CINDY A. COHN (SBN 145997)
cindy@eff.org
LEE TIEN (SBN 148216)
tien@eff.org
DAVID GREENE (SBN 160107)
davidg@eff.org
KURT OPSAHL (SBN 191303)
kurt@eff.org
JENNIFER LYNCH (SBN 240701)
jlynch@eff.org
NATHAN D. CARDOZO (SBN 259097)
nate@eff.org
ANDREW CROCKER (SBN 291596)
andrew@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

RICHARD R. WIEBE (SBN 121156)
wiebe@pacbell.net
LAW OFFICE OF RICHARD R. WIEBE
1 California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

Counsel for Petitioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY LETTERS	Case No. 13-mc-80089 SI Related Case No. 11-cv-2173 SI **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION AND RENEWED PETITION TO SET ASIDE NATIONAL SECURITY LETTER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **LODGED UNDER SEAL** Date: December 18, 2015 Time: 9:00 a.m. Judge: Hon. Susan Illston Place: Courtroom 10, 19th Floor

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION AND RENEWED PETITION TO SET ASIDE NSL

TO THE COURT, RESPONDENTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 18, 2015 at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 10 on the 19th floor of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Petitioner [redacted] ("Petitioner") will, and hereby does, renew its Petition to set aside the National Security Letters ("NSLs") and its nondisclosure requirement imposed in connection therewith and moves for a preliminary injunction barring enforcement of 18 U.S.C. §§ 2709 and 3511.

Pursuant to 18 U.S.C. §§ 3511(a) and (b), Fed. R. Civ. P. 65(a), and Local Rules 7-2 and 65-2, Petitioner seeks an order setting aside the NSLs and their corresponding nondisclosure provisions and enjoining Respondent from enforcing the relevant statutes authorizing Respondent's use of NSLs. As explained further in the accompanying Memorandum of Points and Authorities, the accompanying Declaration of [redacted] and in Petitioner's previous Petition to set aside the NSLs, the nondisclosure provisions of the NSL statute are unconstitutional in at least three ways. First, the NSL statutes' nondisclosure provision is an unconstitutional prior restraint on Petitioner's speech. Second, the judicial review provision violates separation of powers by preventing reviewing courts from applying the appropriate level of review mandated by the First Amendment. Third, the statute as a whole is a content-based restriction on speech that fails strict scrutiny.

Petitioner respectfully asks this Court to issue a preliminary injunction preventing Respondent from enforcing the nondisclosure provisions of the NSL statutes because the four factors are met.

First, Petitioner is likely to succeed on the merits of its claims that the NSL statutes are unconstitutional. This Court has already held that the nondisclosure provision of the NSL statutes is unconstitutional and violates separation of powers. The cosmetic changes Congress made to the nondisclosure provision of the statutes by enacting the USA FREEDOM Act do not cure their constitutional defects.

Second, Petitioner has and continues to suffer irreparable injury because the nondisclosure provision has gagged it from discussing its experiences, violating the First Amendment. Petitioner has lost its First Amendment rights for [redacted] while its legal challenges to the NSLs have been pending, an injury that unquestionably constitutes irreparable harm.

Third, the balance of hardships tips strongly in Petitioner's favor because in light of the continued unconstitutional prior restraint on Petitioner's speech, Respondent has failed to show that such a gag is constitutional, much less necessary.

Fourth, there is a strong public interest in upholding the First Amendment rights of Petitioner and other NSL recipients that have been similarly gagged. A preliminary injunction would prevent further constitutional violations.

DATED: October 23, 2015

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

By: _____
ANDREW CROCKER
DAVID A. GREENE
KURT OPSAHL
CINDY A. COHN
LEE TIEN
JENNIFER LYNCH
NATHAN D. CARDOZO
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE MATERIALS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Two and a half years ago, this Court ruled that National Security Letters violate the constitutional rights of recipients, including the right to be free of prior restraints on speech. Today, Petitioner and the thousands of NSL recipients like it still remain unconstitutionally gagged, with Petitioner now gagged for [redacted] In passing the USA FREEDOM Act earlier this year, Congress and the executive branch had ample opportunity to cure the defects with the National Security Letter statute. Instead, at the executive branch's urging, Congress chose to make only cosmetic changes that largely reinforced the unconstitutional *status quo ante*. The Court's job here is not difficult. The same constitutional principles it previously relied on to strike down the NSL statute continue to apply to the revised statute, so the Court should once again hold that the law simply does not comport with long-settled constitutional requirements.

Additionally, given the loss of First Amendment freedoms already suffered by Petitioner, this Court should issue a preliminary injunction that allows Petitioner to disclose the fact of receiving these NSLs, without disclosing the customer involved, which is what it has long sought. This has already prevented it from full participation in the public and congressional debate over the USA FREEDOM Act. The lengthy, overbroad gags at issue in this case are exactly what the procedural and substantive prior restraint doctrines are supposed to prevent. This Court should set aside the NSLs, declare the NSL statute unconstitutional, and preliminarily enjoin the government from issuing NSLs.

PROCEDURAL HISTORY

In 2011, Petitioner received a National Security Letter from the FBI directing Petitioner "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 "11-2173 NSL"). Decl. of [redacted] in Supp. of Pet. to Set Aside NSL Ex. A, 11-2173 Dkt. No. 7 ("11-2173 [redacted] Decl."). The NSL prohibited Petitioner from disclosing information about the NSL or its petition to Petitioner's

affected customer, to most of Petitioner's employees and staff, to the press, to members of the public, and to members of Congress.

On May 2, 2011, Petitioner filed a petition asking this 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 Court granted the petition to set aside the 11-2173 NSL, declaring the statute to be facially unconstitutional. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1074-75 (N.D. Cal. 2013), *vacated and remanded*, Nos. 13-15957, 13-16731, 13-16732 (9th Cir. Aug. 24, 2015). First, 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*, 380 U.S. 51 (1965), by failing to require the government to initiate judicial review promptly. *Id.* Second, the 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.* at 1076-77. 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 appeal. *Id.*

In [redacted] 2013, [redacted] Petitioner received two additional NSLs from the FBI (collectively, the "13-80089 NSLs"). Decl. of [redacted] in Supp. of Pet. to Set Aside NSL ¶¶ 18-20, 13-80089 Dkt. No. 4 ("13-80089 [redacted] Decl."). The NSLs demanded

subscriber records regarding certain customers and included a similar nondisclosure requirement to the one included with the 11-2173 NSL, preventing it from discussing the demand publicly. *Id.*

Petitioner thereafter filed a second petition, asking this Court to set aside the new NSLs on the same grounds as it had the earlier NSL. This Court, proceeding with caution, abstained from applying its prior ruling to Petitioner's new petition, stating: "Whether the challenged nondisclosure provisions are, in fact, facially unconstitutional will be determined in due course by the Ninth Circuit." Order at 2, *In re Nat'l Sec. Letter*, No. 13-80089 (N.D. Cal. Aug. 12, 2013). The Court denied Petitioner's petition and granted the government's cross-petition to enforce the NSLs. *Id.*

The government and Petitioner appealed cases 11-2173 and 13-80089 respectively to the Ninth Circuit, where they were consolidated along with an appeal of another petitioner to set aside an NSL directed at that recipient. After the consolidated appeals were briefed and argued, but before the Ninth Circuit rendered a decision, Congress passed the USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268 (2015), which, among other things, modified §§ 2709 and 3511. The Ninth Circuit ordered supplemental briefing on June 3, 2015 in the cases, asking the parties to address whether and how Congress' passage of the USA FREEDOM Act affected the appeals. Ultimately, the court vacated all three of this Court's decisions and remanded for this Court to address the recipients' challenges to the statute as amended.

AMENDMENTS TO THE NSL STATUTE

On June 2, Congress passed the USA FREEDOM Act, which amends the NSL statute in part but leaves its operation essentially the same.

As before, without any prior judicial review the FBI can issue a request for records under § 2709(b) to a wire or electronic communication service provider and can unilaterally and indefinitely bar the recipient from disclosing the fact that it has received an NSL. 18 U.S.C. § 2709(c)(1).

As before, in order to issue this gag, an FBI official must in the first instance merely certify that without a gag, one of several enumerated harms "may result." *Id.*

As before, this gag is not subject to judicial review unless the recipient takes action. 18 U.S.C. § 3511(b)(1)(A).

With only slight modification, a district court reviewing a gag is limited to determining whether there is "reason to believe" one of the statutory harms "may result" without the gag. *Id.* § 3511(b)(3).

The most significant revision to the NSL statute created by the USA FREEDOM Act does not create a change in the FBI's practice at all. The amendments merely codify a version of the "reciprocal notice procedure" suggested by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861, 879 (2d Cir. 2008), a procedure the government has previously represented that it voluntarily followed for every NSL it has issued since *Mukasey*. Under the amendments, in addition to allowing the recipient to file a petition to set aside the gag previously found in § 3511, the statute now also provides that "if a recipient . . . wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government[.]" § 3511(b)(1)(A). The government must then file a petition to enforce the gag order within 30 days, § 3511(b)(1)(B), although the statute does not require the gag to automatically dissolve if the government fails to do so. If the recipient seeks judicial review through either of these avenues, the court must "rule expeditiously." § 3511(b)(1)(C).

The amendments also slightly alter the evidence the government must present to a court reviewing an NSL gag and the standard the court applies. On review, the government must now support its certification with a "statement of specific facts" indicating that without a gag, an enumerated harm "may result." § 3511(b)(2). However, the reviewing court is not required to weigh this statement of facts. Rather, the court "shall issue" the gag if it determines that "that there is reason to believe" an enumerated harm "may result" without a gag, § 3511(b)(3). The statute previously directed the court to set aside the gag if "there [was] no reason to believe" that disclosure would cause an enumerated harm. 18 U.S.C. § 3511(b)(2) (in effect Mar. 9, 2006 – June 1, 2015).

ARGUMENT

I. THE NSL STATUTE'S GAG PROVISION, SECTION 2709(C), STILL VIOLATES THE FIRST AMENDMENT BECAUSE IT DOES NOT MEET THE CONSTITUTIONAL STANDARDS FOR PRIOR RESTRAINTS.

As described above, the amendments to the NSL statute do not remedy the constitutional deficits of the statutory scheme previously identified by this Court.[1]

As this Court previously held, the gag provision of the NSL statute, § 2709(c), continues to authorize prior restraints because it prevents NSL recipients from disclosing even that they have received an NSL or anything about their interaction with the government. *See, e.g., Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976) (analyzing temporary gag order for purposes of empanelling a jury to be a prior restraint); *Alexander v. U.S.*, 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). *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1071; *see also Mukasey*, 549 F.3d at 876.

A prior restraint on free speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559. For this reason, the Supreme Court has imposed stringent procedural and substantive restrictions on them. Accordingly, prior restraints authorized by § 2709(c) must satisfy both the procedural and substantive requirements mandated

[1] As before, this Court can exercise its authority under 18 U.S.C. § 3511(a) and (b), to rule that the NSL statute is unconstitutional on its face and as applied. Under § 3511(a) and (b) an NSL recipient can seek review of the letter and any nondisclosure requirement it contains. "The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful," 18 U.S.C. § 3511(a) and "[i]f a recipient of [an NSL] . . . wishes to have a court review [the] nondisclosure requirement imposed in connection with the [NSL], the recipient may . . . file a petition for review." 18 U.S.C. 3511(b)(1)(A). A court that receives a petition to review an NSL "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(c). "As part of determining whether to modify or set aside an NSL . . . the Court can review the constitutional attack on the statute, because the statute's constitutionality implicates whether an NSL served on a wire or electronic communications providers . . . is unreasonable or unlawful." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1070. A court also can "exercise its fundamental obligation to determine the constitutionality of the NSL nondisclosure provisions under the Declaratory Relief Act, 28 U.S.C. § 2201." *Id.*

by the First Amendment. This Court previously concluded that they satisfy neither, and the amendments have not altered this calculus.

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

This Court correctly held that § 2709(c) lacks the procedural protections required of prior restraints set forth by the Supreme Court in *Freedman* and is thus facially unconstitutional. *See In re Nat'l Sec. Letter, 930* F. Supp. 2d at 1074-75. The enactment of the USA FREEDOM Act has not affected that holding.

In *Freedman*, 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, 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 In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1073-74; *Mukasey*, 549 F.3d at 879; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002).

The amendments introduced by the USA FREEDOM Act fail to bring the statute up to the constitutional standard required by *Freedman*. As described in more detail below, the revised statute includes some, but not all, of the *Mukasey* court's suggestions for a "reciprocal notice procedure," but these cosmetic changes do not remediate the statute's constitutional flaws.

1. The Revised 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 Specified Brief Period."

The gag 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.

The revised NSL statute still permits an imposition of an administrative gag of indefinite duration, with no requirement that the government ever seek court approval unless the recipient first takes action. 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. *Id.* at 58-59 (emphasis added). 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 invoking judicial review on the recipient. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1073.

As described above, the "reciprocal notice procedure" added by the USA FREEDOM Act, which gives the recipient the option to notify the government of its desire for judicial review, still does not require that pre-review gags be limited to a "specified brief period." Rather, the statute continues to authorize gags of indefinite duration unless the recipient takes action by initiating judicial review or by notifying the government of its desire for judicial review. 18 U.S.C. § 3511(b)(1)(A). Moreover, even when the recipient takes the affirmative step of invoking the notice provision, the statute directs the government to initiate review within 30 days, but the gag does not automatically dissolve if the government fails to do so. 18 U.S.C. § 3511(b)(1)(B). Indeed, there are *no* statutory consequences for failing to initiate review. This is also especially important in the context of NSLs since the recipient is often a third-party service provider with neither sufficient understanding of the situation to raise possible defenses nor, usually, sufficient incentive to incur the costs of challenging the gag.

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

The gag scheme, even after the USA FREEDOM Act, still 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 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 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).

In revising the statute, Congress failed to require that a court reviewing a gag order issue a "prompt final judicial decision." It certainly could have, but instead, the amended § 3511 now simply says that the court must "rule expeditiously." 18 U.S.C. § 3511(b)(1)(C). Congress declined to include a specified time frame for this review, disregarding the *Mukasey* court's suggestion of "a *prescribed* time, perhaps 60 days." 549 F.3d at 879 (emphasis added). Although the Supreme Court has not specified precisely how quickly a final judicial decision must come, 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* itself. 380 U.S. at 55, 61. Whatever constitutes the outer counters of a "prompt" final judicial determination, such limits must be both brief and finite. The NSL statute was not revised to provide either brief or finite limits.

Even as an initial matter, in 11-2173, with no statutory limitations to the contrary, the Court issued its opinion over 15 months after the hearing on the petition. The revisions to the NSL statute would not have changed the timeline in this case.

Moreover, the concern of the *Freedman* Court that any judicial lifting "comes after the value of speaking about the issues gagged has diminished," has come to pass. The entire span of

Congressional deliberation and a legislative process around NSLs, including the gags, has occurred during the [redacted] that the petitioner has been gagged and unable to fully participate. *See* Decl. of [redacted] in Supp. of Renewed Pet. to Set Aside NSLs and Mot. for Prelim. Inj., ¶¶ 7-24 [redacted] Decl.").

3. The Revised 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 both elements of 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." *See Mukasey*, 549 F.3d at 871 (citing *Freedman*, 380 U.S. at 58-59).

First, as the Court held before, the statute does not require the government to initiate judicial review. 930 F. Supp. 2d at 1074. The inclusion of the reciprocal notice option in the USA FREEDOM Act does not cure this unconstitutionality because it still requires the recipient to act first, either by filing a petition under § 3511(a), or by notifying the government of its desire for judicial review under § 3511(b)(1)(A). If the recipient does nothing, the gag order remains in place. This is the very same backward burden that the Supreme Court found impermissible in *Freedman*. 380 U.S. at 57-58. That the new provisions allow for the recipient to initiate judicial review in some situations—whether by filing an action or causing the government to file one—does not cure this defect. 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. *Id.* at 59.

Second, the NSL statute fails to place the burden of justifying the gag order on the government if the matter is actually brought to court; indeed, the statute deprives that court of any meaningful authority to exercise its constitutional oversight duties. Under the amended statute, the court "shall issue" a gag order if "there is reason to believe" an enumerated harm *may* result. The defect here is that the government still need only prove the barest possibility of harm. The change introduced by the USA FREEDOM Act is cosmetic, replacing the previous provision that allowed the district court to *set aside* a gag if "there is no reason to believe" an enumerated harm might

result. Either way, the standard is far below the constitutional threshold. In amending the statute, Congress failed to even incorporate the Second Circuit's construction in *Mukasey* that the government affirmatively show a "good reason." 549 F.3d at 883; *see also In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1075.

Moreover, this standard still does not require the government to "bear any specific burden of proof, in terms of the showing necessary to justify the non-disclosure order." *Id.* In response to "reciprocal notice" by the recipient, the government must now file an application with a "statement of specific facts" in support of its gag order certification, but the court's review of the gag need not determine the gag is necessary. Indeed, the court need not even take this statement of facts into account.[2]

B. The Revised 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." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted).

To pass constitutional muster, prior restraints must be *necessary* to further a governmental interest of the highest magnitude. *See Nebraska Press*, 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 Co. v. U.S.*, 403 U.S. 713 (1971), the Supreme Court, in a brief *per curiam* decision, found that the United States' request for an

[2] The amendments do remove the conclusive certification provision in § 3511 that the Petitioner previously challenged.

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 (internal quotations and citations omitted). 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." *Id.* at 730 (Stewart, J. joined by White, J., concurring).

The gag imposed on Petitioner 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 Petitioner is not privy to the specific facts presented in camera to the Court, the statute only requires the government to show that the harm to national security "may" occur, whereas the prior restraint test requires that it "must" occur or "surely result."

Nor did the statute require the government to prove that the harm caused by Petitioner'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 of unlimited duration is highly unlikely to be the only alternative for preventing the harm to national security; a time-limited gag is one obvious alternative.

The revisions to the statute do nothing to bring the gag provision in line with the substantive constitutional requirements. As before, the amended § 2709 only requires that the government certify that an enumerated harm "may result" absent a gag, not that the gag is "necessary" to preventing this harm. 18 U.S.C. § 2709(c)(1)(B). While the Court did not apply this test the last time, given the government and Congress' failure to remedy even the procedural flaws in the statute, Petitioner urges the Court to also apply the substantive standards at this juncture.

II. THE STANDARDS OF JUDICIAL REVIEW OF THE GAG PROVISION IN § 3511 ARE EXCESSIVELY DEFERENTIAL AND VIOLATE SEPARATION OF POWERS AND DUE PROCESS.

The amended judicial review provisions of § 3511 also violate the separation of powers and due process. This Court previously concluded that even if judicial review of an NSL gag takes place, the applicable provisions of § 3511(b), which "circumscribe[d] a court's ability to modify or set aside nondisclosure NSLs unless the essentially insurmountable standard 'no reason to believe' that a harm 'may' result is satisfied—[were] incompatible with the court's duty to searchingly test restrictions on speech." *In re Nat'l Sec. Letter,* 930 F. Supp. 2d at 1077-78.

As discussed above, the amended § 3511(b) introduces a small change in the standard applied by a court reviewing a gag order, such that the court is directed to enforce the gag if "there is reason to believe" the enumerated harms "may result." Even assuming that this cosmetically rearranged language grants the court more leeway, the revised statute plainly does not provide for the "searching" standard of review required by this Court. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1077. As the Supreme Court has noted, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns v. Virginia,* 435 U.S. 829, 843 (1978). Ultimately, here, by limiting the Court, the revised NSL statute continues to "impermissibly threaten[] the institutional integrity of the Judicial Branch" in violation of separation of powers. *Mistretta v. U.S.*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 851 (1986)).

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

This Court previously held the NSL statute unconstitutional for the independent reason that § 2709(c) is a content-based restriction on speech that does not meet the requirements of strict scrutiny. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1075. The statute as amended still aims to suppress speech of a specific content—speech about 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, 411-12 (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."[3] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (citations omitted). Moreover, every court that has examined the gag provision has applied strict scrutiny. *See, e.g., Mukasey*, 549 F.3d at 878; *Merrill v. Lynch*, No. 14-cv-09763 (S.D.N.Y. Aug. 28, 2015), slip op. at 11 n.5.

Under the strict scrutiny standard, the gag provision is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). To survive strict scrutiny review, the government must show that a restriction on free speech is "narrowly tailored to promote a compelling Government interest." *U.S. v. Playboy Entm't Grp., 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).

This Court previously found that the statute fails strict scrutiny, and none of the revisions to the statute introduced by the USA FREEDOM Act alter this fundamental infirmity.

First, the provision remains 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 Court previously explained:

> [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.

---

[3] The Supreme Court recently clarified that a law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Laws are also considered content-based if they "cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys." *Id.* (internal quotation marks and citations omitted).

This blanket prohibition remains. The government may point to § 604 of the USA FREEDOM Act, which allows certain recipients to report that they may have received NSLs in broad aggregated bands. However, this blanket rule is not narrowly tailored, because it does not require the government to employ less speech-restrictive means, such as allowing *all* recipients to report the mere fact they have received an NSL. Under § 604's limited license for government-approved speech, recipients who receive fewer than the specified number of NSLs must still include "0" in the lowest reporting band, so these recipients are effectively gagged from reporting complete and honest transparency reports, forced instead to falsely assert that the provider *might* have received none. *See* Gov. Ltr. to the Court, Nos. 13-15957, 13-16731, & 13-16732, Dkt. No. 86 (9th Cir. Nov. 6, 2014). By contrast, recipients who receive a large number of NSLs are not so gagged—they can use a band that does not include a zero—another way in which the provision is not narrowly tailored.

This Court also previously held that the gag provision is overinclusive because it authorizes overly long prior restraints. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1076. Even if a 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 this Court put it, "[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.* at 1076-77; *see also Doe v. Gonzales,* 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007). "Nothing in the statute requires . . . the government to rescind the non-disclosure order once the impetus for it has passed." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1076.

This failure remains for the NSLs at issue here. In the USA FREEDOM Act, Congress directed the Attorney General to adopt unspecified procedures to review "at appropriate intervals" to determine whether gags issued under the revised statute are still supported. Pub. L. 114-23, § 502(f). However, the statute neither specifies that these future administrative procedures will *require* the government to employ less speech-restrictive means, nor will they ensure that gags persist no "longer than necessary." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1076. Finally, the

statute does not apply to the NSLs at issue because it does not require the Attorney General to apply these procedures to any NSLs issued before the passage of the USA FREEDOM Act—all the NSLs in this and related litigation, as well as hundreds of thousands of others. Pub. L. 114-23, § 502(f)(1) (directive limited to "nondisclosure requirements issued pursuant to § 2709 . . . as amended by this Act . . ..")

IV. THE REVISED 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 v. City of Birmingham,* 394 U.S. 147, 149-50 (1969) (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, Georgia v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) ("[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. to 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. . . .").

Just as before, § 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)(1)(B) (emphasis added).

This language leaves the decision entirely to 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. Because it lacks

articulable statutory guidance cabining this executive discretion, allowing a gag to issue merely upon an official's statement that harm *may* occur is insufficient to survive constitutional scrutiny.

Moreover, the government must demonstrate a greater probability of harm than "may" before it can suppress speech on the basis of content. In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), the Supreme Court discussed the problems with a "may result" standard, in the context of students wearing black armband to protest the Vietnam War. In *Tinker*, nothing in the record "demonstrate[d] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id.* at 514. The district court had found the school authorities were acting reasonably, based "upon their fear of a disturbance from the wearing of the armbands." *Id.* at 508.

As the Supreme Court noted, this standard is too low because "[a]ny departure from absolute regimentation *may* cause trouble." *Id.* (emphasis added). But, in *Tinker*, the fact that the student' silent armband protest "may cause" a harm was not enough: "our Constitution says we must take this risk." *Id.* Instead, the Government had to have a "reason to anticipate that the wearing of the armbands *would substantially interfere* with the work of the school." *Id.* at 509 (emphasis added).

The Ninth Circuit's decision in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988) is also instructive. In that case, the court considered a policy to censor student speech under a test with the same critical "may result" language as § 2709:

> When there is evidence that reasonably supports a judgment that significant or substantial disruption of the normal operation of the school or injury or damage to persons or property *may result.*

861 F.2d at 1156 (emphasis added). This was not enough, and the court struck down this standard under *Tinker* and its progeny.

This rule is not limited to the context of student speech. As Justice Stewart explained in his concurrence in the *Pentagon Papers* case, the prior restraint on publication of classified national security information had to be reversed because he could not say "disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York*

Times, 403 U.S. at 730 (Stewart, J., concurring); *see also Nebraska Press,* 427 U.S. at 569-70 (asserting likely harm did not "possess the requisite degree of certainty to justify restraint").

V. THE NSL'S COMPELLED PRODUCTION PROVISION STILL VIOLATES THE FIRST AND FIFTH AMENDMENTS.

Separate from the unconstitutionality of the gag provision, the underlying authority in § 2709(b) given to the FBI to unilaterally compel the production of records without judicial authorization is also unconstitutional as a violation of the First and Fifth Amendments. While not all of the information sought pursuant to NSLs may enjoy constitutional protection, some clearly does.

The NSL authority, for example, would on its face permit the FBI to 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 prior judicial involvement 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)(1), (2).[4] *See, e.g., Doe v. Ashcroft*, 334 F. Supp. 2d 471, 509 (S.D.N.Y. 2004) ("[Section] 2709 imposes a duty on ISPs to provide the names and addresses of subscribers, thus enabling the Government to specifically identify someone who has written anonymously on the [I]nternet.").

Although the statute permits the FBI to compel protected records from any covered communications provider, [redacted]

[4] Nor is it clear that, even if properly followed, the statutory language provides sufficient constitutional protections because it only prohibits investigations based "solely" on activities protected by the First Amendment.

[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.'") (citations omitted)).

Because the First Amendment protects anonymous speech and association, efforts to pierce such anonymity are subject to heightened scrutiny, requiring the demonstration *to a court* 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. Serv. Employees Union AFL-CIO, Local 280*, 950 F.2d 1456, 1462 (9th Cir. 1991). Without a mandatory and independent judicial check prior to issuance, NSLs are not sufficiently protective of First Amendment interests.

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. Unlike other mechanisms compelling an individual or entity to disclose information to the government, NSLs may be issued without any court involvement. *E.g.* Fed. R. Crim. P. 17 (grand jury subpoena); 18 U.S.C. § 2703(d) order; 50 U.S.C. § 1861 (USA PATRIOT Act § 215 order).

Unlike administrative subpoenas and other comparable investigative authorities, NSL demands, including of course the ones at issue here, are almost always accompanied by a gag 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.*[5] *Compare, e.g., FW/PBS*, 493 U.S. at 218 (discussing

[5] DOJ statistics bear this out. Based on the Office of Inspector General reports mandated by Congress, 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, and more than 100,000 between 2007 and 2009. As of December 2013, the FBI was still issuing an average of 60 NSLs per day. 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. 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"). Department
(footnote continued on following page)

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). Finally, the third party providers generally will not have sufficient information about the circumstances of the request—such as whether it is likely based on speech activities or triggers right of association concerns—to raise First Amendment concerns.

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 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. The government's assertion of a national security interest does not eliminate the need for such balancing. *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 the necessary information to do so, the NSL statute violates the due process rights of recipients' subscribers.

(footnote continued from preceding page)
of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters: Assessment of Progress in Implementing Recommendations and Examination of NSL Usage in 2007 through 2009* 60 (2014), *available at* https://oig.justice.gov/reports/2014/s1408.pdf ("2014 OIG Report"); *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."), *Available at* https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

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

This Court previously invalidated the entire NSL statute because it found that the unconstitutional portions were not severable. Now, faced with a revised but still unconstitutional statute, the Court should reach the same conclusion. Above all, in amending the statute in the USA FREEDOM Act, Congress once again included no severability clause or other indication it wanted the statute to function without the unconstitutional provisions.

As the Court previously 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.

In re Nat'l Sec. Letter, 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 filed in 13-80089, 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 of the statutory harms . . .

Decl. of Robert Anderson, Jr. ¶ 13, No. 13-80089 (June 21, 2013).

Because §§ 2709(c) and 3511(b) are unconstitutional, the Court must once again 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." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Ayotte v. Planned Parenthood of N. 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 statutory 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. Faced with this Court's prior ruling on severability, Congress in the USA FREEDOM Act did not adopt a severability clause. This is consistent throughout the statute's history. 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 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, and, as noted above, it did so again in the USA FREEDOM Act after this Court struck down the statute. The gag is not severable.

VII. A PRELIMINARY INJUNCTION IS WARRANTED AND SHOULD NOT BE STAYED PENDING APPEAL.

A preliminary injunction is warranted when a plaintiff can show (1) a likelihood of success on the merits, (2) irreparable injury in the absence of preliminary relief, (3) that a balancing of equities tip in her favor, and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).[6]

[6] In the Ninth Circuit, a plaintiff may, in lieu of establishing a likelihood of success on the merits, obtain a preliminary injunction by showing "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," so long as the other two *Winter* factors are met. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

For the reasons given above, Petitioner is likely to succeed on the merits of its First Amendment claim. When a plaintiff seeks a preliminary injunction to uphold First Amendment rights, the law "clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

The other elements of the preliminary injunction test similarly favor Petitioner.

A. The Revised NSL Statutes Irreparably Harm Petitioner by Unconstitutionally Restraining Its Speech.

The NSL statute's gag provisions have irreparably harmed Petitioner's First Amendment rights to speak about its own direct and troubling experiences with NSLs for [redacted] now and counting, as this Court is well aware. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see also Sammartano v. First Judicial Dist. Court, in and for Cnty. of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002), *overruled on other grounds*, *Winter*, 555 U.S. at 22. If the loss of First Amendment freedoms for even a short period of time "unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373, this first requirement is satisfied. Indeed the irreparable harm suffered by the Petitioner here is outrageous. *See* [redacted] Decl. ¶¶ 6-24.

[redacted]

[redacted] The NSL statutes' gag provisions prevent Petitioner from even stating that it has received an NSL, much less commenting on its experiences [redacted]

The passage of the USA FREEDOM Act has done nothing to alleviate that harm and instead has extended it.

B. A Balancing of the Equities Strongly Favors Petitioner.

The balance of equities tips strongly in Petitioner's favor because it has been prevented from exercising its First Amendment rights, and the government has failed to show that its prior restraint is constitutional, much less necessary. When a party has demonstrated a likelihood of success and irreparable harm, the balancing of equities and public interest tilt in favor of granting a

preliminary injunction. *See Los Padres Forestwatch v. U.S. Forest Serv.*, 776 F. Supp. 2d 1042, 1052 (N.D. Cal. 2011).

The harm to Petitioner's continued deprivation of its First Amendment rights outweighs the government's purported need for nondisclosure that Petitioner received an NSL. As described above, § 3511(b)'s revised standard of review, which instructs a court to enforce a gag order if "there is reason to believe" one of the enumerated harms "may result," is insufficient to meet the safeguards required for a prior restraint under the First Amendment. The government does not have a legitimate interest in unconstitutionally preventing Petitioner's speech. In any event, even if the lower standard of review in § 3511(b) were not unconstitutional, the government has failed to demonstrate that there is a high probability that one of the statute's enumerated harms would result from disclosing the mere fact that Petitioner received an NSL.

Additionally, enjoining the gag provisions of the NSL statutes would not harm the government because this Court previously found that "the government has *not* shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1076 (emphasis in original). The statutes' gag provisions fail to distinguish between disclosing receipt of an NSL and disclosing its underlying content, "rendering the statute impermissibly overbroad and not narrowly tailored." *Id.* This Court's conclusion demonstrates that the harm to Petitioner's First Amendment rights to discuss its experiences outweighs the value of maintaining an unconstitutional prior restraint on Petitioner's speech.

Further, enjoining the NSL would not harm the government because it has other means to obtain the information it seeks in the NSL without unconstitutionally gagging Petitioner's speech. This Court has already noted that the government would not be harmed by a stay of the government's motion to compel that Petitioner comply with an NSL "because the government can obtain the information it seeks in the 11-2173 NSL through other judicially-supervised means, such as by seeking a court order pursuant to 18 U.S.C. §§ 2703(d), 2705." *In re Nat'l Security Letter*, No. 11-cv-2667 (N.D. Cal. Aug. 7, 2013). The government also has other judicially supervised tools it may use that do not so obviously interfere with Petitioner's First Amendment rights. *See*

e.g. Fed. R. Crim. Proc. 41 (probable cause warrant); Fed. R. Crim. P. 17 (grand jury subpoena); 18 U.S.C. § 2516 (wiretap order); 18 U.S.C. § 3123 (pen register/trap and trace order); 50 U.S.C. § 1861 (FISA "215" order). Thus, granting an injunction would not unduly burden the government—it would merely require it to pursue other means of obtaining the information sought in the NSL.

C. Granting a Preliminary Injunction Would Serve the Public Interest.

Finally, granting a preliminary injunction serves the public interest because it vindicates the First Amendment rights of all NSL recipients who have been gagged and prevents further violations of the Constitution. There is a "significant public interest in upholding First Amendment principles," *Sammartano*, 303 F.3d at 974, and it is "always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Com'n,* 23 F.3d 1071, 1079 (6th Cir. 1994)). Further, continued enforcement of an unconstitutional law "would infringe not only the free expression interests of the . . . [parties], but also the interests of other people" subject to the same restrictions. *Sammartano*, 303 F.3d at 974.

The public interest strongly favors ending the continued violation of the First Amendment rights of Petitioner and other parties who have received NSLs. As this Court has previously noted, Petitioner seeks to discuss its experiences with NSLs to participate more fully in the public debate about the NSL program. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1076.

Granting a preliminary injunction would allow Petitioner and many other similarly situated entities to discuss their experiences receiving NSLs, which would add greater context to the ongoing debate about the use of NSLs and government surveillance generally. Allowing these parties to make full use of their First Amendment rights while increasing public understanding about this aspect of government surveillance ultimately redounds to the public's benefit.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the NSLs be set aside, that the statute be declared unconstitutional, and that the government be preliminarily enjoined from issuing NSLs.

DATED: October 23, 2015

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

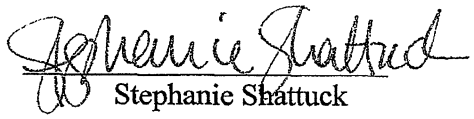
By: _____
ANDREW CROCKER
DAVID A. GREENE
KURT OPSAHL
CINDY A. COHN
LEE TIEN
JENNIFER LYNCH
NATHAN D. CARDOZO
ELECTRONIC FRONTIER FOUNDATION

RICHARD R. WIEBE
LAW OFFICE OF RICHARD R. WIEBE
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stephanie Shattuck, certify that on October 23, 2015, pursuant to prior agreement of the parties, I caused the foregoing to be served electronically on the government's counsel, Steven Y. Bressler, Steven.Bressler@usdoj.gov.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 23, 2015, at San Francisco, California.



Stephanie Shattuck