NOS. 13-15957, 13-16731

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNDER SEAL,

PETITIONER-APPELLEE (No. 13-15957),
PETITIONER-APPELLANT (No. 13-16731),

v.

ERIC H. HOLDER, JR., Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and FEDERAL BUREAU OF INVESTIGATION,

RESPONDENT-APPELLANTS (No. 13-15957),
RESPONDENT-APPELLEES (NO. 13-16731)

On Appeal from the United States District Court
for the Northern District of California
Case Nos. 11-cv-2173 SI, 13-mc-80089 SI
Honorable Susan Illston, District Judge

APPELLEE UNDER SEAL'S ANSWERING BRIEF IN CASE NO. 13-15957;

APPELLANT UNDER SEAL'S OPENING BRIEF IN CASE NO. 13-16731

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Ninth Circuit Rules of Appellate Procedure, Petitioner-Appellant-Appellee makes the following disclosure: [redacted] Petitioner-Appellant-Appellee [redacted]

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INTRODUCTION

> "The teaching of our cases is that ... only a judicial determination in an adversary proceeding [of the lawfulness of a prior restraint] ensures the necessary sensitivity to freedom of expression..."

Freedman v. Maryland, 380 U.S. 51, 58 (1965).

The statutes governing National Security Letters ("NSLs"), 18 U.S.C. §§ 2709, 3511 (hereinafter collectively the "NSL statute"), empower the FBI, without prior judicial authorization, to both demand customer records directly from Internet and telecommunication providers and to issue permanent gag orders that prevent the recipients from disclosing anything about the government's demand.

This unprecedented grant of authority to the FBI is unconstitutional on several grounds. The district court, like the Second Circuit before it, correctly held that the power to issue such gag orders offends the First Amendment because it authorizes the FBI to directly impose content-based prior restraints on speech and then insulates that Executive action from any kind of meaningful judicial review. Similarly, the statute authorizes the FBI to acquire potentially First Amendment protected information from NSL recipients without any obligation for a court to evaluate whether such actions are warranted. Whatever the scope of Congress' constitutional authority to grant investigatory powers to the FBI, it may not go so far as to effectively prevent both the courts and the individual whose First

Amendment rights may be implicated from challenging the FBI's exercise of power.

The district court's decision striking down 18 U.S.C. §§ 2709(c), 3511(b)(2) and (b)(3) as unconstitutional—and enjoining the future use of NSLs and enforcement of NSL gags—should be affirmed.

STATEMENT OF JURISDICTION

Petitioner-Appellee-Appellant "Under Seal" (hereafter "Appellee") agrees with the government's statement of jurisdiction.

STATEMENT OF ISSUES

1. Whether 18 U.S.C. § 2709(c), which allows the FBI to gag the recipient of a National Security Letter without any judicial determination, violates the First Amendment because it lacks the procedural protections for prior restraints required by *Freedman v. Maryland*, 380 U.S. 51 (1965).
2. Whether section 2709(c)'s nondisclosure provision violates the First Amendment because it is a content-based restriction that is not narrowly tailored and does not meet strict scrutiny.
3. Whether the standards of judicial review in 18 U.S.C. § 3511(b) for NSL nondisclosure orders are excessively deferential and therefore violate separation of powers and due process.

4. Whether section 2709(c) violates the First Amendment because it authorizes the issuance of prior restraints that are not necessary to further a governmental interest of the highest magnitude. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

5. Whether section 2709(c) violates the First Amendment because it fails to set forth narrow, objective and definite standards guiding the FBI's discretion as required by *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

6. Whether section 2709(c) violates the First Amendment because it authorizes the FBI to obtain information about potentially protected anonymous association and expression without any requirement for prior court approval.

7. Whether the district court abused its discretion in enjoining the FBI from issuing NSLs or enforcing NSL nondisclosure orders given the unconstitutionality of the NSL statute.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

This is a consolidated appeal of two related actions involving Appellee. In the first action, the district court struck down the NSL statute as facially unconstitutional, staying enforcement of its order pending this appeal. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013) (ER 7-30). The second action

was a subsequent petition by Appellee to set aside additional NSLs; it was denied by the district court, which opted to defer future rulings on the facial unconstitutionality of the NSL statute until this Court had reviewed its initial decision. ER 3.

A. Note Regarding This Brief and the Brief Filed in Related Case No. 13-16732.

Also filed today is the opening appellate brief in related case No. 13-16732, filed by undersigned counsel on behalf of another NSL recipient who brought a similar challenge to the same NSL statute. While the cases raise most of the same issues (and would ordinarily be consolidated), the challenged NSL provisions at issue also prevent the respective petitioners from learning each other's identity or any information about their respective cases; for similar reasons, the government has not consented to the filing of a combined brief. Accordingly, to streamline the process as best possible, undersigned counsel is today filing nearly identical briefs on behalf of each client but separately and under seal in each case. The only material differences between the briefs, aside from the discussion of each petitioner's specific facts and procedural history, is that Appellee here additionally affirmatively challenges the NSL "compelled production" authority on First and Fifth Amendment grounds and defends the scope of the injunction issued by the district court. *See* pages 53-58, 61-65.

B. Appellee's

Appellee is a provider of long distance and mobile phone services.

C. The District Court's Decision Granting Appellee's Petition in 13-15957.

In 2011, Appellee received a National Security Letter from the FBI directing Appellee "to provide to the Federal Bureau of Investigation (FBI) all subscriber information, limited to name, address, and length of service, for all services provided to or accounts held by the named subscriber and/or subscriber of the

named account" (the "15957 NSL"). ER 115, 117. The NSL prohibited Appellee from disclosing information about the NSL or its petition to Appellee's affected customer, to most of Appellee's employees and staff, to the press, to members of the public, and to members of Congress.

On May 2, 2011, Appellee filed a petition asking the district court to set aside the NSL, arguing that the statute was unconstitutional on its face and as applied. Nearly two years later, on March 14, 2013, the district court granted the petition to set aside the 15957 NSL declaring the statute to be facially unconstitutional. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1074-75. The court held that the gag provision of the statute was unconstitutional because it failed to comport with the prior restraint procedural safeguards identified by the Supreme Court in *Freedman v. Maryland* by failing to require the government to initiate judicial review promptly. *Id.* The district court also found that the FBI's gag authority under the statute was a content-based restriction that failed strict scrutiny as "the government has *not* shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs," *id.* at 1076, and "because [the review provisions] ensure that nondisclosure continues longer than necessary to serve the national security interests at stake." *Id.* Third, the court struck down the statutorily mandated standard of review of the gag provision found in 18 U.S.C. § 3511(b) and (c) on separation of powers and First Amendment

grounds, holding that "the statute impermissibly attempts to circumscribe a court's ability to review the necessity of nondisclosure orders." *Id.* at 1077. Fourth, the court found that the gag provision was not severable from the statute and that therefore both the gag authority and the underlying authority to issue NSLs must be struck down. *Id.* at 1081. The court ultimately enjoined the government "from issuing NSLs under § 2709 or from enforcing the nondisclosure provision in this or any other case," staying the injunction pending this appeal. *Id.*

D. The District Court's Decision Denying Appellee's Petition in 13-16731.

In [redacted] 2013, [redacted], Appellee received two additional NSLs from the FBI (collectively, the "16731 NSLs"). ER 74. The NSLs demanded subscriber records regarding certain customers and included a similar nondisclosure requirement to the one included with the 15957 NSL, preventing it from discussing the demand publicly. *Id.*

Appellee thereafter filed a second petition, asking the same district court to set aside these newer NSLs on the same grounds. The district court, proceeding with caution, abstained from applying its prior ruling to Appellee's new petition, stating: "Whether the challenged nondisclosure provisions are, in fact, facially unconstitutional will be determined in due course by the Ninth Circuit." ER 2.

The Court denied Appellee's petition and granted the government's cross-petition to enforce the NSLs. ER 5.

E. The National Security Letter Statutory Framework.

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 on its own, in secret and without any prior judicial oversight, customer records as part of international terrorism and counterintelligence investigations.

The first NSL statutes were passed in 1986, 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) (1986); 18 U.S.C. § 2709 (1986). Today, five statutory provisions authorize the FBI to issue NSLs to a range of recipients to obtain a variety of types of user information.[2]

Section 2709 grants two primary powers to the FBI: (1) authority on the FBI's own certification to compel the production of certain customer information it decides is relevant to a national security investigation; and (2) authority to directly

[2] *See* 18 U.S.C. § 2709 (telecommunications providers), 12 U.S.C. § 3414 (financial institutions), 15 U.S.C. §§ 1681u, v (consumer credit agencies), and 50 U.S.C. § 3162 (financial institutions, consumer credit agencies, travel agencies).

impose indefinite gags on NSL recipients, preventing them from publicly disclosing anything about the NSL, even that they have received one. Both powers are currently exercised without any mandatory court oversight, with only limited oversight coming if an NSL recipient—*i.e.*, the service provider and not the target—petitions a district court for review.

Prior to the passage of the USA PATRIOT Act in 2001, NSL statutory authority, while still suffering from the fundamental infirmities discussed here, was relatively limited in scope, only allowing issuance by senior FBI officials and only upon a self-certification 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 broadened the NSL statute. First, NSLs could be issued by a Special Agent in Charge of any FBI field office. 18 U.S.C. § 2709(b) (2001). Second, rather than being available for the compelled production of records related to foreign powers or their agents, the revised statute allows the collection of any records "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." *Id.* Third, instead of self-certifying that "specific and articulable" facts

exist, the Special Agent need only self-certify that the information is "relevant" to an authorized investigation. *Id.*[3]

No explicit statutory mechanism by which a recipient could challenge the FBI's NSL authority existed until the NSL statutes were amended in 2006. Newly-added 18 U.S.C. § 3511(a) authorized petitions by NSL recipients to modify or set aside an underlying request for records under section 2709 "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(b) authorizes petitions to modify or set aside a gag under section 2709 under certain conditions and under a standard requiring deference to the FBI's certifications. 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. *See* 18 U.S.C. §§ 3511(b)(2), (3).

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[3] Not surprisingly, FBI NSL demands surged from about 8,500 NSL requests in 2000, the year before NSL requirements were loosened by the USA PATRIOT Act, to more than 56,000 NSL requests in 2004 alone. Between 2003 and 2006, the FBI issued a total of 191,180 NSL requests. By 2006, 60% of these requests related to investigations of U.S. persons, and "the overwhelming majority" sought telephone billing records, electronic and phone subscriber information, and electronic communications transactional records. Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* 120 (2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf ("2007 OIG Report"); Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* 107-108 (2008), *available at* http://www.usdoj.gov/oig/special/s0803b/final.pdf ("2008 OIG Report").

F. How NSLs Fit into the Panoply of Investigative Tools Available to the FBI and Law Enforcement.

The FBI and other law enforcement and intelligence officials have a broad range of alternative investigative tools permitting them to obtain the same records the FBI sought here, such as grand jury subpoenas, court orders under 18 U.S.C. § 2703(d), administrative subpoenas, criminal trial subpoenas, and (as the government maintains) orders issued under Section 215 of the PATRIOT Act, 50 U.S.C. § 1861. Indeed, the government has demonstrated the viability of such alternatives already, as discussed below at 40-41.

The fundamental difference between NSLs and these alternatives is that "NSLs such as the ones authorized by § 2709 provide fewer procedural protections to the recipient than any other information-gathering technique the Government employs to procure [similar] information . . . ." *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 484-491 (S.D.N.Y. 2004) (describing in detail the structural differences between NSLs and other processes), *vacated sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006). *See also Liberty and Security in a Changing World: Report and Recommendations from the President's Review Group on Intelligence and Communications Technologies* 91-93 (2013) ("President's Review Grp.")[4] (noting that other investigative tools have independent judicial check and/or allow a target

[4] *Available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

to challenge them in court). Of all similar investigatory tools relied upon by the FBI to investigate criminal and national security-related matters by means of obtaining customer records from third party intermediaries, NSL statutes alone create a process whereby the Executive can self-issue both demands for customer information and accompanying nondisclosure requirements without any prior judicial involvement or giving the ultimate target of an investigation the ability to contest the underlying information request him or herself.

G. The FBI's History of Using (and Misusing) NSLs.

Appellee'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 USA PATRIOT Act in 2006, Congress directed the Department of Justice Inspector General ("IG") to investigate and report on the FBI's use of NSLs. In three reports issued between 2007 and 2010, the IG documented the agency's systematic and extensive misuse of NSLs.[5] The Inspector General concluded that, left to itself to ensure that legal limits were respected, "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." 2007 OIG Report 124.

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[5] 2007 OIG Report; 2008 OIG Report; Department of Justice, Office of Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* (2010), *available at* http://www.justice.gov/oig/special/s1001r.pdf ("2010 OIG Report").

The IG reports and Congressional testimony demonstrated severe, and largely unreported, problems:

- Between 2003 and 2006, the FBI's intelligence violations included improperly authorized NSLs, factual misstatements in the NSLs, improper requests under NSL statutes, and unauthorized information collection through NSLs. 2007 OIG Report 66-67; 2008 OIG Report 138-143; 2010 OIG Report 2-4.

- The FBI's improper practices included requests for information based on First Amendment protected activity. 2010 OIG Report 6, 89-122.

- The FBI has used "after-the-fact," blanket NSLs to "cover" original, informal, and indeed illegal requests for information. The OIG noted these blanket NSLs did "not cure any prior violations" and were "ill-conceived, legally deficient, contrary to FBI policy, and poorly executed." 2010 OIG Report 168, 184.

- Despite a requirement to report all violations, the OIG's review of 2003-05 investigative files at four FBI field offices revealed that 22% contained one or more possible violations that had never been reported, representing an overall possible violation rate of 7.5 percent. 2007 OIG Report 78, 84; 2008 OIG Report 76.

- 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 without the knowledge or approval of authorized NSL signers and

without any determination that the telephone numbers were relevant to authorized national security investigations. 2010 OIG Report at 60, 75-76. Between 2004 and 2009, this method was used to review 10,070 telephone numbers at a single communications service provider. *Id.* at 61.

- Between March 11, 2003, and December 16, 2005, at least 739 NSLs—requesting approximately 3,000 telephone numbers—were signed by unauthorized personnel. 2010 OIG Report 2.

- After violations had been brought to the FBI's attention, the IG expressed concern that the FBI's attitude toward these matters "diminishes their seriousness and fosters a perception that compliance with FBI policies governing the FBI's use of its NSL authorities is annoying paperwork." 2008 OIG Report 100.

- The OIG reports linked much of the FBI's NSL abuse problem to a lack of oversight, both outside and within the agency. 2010 OIG Report 213-14, 219, 279-85. The OIG determined in 2007 that the FBI failed to report as required 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 indicate that telecommunications employees who processed NSLs did not request separate legal process for community-of-interest records requests, the scope of which expanded exponentially to include people

with whom contacts of targets were themselves in contact. 2010 OIG Report 59. The reports also indicate that in over half of all NSL violations submitted to the Intelligence Oversight Board, the NSL recipient either provided more information than requested or turned over information without receiving a valid legal justification from the FBI. *Id.* at 70.

The FBI's NSL practices continue to be of matter of public concern. In December 2013, the President's Review Group on Intelligence and Communications Technologies noted that the FBI continues to issue an average of 60 NSLs per day. *See* President's Review Grp. at 93. The Review Group recommended several limitations on the Bureau's NSL authority to better protect the privacy and civil liberties of Americans. These included restrictions on the issuance of and application of the non-disclosure provision of NSLs; a requirement for judicial approval prior to the issuance of an NSL, absent "genuine emergency;" and public reporting—both by the government and NSL recipients—of the number of requests made, the type of information produced, and the number of individuals whose records have been requested. *Id.* at 26, 92-93, 122-23, 128.

A wide and growing range of telecommunications and technology companies have echoed the concerns of the Review Group,[6] indicating a growing

[6] *See, e.g., The Principles*, Reform Government Surveillance, http://www.reformgovernmentsurveillance.com/ (coalition formed by AOL, Apple, Facebook, Google, LinkedIn, Microsoft, Twitter, and Yahoo calling on the

frustration at their inability to communicate to their customers how often the government orders it to disclose customer information and on what legal basis.[7]

In its opening brief, the government asserts that it has "scrupulously" followed the suggestions for self-imposed restrictions outlined by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), since that decision was issued, and that the statutory requirement of FBI self-certification "ensures that these nondisclosure requirements are not being imposed unnecessarily." Government's Opening Brief at 21, 41-42 ("Gov. Brief"). However, the government has not presented any evidence to support its contention about the "necessity" of NSLs it issued since the *Mukasey* decision or their legality and no subsequent independent investigation of the FBI's use of NSLs has occurred.

H. The Second Circuit's *Doe v. Mukasey* Decision.

The district court's conclusion that the NSL statute is unconstitutional is in fact in agreement with the Second Circuit's similar conclusion in *Doe v. Mukasey*,

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government to "allow companies to publish the number and nature of government demands for user information").

[7] In response to petitions in the Foreign Intelligence Surveillance Court ("FISA Ct" or "FISC") by several technology companies, the Justice Department recently announced a voluntary agreement that will allow these "and other similarly situated companies" to report either (1) the number of NSLs they have received in bands of 1000, starting with 0-999 or (2) the number of all "national security process [sic] received" in bands of 250. *See* Gov. Notice, Nos. Misc 13-03, 13-04, 13-05, 13-06, 13-07 (FISA Ct. Jan. 27, 2014), available at http://www.uscourts.gov/uscourts/courts/fisc/misc-13-03-04-05-06-07-notice-140127.pdf.

the only decision in which a circuit court has considered the constitutionality of the NSL statute. The *Mukasey* court first found that the gag order provisions constituted prior restraints, although not of the "typical" variety, and were content based. *Mukasey*, 549 F.3d at 876. Second, the *Mukasey* court determined that the NSL statute was subject to the procedural requirements of *Freedman v. Maryland* and that the statute failed to satisfy those requirements because it does not obligate the government to initiate government review of NSL nondisclosure orders. *Id.* at 877-81. The *Mukasey* court also noted that (unlike in this case) "the Government has conceded that strict scrutiny is the applicable standard." *Id.* at 878. Finally, like the district court here, the Second Circuit held that the statutory standards of review "are unconstitutional to the extent that, upon such review, a governmental official's certification that disclosure may endanger the national security of the United States or interfere with diplomatic relations is treated as conclusive." *Id.* at 884. As discussed further below, the *Mukasey* court went on to include an advisory opinion about whether future hypothetical changes in government conduct might remedy the statute's unconstitutionality, a proposal which the district court here rejected. But the Second Circuit unequivocally concluded that the nondisclosure provisions of NSL statute as currently written are unconstitutional.

STANDARD OF REVIEW

This Court's review of a district court's ruling on a permanent injunction involves analysis of "factual, legal, and discretionary components." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Factual findings are reviewed for "clear error." *Lemons v. Bradbury*, 538 F.3d 1098, 1102 (9th Cir. 2008). Legal conclusions are reviewed de novo. *Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 840 (9th Cir. 2005). A district court's decision to grant a permanent injunction is reviewed for abuse of discretion. *Internet Specialties W., Inc. v. Milon–DiGiorgio Enters., Inc.,* 559 F.3d 985, 993 (9th Cir. 2009).

SUMMARY OF ARGUMENT

The district court's judgment decision in No. 13-15957 finding the NSL statute unconstitutional should be affirmed. The NSL gag orders are unconstitutional prior restraints on speech. Moreover, the underlying authority to compel the production of potentially protected customer records without any court oversight violates the First Amendment as well as related procedural due process requirements in that they remove the traditional checks on Executive intrusion into First Amendment protected information—*i.e.*, the ability of the interested party whose information is sought to challenge the demand directly or at minimum the

need for prior court approval. It also correctly determined that the statute improperly constrained the appropriate judicial review standard.

The district court was correct in declaring the statute to be facially unconstitutional and non-severable. The district court was also correct in determining that the facial constitutional deficiencies in the NSL process could not be cured by a voluntary "reciprocal notice" procedure as the statute did not require it; in any event, the voluntary procedure still would not solve the First Amendment procedural flaws in the statute. Moreover, the district court's subsequent inconsistent decision in No. 13-16731 to forego applying its prior holding that the NSL statute is facially unconstitutional cannot be sustained. This Court should affirm the district court's holding in No. 13-15957, reverse the district court's holding in No. 13-16731, and uphold the injunction barring the FBI from issuing future NSLs or enforcing any NSL gag order.

ARGUMENT

I. THE NSL STATUTE'S GAG ORDER PROVISION, SECTION 2709(c), VIOLATES THE FIRST AMENDMENT BECAUSE IT LACKS THE PROCEDURES REQUIRED FOR PRIOR RESTRAINTS.

A. The NSL Statute's Gag Order Provision Authorizes Prior Restraints.

A prior restraint on free speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559.

For this reason, the Supreme Court has imposed stringent procedural and substantive restrictions on them.

The statute's gag order provision authorizes the government to prevent NSL recipients from disclosing that they have received an NSL or anything about their interaction with the government. Because the statute prevents recipients from speaking in the first instance rather than imposing a penalty after they have spoken, the gags are prior restraints. *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' . . . [O]rders that actually forbid speech activities . . . are classic examples of prior restraints.") (citation omitted, emphasis original).

The government argues that the gag orders are not prior restraints but "are instead, a common type of regulation that subjects a very narrow type of disclosure to sanction after the fact." Gov. Brief at 49. The government is wrong. The statute explicitly authorizes the FBI to require that an NSL recipient not speak. 18 U.S.C. § 2709(c)(1) ("no [NSL recipient] . . . shall disclose . . . that the Federal Bureau of Investigation has sought or obtained access to information or records under this section"); *see also In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1071; *Mukasey*, 549 F.3d at 876. Thus, although the NSL gag orders allow for

punishment "after the fact," they undeniably take effect before the act of speaking, which is the touchstone in assessing whether a penalty on speech is a prior restraint. Indeed, the NSL issued to Appellee clearly states that "Title 18 U.S.C. § 2709(c) (1) and (2) prohibits you, or any officer, employee, or agent of yours, from disclosing this letter . . . ." ER 118.

Gag orders are routinely treated as prior restraints. *See, e.g., Nebraska Press,* 427 U.S. at 529 (analyzing temporary gag order for purposes of empanelling a jury to be a prior restraint). Accordingly, prior restraints authorized by section 2709(c) must satisfy both the procedural and substantive requirements mandated by the First Amendment. They satisfy neither.

B. The Gag Order Provision Is Unconstitutional Because It Authorizes Prior Restraints Without Including Any of the Procedural Protections Mandated by the First Amendment.

The district court correctly held that section 2709(c) lacks the procedural protections required of prior restraints set forth by the Supreme Court in *Freedman v. Maryland* and is thus facially unconstitutional. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1074-75. In *Freedman v. Maryland*, the Supreme Court stated that any administrative scheme to require governmental permission before one can speak must have built into it three core procedural protections that emphasize the necessity of judicial review: (1) any restraint imposed prior to judicial review must be limited to "a specified brief period"; (2) any 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. *Freedman*, 380 U.S. at 58-59.

Thus a statute must obligate the government to seek court approval for any administratively-imposed gag order, it must obligate the government to do so promptly if it wants the gag to be in effect prior to judicial review, and it must guarantee that the court will issue a final determination promptly. *Id.*; *see also Mukasey*, 549 F.3d at 879; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002).

Every court that has evaluated the NSL statute has faulted it for failing to satisfy the *Freedman* procedures, including the Second Circuit in *Doe v. Mukasey*. Specifically, the Second Circuit determined that by allowing the executive branch to unilaterally gag NSL recipients "who had no interaction with the Government until the Government imposed its nondisclosure requirement upon it," the NSL statute must meet the procedural requirements set forth in *Freedman v. Maryland*. *Mukasey*, 549 F.3d at 877-81. The district court here independently reached the same conclusion. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1073-74.

The government's arguments that *Freedman* does not apply and that the statute may be upheld even if its requirements are not met are incorrect. The

government first fundamentally misconstrues the nature of the Supreme Court's *Freedman* holding, confusing the impact of a statute failing to comply with the *Freedman* procedural requirements with the separate approach to evaluating overbreadth challenges. *See* Gov. Brief at 44-48. In order to make a facial challenge, a *Freedman* challenger need not demonstrate that there "are no conceivable set of facts where the application of the particular government regulation might or would be constitutional," *United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000) (citing *Freedman*, 380 U.S. at 58-60), but rather that the statute lacks "adequate procedural safeguards necessary to ensure against undue suppression of protected speech." *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998); *see also MacDonald v. Safir*, 26 F. Supp. 2d 664, 674 n.14 (S.D.N.Y. 1998) (noting that the overbreadth analysis established in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and its progeny "is simply not an accurate statement of the law with respect to *Freedman* challenges."). The *Freedman* procedural requirements are binary—they either exist on a statute's face or they do not—and their absence cannot be cured through case-by-case analysis and by voluntary compliance with nonstatuory limitations.

The government can cite no authority to support its novel *Freedman* contention—that a prior restraint statute that fails to incorporate the *Freedman* requirements can be upheld because challengers cannot additionally satisfy the

burdens of an overbreadth challenge—because no other such authority exists. This is because the *Freedman* Court was concerned about different harms than overbreadth, chiefly ensuring the prompt, affirmative role of the judiciary when administrative prior restraints are threatened. Indeed, *Freedman* itself directly contradicts the government's argument. The *Freedman* Court explicitly stated that the procedural requirements it articulated were separate from and in addition to those related to First Amendment overbreadth challenges: "[W]e have no occasion to decide whether the vice of overbroadness infects the Maryland statute . . . ." *Freedman*, 380 U.S. at 56. Notwithstanding the fact that the Maryland statute was not found to be overbroad, the *Freedman* Court struck it down based on its failure to include the necessary procedural requirements.

The government next makes the unsupportable claim that *Freedman* does not apply because the concerns underlying other speech licensing schemes are not present here. Gov. Brief. at 48-51. The government claims that, unlike the government film evaluators in *Freedman*, the FBI is not biased toward issuing gag orders. But the OIG reports indicate that the FBI issues gag orders nearly 97% of the time it issued NSLs. 2008 OIG Report 124. And throughout its brief the government acknowledges that most of its investigations "must be carried out in secrecy if they are to succeed." Gov. Brief at 8. *See also, e.g.*, ER 103 (Redacted, Unclassified Declaration of FBI Assistant Director Mark F. Giuliano ("Giuliano

Decl.") ¶ 9). Clearly, the FBI prefers secrecy. And although there are occasions in which such secrecy may be required, in order to ensure that the FBI's preference is not substituted for an actual need for secrecy in each case where it imposes a gag, *Freedman* requires that nondisclosure decision not be the FBI's alone.

The government finally asserts that *Freedman* does not apply because the gag the FBI issues only reaches "information provided by the Government." Gov. Brief at 50. This is false: the gag prevents the recipient from discussing more than the fact of the NSL; it cannot describe its own experience in receiving and responding to the NSL, and its objections to that experience. But, even if it were true that the gag only reached information provided in the NSL itself, this would be irrelevant. Unlike the cases in which *Freedman* has been found inapplicable, as both the district court and the *Mukasey* court observed, the gag prevents the NSL recipient from discussing a circumstance that has been thrust upon it unwillingly. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1071-72; *Mukasey*, 549 F.3d at 877.

The *Freedman* requirements apply in full to the NSL statute.

1. The NSL Statute Violates the First Prong of the *Freedman* Test Because It Neither Assures That Judicial Review of NSL Gags Takes Place Nor Limits Pre-Review Gags to "a Specific Brief Period."

The gag order scheme fails *Freedman*'s first prong—that any restraint imposed prior to judicial review must be limited to "a specified brief period, to either issue a license or go to court to restrain" the speech in question. 380 U.S.

at 59. This limitation is important because without it the government can use the unlimited duration of the gag to effectively avoid judicial review by imposing the burden of seeking judicial review on the recipient.

The NSL statute permits an imposition of a gag of indefinite duration, with no requirement whatsoever that the government ever seek court approval, something the government concedes. Gov. Brief at 53 ("this latter mechanism is not contained within the four corners of the statute"). This is inconsistent with the *Freedman* Court's admonition that a potential speaker must be "assured" by the statute that a censor "*will*, within a *specified brief period*, either issue a license or go to court to restrain" the speech at issue is wholly absent from the NSL statute. *Freedman*, 380 U.S. at 59 (emphasis added). *See also In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1073.

2. The NSL Statute Violates the Second Prong of the Freedman Test Because It Does Not Assure a Prompt Final Judicial Decision.

The gag order scheme also fails *Freedman*'s second prong—that the scheme in question "must . . . assure a prompt final judicial decision." *Freedman*, 380 U.S. at 59. This second requirement reflects the Supreme Court's concern that "unduly onerous" procedural requirements that drive up the time, cost, and uncertainty of judicial review of speech licensing schemes discourage the exercise of protected First Amendment rights. *Id.* at 58.

A lengthy and protracted process of judicial determination, which leaves the gag order in place in the interim and potentially comes after the value of speaking about the issues gagged has diminished, "would lend an effect of finality to the censor's determination" that the gag order is valid. *Id.* As the Supreme Court has recognized in a variety of contexts, the deprivation of First Amendment rights, for even a limited period of time, causes a significant constitutional injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).[8]

The Supreme Court has not specified precisely how quickly a final judicial decision must come, but it did conclude that it had to be faster than the four months for an initial judicial review and six months for appellate review as had occurred in *Freedman.* 380 U.S. at 55, 61. By contrast, in the current case, with no statutory limitations to the contrary, the district court issued its opinion over 15 months after the hearing on the petition. Moreover, notwithstanding that order, the gag remains in effect, 34 months and counting since the filing of the petition. Whatever constitutes the outer counters of a "prompt" final judicial determination, such limits must be both brief and finite. The NSL statute provides neither.[9]

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[8] The government incorrectly states that Appellee has not alleged a violation of the second prong, but that is not true; Appellee expressly challenged it in No. 13-16731. SER 59.

[9] The Second Circuit in *Mukasey* properly recognized that the NSL statute did not contain any such limitation and opined that to be constitutional any judicial proceeding evaluating the appropriateness of an NSL "would have to be concluded within a prescribed time, perhaps 60 days." *Mukasey*, 549 F.3d at 879.

3. The NSL Statute Violates the Third Prong of the *Freedman* Test Because It Does Not Place the Burden of Going to Court and the Burden of Proof on the Government.

The NSL statute also violates the third *Freedman* prong—that "the burden of going to court to suppress speech and the burden of proof in court must be placed on the government"—in two ways. *See Mukasey*, 549 F.3d at 871 (citing *Freedman*, 380 U.S. at 58-59).

First, instead of requiring the government to go to court to seek permission to suppress speech, section 2709(c) requires the recipient of an NSL to initiate judicial review by petitioning for an order modifying or setting aside the nondisclosure requirement. 18 U.S.C. § 3511(b).

Second, the NSL statute fails to place the burden of justifying the need for the gag order on the government when the matter is actually brought to court; indeed, the statute deprives that court of any meaningful authority to exercise its constitutional oversight duties. Instead, a court may only modify the nondisclosure requirement if it finds there is "no reason to believe that disclosure may endanger the national security of the United States, interfere with a[n] . . . investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. § 3511(b)(2). And where senior FBI or DOJ officials certify the need for the gag order, the court has even less discretion: a court is not

permitted to evaluate the facts, but instead is required to blindly accept the FBI's representations.[10]

As the district court held below, these attempts to shift the burden to the NSL recipient violates the third *Freedman* prong. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1077 ("as written, the statute impermissibly attempts to circumscribe a court's ability to review the necessity of nondisclosure orders."); *see also Mukasey*, 549 F.3d at 883.

That the statute allows for the recipient to initiate judicial review in some situations thus does not cure this defect, contrary to the government's assertion. *See* Gov. Brief at 52. One of the Supreme Court's explicit goals behind imposing the *Freedman* requirements was to counteract the self-censorship that occurs when would-be speakers are unwilling or unable to initiate judicial review themselves. *Freedman*, 380 U.S. at 59.

[10] 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). There is no procedure for factual review whereby the court could determine whether such certification was made in bad faith.

4. The Second Circuit and the District Court Agree: *Freedman* Applies to the NSL Statute, the NSL Statute Conflicts With the First Amendment, and There Is No Possible Constitutional Construction of the NSL Statute.

There is no conflict between the statutory and constitutional interpretation of the district court and the Second Circuit in *Mukasey* regarding the nondisclosure provision, only a disagreement on the question of remedy. Both courts concluded that the *Freedman* standard governs the NSL statute, that the NSL statute conflicts with the First Amendment because it violates the third *Freedman* prong, and that there was no limiting construction of the NSL statute that could save it.

Importantly, the Second Circuit was unequivocal that there was no possible construction that could save the nondisclosure provision of the NSL statute: "We deem it 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." *Mukasey*, 549 F.3d at 883. Thus, the government misreads *Mukasey* when it asserts that the Second Circuit "found that the provisions [*i.e.*, sections 2709(c) and 3511(b)] are also susceptible to a different reasonable interpretation that renders them constitutional." Gov. Brief at 24.

The district court here agreed with the Second Circuit's view of section 2709(c): "The statutory provisions at issue—as written, adopted and amended by Congress in the face of a constitutional challenge—are not susceptible

to narrowing or conforming constructions to save their constitutionality." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1080. That conclusion is correct because, as the court noted, the "multiple inferences required to save the provisions at issue are not only contrary to evidence of Congressional intent, but also contrary to the statutory language and structure of the statutory provisions actually enacted by Congress." *Id.*

5. The District Court Properly Invalidated the Nondisclosure Provision.

Because the nondisclosure provision is unconstitutional, the district court had no choice but to invalidate them. This rule is as old as *Marbury v. Madison* and its application is as recent as the Supreme Court's invalidation of the Defense of Marriage Act and its partial invalidation of the Affordable Care Act. "[A] law repugnant to the constitution is void." *Marbury v. Madison*, 5 U.S. 137, 180 (1803). "[T]here can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579-80 (2012) (citing *Marbury*); *see United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating Defense of Marriage Act).

The district court here followed its constitutional duty and declared the nondisclosure provision unconstitutional in No. 13-15957. *In re Nat'l Sec. Letter*,

930 F. Supp. 2d at 1067. However, its failure to do so again in No. 13-16731 must, for these same reasons, be reversed.

6. Voluntary Deviations by the FBI from The Procedures Mandated by the NSL Statute Cannot Save the Statute from Unconstitutionality.

The government contends that it has cured the unconstitutionality of the nondisclosure provisions of the NSL statute by adopting new notice procedures for NSLs—procedures that are not required by the NSL statute. This contention lacks merit and should be rejected.[11]

First, critically, even if the voluntary adoption of the *Mukasey*'s court's suggested reciprocal notice procedure was appropriate (which it is not), it could not cure the statute's unconstitutionality because it still fails the *Freedman* requirements. Not only does the reciprocal notice process still not mandate that the

[11] The government, citing the district court, maintains that Appellee has conceded that if the NSL statute contained the *Mukasey* reciprocal notice provisions, it would satisfy the *Freedman* requirements. Gov. Brief at 33-34; ER 13. This is not the case, as the exchange at oral argument on which the government apparently relies demonstrates. Appellee's point was that only an amended statute that strictly complied with all three *Freedman* requirements would be constitutional. In response to a question from the court about whether the statute would still be unconstitutional after a congressional amendment incorporating the reciprocal notice procedure, Appellee's counsel stated, "I don't think so . . . To put the burden on the government, to make sure that the government is the moving party and it is not left to the recipient of an NSL and the period of time in which the Court has[,] . . . if Congress had built those three *Friedman* [*sic*] steps in, then I think that would solve the infirmity that we've raised in our petition." SER 16. (Tr. 10:13-24). Counsel later stated, "[T]he *Mukasey* court, I strongly believe that it did not comply with the requirements of *Friedman* [*sic*]." SER 18 (Tr. 12:1).

FBI obtain a judicial evaluation of its NSL gags, the proposed process does nothing to ensure prompt judicial review and thereby cabin the length of a challenged gag, a failure highlighted by the nearly two-year delay between Appellee's initial filing and the district court's eventual decision to strike down the statute and set the NSL aside.

In any event, even if the voluntarily-adopted procedures in some way mitigated the constitutional shortcomings, the government is incorrect in suggesting that such non-statutory limitations can be grafted onto the NSL process. The *Mukasey* court, as noted, held 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." *Mukasey*, 549 F.3d at 883. But after concluding that no saving construction was possible, it went on to speculate in dicta that if the government were to change its practices and adopt a hypothetical "reciprocal-notice" provision, that "perhaps" would mitigate the unconstitutionality of the statute:

> The Government could inform each NSL recipient that it should give the Government prompt notice, perhaps within ten days, in the event that the recipient wishes to contest the nondisclosure requirement. Upon receipt of such notice, the Government could be accorded a limited time, perhaps 30 days, to initiate a judicial review proceeding to maintain the nondisclosure requirement, and the proceeding would have to be concluded within a prescribed time, perhaps 60 days. In accordance with the first and second *Freedman* safeguards, the NSL could inform the recipient that the nondisclosure requirement would remain in effect during the entire interval of the recipient's decision

> whether to contest the nondisclosure requirement, the Government's prompt application to a court, and the court's prompt adjudication on the merits. The NSL could also inform the recipient that the nondisclosure requirement would remain in effect if the recipient declines to give the Government notice of an intent to challenge the requirement or, upon a challenge, if the Government prevails in court.

Id. at 879 (citation omitted). The *Mukasey* court went on to assert that if the government were to voluntarily adopt this hypothetical procedure, the Second Circuit could then impose time limits on the process, including imposing time limits on district courts nationwide mandating when they must act. *Id.* at 883.

As its liberal use of the future conditional tense demonstrates, the *Mukasey* court's speculation was an impermissible advisory opinion, for there was no case or controversy before the Second Circuit regarding the hypothetical reciprocal-notice procedure, which the government at that point had never proposed, much less implemented. The Second Circuit erred in issuing this advisory opinion. A federal court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

The district court properly rejected the authority relied upon by the *Mukasey* Court in its attempt to remedy the unconstitutionality it found in the NSL statute. *United States v. Thirty–Seven (37) Photographs*, for example (the primary

authority relied upon by the *Mukasey* court but not discussed by the government here), involved a pre-*Freedman* statute for which there was extensive legislative history recognizing the need for and desirability of prompt judicial review of a prior restraint. This allowed the Court to conform the statutory language to the subsequently-articulated *Freedman* First Amendment requirements. 402 U.S. 363, 370 (1971). Here, by contrast, there is no evidence that Congress intended for NSL recipients to enjoy the protections mandated by *Freedman*. Indeed, the *Mukasey* court concluded that a limiting construction that would make the statute constitutional was impossible. *Mukasey*, 549 F.3d at 883. As the district court rightly found, "in amending and reenacting the statute as it did, Congress was concerned with giving the government the broadest powers possible to issue NSL nondisclosure orders and preclude searching judicial review of the same." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1080. Congress was fully aware of the mandates of the *Freedman* Court, articulated over 20 years before the NSL statute was first passed and over 40 years before the latest amendments to the statute were passed. The legislative history confirms what is clear on the statute's face: Congress' objective in enacting the NSL statute was to mandate access to information sought by law enforcement, not in any way to ensure that procedural checks were robust. *See* S. Rep. No. 99-307, at 3 (1986) ("[T]he Committee focused careful attention on the following major intelligence requirements: . . . The

provision of timely and focused information in support of U.S. military operations and diplomacy worldwide."). With neither statutory language nor legislative history upon which to base a limiting construction, the statute's facial unconstitutionality is fatal.

Appellee is aware of no other instance where a court has found a statute unconstitutional and incapable of being saved by a limiting construction and yet has gone on to suggest that the government can continue to exercise the powers granted to it by the unconstitutional statute if it disregards the procedures Congress mandated in the statute and simply invents new ones. Indeed, for the Executive and the courts to combine to make an end run around the statute that Congress enacted, as has now occurred with the FBI's adoption of the *Mukasey* court's suggestion, raises grave separation of powers questions. *Windsor*, 133 S. Ct. at 2688 ("[W]hen Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the [Supreme] Court."). The Constitution does not permit the Executive and the courts to substitute different procedures for those that Congress enacted. The invented procedures suggested by the *Mukasey* court and

subsequently adopted by the FBI are a usurpation of congressional authority over the NSL statutory scheme.[12]

The government argues nonetheless that the "reciprocal notice" procedure saves the statute from facial invalidity, because the procedure has been "accepted . . . and fully implemented" by the FBI and is therefore a "well-understood and uniformly applied practice. . . that has virtually the force of a judicial construction." Gov. Brief at 53 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11 (1988)). However, the cases in which the Supreme Court has considered an established government practice as a limitation on a statute under facial attack do not support the government's position.

First, fundamentally, the "well-established practice" doctrine only applies where the statute is "fairly susceptible" to a narrowing construction. *City of Lakewood*, 486 U.S. at 770 & n.11 (citing *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975)). This is because the well-established practice simply functions as a narrowing construction. As the district court and the *Mukasey* court both held,

[12] Congress has explicitly considered amendments to the NSL statute to fix some of the *Freedman* deficiencies identified by the *Mukasey* court and later by the district court, but no amendments have thus far been passed. *See, e.g.*, USA PATRIOT ACT Sunset Extension Act of 2011, S. 193, 112th Cong. (2011), *available at* http://www.govtrack.us/congress/bills/112/s193/text (last visited January 28, 2014) (Section 6(b): mandating a 30-day deadline by which the government must apply for a court order to enforce an NSL and gag and compelling a district court to "rule expeditiously" on such an application).

the NSL statute is not susceptible to any such limiting construction. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1080.

Second, the "well-established practice" doctrine described in *City of Lakewood* applies to First Amendment challenges to *state* statutes. 486 U.S. at 770. For reasons of federalism, federal courts are bound by a state court's authoritative construction of the statute. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). By extension, federal courts defer to the practice of a state agency or municipal authority that is so "well-established" that it has attained "the force of a [state] judicial construction." *City of Lakewood*, 486 U.S. at 770 n.11 ("the *state* law is read in light of" well-established practice) (emphasis added); *see also, e.g., Forsyth County v. Nationalist Movement,* 505 U.S. 123, 131 (1992) (considering county's "authoritative constructions of the [county] ordinance"); *Ward v. Rock Against Racism,* 491 U.S. 781, 795-96 (1989) ("federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.") (internal quotations and citations omitted). The cases cited by the government, *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) and *Santa Monica Food Not Bombs v. Santa Monica,* 450 F.3d 1022 (9th Cir. 2006), involve challenges to city ordinances. It points to no authority in which this doctrine has been applied to the allegedly well-established practice of a federal agency administering a federal

statute as opposed a state or local law. *See Arnold v. Morton*, 529 F.2d 1101, 1104 (9th Cir. 1976) (stating that in regard to allegedly well-established practice of Secretary of the Interior, "[a]dministrative practice is no authority when that practice is contrary to law.").

Third, the policy underlying these cases does not support reading the reciprocal-notice procedure as a narrowing construction on the NSL statute. In *City of Lakewood*, the Court explained that unless an administrative policy is so well-established as to be binding, reading it into a statute would require "the very presumption that the doctrine forbidding unbridled discretion disallows," namely that an official entrusted with discretion will act according to constitutional requirements. 486 U.S. at 770 (citing *Freedman*); *cf. Santa Monica*, 450 F.3d at 1035 (finding that Administrative Instruction was adopted by the city and was "binding on the City's enforcement staff" and "is therefore properly viewed as . . . [an] authoritative interpretation").

Here, by contrast, the district court correctly found that the government's commitment to reciprocal notice was "voluntary" and therefore "not sufficient to demonstrate the existence of . . . an agency's 'authoritative construction.'" *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1073. For this reason, even if the FBI had adopted reciprocal notice as a formal policy, "the fact that the statute is facially deficient . . . presents too great a risk of potential infringement of First Amendment

rights to allow the FBI to side-step constitutional review . . . ." *Id.* at 1074. The government makes no argument to the contrary, pointing only to an FBI declaration indicating what the FBI has voluntarily "implemented" but to nothing that would legally bind its behavior. *See* Gov. Brief at 11; ER 48-50.

The *Freedman* deficiencies that remain with the FBI's post-*Mukasey* NSL practices do not raise merely theoretical concerns. In both related cases now before this Court, the FBI did not commit to seeking judicial review and did not in fact file an affirmative request for judicial review until after Appellee had filed its own challenge to the statute. The *Freedman* requirement would be meaningless if it could be satisfied by the government's rushing to court after a would-be-speaker had itself already done so, as happened here; one of the Supreme Court's explicit goals behind imposing the *Freedman* requirements was to counteract the self-censorship that occurs when would-be speakers are unwilling or unable to initiate judicial review themselves. *Freedman*, 380 U.S. at 59.

And indeed, the government's own behavior in the No. 13-16732 appeal gives lie to the government's assertion that its purported adoption of the *Mukasey* "reciprocal notice procedure guarantees prompt initiation of judicial review by the government." Gov. Brief at 53. In 13-16732, a separate NSL recipient filed a similar petition to set aside two NSLs. Instead of the government moving forward with its "guarantee" to solicit court review for the NSL gag, the FBI withdrew the

NSL and filed an *ex parte* application for the information in the District Court for the Eastern District of Virginia pursuant to 18 U.S.C. 2703(d). *See In re Nat'l Sec. Letters*, No. 13-1165, slip op. at 1 n.1 (N.D. Cal. Aug. 13, 2013), on appeal as No. 13-16732.[13] That the government may unilaterally impose a non-judicial gag on an NSL recipient that it need not justify before an Article III court until the recipient indicates that it should, and then *withdraws* the NSL before it must justify its behavior before that court, raises precisely the kinds of concerns about arbitrariness and chilling effects that the *Freedman* Court was concerned about. In 13-16732 (and perhaps with other such NSL challenges that remain secret), the "orphan" gag—now detached from the underlying NSL request—remains in effect. Given the disincentives already in place in the NSL statute, the chances that an NSL gag would *ever* receive judicial review are already vanishingly small. The FBI's practice of issuing NSLs and then revoking them in some circumstances when they are actually contested plainly exacerbates the constitutional infirmities further. The "voluntary" nature of the NSL process—leaving all manner of discretion in the hands of the FBI—is precisely the problem.

[13] Available in the excerpts of record accompanying appeal number 13-16732.

II. THE STANDARDS OF JUDICIAL REVIEW OF THE NONDISCLOSURE REQUIREMENT IN 18 U.S.C. § 3511(b) ARE EXCESSIVELY DEFERENTIAL AND VIOLATE SEPARATION OF POWERS AND DUE PROCESS.

Even if judicial review of the gags takes place, the district court rightly concluded that the applicable provisions of sections 3511(b)(2) and (3) fail to meet the requirements of the Constitution. Sections 3511(b)(2) and (3) prevent independent review and instead impose an extremely deferential standard of review. Specifically, the statute allows the court to dissolve the agency's gag order only if the court:

> finds that there is *no reason* to believe that disclosure may endanger the 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.

18 U.S.C. §§ 3511(b)(2), (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.* The district court correctly observed that "the Court can only sustain nondisclosure based on a searching standard of review, a standard incompatible with the deference mandated by Sections 3511(b) and (c)." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1077. The Second Circuit in *Mukasey* similarly rejected this deferential review standard, highlighting the separation of powers concerns: "The fiat of a governmental official, though senior in rank and

doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements." *Mukasey*, 549 F.3d at 882-83.[14]

As the Supreme Court has noted, "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978). Ultimately, here, by limiting the Court, the NSL statute "impermissibly threatens the institutional integrity of the Judicial Branch" in violation of 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)).

III. THE NSL STATUTE ALSO FAILS TO SATISFY THE SUBSTANTIVE REQUIREMENTS FOR PRIOR RESTRAINTS.

In addition to the procedural requirements of *Freedman*, a prior restraint must be justified on substantive grounds and will be invalid unless it survives the most exacting scrutiny. "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).

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[14] The government argues for the first time on appeal that the district court impermissibly struck down the statute based on a legal standard not at issue here: the conclusiveness of an NSL certification submitted by a senior official. Gov. Brief at 59. Even if this argument could be raised for the first time here, the government ignores the excessive deference required as to its lowered certification standard. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1078.

To pass constitutional muster, prior restraints must be *necessary* to further a governmental interest of the highest magnitude. *See Neb. Press Ass'n*, 427 U.S. at 562. The prior restraint will be necessary only if: (1) the harm to the governmental interest will definitely occur; (2) the harm will be irreparable; (3) no alternative exists for preventing the harm; and (4) the prior restraint will actually prevent the harm. *See id.*

This exacting scrutiny applies even if the asserted governmental interest is national security. In the *Pentagon Papers* case, *New York Times v. United States*, 403 U.S. 713 (1971), the Supreme Court, in a brief *per curiam* decision, found that the United States' request for an injunction preventing the New York Times and Washington Post from publishing the contents of a classified study of U.S. policy towards Vietnam was an impermissible prior restraint; the government had not overcome the "heavy presumption" against the constitutionality of a prior restraint on speech and failed to carry its "heavy burden of showing justification for the imposition of such a restraint." *Id.* at 714. Justice Stewart, joined by Justice White, faulted the government for not demonstrating that disclosure of the information will "surely result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730 (Stewart, J. joined by White, J., concurring).

The gag order imposed on Appellee fails to meet this exacting scrutiny because the government did not need to prove that it is "necessary." *Nebraska*

Press, 427 U.S. at 562. Although Appellee is not privy to the specific facts presented *in camera* to the district court, the statute only required the government to show that the harm to national security "may" occur, whereas the prior restraint test requires that it "must" occur.

Nor did the statute require the government to prove that the harm caused by Appellee's disclosure of the mere fact that it had received an NSL would be irreparable. Because the government has disputed that the prior restraint test applies at all and because the statute does not require it, it would be surprising if the government submitted evidence to satisfy the test. Lastly, the gag order of unlimited duration is highly unlikely to be the only alternative for preventing the harm to national security; a time-limited gag order is one obvious alternative.

IV. THE NONDISCLOSURE PROVISION VIOLATES THE FIRST AMENDMENT BECAUSE IT IS A CONTENT-BASED RESTRICTION ON SPEECH THAT FAILS STRICT SCRUTINY.

The district court also correctly held that the statute is unconstitutional for the independent reason that section 2709(c) is a content-based restriction on speech that does not meet the requirements of strict scrutiny. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1075 ("as content-based restrictions on speech, the NSL nondisclosure provisions must be narrowly tailored to serve a compelling governmental interest."). Indeed, while it does not do so here, the government has previously "conceded that strict scrutiny is the applicable standard" for a review of

the nondisclosure provision, a concession adopted by the Second Circuit in its evaluation of the statute. *Mukasey*, 549 F.3d at 878.

Under the strict scrutiny standard, the gag order provision is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("content-based regulations are presumptively invalid"). To survive strict scrutiny review, the government 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). This narrow tailoring requires that the restriction on speech directly advance the governmental interest, that it be neither overinclusive nor underinclusive, and that there be no less speech-restrictive alternatives to advancing the governmental interest. *Id.*; *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997).

As the district court held, the gag provision fails strict scrutiny. The provision is overinclusive because it impermissibly permits the FBI to gag recipients about not only the content of the NSL but also as "to the very fact of having received one." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1075. As the district court noted:

> [T]he government has not shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs. The statute does not distinguish—or allow the FBI to distinguish—between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The statute contains a

> blanket prohibition: when the FBI provides the required certification, recipients cannot publicly disclose the receipt of an NSL.

Id. at 1076. The gag provision is also overinclusive in that it authorizes overly long prior restraints. Even if the Court decides that the prior restraint is justified in a particular case, it cannot tailor the duration of the prior restraint to the circumstances. As the district court held, "[b]y their structure . . . the review provisions are overbroad because they ensure that nondisclosure continues longer than necessary to serve the national security interests at stake." *Id.; see also Doe v. Gonzales*, 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007)).

Moreover, there are obvious alternatives that would be equally effective in protecting the government's national security interests. The gag order could be authorized only when the disclosure of the fact of the NSL would be reasonably likely to, as opposed to potentially, endanger national security.

The government does not argue that the statute satisfies strict scrutiny. Rather, it argues that strict scrutiny does not apply at all because the statute is content-neutral and thus subject only to intermediate scrutiny. Gov. Brief at 31. The government is incorrect. The statute aims to suppress speech of a specific content—the fact of the NSL—and it aims to suppress it precisely because it fears the communicative impact of that speech. *See Texas v. Johnson*, 491 U.S. 397, 412 (1989). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-

based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994) (citations omitted).

The government's assertion that a statute may be content neutral "even when a statute in fact 'refer[s] to the content of speech'" is of no import here. Gov. Brief at 31 (quoting *Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1369 (9th Cir. 1997)). To the extent the government's assertion is true, it is limited to those situations where the government's goal is unrelated to the suppression of the speech. Here, the very reason the government wants to gag NSL recipients is because it does not want the public to learn the information it seeks to suppress. There is no other reason for the gag.[15]

The government's assertion that "strict scrutiny does not always apply even when a statute regulates speech based on its effects" is also incorrect. Gov. Brief at 31-32. The cases relied on by the government did not find that the restrictions at issue were content neutral. Rather, they rejected strict scrutiny for entirely different reasons, reasons that are not present here.

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[15] *Perry* itself is inapposite. At issue in *Perry* was an ordinance that this Court reviewed under the standard for content-neutral speech restrictions because the original ordinance, as opposed to a later amendment, made "no reference to content." *Perry*, 121 F.3d at 1365.

In *United States v. Aguilar*, 515 U.S. 593 (1995), a federal judge was convicted of disclosing the existence of an expired wiretap order. It was the defendant's status as a judge who had voluntarily taken an oath of confidentiality that led the court to apply a less stringent scrutiny; the court affirmed that strict scrutiny would have applied if the government sought to restrict the speech of "unwilling members of the public" as Appellee is here. *Id.* at 606.

And in *United States v. Fulbright*, 105 F.3d 443, 452 (9th Cir. 1995), this Circuit evaluated a First Amendment overbreadth challenge to a law that punished the filing of "false" documents. The court declined to apply strict scrutiny only because it found that "no legitimate free speech interest is implicated." *Id.*

V. THE NSL STATUTE FAILS TO SET FORTH "NARROW, OBJECTIVE, AND DEFINITE STANDARDS" GUIDING THE DISCRETION OF THE FBI.

Even apart from the foregoing limitations, the First Amendment generally requires that any governmental action that restrains speech be governed by "narrow, objective, and definite" standards; the absence of such standards raises the prospect that governmental officials can discriminate against disfavored viewpoints. *Shuttlesworth*, 394 U.S. at 149-50 (rejecting 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). *See also Forsyth County*, 505 U.S. at 131 ("[I]f 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)); *Seattle Coal. Stop Police Brutality v. City of Seattle*, 550 F.3d 788, 803 (9th Cir. 2008) ("The First Amendment prohibits placing such unfettered discretion in the hands of licensing officials . . . .").

Section 2709(c) 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) (emphasis added). This language leaves the decision entirely in the subjective judgment of the FBI official issuing the NSL and reserves no meaningful ability for a court to evaluate whether the official acted lawfully, regardless of any degree of deference that is appropriate. Without any articulable statutory guidance cabining this executive discretion, allowing a gag to issue merely upon an official's statement merely that harm *may* occur is insufficient to survive constitutional scrutiny.

VI. THE GAG ORDERS AUTHORIZED BY SECTION 2709(c) ARE MATERIALLY DIFFERENT FROM PERMISSIBLE GAG ORDERS ISSUED IN OTHER CONTEXTS.

Attempting to justify the NSL gag orders, the government asserts that they are analogous to gag orders issued in other contexts, such as in certain court proceedings and where government employees who have agreed to secrecy requirements are prohibited from disclosing certain information. *See* Gov. Brief at 35. But these analogies only highlight the constitutional flaws in the NSL nondisclosure requirement.

As the *Mukasey* court observed, section 2709(c) gag demands are significantly different from gags discussed by the government because they are "imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." *Mukasey*, 549 F.3d at 877. Section 2709(c) also has different underlying policy rationales and contains no temporal limitation. *Id.*

As the government notes, the Supreme Court has approved gag orders, in the form of protective orders, which are imposed on those who obtain information through pretrial discovery. *See, e.g., Seattle Times v. Rhinehart*, 467 U.S. 20 (1984). But as noted above, the 2709(c) gag orders prevent the NSL recipient from discussing circumstances that have been thrust upon it unwillingly. *Mukasey,* 548 F.3d at 877. In contrast, the protective order in *Seattle Times* addresses the

particular concerns raised where a party to litigation, by its own efforts, seeks out and acquires information through civil discovery. The availability of that information is thus a product solely of "legislative grace." *Seattle Times*, 467 U.S. at 21.

Nor are the gag orders attached to grand jury subpoenas analogous. As the Supreme Court has recognized, a grand jury witness can only be prevented from communicating information he learned "as a result of his participation in the proceedings of the grand jury." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). But a grand jury witness could not be gagged from disclosing the fact of her subpoena or testimony. *Id.* at 636-37 (Scalia, J., concurring). *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1072; *Mukasey*, 549 F.3d at 877. Moreover, the gag orders issued in the grand jury context originate from the court. *See, e.g., United States v. Navarro-Vargas*, 408 F.3d 1184, 1199 (9th Cir. 2005) (documenting the historical operation of the grand jury, noting that it is "an appendage of the court" and "subject to the supervision of a judge"). Unlike NSL gag orders, they are not unilaterally imposed by the Executive on its own authority.

Nor are nondisclosure agreements enforced against governmental employees analogous. The subjects of these gags voluntarily agreed to silence themselves, contractually waiving their First Amendment rights; their validity is wholly dependent on the voluntary agreement between the government and its employees.

See Snepp v. United States, 444 U.S. 507, 511 (1980) (employment agreement constituted "special trust" between employee and government); *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir 1983) (secrecy agreement as condition of employment). *See also In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1078; *Mukasey*, 549 F.3d at 877 (rejecting the analogy).

VII. THE NSL STATUTE'S COMPELLED PRODUCTION PROVISION VIOLATES THE FIRST AND FIFTH AMENDMENTS.

Separate from the unconstitutionality of the gag provision, the underlying 18 U.S.C. § 2709 authority given to the FBI to compel the production of records is also unconstitutional as a violation of the First and Fifth Amendments. While not all of the information sought pursuant to NSLs enjoys constitutional protection, some clearly does. NSL authority, for example, would on its face permit the FBI to unilaterally obtain non-public information such as the network of people who organized an anti-government rally through the use of cell phones or who belong to a particular religious sect, with no judicial oversight to ensure "that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States," or that the investigation was not simply a pretext. 18 U.S.C. § 2709(b).[16] *See, e.g., Doe v. Ashcroft*, 334 F. Supp. 2d at 509 ("[Section] 2709 imposes a duty

[16] Nor is it clear that the statute provides sufficient constitutional protections since it only prohibits investigations based "solely" on activities protected by the First Amendment.

on ISPs to provide the names and addresses of subscribers, thus enabling the Government to specifically identify someone who has written anonymously on the internet.").

Although the statute permits the FBI to compel protected records from any covered communications provider, [redacted] to the FBI without a court having the opportunity to put the FBI's conclusory rationale to any test.

Investigations that "intrude[] into the area of constitutionally protected rights of speech, press, association and petition" are subject to heightened First

Amendment scrutiny. *Gibson v. Fla. Legislative Invest. Comm.*, 372 U.S. 539, 546 (1963). Courts have long recognized protection under the First Amendment for the right to engage in anonymous communication—to speak, read, listen, and/or associate anonymously—as fundamental to a free society. The Supreme Court has consistently defended such rights in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority ... [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (holding that an "author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment").

Similarly, the Supreme Court has long held that compelled disclosure of membership lists and other associational information may constitute an impermissible restraint on freedom of association. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (compelled identification violated group members' right to remain anonymous; "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association"); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91-92 (1982) ("The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' and then only if there is a

'substantial relation between the information sought and [an] overriding and compelling state interest.'") (citing *NAACP*, *Gibson*) (internal citations omitted)).

Because the First Amendment protects anonymous speech and association, efforts to pierce such anonymity are subject to heightened scrutiny, requiring the demonstration of a compelling need and a showing that the demand is narrowly tailored. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Dole v. Service Employees Union AFL-CIO, Local 280*, 950 F.2d 1456, 1462 (9th Cir. 1991). However, a *court* must perform this exacting scrutiny. Without any such mandatory and independent check, First Amendment rights have no meaningful opportunity for vindication.

A. The First Amendment Requires Prior Judicial Review.

The structure of the statute ensures that in all but the most rare cases, the constitutional interests of the subscriber will never be considered by a court. As described above, unlike other mechanisms compelling an individual or entity to disclose information to the government, NSLs may be issued without any court involvement. *See* Fed. R. Crim. P. 17 (grand jury subpoena); 18 U.S.C. § 2703(d) order; 50 U.S.C. § 1861 (USA PATRIOT section 215 order).

Unlike administrative subpoenas and other comparable investigative authorities, NSL demands are almost always accompanied by a gag order that prevents the person whose information is being sought from contesting the

production. *See, e.g., Ashcroft*, 334 F. Supp. 2d at 485. As a result, those persons whose First Amendment associational rights are threatened must rely on independent third parties, their telecommunications service providers, to assert their rights.

This is constitutionally problematic for at least two reasons. First, although some third parties have standing to bring First Amendment claims on behalf of their associates, that third-party standing does not eliminate the requirement that the individuals have access to the court as well. *See, e.g., McKinney v. Alabama*, 424 U.S. 669, 675-76 (1976). Second, the entity served with the NSL certainly has no duty and ordinarily lacks the incentive or ability to assert vigorously the First Amendment rights of its subscribers. *Id.*[17] *Compare, e.g., FW/PBS*, 493 U.S. at 218 (discussing incentives to challenge administrative decision in city ordinance) with *Ashcroft*, 334 F. Supp. 2d at 502 (discussing lack of incentives in pre-2006 version of the NSL statute).

B. The Fifth Amendment Similarly Requires Prior Judicial Review.

For the same reasons, the compelled production provision also violates the Fifth Amendment's procedural due process rights because there is no meaningful

[17] DOJ statistics bear this out. Based on the OIG reports mandated by Congress as part of the 2006 amendments, it is known that the FBI issues a high volume of NSLs every year: nearly 200,000 NSLs were issued in the period between 2003 and 2006 alone. Yet this challenge is one of only seven that are publicly known ever to have been filed, representing a tiny fraction of the total NSLs issued.

process by which the First Amendment and privacy interests of NSL targets (*i.e.*, subscribers using NSL recipients' telecommunications services) may be protected from FBI overreach.

Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), the adequacy of process is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater process. 424 U.S. at 335. Although a national security interest might be relevant to this balancing, it does not eliminate the need for it. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (noting the need to balance that interest against the interest of those whose liberty was erroneously or otherwise incorrectly curtailed). By eliminating the need for judicial review and placing the ability to challenge NSLs solely in the hand of service providers who likely have little incentive or information to do so, the NSL statute violates the due process rights of recipients' subscribers.

VIII. THE UNCONSTITUTIONAL PORTIONS OF THE NSL STATUTE ARE NOT SEVERABLE.

Because sections 2709(c) and 3511(b) are unconstitutional, the Court must—as did the district court—invalidate the statutory scheme as a whole because these provisions are not severable. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1081. Severability "is essentially an inquiry into legislative intent." *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. The legislative history is clear. The Senate Intelligence Committee in 1986, for example, noted that the new NSL gag authority would "ensure[]" that "no" recipient would "disclose to anyone" that it had received an NSL, and flatly that "[t]he effective conduct of FBI counterintelligence activities requires such non-disclosure." S. Rep. 99-307, at 21 (1986). Not only did Congress enact the two sets of provisions together, in 2006 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. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1081; *Mukasey*, 549 F.3d at 866-68. Congress' 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. As the district court observed:

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

930 F. Supp. 2d at 1081.

Tellingly, this fact is borne out even by the government's own declaration in this case. In his declaration, Assistant Director of the FBI's Counterintelligence Division Robert Anderson, Jr., indicated that only in "highly unusual" circumstances would the provisions not operate together:

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

ER 46. That the government can offer no other context in which a gag would not accompany an NSL except where those "who understand the importance of nondisclosure in this context to preventing terrorism" may voluntary gag

themselves shows the illusory nature of the government's argument. Gov. Brief at 62. Indeed, the legislative history plainly indicates that Congress considered NSL authority to be distinct from the kind of informal agreement described by the government. *See, e.g.,* S. Rep. 99-307, at 19 (1986) ("The new mandatory FBI [NSL] authority for counterintelligence access to records is in addition to, and leaves in place, existing non-mandatory arrangements for FBI access based on voluntary agreement of communications common carriers.").

IX. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENJOINING THE GOVERNMENT FROM USING THE NSL STATUTE.

After declaring the NSL statute unconstitutional, the district court enjoined the FBI from issuing NSLs or enforcing the statute's gag provision. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1081. It acted well within its discretion in doing so.

When a court finds that a statute is unconstitutional, it is obligated to declare it void. *Sebelius*, 132 S. Ct. at 2579-80. The district court fulfilled that obligation here. As a matter of course, courts typically follow a declaration of a statute's unconstitutionality with an injunction against the statute's enforcement. Indeed, it is difficult to imagine circumstances in which it would be an abuse of discretion to enjoin the government from exercising powers granted to it by an unconstitutional statute, and it certainly was not an abuse of discretion here.

The government objects that the district court's nationwide injunction creates a conflict with the Second Circuit's *Mukasey* decision. It argues that the injunction should have been limited to barring only use of the NSL statute against Appellee, and in any event should not have extended beyond the Ninth Circuit. Gov. Brief at 63. Neither argument has merit.

As this Court has held, "[o]nce a court has obtained personal jurisdiction over a defendant, the court has the power to enforce the terms of the injunction outside the territorial jurisdiction of the court, including issuing a nationwide injunction." *United States v. AMC Entertainment, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008) (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) ("the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.")). There is no dispute that the government is properly before the court.

The general rule provides an exception—as a matter of comity, not jurisdiction—for cases where "injunctive relief . . . would cause substantial interference with another court's sovereignty" because it would "*negate* something that has already been determined in adversary proceedings" in another circuit. *Id.* at 772 (emphasis added). In *AMC Entertainment*, there was a conflict between the Fifth and Ninth Circuits' rulings on the merits of the legal question at issue—how certain federal regulations should be properly interpreted. Because of a direct

conflict with the Fifth Circuit's interpretation of the regulations, this Court limited the district court's injunction to exclude the Fifth Circuit from its nationwide scope. *Id.* at 770-74; *cf. id.* at 774-81 (Wardlaw, J. dissenting on this interference finding, collecting cases allowing nationwide injunctions); *see Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011) (finding *AMC Entertainment* exception inapplicable where no conflicting legal rulings).

Here, however, there is no interference with, much less negation of, either the Second Circuit's legal rulings or its injunction. First, there is no conflict between the district court and the Second Circuit on the merits question of the NSL statute's unconstitutionality. Both courts found the statute unconstitutional. They differed only in the remedy they imposed.

Second, there is no conflict between the injunctions. The district court here imposed the following injunction: "The Government is therefore enjoined from issuing NSLs under § 2709 or from enforcing the nondisclosure provision in this or any other case." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1081. The Second Circuit, after also holding the NSL statute unconstitutional because it lacked the review provisions required by the First Amendment, enjoined the government in the following terms: "As a result of this ruling, we modify the District Court's injunction by limiting it to enjoining FBI officials from enforcing the

nondisclosure requirement of section 2709(c) in the absence of Government-initiated judicial review." *Mukasey*, 549 F.3d at 885.

The Second Circuit's injunction does not mandate or prohibit any future conduct by the government defendants that conflicts with the district court's order here. The district court's injunction here is broader here because it prohibits the FBI from issuing NSLs or enforcing the nondisclosure provision, but nothing the FBI is required to do under the district court's injunction conflicts with what the Second Circuit's injunction requires them to do. They can obey both without breaching either. Thus, this is not a case of clashing injunctions where defendants are subject to conflicting statements of what the law is from two different courts, as was the case in *AMC Entertainment*.[18]

Finally, given the district court's (and the Second Circuit's) holding that the NSL statute is facially unconstitutional because it fails to require the government to initiate judicial proceedings, broad relief is entirely appropriate. The government's alternative of imposing on every NSL recipient the burden of bringing repeated piecemeal litigation to repeatedly reestablish the facial

[18] The government also asserts that *United States v. Mendoza* holds that injunctive relief extending beyond a Circuit's boundaries "'thwart[s] the development of important questions of law by freezing the first final decision rendered on a particular legal issue.'" Gov. Brief at 63 (quoting *Mendoza*, 464 U.S. 154, 160 (1984)). Not so. *Mendoza* was a nonmutual collateral estoppel case, not a case about whether a district court may issue a nationwide injunction against enforcement of an unconstitutional statute, and the quoted language is referring to the effect of applying nonmutual collateral estoppel against the government.

unconstitutionality of the NSL statute makes no sense. Constitutional litigation should not be a roulette wheel that the government gets to spin endlessly in hopes of a better result.

CONCLUSION

The district court's judgment in No. 13-15957 should be affirmed and the district court's judgment in No. 13-16731 should be reversed. For the foregoing reasons, the nondisclosure provision of NSL statute is unconstitutional because it fails to require the government to initiate judicial proceedings, because its judicial review standards are excessively deferential, and because it is a prior restraint that is not narrowly tailored. Because the nondisclosure and judicial review provisions are not severable from the rest of the statute, the NSL statute as a whole is invalid. Moreover, the statute violates the First and Fifth Amendments as it authorizes the FBI to potentially violate the anonymous speech and associational rights of telecommunications subscribers without any oversight by the judicial branch.

Dated: February 28, 2014

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. Appellees' Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4 because this brief contains 15,396 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 for Mac, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 28, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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