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13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

15 INTERNET ARCHIVE; AMERICAN CIVIL
16 LIBERTIES UNION; AMERICAN CIVIL
LIBERTIES UNION FOUNDATION;
17 AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, INC.;
18 AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
19 CALIFORNIA, INC.; and ELECTRONIC
FRONTIER FOUNDATION,
20

Plaintiffs,

21 v.

22 MICHAEL B. MUKASEY, in his official
capacity as Attorney General of the United
23 States; ROBERT S. MUELLER III, in his
official capacity as Director of the Federal
24 Bureau of Investigation; and ARTHUR M.
CUMMINGS II, in his official capacity as
25 Deputy Assistant Director of the
26 Counterterrorism Division of the Federal Bureau
of Investigation,
27

Defendants.

28 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION
TO SET ASIDE NATIONAL SECURITY LETTER

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SAN FRANCISCO DISTRICT OF CALIFORNIA

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SEALED
BY COURT ORDER

CW

Case No. _____

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION OF PLAINTIFF INTERNET
ARCHIVE TO SET ASIDE NATIONAL
SECURITY LETTER

DOCUMENT SUBMITTED UNDER
SEAL

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INTRODUCTION

On November 26, 2007, an agent of the Federal Bureau of Investigation ("FBI") served a National Security Letter ("NSL") pursuant to 18 U.S.C. § 2709 on petitioner Internet Archive ("Archive"), demanding that it turn over records about one of its patrons. An NSL is akin to an administrative subpoena. Through NSLs, the FBI can demand records from an electronic communication service provider so long as the FBI certifies that the information sought is relevant to a counter-terrorism or counter-intelligence investigation. *See* 18 U.S.C. § 2709(a)-(b). The NSL statute also permits the FBI to impose broad and effectively permanent gag orders on an NSL recipient. *See* 18 U.S.C. § 2709(c). Where the FBI certifies that certain harms may result from disclosure, *see* 18 U.S.C. § 2709(c), the recipient is prohibited from disclosing that the FBI has sought or obtained information. *Id.* The NSL served on the Archive ("November 2007 NSL") demanded that it disclose the subscriber name, address, length of service, and electronic communication transactional records related to [REDACTED] [REDACTED] the Archive's services. It also imposed a gag order on the Archive, its officers, its employees, and its agents.

As authorized by 18 U.S.C. § 3511(a), the Archive asks this Court to issue an order setting aside the NSL on the ground that the demand for records is unlawful for several reasons. First, section 2709 only authorizes the issuance of an NSL to an electronic communication service provider. But the Archive is not such a provider for two reasons: (1) in permitting patrons to upload materials to the site, the Archive is not acting as a *provider* of an electronic communication service; and (2) the Archive is a library which, pursuant to 18 U.S.C. § 2709(f), is not a provider of electronic communication services. Second, the provision governing the gag order in the November 2007 NSL, 18 U.S.C. § 2709(c), is unconstitutional on its face. Since that provision is not severable from the remainder of the statute, the entire NSL statute is unconstitutional, as one court has already concluded. *See Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), *appeal pending*. Because the November 2007 NSL was issued under a facially unconstitutional statute, it is unlawful.

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STATEMENT OF FACTS

A. The Internet Archive

The Internet Archive is a digital library established in San Francisco, California in 1996.

Declaration of Brewster Kahle ("Kahle Decl.") ¶ 4; Internet Archive, About IA, <http://www.archive.org/about/about.php> (last visited Dec. 13, 2007), attached to Kahle Decl. as Ex.

A. Its overarching mission is to help provide universal access to all knowledge. *Id.* ¶ 5. To fulfill that mission, the Archive works with national libraries, museums, universities, and the general public to collect and offer free access to a wide variety of materials in digital format. *Id.* ¶ 6.

Some of its partners include the Library of Congress, the National Archives, and the British Library. *Id.* ¶ 9. The State of California has formally recognized the Archive as a library for the purposes of the 1996 Library Services and Technology Act, 20 U.S.C. § 9122(1)(E). *Id.* ¶ 10 and

Ex. B. The Archive has been a member of the American Library Association since 2000. *Id.* ¶ 10.

One of the unique features of the Archive is the "Wayback Machine," which allows people to visit archived versions of websites. Visitors to the Wayback Machine can type in a URL, select a date, and then begin surfing on an archived version of the Web. Kahle Decl. ¶ 11. The Archive has created and maintained the Wayback Machine by collecting snapshots of billions of public web pages, except those that have opted not to be archived, every two months for the last ten years. *Id.*

In addition to preserving an archival copy of the Web, the Archive is dedicated to preserving digital copies of other sources of knowledge and culture. The Archive has digitized archival and education movies since 1999. Kahle Decl. ¶ 8. It also has been involved in several book digitization projects in collaboration with other institutions. *Id.* ¶ 9. In 2005, the Archive formed the Open Content Alliance to build a joint collection of digitized public domain books. *Id.* The Archive's book collection currently contains over 200,000 volumes from over 70 contributing libraries. *Id.* In fact, the Archive's holdings contain more material than 95% of the world's libraries. *Id.* All of these materials are available to patrons through the Archive's website. To ensure continued access to this material, the Archive provides storage and preservation services for its extensive digital collections. *Id.* ¶ 6; *Id.* Ex. A.

1 The Archive also accepts donated material that belongs in a library from individual patrons,
2 including audio and video recordings. Kahle Decl. ¶ 6. Thus, members of the public directly
3 contribute resources to the Archive's digital collection. Kahle Decl. ¶ 12. To ensure continued
4 access to this material, as with other portions of its collection, the Archive provides permanent,
5 archival storage and preservation services for these recordings and other materials donated by the
6 public. *Id.* [REDACTED]

7 As a library, the Archive actively works to serve its patrons as a resource for exploration,
8 research, and learning. Kahle Decl. ¶ 13. Providing a safe environment for a patron's activities
9 has long been an important function of libraries with physical materials. The Archive seeks to
10 continue this practice for those patrons accessing its website. *Id.* An individual wishing to view
11 digital materials on the Archive's website may do so as an "anonymous user"—that is to say,
12 without logging in to the website. *Id.* However, individuals seeking to upload materials, post
13 reviews, or communicate on message boards must first register with the Archive, which includes
14 agreeing to the Archive's "Terms of Use," providing a "valid" (although unverified) e-mail
15 address, creating a password, and supplying a screen name. *Id.* They must then log in to their
16 accounts. *Id.* While the Archive intentionally limits the information that it collects and retains
17 from users, from time to time it may possess some information about its patrons. *Id.* ¶ 14. Such
18 records may include the date the patron's account was opened, the screen names associated with the
19 patron's account, an unconfirmed e-mail address associated with the patron, and messages of those
20 who communicate with the Archive via e-mail. *Id.*

21 **B. The November 2007 National Security Letter**

22 Many U.S. Attorneys and other law enforcement officials find the Archive a valuable
23 resource, and the Archive has regularly received requests for information about its collections,
24 most frequently for information stored in the Wayback Machine. Kahle Decl. ¶ 15. The Archive
25 regularly interacts with the federal government, including the Department of Justice, the FBI, and
26 the Central Intelligence Agency and has complied with lawful subpoenas requesting information.
27 *Id.*

28

1 In June 2007, Special Agent Scott Rakowitz and Supervisory Special Agent Chuck
2 Esposito of the San Francisco office of the FBI met with attorneys at the Electronic Frontier
3 Foundation ("EFF"), who provide legal representation to the Archive for various purposes.
4 Declaration of Kurt Opsahl ("Opsahl Decl.") ¶ 4. At that meeting, EFF agreed that it would accept
5 service of any future legal process from the FBI on behalf of the Archive. *Id.*

6 On Monday, November 26, 2007, Supervising Special Agent [REDACTED] left a voicemail
7 message for Kurt Opsahl, Senior Staff Attorney at EFF. Opsahl Decl. ¶ 5. Similar messages were
8 left with Senior Staff Attorney Lee Tien and Staff Attorney Kevin Bankston. *Id.* The messages
9 informed them that an FBI agent would be coming to EFF's office that day. *Id.* Later that
10 morning, Special Agent [REDACTED] arrived at EFF's office, met with Bankston, and served an
11 NSL addressed to the Archive, dated November 19, 2007 ("November 2007 NSL"). *Id.* ¶ 6 and
12 Ex. A to Opsahl Decl. The November 2007 NSL was signed by defendant Arthur M. Cummings,
13 II, Deputy Assistant Director of the Counterterrorism Division of the FBI. Opsahl Decl., Ex. A.

14 The November 2007 NSL directs the Archive "to provide the [FBI] the subscriber's name,
15 address, length of service, and electronic communication transactional records" pertaining to a
16 particular [REDACTED] *Id.* It covers the period [REDACTED]

17 [REDACTED] *Id.* Parrotting the language of the NSL statute's non-disclosure certification
18 provision, 18 U.S.C. §2709(c), the November 2007 NSL includes the following certification:

19 disclosure of the fact that the FBI has sought or obtained access to the information
20 sought by this letter may endanger the national security of the United States,
21 interfere with a criminal, counterterrorism, or counterintelligence investigation,
22 interfere with diplomatic relations, or endanger the life or physical safety of a
23 person.

24 *Id.* The certification does not specify which of these harms may result from disclosure. *Id.* The
25 November 2007 NSL further advises the Archive that the NSL statute "prohibits you, or any
26 officer, employee, or agent of yours, from disclosing this letter, other than to those to whom
27 disclosure is necessary to comply with the letter or to an attorney to obtain legal advice or legal
28 assistance with respect to this letter." *Id.*

1 Appended to the November 2007 NSL is a page titled "ATTACHMENT" that states, "In
2 preparing your response to this National Security Letter, you should determine whether your
3 company maintains the following types of information which may be considered by you to be an
4 electronic communications transactional record in accordance with Title 18 United States Code
5 Section 2709." Opsahl Decl., Ex. A. The page lists, among other things, [REDACTED]

6 [REDACTED]
7 [REDACTED] and "[a]ny other information which you consider to be an
8 electronic communication transactional record." *Id.* The November 2007 NSL requires that the
9 Archive provide the requested information "personally to a representative of the FBI [REDACTED]
10 [REDACTED] or through use of delivery service or through secure fax" by December 14, 2007 (14
11 business days from receipt of the letter). *Id.*

12 On Tuesday, November 27, 2007, Opsahl and EFF Staff Attorney Marcia Hofmann brought
13 the November 2007 NSL to the Archive and showed it to Brewster Kahle, who is the Chair of the
14 Archive's Board of Directors as well as one of its Digital Librarians. Kahle Decl. ¶ 18; Opsahl
15 Decl. ¶ 8.

16 On Wednesday, November 28, 2007, Special Agent [REDACTED] left a message for Bankston
17 inquiring about the status of the Archive's response. Opsahl Decl. ¶ 11. Later that day, Opsahl
18 spoke with Special Agent [REDACTED] on the telephone and informed him that the Archive was
19 reviewing and considering the letter and notified him, pursuant to section 2709(c)(4), that the
20 Archive would be bringing in additional counsel. *Id.* ¶ 12.

21 The NSL statute and the November 2007 NSL have prevented the Archive from disclosing
22 information about the November 2007 NSL and this lawsuit to the Archive's board of directors, to
23 its staff, to its patrons, to other libraries, to the press, to members of the public, and to members of
24 Congress. They likewise have prevented the Archive from making it known that it is speaking
25 from experience in publicly advocating for legislative change with respect to the NSL demand and
26 gag power. Kahle Decl. ¶ 21.

27
28

1 ARGUMENT

2 I. THE NOVEMBER 2007 NSL IS NOT AUTHORIZED BY 18 U.S.C. § 2709

3 The Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712, which was enacted as
4 Title II of the Electronic Communications Privacy Act ("ECPA"), regulates the government's
5 access to stored information maintained by network service providers. Section 2709, which is part
6 of the SCA, governs the FBI's issuance of an NSL. Section 2709(a) provides in pertinent part:

7 **Duty to provide.**—A wire or electronic communication service provider shall
8 comply with a request for subscriber information and toll billing records
9 information, or electronic communication transactional records in its custody or
10 possession made by the Director of the Federal Bureau of Investigation under
11 subsection (b) of this section.

12 By its terms, section 2709 permits the issuance of an NSL only to a wire or electronic
13 communication service ("ECS") provider.¹ The Internet Archive, however, is not an ECS provider
14 and hence may not be required to comply with the November 2007 NSL. First, in configuring its
15 site so that patrons can contribute materials by uploading them to the site, the Archive is only a
16 user, not a provider of an ECS. Second, the activity at issue under the November 2007 NSL –

17 permitting patrons [REDACTED] part of the Archive [REDACTED]
18 [REDACTED] – is not the provision of an electronic communication service; rather, it is providing
19 storage and preservation services, more akin to providing remote computing storage. The NSL
20 must therefore be set aside.

21 A. The Archive Is A User, Not A Provider of An Electronic Communication Service

22 The SCA defines "electronic communication service" as "any service which provides to
23 users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. §
24 2510(15). The issue here, however, is not whether electronic communications are being sent and
25

26 ¹ The reference to a "wire" communication service in section 2709 is redundant, since the
27 definition of an "electronic" communication service encompasses "any service which provides to
28 users thereof the ability to send or receive *wire* or electronic communications." 18 U.S.C. §
2510(15) (emphasis added) (incorporated by reference into the SCA at 18 U.S.C. § 2711).

1 received between the Archive and its patrons. They plainly are. The issue is whether the Archive
2 actually *provides* the service that allows the communications to be sent and received or whether, as
3 the case law discussed below makes clear, the Archive, like its patrons, is simply a user of that
4 service.

5 Allowing those who visit a website to provide information to it does not make that website
6 a *provider* of an ECS. This is true whether a visitor is providing information to the site in order to
7 complete a purchase, *see Crowley v. Cybersource Corp.*, 166 F. Supp. 2d 1263 (N.D. Cal. 2001), or
8 is providing information in connection with downloading streaming "visual programming," *see In*
9 *re Broadcast.com, Inc.*, 2001 WL 36050382 (E.D. Tex. 2001), or is making online airline
10 reservations, *see In re JetBlue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299 (E.D.N.Y.
11 2005), or is [REDACTED] the Internet Archive. To the contrary, both the
12 website in question and the person or entity communicating with the site are *users* of an ECS.
13 Here, as in the cases cited above, the entity that enables the communications to take place is the
14 Internet access provider used by the Archive or the visitor to the Archive website. Those access
15 providers are the ECS providers. *See In re Doubleclick Privacy Litigation*, 154 F. Supp. 2d 497,
16 508 (S.D.N.Y. 2001) ("the 'service which provides to users thereof the ability to send or receive
17 wire or electronic communications' is 'Internet access.'"); *In re Broadcast.com, Inc.*, 2001 WL
18 36050382 at *2 (same).

19 In a number of cases, website patrons have alleged that the defendant was an ECS provider
20 that had violated the SCA by unlawfully disclosing personal information provided in connection
21 with obtaining the products or services of the website. In each case, the court rejected the
22 plaintiff's claim because the website in question did not provide an electronic communication
23 service and hence was not subject to the SCA's proscription. *In re JetBlue Corp. Airways Privacy*
24 *Litigation*, 379 F. Supp. 2d 299; *Dyer v. Northwest Airlines Corporations*, 334 F. Supp. 2d 1196,
25 1199 (D.N.D. 2004) ("businesses offering their traditional products and services online through a
26 website are not providing an 'electronic communication service'"); *Crowley*, 166 F. Supp. 2d at
27 1270 (Amazon.com is not an ECS provider, it is an ECS user); *In re Broadcast.com, Inc.*, 2001 WL
28 36050382 at *2, 3 ("Broadcast.com operates a website and, in doing so, does not provide Internet

1 access to the public. It uses it."); *see also, In re Doubleclick Privacy Litigation*, 154 F. Supp. 2d at
2 508-09 (websites are users of an ECS under ECPA for purposes of determining applicability of
3 exception to prohibition against obtaining access to an electronic communication). As the court in
4 *In re JetBlue Corp. Airways Privacy Litigation* explained:

5 Although JetBlue operates a website that receives and transmits data to and from
6 its customers, it is undisputed that it is not the provider of the electronic
7 communication service that allows such data to be transmitted over the Internet.
8 Rather, JetBlue is more appropriately characterized as a provider of air travel
9 services and a consumer of electronic communication services. The website that
10 it operates, like a telephone, enables the company to communicate with its
11 customers in the regular course of business. Mere operation of the website,
12 however, does not transform JetBlue into a provider of internet access, just as the
13 use of a telephone to accept telephone reservations does not transform the
14 company into a provider of telephone service. Thus, a company such as JetBlue
15 does not become an "electronic communication service" provider simply because
16 it maintains a website that allows for the transmission of electronic
17 communications between itself and its customers."

18 *In re JetBlue Corp. Privacy Litigation*, 379F. Supp. 2d at 307 (fn. omitted).²

19 The Archive is no more an ECS provider than were the websites in the cases cited above.
20 Like those websites, the Archive is a user of the Internet so that it may, for example, [REDACTED]
21 [REDACTED] the Archive's collection. Its
22 purpose is not to provide basic connectivity, *i.e.*, access to an electronic communications service
23 to third parties. Its purpose is to act as a repository of information and knowledge, stored in
24 digital form, so that knowledge and information may be preserved and made available to those
25 seeking it, now and for generations to come. Because the Archive is not an ECS provider, the
26 Archive falls outside the parameters of section 2709(a) and hence the NSL at issue here must be
27 set aside as unlawful.
28

² The Archive's public Internet website stands in stark contrast to the elaborate, internal American Airlines computerized customer reservation system, known as SABRE, that was at issue in *United States v. Mullins*, 992 F.2d 1472 (9th Cir. 1993). In *Mullins*, the defendant travel agents used the system, access to which they leased from American, to defraud the airline by stealing frequent flyer miles. *Id.* at 1474-75. In upholding the constitutionality of the manner in which evidence against the defendants was obtained from SABRE, the Ninth Circuit assumed, without analysis, that American was a provider of a wire or electronic communications service with respect to the system. *Id.* at 1478. The court's conclusion, with respect to a private, internal system, access to which was leased to others, in no way contradicts the conclusions of the decisions cited in the text.

1 **B. In Allowing Patrons [REDACTED] the Archive Is**
2 **Providing Storage and Preservation Services and Therefore Is Not an ECS**
3 **Provider**

4 The SCA regulates the activities of providers of an "electronic communication service" and
5 those of a "remote computing service" ("RCS").³ Section 2709 applies only to ECS providers,
6 however, not to RCS providers, nor to entities that are neither an ECS nor an RCS provider. In
7 determining whether an entity is an ECS provider, an RCS provider, or neither, the court must
8 examine the nature of the activity in question in order to ascertain whether the statute applies. That
9 is because an entity may be an electronic communication service provider with respect to some
10 activities but not with respect to others. As the Department of Justice itself recognizes:

11 Whether an entity is a provider of an "electronic communication service," or a
12 provider of "remote computing service," or neither depends on the nature of the
13 particular communication sought [by the government]. For example, a single
14 provider can simultaneously provide "electronic communications service" with
15 respect to one communication and "remote computing service" with respect to
16 another communication.

17 U.S. Dep't of Justice, Criminal Division, Computer Crime and Intellectual Property Section,
18 *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*
19 88 (July 2002); accord, *Quon v. Arch Wireless Operating Company, Inc.*, 445 F. Supp. 2d 1116,
20 1136 (C.D. Cal. 2006) ("Congress recognized that service providers can offer a wide variety of
21 different services, each one being characterized differently under the statute." (citing S. Rpt. No.
22 99-541, at 16 (1986)). As Professor Orin Kerr explains:

23 The distinction between providers of ECS and RCS is made somewhat confusing
24 by the fact that most network service providers are multifunctional. . . . The
25 classifications of ECS and RCS are context sensitive: the key is the provider's role
26 with respect to a particular copy of a particular communication, rather than the
27 provider's status in the abstract.

28 Orin S. Kerr, *A User's Guide to the Stored Communications Act—and a Legislator's Guide to*
Amending It, 72 GEO. WASH. L. REV. 1208, 1215 (2004).

³ As noted above, the Act defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). It defines a "remote computing service" as the "provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

1 The characteristics the courts rely on to distinguish an RCS from an ECS also demonstrate
2 that the storage and preservation services that the Archive provides to those who [REDACTED]
3 [REDACTED] take the Archive outside the definition of an ECS. The discussion in *Quon v.*
4 *Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, is particularly useful. The court there
5 delineates three essential characteristics that distinguish storage by an ECS from storage by an
6 RCS:

7 First, "the centrality a computer plays in facilitating the communication is key to Congress'
8 definition of a remote computing service. . . . [A]t a minimum, a computer must play a central role
9 in facilitating the storage of the communication." *Id.* at 1132-33 (emphasis added). Second, the
10 fact that the material is being stored is a critical factor. *Id.* at 1134. Finally, the length and purpose
11 of the storage must be examined. When an entity provides long term storage that "is not incidental
12 to the transmission of the communication itself, and is not meant for backup protection but . . . as
13 the single place where text messages, after they have been read, are archived for a permanent
14 record-keeping mechanism," it is acting as an RCS. *Id.* at 1136; accord *United States v. Jackson*,
15 2007 WL 3230140 at *3 (D.D.C. 2007) (quoting *Quon* with approval).

16 Like the text message storage service at issue in *Quon* and *Jackson*, the service the Archive
17 provides in [REDACTED] the public takes it outside the definition of
18 an ECS. As in *Jackson* and *Quon*, the Archive provides permanent, archival storage as part of
19 [REDACTED] the collection. Kahle Decl. ¶ 12. This differentiates the Archive from an ECS
20 whose electronic storage of communications is either temporary, intermediate storage in
21 connection with the transmission of a communication or is for purposes of backup protection for
22 the communication. See *Quon*, 445 F. Supp. 2d at 1136. The Archive is intended as the final
23 point where the material is stored—that is, the material becomes part of the Archive's permanent
24 collection.⁴

25 ⁴ Although the Archive provides many other services to the public, including the ability to
26 [REDACTED] and [REDACTED]
27 here—[REDACTED] that does not change the fact that the service in question
28 is one of storage, not the provision of an electronic communication service. Whether the Archive might be considered an ECS provider with respect to those services is a question better left for another day. See *United States v. Steiger*, 318 F.3d 1039, 1049 (11th Cir. 2003) (equating, in dictum, an electronic bulletin board system with

1 The FBI cannot obtain from the Archive the particular records it seeks using an NSL issued
2 under 18 U.S.C. 2709(a) because the Archive is not an electronic communication service provider
3 for purposes of maintaining the records sought.

4 **II. THE ARCHIVE IS NOT SUBJECT TO THE NOVEMBER 2007 NSL BECAUSE IT**
5 **IS A LIBRARY PURSUANT TO 18 U.S.C. § 2709(f)**

6 18 U.S.C. § 2709 contains an additional protection to ensure that libraries cannot be treated
7 as electronic communication service providers for providing essential library services to the public.

8 Specifically, the statute provides:

9 A library (as that term is defined in section 213(1) of the Library Services and
10 Technology Act (20 U.S.C. § 9122(1)), the services of which include access to the
11 Internet, books, journals, magazines, newspapers, or other similar forms of
12 communication in print or digitally by patrons for their use, review, examination,
13 or circulation, is not a wire or electronic communication service provider for
14 purposes of this section, unless the library is providing the services defined in
15 section 2510(15) ("electronic communication service") of this title.

16 18 U.S.C. § 2709(f).

17 In turn, the 1996 Library Services and Technology Act defines a "library" as including,
18 *inter alia*, "a private library or other special library, but only if the State in which such private or
19 special library is located determines that the library should be considered a library for purposes of
20 this subchapter." 20 U.S.C. § 9122(1)(E). The Archive has been formally recognized as a library
21 by the State of California for purposes of the 1996 Library Services and Technology Act, and thus
22 satisfies this definition. Kahle Decl., Ex. B. The Archive is therefore the type of library to which
23 18 U.S.C. § 2709(f) applies, and cannot be considered a wire or electronic communication service
24 provider under 18 U.S.C. § 2709(f) unless it provides an "electronic communication service" under
25 18 U.S.C. § 2510(15).

26 a telephone company or an ISP); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879-80 (9th Cir.
27 2002) (accepting the parties' assumption that host of Web-based message board was an electronic
28 communication service provider).

29 *See Quon*, 445 F. Supp. 2d at 1136-37 (A single entity can offer differing services and
30 whether it is treated as an ECS or an RCS with respect to that service depends on the nature of the
31 service in question).

1 As explained above, the Archive does not provide an "electronic communication service"
2 with respect to the [REDACTED] It provides access to those [REDACTED] "patrons for their
3 use review, examination or circulation," 18 U.S.C. § 2709(f). Thus, 18 U.S.C. § 2709(f) provides
4 an additional reason why the Court should not classify the Archive as a provider of electronic
5 communication services subject to demands for records under 18 U.S.C. § 2709(a), and the Court
6 must therefore set aside the November 2007 NSL.

7 **III. THE NOVEMBER 2007 NSL IS UNCONSTITUTIONAL BECAUSE IT VIOLATES**
8 **THE FIRST AMENDMENT**

9 The November 2007 NSL must also be set aside because the statutory authority under
10 which it was issued is unconstitutional on its face. The gag order provision in section 2709(c)
11 violates the First Amendment and cannot be severed from the remainder of the statute. That
12 renders 18 U.S.C. § 2709 unenforceable in its entirety. Notably, the one court that has already
13 considered the constitutionality of the NSL statute concluded that the statute's gag provisions
14 violate the First Amendment and that because those gag provisions are not severable, the entire
15 statute is unconstitutional. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), *appeal*
16 *pending*. The *Doe* court enjoined the FBI from issuing NSLs under 18 U.S.C. § 2709, but that
17 ruling is stayed pending appeal. That the November 2007 NSL was issued under a facially
18 unconstitutional statute provides yet another reason that the NSL should be set aside.

19 The Court need not, however, decide the question of the facial constitutionality of the NSL
20 statute's gag provisions in the context of this petition. That issue will be briefed in connection with
21 the motion for summary judgment that plaintiffs will be filing in this case, challenging the facial
22 and as-applied constitutionality of 18 U.S.C. § 2709 and of § 3511, which sets forth the procedures
23 and standards governing a challenge to a section 2709(c) a gag order. Accordingly, petitioner's
24 constitutional argument can, most appropriately, be fully explicated in the context of that action.

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CONCLUSION

For the foregoing reasons, the Archive requests that this Court issue an order setting aside the November 2007 NSL.

Respectfully submitted,

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