBI officials that the NSLs are necessary to ongoing, authorized national security investigations and national security concerns weigh heavily in favor of enforcing the NSLs. *See* Demarest Decl.; Resp.'s Br. at 17-19. Assistant Director Demarest also explained that the NSLs each request limited, specific information, and "why disclosure of the information could reasonably be expected to damage critical national security interests." *See* Demarest Decl.; Resp.'s Br. at 19-20. Petitioner has not argued that the FBI lacks a compelling need for the requested information, that the FBI has not met the procedural requirements for issuing the NSLs, or that the NSLs are overbroad or unduly burdensome. Moreover, as the government explained it its prior memoranda and as set forth in Assistant Director Demarest's declaration, the government has established that the NSL information requests at issue here satisfy the applicable standards and that the Court should, therefore, enforce them.

C. Enforcement of the PHD NSL and the Nondisclosure Requirement of the WFO NSL Is Both Appropriate and Within the Authority of This Court.

Petitioner's principal argument against enforcement of the NSLs is to posit that such enforcement is procedurally unavailable, either because the Court "has no ability to enforce" the statute during the pendency of the *In re NSL* appeal (and petitioner's own purported facial challenge to the statute) or because the government's cross-petition – specifically authorized by statute, *see* 18 U.S.C. § 3511(c) – is somehow "improper." Pet's Opp. Br. at 17. In doing so, petitioner addresses neither the authority cited in the government's opening brief nor the Court's decision in rejecting the comparable challenge in *In re 19 NSLs*, which, in conjunction with the specific facts pertaining to the NSLs here demonstrate that the Court should order enforcement.

Contrary to petitioner's claim that "[t]he Court cannot elect to enforce the NSLs" during a period in which it "has stayed its earlier injunction," Pet's Opp. Br. at 14, it is beyond cavil that

the purpose of a stay of an injunction pending appeal is to preserve the *status quo*. And here, the *status quo* to be preserved "is a condition not of rest, but of action," in which the NSL statutes are "presumptively constitutional . . . [and] should remain in effect pending a final decision on the merits" by the appellate Court. *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, J., in chambers); *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116-17 (9th Cir. 2008) (*quoting, inter alia*, *Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co.*, 54 F. 730, 741 (C.C.N.D. Ohio 1893) (W.H. Taft, J.).

The government's opening brief discussed how this inherent power of the Court to preserve the *status quo* is exercised to stay injunctions, particularly where "the legal questions are novel, complex, and of public importance." *Bernstein v. Dep't of State*, 974 F. Supp. 1288, 1310 (N.D. Cal. 1997). In *Bernstein*, this Court ruled for a plaintiff on a facial First Amendment challenge, but rejected plaintiff's entreaty for "a permanent injunction against [the government] barring nationwide application" of the laws at issue. *Id. See also Bernstein v. Dep't of State*, Appeal No. 97-16686 (9th Cir. September 22, 1997) (unpublished order granting government's emergency motion to stay district court injunction in its entirety); *Bernstein v. Dep't of State*, No. C 95-0582 MHP, 2004 WL 838163, *2 (N.D. Cal. April 19, 2004) (noting the district court eventually entered summary judgment for the government in *Bernstein* following a regulatory change). This Court likewise recognized that, given the "significant constitutional and national security issues at stake," a stay of injunction against the NSL statutes – thus permitting the government's continued reliance on those statutes when they are applied constitutionally in individual NSLs – is the appropriate course here. *In re NSL*, Slip Op. at 24.

This Court applied these principles when conducting an NSL-by-NSL review in *In re 19 NSLs*. Noting that, as with the petitioner there did not "raise arguments *specific* to the 19 NSLs at issue," and considering the government's showing through classified declarations that the 19 NSLs were properly served and that disclosure of their contents was likely to damage national security interests, the Court ordered that the non-disclosure requirements remain in force, given the pending "review at the Ninth Circuit." *In re 19 NSLs*, Slip Op., at 2. The Court likewise ordered enforcement of the information requests in the 19 NSLs at issue. *Id* (enforcing

17 of 19 NSLs); *In re 19 NSLs*, Order dated May 23, 2013 (enforcing two remaining NSLs). The situation here is comparable: petitioner has not raised any arguments specific to the two NSLs, and Assistant Director Demarest has demonstrated that the appropriate standards are satisfied. For these reasons, the Court may exercise the same authority to preserve the status quo here and order full compliance with the information request in the PHD NSL and compliance with the nondisclosure requirements of the WFO and PHD NSLs.[2]

Petitioner also contends that it is "premature" and "improper" for the government to seek as relief an order compelling compliance with the NSLs, analogizing to a motion to compel civil discovery during the pendency of a motion for a protective order. Pet's Opp. Br. at 17-18. Petitioner's argument misunderstands the permanent relief sought as the object of the government's cross-petition by confusing it with a "respon[se] to the petition" itself. *Id.* at 17. As the government's prior briefing makes clear, its request for enforcement of the NSLs is consistent with its compliance with the modified injunction in *Doe*, which places the "burden of initiating litigation" on the government within approximately 30 days of receipt of notice that the nondisclosure requirement in an NSL is contested. 549 F.3d 861, 879, 885. The government's cross-petition is not a response to [redacted] petition, but to the objection embodied therein.

There is no question that a cross-petition "to compel compliance" is authorized by 18 U.S.C. § 3511(c), and that the government could therefore file a separate action pursuant to the statute seeking to compel petitioner to respond to the NSLs. Moreover, consistent with the Second Circuit's injunction in *Doe*, the government would seek judicial review of the nondisclosure requirements by the Court in some manner. Thus, petitioner's argument that the

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[2] Petitioner also briefly contends that the traditional standards for a stay pending appeal are not met here where the Court has found the statutes facially unconstitutional. *See* Pet's Opp. Br. at 16-17. As the government previously argued, a stay would be appropriate here, just as it was in *In re NSLs*: there are "substantial legal questions" raised by its appeal, the government has a "substantial case on the merits," and absent continued enforcement of NSLs pending outcome of the appeal, there will be irreparable harm to national security and an undermining of the public interest. *See* Resp.'s Br. at 24 (*quoting Leiva-Perez v. Holder*, 640 F.3d 962, 966, 968 (9th Cir. 2011) (*per curiam*)); Demarest Decl.

Attorney General's cross-petition and its request for relief should have been brought as a separate parallel action plainly disregards judicial efficiency and is meritless.[3]

II. A Facial Challenge to the NSL Statutes is Not Before the Court and Provides No Basis to Deny Enforcement of the WFO and PHD NSLs.

A. The Court Should Not Expand its Review of the Constitutionality of the NSL Statutes Beyond The Application of the Two NSLs at Issue to Petitioner.

As the government noted in its opening brief, "as applied challenges are the basic building blocks of constitutional adjudication," because the Court's ability to assess constitutional harms is best informed by the factual context in which a statute is applied. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). For this reason, facial challenges of the sort sought by petitioner are disfavored, particularly by those "to whom a statute may constitutionally be applied." *Parker v. Levy*, 417 U.S. 733, 759 (1974) (internal quotations omitted). In some instances, a Court presented with a First Amendment challenge to a statute may conclude that the statute is impermissibly broad, *New York v. Ferber*, 458 U.S. 747, 769-71 (1982), but courts should nonetheless avoid invoking the overbreadth exception "when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (citations omitted); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (stating that, in a First Amendment facial challenge, "[a]ny inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.").

Here, precisely such a limiting construction has been placed on the challenged statutes in their application to petitioner. As the government has explained at length, the U.S. Court of Appeals for the Second Circuit, in 2008, construed 18 U.S.C. §§ 2709(c) and 3511(b) narrowly to avoid constitutional concerns. *Mukasey*, 549 F.3d 861. Since that time, the FBI's consistent practice – including in the NSLs at issue here – has been to strictly comply with the procedures

[3] Petitioner also suggests that, instead of seeking enforcement of the NSLs, the government should rely on a vague promise that petitioner will "either comply [with the NSLs] or exercise other appropriate statutory remedies" in the future. Pet's Opp. Br. at 18. As with petitioner's suggestion that a cross-petition should be a separate action, petitioner appears to be proposing that the parties present their dispute to the Court in repetitive and sequential litigation rather than all at once.

enunciated in *Doe*. *See* Demarest Decl. The facial constitutionality of the NSL statutes is thus not properly raised by this case, and the Court should therefore not tread more broadly into constitutional law "than is required by the precise facts" of the case. *Wash. State Grange*, 552 U.S. at 450-51; *cf. Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.").[4]

B. Petitioner's Requests for Broader Relief Are Unavailable In This Action, Which Presents Only a Challenge Pursuant to 18 U.S.C. § 3511.

In objecting to the WFO and PHD NSLs, [redacted] petitions the Court "under 18 U.S.C. §§ 3511(a) and (b) for an order setting aside both NSLs." Petition at 1. This statute expressly provides authority for the Court (only) "to modify or set aside" an NSL request "if compliance would be 'unreasonable, oppressive, or otherwise unlawful.'" Pet's Opp. Br. at 4 (*quoting* 18 U.S.C. § 3511(a)). As the government explained in its opening brief, this language expressly and unequivocally limits the relief available to the specific NSLs challenged by Petitioner. *See* Resp's Br. at 11-12. Of particular import is that the statute does not authorize either prospective injunctive or declaratory relief, only the modification or displacement of the particular NSLs at issue. 18 U.S.C. § 3511(a), (b).

Petitioner conflates the statutory provisions prescribing the scope of review with those defining the available relief. *See* Pet's Opp. Br. at 4-5 (suggesting that, because the statute authorizes review of whether the NSL is "unlawful," the language limiting relief to the "modif[ication]" or "set[ting] aside" of an NSL can be ignored). Petitioner's reading, however, is inconsistent with the requirement that courts treat waivers of sovereign immunity narrowly, including as to their limitations on available relief. *See Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"); *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992) (party suing the United States must point to "'an unequivocal

[4] The government has briefed extensively the question of whether the Court should find the NSL statutes facially constitutional and will stand on those arguments here.

waiver of [sovereign] immunity.'"). Petitioner's view that Section 3511 be read to authorize facial invalidation of the statute as relief cannot substitute for the absence of such authority in the text of the statute. *See Lane v. Pena*, 518 U.S. 187, 197 ("a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."); *cf. United States v. Hall*, 269 F.3d 940, 942-43 (applying *Pena* to conclude that the availability of other statutes waiving sovereign immunity as to monetary relief do not authorize monetary relief under a waiver of sovereign immunity for equitable relief).

Petitioner also reaches out to *Marbury v. Madison* for assistance in its claim that the Court's "inherent power" authorizes the broad injunction petitioner seeks. *See* Pet's Opp. Br. at 5 (*citing Marbury*, 5 U.S. 137, 177 (1803)). But *Marbury* does not stand for the proposition that a party may seek constitutional relief untethered to the facts of a case. Rather, *Marbury* illustrates that the correct outcome is a narrower interpretation of available relief, as urged by the government here: "if a law be in opposition to the constitution; if both the law and the constitution apply to *a particular case* . . . the court must determine which of these conflicting rules governs *the case*." *Marbury*, 5 U.S. 137 at 178 (emphasis added).[5] The appropriate scope of review in this action is that set forth in the statute under which it is brought: whether the two NSLs at issue should be "modif[ied] or set aside." 18 U.S.C. § 3511(c).

[5] Petitioner's citation to the Declaratory Judgment Act, 28 U.S.C. § 2201, and to the Administrative Procedure Act, 5 U.S.C. § 702, as described in *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 865-67 (9th Cir. 2011), as alternative bases for the relief it seeks are equally unavailing. Even setting aside the subsequent *en banc* reversal of *Veterans for Common Sense* on jurisdictional grounds, *see Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1037 (9th Cir. 2012) ("The panel opinion . . . 644 F.3d 845 . . . is hereby VACATED and shall not be cited as precedent by or to any court of the Ninth Circuit"), petitioner cannot rely on either of these Acts here because petitioner's pleadings sought relief *only* pursuant to 18 U.S.C. § 3511. *See* Petition to Set Aside National Security Letters and Nondisclosure Requirements Imposed Therein at 1.

C. Under Applicable Ninth Circuit Law, This Court Should Avoid Interference With the Second Circuit Precedent In *Doe*.

The Court should reject petitioner's invitation to grant improper relief that would, contrary to the law of this Circuit, interfere with the law of other Circuits. As discussed in the government's prior briefing, the Second Circuit's modification of a nationwide injunction in *Doe* is settled law in that Circuit, and under the law of this Circuit, this Court should not enter relief that would "cause substantial interference with the established judicial pronouncements of [other] circuits" or the "sovereign[]" prerogatives of other courts. *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-73 (9th Cir. 2008). *See also Va. Soc'y for Human Life, Inc. v. FEC*, 263 F. 3d 379, 393 (4th Cir. 2001) (in First Amendment facial overbreadth challenge, holding that a district court "abused its discretion by issuing a nationwide injunction . . . prevent[ing] . . . enforce[ment] against any party anywhere in the United States . . . [and] encroach[ing] on the ability of other circuits to consider the constitutionality of" the challenged rule."). The nationwide injunction against all NSLs sought by petitioner here would be inconsistent with "the law of [the Second Circuit's] geographical area," and would therefore compromise the "[p]rinciples of comity" essential to the smooth functioning of our judicial system. *Id.* For this reason, this Court should follow *AMC Ent'mt* and provide relief no broader than necessary. *See Fox Television Stations, Inc. v. BarryDiller Content Systems, PLC*, --- F. Supp. 2d ---, 41 Media L. Rep. 1515 (C.D. Cal. Dec. 27, 2012) (applying *AMC Ent'mt* to hold that "Courts should not issue nationwide injunctions where the injunction would not issue under the law of another circuit," and limiting its injunction to the Ninth Circuit); *Bernstein*, 974 F. Supp. 2d 1310 (appropriate scope of injunction is "no broader than necessary.").

Disregarding this controlling precedent, petitioner's initial response is to dismiss comity altogether by characterizing the Second Circuit's opinion in *Doe* as "an impermissible advisory opinion." Pet's Opp. Br. at 11. But the *Doe* Court's partial affirmance, partial reversal, and remand in that case for the government "to sustain its burden of proof and satisfy the constitutional standards . . . outlined" is a "pronouncement [that] is the law of that geographical

area" and which must be respected under *AMC Entm't*. *See Doe*, 549 F.3d at 885; *AMC Entm't*, 549 F.3d 760, 772.

Similarly, Petitioner's disagreement with the logic of *AMC Entm't* does not undermine its status as binding and applicable precedent. Petitioner objects to the Ninth Circuit's analysis that "[t]he courts do not require an agency of the United States to accept an adverse determination . . . by any of the Circuit Courts of Appeals as binding on the agency for all similar cases throughout the United States." 549 F.3d at 771-72. Complaining that this is an invitation for "the government [to] engage[] in forum shopping," Pet's Opp. Br. at 13, petitioner would have this Court disregard both the plain terms and the logic of the Ninth Circuit's decision, which indeed evaluated the risk of forum shopping and concluded that petitioner's approach would impose the true risk. *See AMC Entm't*, 549 F.3d at 773 (observing that, for courts to ignore circuit geography would be to powerfully "encourage forum shopping"). Thus, the possibility that petitioner may be subject to enforcement of the law elsewhere, including in the Second Circuit, is explicitly contemplated by the applicable precedent and provides no reason for this Court to enter an injunction that would be "in direct conflict with the [Second] Circuit's precedent." *Id.*

Under these circumstances, as in *In re 19 NSLs*, the Court should affirm the constitutionality and enforceability of the two NSLs at issue and reject petitioner's unwarranted requests for broader relief.

CONCLUSION

There is no reason in this case to deny the FBI information lawfully sought as part of ongoing, authorized national security investigations or to subject the United States to the harms of disclosure of the FBI's information requests. In light of the FBI's adoption of and consistent compliance with the constitutional procedures articulated by the Second Circuit in *Doe v. Mukasey* in the NSLs at issue here, the Court should grant the Attorney General's cross-petition and enforce the NSL information request in the PHD NSL and non-disclosure requirements in the WFO and PHD NSLs.

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Respectfully submitted,

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