

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Microsoft Corporation,

Plaintiff,

v.

The United States Department of Justice, and
Loretta Lynch, in her official capacity as
Attorney General of the United States,

Defendants.

No. 2:16-cv-00538-JLR

FIRST AMENDED COMPLAINT
FOR DECLARATORY
JUDGMENT

Microsoft Corporation (“Microsoft”) alleges as follows.

INTRODUCTION

1. Microsoft brings this case because its customers have a right to know when the government obtains a warrant to read their emails, and because Microsoft has a right to tell them. Yet the Electronic Communications Privacy Act (“ECPA”) allows courts to order Microsoft to keep its customers in the dark when the government seeks their email content or other private information, based solely on a “reason to believe” that disclosure might hinder an investigation. Nothing in the statute requires that the “reason to believe” be grounded in the facts of the particular investigation, and the statute contains no limit on the length of time secrecy orders may be kept in place. 18 U.S.C. § 2705(b). Consequently, as Microsoft’s customers increasingly store their most private and sensitive information in the cloud, the

1 government increasingly seeks (and obtains) secrecy orders under Section 2705(b). This
2 statute violates both the Fourth Amendment, which affords people and businesses the right to
3 know if the government searches or seizes their property, and the First Amendment, which
4 enshrines Microsoft's rights to talk to its customers and to discuss how the government
5 conducts its investigations—subject only to restraints narrowly tailored to serve compelling
6 government interests. People do not give up their rights when they move their private
7 information from physical storage to the cloud. Microsoft therefore asks the Court to declare
8 that Section 2705(b) is unconstitutional, both on its face and as applied to Microsoft and its
9 customers. Microsoft also asks the Court to declare that 18 U.S.C. § 2703 is unconstitutional,
10 both on its face and as applied, to the extent it permits the government to conduct warranted
11 searches and seizures without notice to the target of the warrant.

12 2. Before the digital age, individuals and businesses stored their most sensitive
13 correspondence and other documents in file cabinets and desk drawers. As computers became
14 prevalent, users moved their materials to local computers and on-premises servers, which
15 continued to remain within the user's physical possession and control. In both eras, the
16 government had to give notice when it sought private information and communications, except
17 in the rarest of circumstances.

18 3. Cloud computing has spurred a profound change in the storage of private
19 information. Today, individuals increasingly keep their emails and documents on remote
20 servers owned by third parties, i.e., in the cloud, using free web-based services such as
21 Microsoft's Outlook.com. Businesses have also migrated their information technology
22 infrastructure to servers hosted by providers such as Microsoft, which offer productivity
23 software (e.g., Microsoft's Office365) and the ability to access correspondence and other
24 documents from any device. But the transition to the cloud does not alter the fundamental
25 constitutional requirement that the government must—with few exceptions—give notice when
26 it searches and seizes the private information or communications of individuals or businesses.
27

1 4. The government, however, has exploited the transition to cloud computing as a
2 means of expanding its power to conduct secret investigations. As individuals and businesses
3 have moved their most sensitive information to the cloud, the government has increasingly
4 adopted the tactic of obtaining the private digital documents of cloud customers not from the
5 customers themselves, but through legal process directed at online cloud providers like
6 Microsoft. At the same time, the government seeks secrecy orders under 18 U.S.C. § 2705(b)
7 to prevent Microsoft from telling its customers (or anyone else) of the government’s demands.
8 These secrecy orders generally assert that abiding by the centuries-old requirement of seeking
9 evidence directly from its owner would jeopardize the government’s investigation. Most of the
10 time, these secrecy orders prohibit notification for unreasonably long (or even unlimited)
11 periods of time, which Section 2705(b) permits whenever a court has “reason to believe” any of
12 several adverse consequences might otherwise ensue—including any time notice would
13 “seriously jeopardiz[e] an investigation or unduly delay[] a trial”—without requiring any case-
14 specific showing to support the belief.

15 5. Over a 20-month period ending in May 2016, federal courts issued more than
16 3,250 secrecy orders silencing Microsoft from speaking about the government’s legal demands
17 for Microsoft customers’ data; of those secrecy orders, nearly two-thirds contained no fixed end
18 date. Further, more than 650 of those secrecy orders accompanied search warrants, and
19 roughly 70 percent of those orders were of indefinite duration. (In fact, the dozens of secrecy
20 orders issued to Microsoft in this District almost without exception contain no time limit.)
21 These twin developments—the increase in government demands for online data and the
22 simultaneous increase in secrecy—have combined to undermine confidence in the privacy of
23 the cloud and have impaired Microsoft’s right to be transparent with its customers, a right
24 guaranteed by the First Amendment.

25 6. There may be exceptional circumstances when the government’s interest in
26 investigating criminal conduct justifies an order temporarily barring a provider from notifying a
27 customer that the government has obtained the customer’s private communications and data.

1 But Section 2705(b) sweeps too broadly. That antiquated law (passed decades before cloud
2 computing existed) allows courts to impose prior restraints on speech about government
3 conduct—the very core of expressive activity the First Amendment is intended to protect—
4 even if other approaches could achieve the government’s objectives without burdening the right
5 to speak freely. The statute sets no limits on the duration of secrecy orders, and it permits prior
6 restraints any time a court has “reason to believe” adverse consequences would occur if the
7 government were not allowed to operate in secret. Under the statute, the assessment of adverse
8 consequences need not be based on the specific facts of the investigation, and the assessment is
9 made *only* at the time the government applies for the secrecy order, with no obligation on the
10 government to later justify continued restraints on speech even if circumstances change
11 because, for instance, the investigation is closed or the subject learns of it by other means. It
12 also permits those restraints based on the application of purely subjective criteria, such as a
13 finding that notice would “jeopardiz[e] an investigation” in unspecified ways or “unduly delay
14 a trial.” Section 2705(b) is therefore facially overbroad under the First Amendment, since it
15 does not require the government to establish that the continuing restraint on speech is narrowly
16 tailored to promote a compelling interest applicable to the specific secrecy order. Further,
17 because Microsoft has been subjected to non-disclosure orders entered pursuant to Section
18 2705(b) without adherence to the requisite constitutional standards, Section 2705(b) is also
19 unconstitutional under the First Amendment as applied to Microsoft.

20 7. Further, ECPA violates the Constitution’s protection against unreasonable
21 searches and seizures. The Fourth Amendment’s requirement that government engage only in
22 “reasonable” searches necessarily includes a right for people to know when the government
23 searches or seizes their property. *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). For
24 example, if the government comes into a person’s home to seize her letters from a desk drawer
25 or computer hard drive, that person in almost all circumstances has the right to notice of the
26 government’s intrusion. The same is true when the government executes a search of a business
27 to seize emails from the business’s on-site server. But 18 U.S.C. § 2703 combines with Section

1 2705(b) to subject Microsoft's cloud customers to a different standard merely because of how
2 they store their communications and data: Section 2703 allows the government to search and
3 seize customers' private information without providing any notice to the customer, while
4 Section 2705(b) permits the government to obtain an order gagging the cloud services provider
5 based upon a constitutionally insufficient showing. Section 2703, to the extent it authorizes
6 warranted searches and seizures without notice to the warrant's target, and Section 2705(b)
7 together fall short of the intended reach of Fourth Amendment protections, which do not
8 depend on the technological medium in which private "papers and effects" are stored.

9 8. For these reasons, Microsoft asks the Court to declare that Section 2703, to the
10 extent it permits the government to conduct warranted searches and seizures without notice to
11 the target, and Section 2705(b) are unconstitutional on their face and as applied.

12 **PARTIES**

13 9. **Microsoft.** Microsoft is a corporation organized and existing under the laws of
14 the State of Washington, with its principal place of business at One Microsoft Way, Redmond,
15 Washington 98052. Microsoft has standing to bring this action because of the repeated
16 invasion of its First Amendment rights through the issuance of indefinite and insufficiently
17 substantiated secrecy orders, its interest in upholding its public commitment to safeguard the
18 privacy of its customers' sensitive emails and documents without violating court orders, its
19 right to invoke the Fourth Amendment rights of its customers (who have no practical means of
20 protecting those rights), and its interest in avoiding findings of contempt.

21 10. **The United States Department of Justice.** The United States Department of
22 Justice is an agency of the executive branch of the federal government, employees of which
23 regularly apply for secrecy orders under 18 U.S.C. § 2705(b), serve those secrecy orders on
24 providers, including Microsoft, and obtain the contents of electronic communications without
25 notice to affected Microsoft customers under 18 U.S.C. § 2703.

26 11. **Loretta Lynch.** Loretta Lynch, sued in her official capacity only, is the Attorney
27 General of the United States. Attorney General Lynch has ultimate authority over the United

1 States Department of Justice, employees of which regularly apply for secrecy orders under 18
2 U.S.C. § 2705(b), serve those secrecy orders on providers, including Microsoft, and obtain the
3 contents of electronic communications without notice to affected Microsoft customers under 18
4 U.S.C. § 2703.

5 JURISDICTION AND VENUE

6 12. **Jurisdiction.** This Court has jurisdiction over this action pursuant to 28 U.S.C.
7 § 1331 because the action concerns federal questions, and pursuant to 28 U.S.C. §§ 2201 and
8 2202 because this is a civil action for a declaratory judgment.

9 13. **Venue.** Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2)
10 because Microsoft has its headquarters and principal place of business in this District and
11 because Microsoft’s speech, in the absence of a secrecy order, would emanate in substantial
12 part from this District.

13 MICROSOFT’S CLOUD SERVICES

14 14. **Cloud Computing.** As they migrate their communications and documents to the
15 cloud, individuals and businesses have increasingly entrusted Microsoft and other providers
16 with their most private information—what the Supreme Court has referred to as a “cache of
17 sensitive personal information.” *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). A customer
18 that stored paper documents in file cabinets or emails on on-site servers would generally know
19 contemporaneously about the execution of a warrant by law enforcement—and would be able
20 to assert any rights concerning any documents or data seized during the search. A customer
21 storing documents and emails remotely in the cloud should be in the same position. That is,
22 cloud customers should be able to trust they will know if they become the targets of warrants or
23 other legal process authorizing the seizure of sensitive information.

24 15. **Secrecy Orders.** Secrecy orders issued under Section 2705(b) combine with the
25 government’s ability to obtain electronic communications and data without notice to the target
26 under Section 2703 to give the government a double-barreled weapon, allowing it to seek
27 electronic communications and other private data under a veil of prolonged (or even indefinite)

1 secrecy. The government's use of legal process directed at cloud providers such as Microsoft,
 2 when combined with accompanying secrecy orders, amounts to a substantial expansion of law
 3 enforcement's ability to engage in secret search and seizure activity, adversely affecting both
 4 Microsoft's right to communicate with its customers and the customers' privacy interests—
 5 simply because customers have moved their information to the cloud.

6 16. ***The Frequency of Secrecy Orders.*** Between September 2014 and May 2016,
 7 Microsoft received more than 6,000 federal demands for customer information or data. Of
 8 those demands, more than 3,250 were accompanied by secrecy orders (including more than 650
 9 secrecy orders served with search warrants), forbidding Microsoft from telling the affected
 10 customers that the government was looking at their information. The vast majority of these
 11 secrecy orders related to consumer accounts and prevent Microsoft from telling affected
 12 individuals about the government's intrusion into their personal affairs; others prevent
 13 Microsoft from telling business customers that the government has searched and seized the
 14 emails of individual employees of the customer. Further, more than 2,000 of these federal
 15 secrecy orders (including more than 450 secrecy orders accompanying search warrants)
 16 contained no time limit, meaning that Microsoft could *forever* be barred from telling the
 17 affected customer about the government's intrusion. The government has used this tactic in
 18 this District. Since September 2014, Microsoft received at least 63 secrecy orders issued in this
 19 District pursuant to Section 2705(b), which almost without exception contained no time limit.
 20 These secrecy orders prohibit Microsoft from speaking about the government's specific
 21 demands to *anyone* and forbid Microsoft from ever telling its customers whose documents and
 22 communications the government has obtained. The secrecy orders thus prevent Microsoft's
 23 customers and the public at large from ever learning the full extent of government access to
 24 private, online information.

25 STATUTORY OVERVIEW

26 17. ***Section 2703.*** Congress enacted Section 2703 as part of the Electronic
 27 Communications Privacy Act of 1986 ("ECPA"). Section 2703 authorizes the government to

1 obtain the contents of electronic communications pursuant to a warrant without the government
2 providing notice to the person whose communications are being seized and searched.

3 18. **Section 2705(b).** Congress also enacted Section 2705(b) as part of ECPA.

4 Section 2705(b) provides, in its entirety:

5 **(b) PRECLUSION OF NOTICE TO SUBJECT OF GOVERNMENTAL**
6 **ACCESS.**—A governmental entity acting under section 2703,
7 when it is not required to notify the subscriber or customer under
8 section 2703(b)(1), or to the extent that it may delay such notice
9 pursuant to subsection (a) of this section, may apply to a court for
10 an order commanding a provider of electronic communications
11 service or remote computing service to whom a warrant,
12 subpoena, or court order is directed, for such period as the court
13 deems appropriate, not to notify any other person of the existence
14 of the warrant, subpoena, or court order. The court shall enter
15 such an order if it determines that there is reason to believe that
16 notification of the existence of the warrant, subpoena, or court
17 order will result in—

- 12 (1) endangering the life or physical safety of an individual;
- 13 (2) flight from prosecution;
- 14 (3) destruction of or tampering with evidence;
- 15 (4) intimidation of potential witnesses; or
- 16 (5) otherwise seriously jeopardizing an investigation or unduly
17 delaying a trial.

18 19. **Effect of Statute.** Microsoft is a “provider of electronic communications
19 service or remote computing service” as those terms are used in ECPA. Under the plain terms
20 of Section 2705(b), a court therefore may order Microsoft “not to notify **any other person** of
21 the existence” of a legal demand for its customer’s emails and documents. A court may issue
22 such an order “for such period as the court deems appropriate,” without any requirement that
23 the government advise the court of any change in circumstances bearing upon the government’s
24 initial asserted need for nondisclosure. Thus, for example, a secrecy order may prevent
25 Microsoft from informing a customer of the intrusion even after the government’s investigation
26 ends or becomes public through other means. And under Section 2703, the government itself
27

1 has no obligation to provide notice when it seizes and searches the contents of electronic
2 communications pursuant to a warrant.

3 20. ***Grounds for Secrecy Order under Section 2705(b).*** Section 2705(b) does not
4 require a court to consider whether a secrecy order is narrowly tailored to further the
5 government's asserted interests in a particular case and whether there are less restrictive
6 alternatives in that case. Indeed, the statute contemplates that the court "shall enter such an
7 order" without weighing whether less restrictive alternatives are available. Further, Section
8 2705(b) allows the court to issue a secrecy order whenever it finds "reason to believe" that any
9 of five adverse results would otherwise occur, including when notification "will result in ...
10 otherwise seriously jeopardizing an investigation or unduly delaying a trial." Nothing in
11 Section 2705(b) requires a court to base its finding of a "reason to believe" on a showing of
12 specific facts applicable to the particular request for secrecy.

13 21. ***Comparison to Section 2705(a).*** Section 2705(b) is notably different from its
14 parallel provision, Section 2705(a), which applies to certain forms of legal process issued under
15 ECPA, 18 U.S.C. § 2703(b)(1)(B). When the government requires a provider to disclose
16 information under this provision, the government itself has an affirmative obligation to notify
17 the customer. Section 2705(a) permits the government to delay its notice when "there is reason
18 to believe" notification will trigger the same five adverse results listed in Section 2705(b). But
19 even though Section 2705(a) relies on exactly the same government interests as Section
20 2705(b) to justify withholding notice, Section 2705(a) authorizes a delay of only a definite and
21 fixed duration—90 days—and requires the government to justify any further delays in
22 notification. In other words, in Section 2705(a), Congress determined that withholding notice
23 for no more than 90 days satisfied the five government interests enumerated in both Section
24 2705(a) and Section 2705(b), subject only to the government's right to renew the period of
25 delayed upon making a further showing.

26 22. ***Searches in the Physical World.*** By allowing the government to operate behind
27 a veil of secrecy, Sections 2703 and 2705(b) also differ from similar forms of process in the

1 physical world. For example, although 18 U.S.C. § 3103a authorizes so-called “sneak and
 2 peek” warrants for secret searches—the only permissible means of executing search warrants of
 3 physical documents without notice—that provision presumptively requires the government to
 4 notify the target of the search “within a reasonable period not to exceed 30 days after the date
 5 of its execution.” 18 U.S.C. § 3103a(b)(3). The statute permits extensions of this deferred
 6 notice, but “subject to the condition that extensions should only be granted upon an updated
 7 showing of the need for further delay and that each additional delay should be limited to
 8 periods of 90 days or less.” 18 U.S.C. § 3103a(c). While these provisions permit delays of
 9 longer than 30 and 90 days “if the facts of the case justify a longer period of delay,” the statute
 10 imposes temporal baselines lacking in Sections 2703 and 2705(b).

11 COUNT I

12 **REQUEST FOR DECLARATORY RELIEF –**

13 **INVALIDITY OF SECTION 2705(b) UNDER THE FIRST AMENDMENT**

14 23. ***Overbreadth Doctrine.*** “When the Government restricts speech, the
 15 Government bears the burden of proving the constitutionality of its actions.” *Comite de*
 16 *Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011)
 17 (internal quotation marks and citation omitted). “In a facial challenge to a law’s validity under
 18 the First Amendment, the law may be invalidated as overbroad if a substantial number of its
 19 applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”
 20 *Id.* (internal quotation marks and citation omitted).

21 24. ***Presumptive Invalidity of Prior Restraints.*** A secrecy order “imposes a prior
 22 restraint on speech.” *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F.
 23 Supp. 2d 876, 882 (S.D. Tex. 2008) (“*In re Sealing*”). Any prior restraint “bear[s] a heavy
 24 presumption against its constitutional validity,” and the government has a “heavy burden of
 25 showing justification for the imposition of such a restraint.” *Capital Cities Media, Inc. v.*
 26 *Toole*, 463 U.S. 1303, 1305 (1983). Thus, because Section 2705 on its face authorizes the
 27 issuance of secrecy orders that operate as a prior restraint on Microsoft’s speech, the

1 government's burden of justifying the restraint is particularly heavy. The statute authorizes
2 secrecy orders that prohibit, *ex ante*, providers such as Microsoft from engaging in core
3 protected speech under the First Amendment, i.e., speech about the government's access to
4 customers' sensitive communications and documents and its increased surveillance on the
5 Internet. "Whatever differences may exist about interpretations of the First Amendment, there
6 is practically universal agreement that a major purpose of that Amendment was to protect the
7 free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1971).

8 **25. Content-Based Speech Restrictions.** Secrecy orders issued under Section
9 2705(b) also function as content-based restrictions on speech, as "they effectively preclude
10 speech on an entire topic—the [accompanying] order and its underlying criminal
11 investigation." *In re Sealing*, 562 F. Supp. 2d at 881. Like prior restraints, "[c]ontent-based
12 regulations are presumptively invalid" and subject to strict scrutiny. *R.A.V. v. City of St. Paul*,
13 505 U.S. 377, 382 (1992). They may be upheld only if they are "narrowly tailored to promote a
14 compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803,
15 813 (2000). "If a less restrictive alternative would serve the Government's purpose, the
16 legislature must use that alternative." *Id.*

17 **26. Presumptive Openness of Government Records.** Secrecy orders also
18 improperly inhibit the public's right of access to search warrants under both the common law
19 and the First Amendment. Upon application by a party, the press, or the public, search
20 warrants generally must be unsealed after investigations are concluded. *See United States v.*
21 *Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194-95 (9th Cir. 2011) (access to
22 search warrant materials may be denied only where "compelling reasons" outweigh
23 presumption of disclosure). But when a search warrant is accompanied by an indefinite secrecy
24 order, the public and the press—like the affected customer—may have no idea a warrant has
25 been issued. As a result, even after the government concludes an investigation, the public and
26 the press may have no effective way to learn about, discuss, and debate the government's
27 actions.

1 27. **Overbreadth of Section 2705(b).** Section 2705(b) facially violates the First
2 Amendment because a substantial number of its applications are unconstitutional under these
3 standards, when judged in relation to the statute’s legitimate sweep. This overbreadth
4 manifests itself in at least three ways.

5 28. **Indefinite Duration.** First, Section 2705(b) is unconstitutional because it
6 permits secrecy orders “for such period as the court deems appropriate.” Because this language
7 at least allows a court to issue secrecy orders of a prolonged duration, and has been understood
8 by dozens of courts (including this one) to authorize indefinite secrecy orders, the statute
9 violates the First Amendment because it is not narrowly tailored to satisfy a compelling
10 government interest. Even when case-specific circumstances initially justify a secrecy order as
11 the narrowest means available to satisfy a compelling government interest, the First
12 Amendment demands that the provider be free to engage in truthful speech about the
13 government’s activities as soon as secrecy is no longer required to satisfy that interest. *In re*
14 *Sealing*, 562 F. Supp. 2d at 895 (“As a rule, sealing and non-disclosure of electronic
15 surveillance orders must be neither permanent nor, what amounts to the same thing,
16 indefinite.”); *In Matter of Search Warrant for [Redacted]@hotmail.com*, 74 F. Supp. 3d 1184,
17 1185 (N.D. Cal. 2014) (reading Section 2705(b) to require a fixed end date on any secrecy
18 order; observing the “First Amendment rights of both Microsoft and the public” were affected
19 by such an order); *In the Matter of the Grand Jury Subpoena for: [Redacted]@yahoo.com*, 79
20 F. Supp. 3d 1091, 1091 (N.D. Cal., 2015) (denying government’s application for indefinite
21 order under Section 2705(b) because it would “amount to an undue prior restraint of Yahoo!’s
22 First Amendment right to inform the public of its role in searching and seizing its
23 information”). A secrecy order of a prolonged or indefinite duration will apply beyond the
24 point when a compelling government interest requires it. As a result, to the extent it authorizes
25 issuance of secrecy orders of prolonged or indefinite duration, Section 2705(b) violates the
26 First Amendment on its face. *See Butterworth v. Smith*, 494 U.S. 624, 635-36 (1993) (state
27

1 statute indefinitely banning witnesses from disclosing testimony given before a grand jury
2 violates the First Amendment).

3 29. **“Reason to Believe.”** Second, Section 2705(b) is unconstitutionally overbroad
4 because it permits a court to issue a secrecy order whenever it has “reason to believe”
5 notification would result in one of five listed adverse results. But the statute does not require
6 that the “reason to believe” be grounded in the specific facts of the particular investigation, as
7 distinct from the government’s overall experiences or other unspecified considerations.
8 Further, the statute offers no guidance as to the evidentiary burden the government bears in
9 showing a “reason to believe” sufficient to justify a secrecy order. And the “reason to believe”
10 standard fails to require that a secrecy order be the least restrictive means available to further
11 the government’s interest in avoiding the specified adverse results in the particular case, as the
12 First Amendment requires to justify this sort of restraint. The “reason to believe” standard
13 therefore falls far short of the “heavy burden” the First Amendment imposes when the
14 government seeks to impose a prior restraint on speech.

15 30. **The Overbroad Catchall.** Third, Section 2705(b) allows a court to issue secrecy
16 orders whenever it finds “reason to believe” notification of the target would “otherwise
17 seriously jeopardiz[e] an investigation or unduly delay[] a trial.” This subjective and vaguely-
18 defined provision allows the issuance of secrecy orders in the absence of any case-specific
19 compelling interest sufficient to justify a prior restraint or a content-based restriction on speech.
20 There may be compelling circumstances not captured within the “adverse results” specifically
21 enumerated in Section 2705(b)(1)-(4) that would justify a restraint on the provider’s speech, but
22 this catchall provision is substantially broader than necessary to account for those
23 circumstances and provides no meaningful constraints. It therefore violates the First
24 Amendment.

25 31. **Facial Overbreadth.** Because Section 2705(b) is overbroad in each of the ways
26 described in the previous paragraphs, the government cannot overcome the presumption that
27 the provision on its face violates the First Amendment.

1 32. **Invalidity as Applied to Microsoft.** For the same reasons that Section 2705(b) is
 2 facially invalid, it is also unconstitutional as applied to Microsoft. Of the federal secrecy orders
 3 issued to Microsoft in the 20-month period ending in May 2016, more than 2,000 (including
 4 more than 450 secrecy orders accompanying search warrants) were indefinite, and all were
 5 issued under the deficient “reason to believe” standard, without any statutory requirement for
 6 case-specific factual showings. Further, it appears a substantial number of the orders may have
 7 relied on the unconstitutionally vague catchall provision to justify the restraint on speech.
 8 Almost without exception, the secrecy orders issued in this District pursuant to Section 2705(b)
 9 likewise were indefinite in duration, and all were issued pursuant to the defective “reason to
 10 believe” standard, without any statutory requirement for a case-specific evidentiary showing,
 11 and are therefore constitutionally deficient under these standards.

12 33. **Judicial Declaration.** A judicial declaration that Section 2705(b) violates the
 13 First Amendment is necessary and appropriate so Microsoft may ascertain its obligations under
 14 law. Absent such a declaration, the government will continue to seek, and courts will continue
 15 to issue, secrecy orders that impermissibly restrict the First Amendment rights of Microsoft and
 16 similarly situated providers. And although Microsoft has the right to challenge individual
 17 orders (as it has done), the need for Microsoft repeatedly to expend time and effort challenging
 18 orders issued pursuant to a constitutionally flawed statute places an impermissible burden on its
 19 First Amendment rights.

COUNT II

REQUEST FOR DECLARATORY RELIEF—

INVALIDITY OF SECTIONS 2703 AND 2705(b) UNDER FOURTH AMENDMENT

23 34. **Notice under the Fourth Amendment.** Notice to an owner whose property is
 24 being searched or seized “is an element of the reasonableness inquiry under the Fourth
 25 Amendment.” *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995); *see also United States v. Freitas*,
 26 800 F.2d 1451, 1456 (9th Cir. 1986).
 27

1 35. ***Failure to Provide Notice.*** A statute is facially unconstitutional under the
2 Fourth Amendment if the “applications of the statute in which it actually authorizes or prohibits
3 conduct” are unconstitutional. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015).
4 Section 2703 is facially unconstitutional to the extent it absolves the government of the
5 obligation to give notice to a customer whose content it obtains by warrant, without regard to
6 the circumstances of the particular case. Section 2705(b) exacerbates the constitutional injury
7 because, as discussed above, it permits secrecy orders that prohibit providers from telling
8 customers when the government has accessed their private information and data, without
9 requiring constitutionally sufficient proof of the existence of a compelling government interest
10 and without temporally limiting the prohibition to the least restrictive period sufficient to
11 satisfy the government’s compelling interests. The interaction of these provisions means the
12 government can access a customer’s most sensitive information without the customer having
13 any way to learn about, or challenge, the government’s intrusion. This result flouts
14 fundamental Fourth Amendment principles.

15 36. ***Standards for Physical Search.*** Sections 2703 and 2705(b)’s Fourth
16 Amendment deficiencies are underscored by comparison to the limits on the government’s
17 authority to conduct a search and seizure in the physical world. It has been established for
18 centuries that, absent exigent circumstances, law enforcement must provide contemporaneous
19 notice when conducting a search or seizure. “The common-law principle that law enforcement
20 officers must announce their presence and provide residents an opportunity to open the door is
21 an ancient one.” *Michigan v. Hudson*, 547 U.S. 586, 589 (2006). Even when exigent
22 circumstances exist and thus allow law enforcement to conduct a search before providing
23 notice, the government may delay notice only for a limited period of time. *See* 18 U.S.C. §
24 3103a; Fed. R. Crim. P. 41(f)(1)(C). As a result, if an individual or business elects to maintain
25 its emails on premises, the government could not execute a search warrant for those emails
26 without the customer learning about it and having the ability to assert any rights or privileges it
27 may have. “[W]hen law enforcement agents seize property pursuant to a warrant, due process

1 requires them to take reasonable steps to give notice that the property has been taken so the
2 owner can pursue available remedies for its return.” *City of West Covina v. Perkins*, 525 U.S.
3 234, 240 (1999). “[T]he government may not take property like a thief in the night; rather, it
4 must announce its intentions and give the property owner a chance to argue against the taking.”
5 *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012) (internal quotation marks
6 and citation omitted).

7 **37. *Privacy in the Cloud.*** Here, Microsoft’s customers have decided to store their
8 information and data with Microsoft in the cloud rather than on computers at their own
9 premises. This technological fortuity, however, does not weaken the privacy interests at stake.
10 *See Riley*, 134 S. Ct. at 2494-95 (“The fact that technology now allows an individual to carry
11 ... in his hand” a cell phone containing the “privacies of life,” including thousands of
12 photographs and records of all his communications, “does not make the information any less
13 worthy of the protection for which the Founders fought[.]”) (internal quotation marks and
14 citation omitted). Nevertheless, relying on Sections 2703 and 2705(b), the government seeks
15 and executes warrants for electronic communications far more frequently than it sought and
16 executed warrants for physical documents and communications—apparently because it believes
17 it can search and seize those documents and communications under a veil of secrecy. But
18 providing less protection to information stored in the cloud than to information stored in a local
19 server or papers stored in a file cabinet would ignore the Supreme Court’s admonition not to let
20 “technology ... erode the privacy guaranteed by the Fourth Amendment” and its caution to,
21 when confronted with new technologies, “assure[] preservation of that degree of privacy
22 against government that existed when the Fourth Amendment was adopted.” *Kyllo v. United*
23 *States*, 533 U.S. 27, 34 (2001).

24 **38. *Standards for Standing.*** When the government serves a warrant on Microsoft
25 seeking a customer’s private information and data, the Fourth Amendment rights described
26 above belong to the customer, whose “papers and effects” are the target of the government’s
27 legal process. But Microsoft has third-party standing to vindicate its customers’ Fourth

1 Amendment rights to notice, particularly when customers lack sufficient knowledge to
2 challenge government action because of the government’s tactic of operating behind a veil of
3 secrecy. *See Powers v. Ohio* 499 U.S. 400, 410–11 (1991) (permitting third-party standing
4 where: (1) the litigant has “suffered an injury in fact, thus giving him or her a sufficiently
5 concrete interest in the outcome of the issue in dispute”; (2) the litigant has a “close relation to
6 the third party”; and (3) there is “some hindrance to the third party’s ability to protect his or her
7 own interests”) (internal quotation marks and citations omitted).

8 39. ***Microsoft’s Standing.*** Microsoft satisfies each element of the *Powers* test.
9 First, Microsoft has a core business interest in safeguarding its customers’ private
10 correspondence and documents. Sections 2703 and 2705(b)’s violation of Microsoft’s
11 customers’ Fourth Amendment rights therefore injures Microsoft by eroding the customer trust
12 that encourages individuals and businesses to migrate their technological infrastructure to
13 Microsoft’s cloud. Further, the Fourth Amendment harms caused by Sections 2703 and
14 2705(b) are themselves the subject of Microsoft’s forbidden political speech, speech in which
15 Microsoft cannot engage because of secrecy orders issued pursuant to Section 2705(b);
16 accordingly, the Fourth Amendment violations caused by Sections 2703 and 2705(b)
17 compound Microsoft’s First Amendment injury. Second, courts recognize that providers such
18 as Microsoft have a sufficiently close relationship with their customers to allow providers to
19 assert their customers’ constitutional rights under *Powers*. *See In re Verizon Internet Servs.*,
20 257 F. Supp. 2d 244, 258 (D.D.C. 2003) (“Verizon’s relationship with its client subscribers is
21 the kind of relationship that warrants allowing Verizon to assert a First Amendment challenge
22 on their behalf.”), *rev’d on other grounds by Recording Industry Ass’n of Am., Inc. v. Verizon*
23 *Internet Servs., Inc.*, 351 F.3d 1229, 1239 (D.C. Cir. 2003)). Third, by design, Sections 2703
24 and 2705(b) combine to thwart any effort by Microsoft’s customers to protect their own Fourth
25 Amendment rights.

26 40. ***Invalidity as Applied.*** For the same reasons that Sections 2703 and 2705(b) on
27 their face violate the Fourth Amendment, they are also unconstitutional as applied to Microsoft

1 and its customers. The absence of a government notice obligation, combined with the
2 imposition of secrecy orders on Microsoft, has resulted, and will continue to result, in an
3 unconstitutional delay of notice to Microsoft's customers, in violation of their Fourth
4 Amendment rights.

5 41. **Judicial Declaration.** A judicial declaration that Sections 2703 and 2705(b)
6 violate the Fourth Amendment is necessary and appropriate so that Microsoft and the
7 government may ascertain their obligations under law. Absent such a declaration, the
8 government will continue to request and obtain secrecy orders that impermissibly restrict the
9 Fourth Amendment rights of Microsoft's customers and the customers of other, similarly
10 situated providers.

11 **PRAYER FOR RELIEF**

12 Microsoft prays for an Order and Judgment:

13 (a) Declaring that 18 U.S.C. § 2705(b) is unconstitutional under the First
14 Amendment;

15 (b) Declaring that 18 U.S.C. § 2705(b) is unconstitutional under the Fourth
16 Amendment;

17 (c) Declaring that 18 U.S.C. § 2703 is unconstitutional under the Fourth
18 Amendment, at least to the extent it permits warranted searches and seizures without the
19 government providing notice to the person whose communications are being searched and
20 seized;

21 and

22 (d) Granting such other and further equitable or legal relief as the Court deems
23 proper.

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DATED this 17th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, I electronically filed the foregoing *First Amended Complaint for Declaratory Judgment* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. I further hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participant:

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DATED this 17th day of June, 2016.

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