

ORIGINAL
FILED
2011 JUL 29 A 11:54
RICHARD W. WILKINS
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

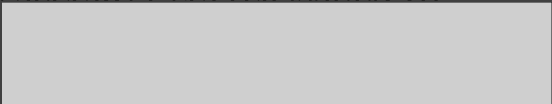
1 TONY WEST
Assistant Attorney General
2 MELINDA HAAG
United States Attorney
3 ARTHUR R. GOLDBERG
SANDRA M. SCHRAIBMAN
4 Assistant Branch Directors
STEVEN Y. BRESSLER D.C. Bar No. 482492
5 Trial Attorney
United States Department of Justice
6 Civil Division, Federal Programs Branch

7 P.O. Box 883
Washington, D.C. 20044
8 Telephone: (202) 305-0167
Facsimile: (202) 616-8470
9 Email: Steven.Bressler@usdoj.gov

10 Attorneys for the United States Department of Justice

11 UNITED STATES DISTRICT COURT
12
13 NORTHERN DISTRICT OF CALIFORNIA

14 IN RE MATTER OF NATIONAL
SECURITY LETTER ISSUED TO



No. C 11-2173

MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL COMPLIANCE
WITH NATIONAL SECURITY LETTER
REQUEST FOR INFORMATION

FILED UNDER SEAL PURSUANT TO
THE COURT'S ORDER DATED MAY
11, 2011

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... iii

PRELIMINARY STATEMENT..... 2

BACKGROUND..... 3

 I. Statutory Background..... 3

 II. Factual Background..... 4

ARGUMENT..... 5

 I. Statutory Authority And Standard Of Review..... 5

 II. The NSL Served On Petitioner Complies With All Applicable Requirements.. 6

 A. The FBI Is Authorized To Conduct National Security Investigations And To Issue National Security Letters..... 6

 B. The [redacted] 2011 NSL Served On [redacted] Complies With Applicable Procedural Requirements.. 7

 1. [redacted] Is An Electronic Communication Service Provider Subject To 18 U.S.C. § 2709..... 7

 2. The FBI Made All Required Findings Before Issuing The [redacted] 2011 NSL to [redacted]..... 7

 3. The [redacted] 2011 NSL to [redacted] Requested Only Limited Information In Accord With 18 U.S.C. § 2709..... 8

 C. The Information Sought By The [redacted] 2011 NSL Is Relevant To An Ongoing National Security Investigation..... 8

 III. The Limited Request For Information In The [redacted] 2011 NSL Is Not Overbroad Or Unduly Burdensome..... 8

 IV. The Request For Information In The [redacted] 2011 NSL Does Not Violate The First Amendment.. 9

 A. The Request For Information In The [redacted] 2011 NSL Is Narrowly Tailored To Serve A Compelling Government Interest..... 10

 B. The Request For Information From [redacted] In The [redacted] 2011 NSL Is Validly Applied To [redacted] And Does Not Impinge On The Anonymous Speech Or Associational Rights Of [redacted] Or Its [redacted]..... 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. The FBI's Request For Information In The NSL
To Petitioner Does Not Impermissibly Compel Speech..... 10

2. The [redacted] 2011 NSL Served On [redacted] Does
Not Impinge On The Right To Anonymous Speech..... 11

3. The [redacted] 2011 NSL Served On [redacted] Does
Not Violate The Right To Free Association..... 13

CONCLUSION. 14

TABLE OF AUTHORITIES

1		
2	CASES	PAGE(s)
3	<i>Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,</i>	
4	481 U.S. 537 (1987).....	13
5	<i>Buckley v. American Const'l Law Foundation,</i>	
6	525 U.S. 182 (1999).....	12
7	<i>Buckley v. Valeo,</i>	
8	424 U.S. 1 (1976).....	13
9	<i>EEOC v. Children's Hosp. Med. Center,</i>	
10	719 F.2d 1426 (9th Cir. 1983).....	5, 8
11	<i>EEOC v. Karuk Tribe Housing Authority,</i>	
12	260 F.3d 1071 (9th Cir. 2001).....	6
13	<i>FMC v. Port of Seattle,</i>	
14	521 F.2d 431 (9th Cir. 1975).....	6
15	<i>Full Value Advisors, LLC v. S.E.C.,</i>	
16	633 F.3d 1101 (D.C. Cir. 2011).....	11
17	<i>Glickman v. Wileman Bros. & Elliot,</i>	
18	521 U.S. 457 (1997).....	11
19	<i>Goodman v. United States,</i>	
20	369 F.2d 166 (9th Cir. 1966).....	9
21	<i>McIntyre v. Ohio Elections Comm'n,</i>	
22	514 U.S. 334 (1995).....	12
23	<i>Morales v. Daley,</i>	
24	116 F. Supp. 2d 801 (S.D. Tex. 2000).....	11
25	<i>Murphy v. Waterfront Comm'n of New York Harbor,</i>	
26	378 U.S. 52 (1964).....	10
27	<i>NAACP v. Alabama ex rel. Patterson,</i>	
28	357 U.S. 449 (1958).....	13
	<i>Oklahoma Press Pub. Co. v. Walling,</i>	
	327 U.S. 186 (1946).....	5
	<i>Pharm. Care Mgmt. Ass'n v. Rowe,</i>	
	429 F.3d 294 (1st Cir. 2005).....	11
	<i>Roberts v. United States Jaycees,</i>	
	468 U.S. 609 (1984).....	13
	<i>Rounds v. Oregon State Bd. of Higher Educ.,</i>	
	166 F.3d 1032 (9th Cir. 1999).....	11

1	<i>United States v. Morton Salt Co.</i> ,	
	338 U.S. 632 (1950).....	<i>passim</i>
2		
3	<i>United States v. Sindel</i> ,	
	53 F.3d 874 (8th Cir. 1995).....	11
4	<i>W.V. State Bd. of Educ. v. Barnette</i> ,	
	319 U.S. 624 (1943).....	11

FEDERAL STATUTES AND REGULATIONS

6	18 U.S.C. § 2709.....	<i>passim</i>
7		
8	18 U.S.C. § 2510.....	7
9	18 U.S.C. § 2711.....	7
10	18 U.S.C. § 2703.....	12
11	18 U.S.C. § 3511(c).....	<i>passim</i>
12	28 U.S.C. § 17.17.....	3

EXECUTIVE ORDERS AND LEGISLATIVE HISTORY

13	Exec. Order No. 12333, 46 Fed. Reg 59941 (Dec. 4, 1981).....	3, 6
14	H.R. Rep. No. 99-647, 37 (1986).....	7
15	S. Rep. No. 99-541 at 14 (1986).....	7
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 PRELIMINARY STATEMENT

2 National security and law enforcement investigations, by their very nature, require federal
3 government officials to collect information, and courts have long recognized the ability of
4 government agencies to collect information, particularly where authorized by law. This case
5 concerns the government's collection of information under 18 U.S.C. § 2709, which is one of a
6 number of statutes that authorize the government to collect information in service of a national
7 security investigation. Pursuant to § 2709 and as part of an ongoing national security
8 investigation, the Federal Bureau of Investigation ("FBI") served a National Security Letter
9 ("NSL") -- a type of administrative subpoena -- on a wire and telephone service provider,
10 [REDACTED] The NSL sought narrow, specific, and limited information
11 which § 2709 expressly authorizes the FBI to obtain: [REDACTED]
12 [REDACTED]
13 [REDACTED] objected to the NSL and has petitioned this Court to set it aside. To date,
14 [REDACTED] has not complied with the NSL request for information. The FBI, however, has been
15 unable to obtain the [REDACTED] and it maintains a compelling
16 need for the information in order to further an ongoing, authorized national security
17 investigation. Congress provided for the government to seek the aid of a district court in
18 precisely this situation, where an NSL recipient has failed to comply with a request for needed
19 information. See 18 U.S.C. § 3511(c). Pursuant to that statute, on June 3, 2011, the government
20 filed a civil action in this Court to enforce the NSL, including its request for information as well
21 as its nondisclosure requirement. See Civ. No. 11-2667 SI (N.D. Cal.) (under seal). In this
22 proceeding, the U.S. Department of Justice now also moves for an order compelling [REDACTED] to
23 promptly respond to the NSL request for information.

24 It is axiomatic that the government may require individuals to provide information in
25 service of, e.g., a law enforcement or national security investigation (as here), the raising of
26 revenues, or the conduct of the census. The NSL is just such a classic and permissible request
27 for information. Likewise, it is well-established that the government may seek the aid of a court
28 to compel compliance with an administrative request for information as long as the agency is

1 authorized to investigate, it has complied with applicable procedural requirements, and the
2 information requested is relevant to the underlying investigation. The NSL here easily meets this
3 standard. Moreover, it is not unreasonable, oppressive, or otherwise unlawful. To the contrary,
4 it is a highly specific, limited request for information issued pursuant to law that does not
5 infringe on [redacted] statutory or constitutional rights.

6 This Court should, accordingly, order [redacted] to comply with the NSL request for
7 information pursuant to 18 U.S.C. § 3511(c).

8 BACKGROUND¹

9 I. Statutory Background

10 The President of the United States has charged the FBI with primary authority for
11 conducting counterintelligence and counterterrorism investigations in the United States. *See*
12 *Exec. Order No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg 59941 (Dec. 4, 1981)*. The FBI's
13 experience with national security investigations has shown that electronic communications play a
14 vital role in advancing terrorist and foreign intelligence activities and operations. *See Classified*
15 *Declaration of Mark F. Giuliano, Assistant Director of the FBI for the Counterterrorism Division,*
16 *to be submitted ex parte and in camera to the Court pursuant to 18 U.S.C. § 3511(e) and 28*
17 *C.F.R. § 17.17.² Accordingly, pursuing and disrupting, e.g., terrorist plots often requires the FBI*
18 *to seek information relating to electronic communications.*

19 Title 18 U.S.C. § 2709 was enacted by Congress 25 years ago to assist the FBI in
20 obtaining such information. Section 2709 empowers the FBI to issue an NSL, a type of
21 administrative subpoena. Subsections (a) and (b) of § 2709 authorize the FBI to request "sub-

22
23 ¹The relevant statutory and factual background is set forth in the government's
24 memorandum in opposition to [redacted] petition to set aside the NSL, filed under seal on July
25 22, 2011. The government respectfully incorporates that memorandum herein by reference.

26 ²The government previously lodged Assistant Director Giuliano's classified declaration
27 with a Department of Justice Court Security Officer pursuant to 28 U.S.C. § 17.17 and in support
28 of the government's opposition to [redacted] petition to set aside the NSL. The government has
also filed under seal and served on [redacted] a redacted version the Giuliano Declaration that does
not contain classified information or other sensitive law enforcement information that cannot be
shared with petitioner, as well as an unclassified summary of the declaration.

1 scriber information” and “toll billing records information,” or “electronic communication
2 transactional records,” from wire or electronic communication service providers. In order to
3 issue an NSL, the Director of the FBI, or a senior-level designee, must certify that the
4 information sought is “relevant to an authorized investigation to protect against international
5 terrorism or clandestine intelligence activities” *Id.* § 2709(b)(1)-(2). When an NSL is
6 issued in connection with an investigation of a “United States person,” the same officials must
7 also certify that the investigation is “not conducted solely on the basis of activities protected by
8 the first amendment” *Id.*

9 Congress has provided that, “[i]n the case of a failure to comply with a request for”
10 information by NSL pursuant to, *inter alia*, 18 U.S.C. § 2709(b), “the Attorney General may
11 invoke the aid of any district court of the United States within the jurisdiction in which the
12 investigation is carried on or the person or entity resides, carries on business, or may be found, to
13 compel compliance with the request. The court may issue an order requiring the person or entity
14 to comply with the request. Any failure to obey the order of the court may be punished by the
15 court as contempt thereof.” 18 U.S.C. § 3511(c). Conversely, upon a petition by an NSL
16 recipient, a “court may modify or set aside the request [for information] if compliance would be
17 unreasonable, oppressive, or otherwise unlawful.”

18 **II. Factual Background**

19 During the course of an ongoing, authorized national security investigation, the FBI
20 determined that it needed to [REDACTED]

21 The investigation is discussed in Assistant Director Giuliano’s classified Declaration. [REDACTED]

22 [REDACTED] Pursuant to § 2709, the FBI served
23 petitioner with an NSL requesting [REDACTED]

24 The NSL served on petitioner was issued by the Acting Special Agent in Charge (“SAC”)
25 of the FBI’s [REDACTED] under the authority of 18 U.S.C. § 2709. *See* [REDACTED] 2011 NSL
26 (attached to the Petition). The Acting SAC certified, in accordance with 18 U.S.C. § 2709(b),
27 that the information sought was relevant to an authorized investigation to protect against
28 international terrorism or clandestine intelligence activities. *Id.* The NSL, dated [REDACTED] 2011,

1 sought only [REDACTED]

2 [REDACTED] The NSL notified petitioner that petitioner had a
3 right to challenge the letter if compliance would be unreasonable, oppressive, or otherwise
4 illegal, under § 3511(a) and (b). On May 2, 2011 [REDACTED] filed a petition to set aside the [REDACTED]
5 [REDACTED] 2011 NSL, which it served on the FBI's [REDACTED] on May 4 and on the U.S. Attorney
6 for this District on May 11. On June 3, 2011, the Department of Justice brought a separate action
7 in this Court to enforce compliance with the NSL. *See* Civ. No. 11-2667 SI (N.D. Cal.) (under
8 seal).

9 To date, the FBI has been unable to [REDACTED]

10 [REDACTED] Giuliano Decl. ¶ 35. The FBI continues to need that information to further
11 an ongoing national security investigation. *Id.* ¶¶ 7, 35.

12 ARGUMENT

13 I. Statutory Authority And Standard Of Review

14 An NSL is a type of administrative subpoena authorized by law, and “[t]he scope of the
15 judicial inquiry in an . . . agency subpoena enforcement proceeding is quite narrow.” *EEOC v.*
16 *Children’s Hosp. Med. Center*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*). The district court
17 should determine whether (1) “Congress has granted the [agency the] authority to investigate;”
18 (2) the “procedural requirements have been followed;” and (3) the evidence sought is “relevant
19 and material to the investigation.” *Id.* Once the agency has demonstrated these three factors, the
20 court should enforce the subpoena “unless the party being investigated proves the inquiry is
21 unreasonable because it is overbroad or unduly burdensome.” *Id.* *See also United States v.*
22 *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (enforcement proper where “inquiry is within the
23 authority of the agency, the demand is not too indefinite and the information is reasonably
24 relevant”); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1946) (enforcement
25 proper where agency is authorized to make demand, demand is not too indefinite or broad, and
26 materials sought are relevant).

1 **II. The NSL Served On Petitioner Complies With All Applicable Requirements.**

2 Under the law of this Circuit and as set forth above, “courts must enforce administrative
3 subpoenas unless the evidence sought by the subpoena [is] plainly incompetent or irrelevant to
4 any lawful purpose of the agency.” *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071,
5 1076-77 (9th Cir. 2001) (quoting *FMC v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975),
6 internal quotation marks and other citations omitted). As explained below, the [redacted] 2011
7 NSL served on [redacted] satisfies all of the applicable procedural and substantive requirements
8 described *supra*.

9 **A. The FBI Is Authorized To Conduct National Security Investigations And To
10 Issue National Security Letters.**

11 As noted, the President has charged the FBI with primary authority for conducting
12 counterintelligence and counterterrorism investigations in the United States, *see* Exec. Order No.
13 12333 §§ 1.14(a), 3.4(a), and such investigations often require the FBI to seek information
14 relating to electronic communications, *see* Giuliano Decl. To assist the FBI in obtaining such
15 information, 25 years ago Congress enacted 18 U.S.C. § 2709. Section 2709 empowers the FBI
16 to issue NSLs such as the [redacted] 2011 NSL served on [redacted] as part of an ongoing,
17 authorized national security investigation. The FBI is, therefore, authorized to conduct its
18 underlying investigation here and to do so using, *inter alia*, the [redacted] 2011 NSL.

19 **B. The [redacted] 2011 NSL Served On [redacted] Complies With Applicable
20 Procedural Requirements.**

21 **1. [redacted] Is An Electronic Communication Service Provider Subject
22 To 18 U.S.C. § 2709.**

23 Subsections (a) and (b) of § 2709 authorize the FBI to use an NSL in order to request
24 certain information, including “subscriber information,” from a “wire or electronic
25 communication service provider.” *Id.* § 2709(a). [redacted] is a wire or electronic communication
26 service provider and the proper recipient of an NSL pursuant to § 2709.

27 Section 2709 is contained in Title II of the Electronic Communications Privacy Act
28 (ECPA), 18 U.S.C. §§ 2701 *et seq.* ECPA defines “electronic communication service” (“ECS”) as any service that “provides to users thereof the ability to send or receive wire or electronic

1 communications.” 18 U.S.C. §§ 2510(15), 2711(1). When Congress enacted ECPA in 1986, it
2 identified telephone companies as the quintessential example of ECS providers. *See* H.R. REP.
3 No. 99-647, 37 (1986) (“Common carriers like existing telephone companies are deemed
4 providers of an electronic communication service”); S. REP. NO. 99-541 at 14 (1986), *reprinted*
5 *in* 1986 U.S.C.C.A.N. 3558 (same).³

6 In its papers challenging the [redacted] 2011 NSL, [redacted] states that it “provides long
7 distance and mobile phone services.” *See* Memorandum in Support of Petition to Set Aside NSL
8 at 2. Indeed, [redacted] is a mobile and long-distance telephone company. *See, e.g.,*
9 [redacted] is thus an archetypical ECS provider under ECPA
10 and, therefore, is a proper recipient of an NSL under 18 U.S.C. § 2709.

11 **2. The FBI Made All Required Findings Before Issuing The [redacted]**
12 **2011 NSL to [redacted]**

13 In order to issue an NSL, the Director of the FBI, or a designee “not lower than Deputy
14 Assistant Director at Bureau headquarters” or SACs of FBI field offices must certify that the
15 information sought is “relevant to an authorized investigation to protect against international
16 terrorism or clandestine intelligence activities” *Id.* § 2709(b)(1)-(2). In addition, when an
17 NSL is issued in connection with an investigation of a “United States person,” the same officials
18 must certify that the investigation is “not conducted solely on the basis of activities protected by
19 the first amendment” *Id.* The FBI complied with these requirements here.

20 The NSL served on petitioner was issued by the Acting SAC of the FBI’s [redacted]
21 [redacted] under the authority of 18 U.S.C. § 2709. *See* [redacted] 2011 NSL (attached to the
22 Petition). The Acting SAC certified, in accordance with 18 U.S.C. § 2709(b), that the
23 information sought was relevant to an authorized investigation to protect against international

24
25 ³At the time of ECPA’s enactment in 1986, “electronic communications service
26 providers” also included a small number of other companies, including “electronic mail
27 compan[ies]” and “[e]lectronic ‘bulletin board[]’” operators. *See* S. REP. NO. 99-541 at 8-9,
28 *reprinted in* 1986 U.S.C.C.A.N. 3562-63. These legislative examples make clear what kind of
businesses Congress had in mind when it adopted ECPA’s definition of electronic
communication service: the provision of a service that allows members of the public to
communicate with each other.

1 terrorism or clandestine intelligence activities. *Id.* The Acting SAC also certified that the
2 underlying investigation is not conducted solely on the basis of First Amendment-protected
3 activities. *Id.*

4 **3. The [REDACTED], 2011 NSL to [REDACTED] Requested Only Limited**
5 **Information In Accord With 18 U.S.C. § 2709.**

6 Under § 2709, the FBI is authorized to request information including “the name, address,
7 length of service, and local and long distance toll billing records of a person or entity.” 18
8 U.S.C. § 2709(a), (b)(1). The NSL served on [REDACTED] sought only [REDACTED]
9 [REDACTED] See [REDACTED] 2011 NSL, attached to Petition. It
10 therefore sought limited information as expressly authorized by law.

11 **C. The Information Sought By The [REDACTED] 2011 NSL Is Relevant To An**
12 **Ongoing National Security Investigation.**

13 As noted, the NSL served on [REDACTED] sought only [REDACTED]
14 [REDACTED] The NSL was issued because the
15 FBI determined that it needed to [REDACTED]
16 [REDACTED] to further an ongoing, authorized national security investigation. The investigation and
17 the relevancy of the requested [REDACTED] information are discussed in Assistant Director
18 Giuliano’s classified declaration.

19 **III. The Limited Request For Information In The [REDACTED] 2011 NSL Is Not Overbroad**
20 **Or Unduly Burdensome.**

21 As explained *supra*, the NSL served on [REDACTED] satisfies the standards for enforcement
22 of such an administrative request for information in this Circuit. That is, (1) “Congress has
23 granted the [agency the] authority to investigate;” (2) the “procedural requirements have been
24 followed;” and (3) the evidence sought is “relevant and material to the [underlying]
25 investigation.” *Children’s Hosp. Med. Center*, 719 F.2d at 1428. The court should therefore
26 enforce the NSL request for information unless the recipient “proves the inquiry is unreasonable
27 because it is overbroad or unduly burdensome.” *Id.*

28 [REDACTED] has not asserted to FBI or in its petition to set aside the NSL that the request for
information is overbroad or unduly burdensome, and any such argument would be without merit.

1 As explained above, the NSL requests only [REDACTED]
2 [REDACTED] See [REDACTED] 2011 NSL, attached to Petition. This is
3 precisely the type of information which Congress contemplated the FBI would seek by NSL,
4 see 18 U.S.C. § 2709(b)(1) (authorizing FBI to request by NSL “the name, address, length of
5 service, and local and long distance toll billing records of a person or entity.”). Assistant
6 Giuliani’s declaration establishes the relevancy of this limited information to the underlying
7 national security investigation, and so the narrow request is not overbroad. It is also difficult to
8 imagine how a request for information relating to a [REDACTED] could place a serious burden
9 on the [REDACTED] but, in any event, [REDACTED] has not suggested there is such
10 a burden. *Cf. Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966). (Under Fed. R.
11 Crim. Proc. 17(c), “[t]he burden of showing that a subpoena is unreasonable and oppressive is
12 upon the party to whom it is directed.”).

13 The NSL here is thus not overbroad or unduly burdensome; it is subject to enforcement
14 by this Court pursuant to 18 U.S.C. § 3511(c).

15 **IV. The Request For Information In The [REDACTED] 2011 NSL Does Not Violate The First**
16 **Amendment.**

17 As explained above, the NSL request for information satisfies all applicable standards for
18 enforcement under the law of this Circuit. “[T]he inquiry is within the authority of the agency,
19 the demand is not too indefinite and the information sought is reasonably relevant.” See *Morton*
20 *Salt Co.*, 338 U.S. at 652. In its petition to set aside the NSL, however, [REDACTED] has argued that
21 the NSL information request is “otherwise unlawful” because it violates the First Amendment by
22 compelling speech, identifying [REDACTED] or interfering with a right to anonymous
23 association. As explained in the government’s opposition to [REDACTED] petition, incorporated
24 herein by reference, and as explained further below, these arguments are meritless. Moreover,
25 the NSL request for information survives any applicable scrutiny under the First Amendment.
26
27
28

1 **A. The Request For Information In The [REDACTED] 2011 NSL Is Narrowly**
2 **Tailored To Serve A Compelling Government Interest.**

3 As set forth in the classified Declaration of Mark F. Guiliano, the narrow request for
4 information in the NSL is well tailored to serve the government’s underlying and compelling
5 legitimate interests. It therefore survives any applicable level of scrutiny under the First
6 Amendment.

7 **B. The Request For Information From [REDACTED] In The [REDACTED] 2011 NSL Is**
8 **Validly Applied To [REDACTED] And Does Not Impinge On The Anonymous**
9 **Speech Or Associational Rights Of [REDACTED]**

10 In the [REDACTED] 2011 NSL, the FBI sought [REDACTED]
11 [REDACTED] relevant to an ongoing, authorized national security
12 investigation. The NSL did not seek any information concerning the content of communications
13 made by anyone. As explained in the classified Giuliano Declaration, the information requested
14 is plainly relevant to the FBI’s investigation and the FBI maintains a compelling need for the
15 information. *See* Giuliano Decl. ¶¶ 7, 35. The request for information in the [REDACTED] 2011 NSL
16 does not run afoul of the First Amendment, including any recognized rights to anonymous speech
17 and associational rights by petitioner or its [REDACTED]. Rather, it is fully consistent with the
18 government’s established authority to request or demand information to further law enforcement
19 or national security investigations. *Cf. Morton Salt Co.*, 338 U.S. at 652 (stating, in rejecting
20 Fourth and Fifth Amendment challenge to government agency’s request for information during
21 an investigation, that “neither incorporated nor unincorporated associations can plead an
22 unqualified right to conduct their affairs in secret”).

23 **1. The FBI’s Request For Information In The NSL To Petitioner Does**
24 **Not Impermissibly Compel Speech.**

25 It is beyond dispute that “[a]mong the necessary and most important of the powers of the
26 States as well as the Federal Government to assure the effective functioning of government in an
27 ordered society is the broad power to compel residents to testify in court or before grand juries or
28 agencies.” *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 93-94 (1964).
Thus, courts have long recognized that “essential operations of government may require
[compelled speech] for the preservation of an orderly society,-as in the case of compulsion to

1 give evidence in court.” *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy,
2 J., concurring). The requirement here that a telephone company and an electronic
3 communication service provider provide limited information to the FBI as part of an ongoing
4 national security investigation is no more unconstitutional than a requirement that a corporation
5 comply with a validly-issued subpoena, that it provide certain information on its taxes, or that an
6 individual respond to the census. *See, e.g., Full Value Advisors, LLC v. S.E.C.*, 633 F.3d 1101,
7 1108-09 (D.C. Cir. 2011) (declining to apply heightened scrutiny and upholding requirement that
8 corporation disclose certain information to the SEC); *United States v. Sindel*, 53 F.3d 874, 878
9 (8th Cir. 1995) (First Amendment not implicated by requirement of disclosure to IRS that entails
10 no public dissemination of a political or ideological message); *Morales v. Daley*, 116 F. Supp. 2d
11 801, 816 (S.D. Tex. 2000) (census requirement that plaintiff provide information concerning his
12 race was not improper compulsion of speech). *Cf. Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d
13 294, 316 (1st Cir. 2005) (the level of constitutional scrutiny of government-mandated disclosure
14 requirements, even where the disclosure is broadcast beyond the government agency, is “akin to
15 the general rational basis test governing all government regulations under the Due Process
16 Clause”). Outside the protections afforded by the Fifth Amendment, which are not at issue here,
17 there is simply no general “right to remain silent” in the face of a legitimate governmental
18 inquiry, particularly where, as here, the inquiry is authorized by Congress and requires no public
19 dissemination of any “speech” by petitioner. *Full Value Advisors*, 633 F.3d at 1108-09; *see also*
20 *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 470-71 (1997) (compelled speech doctrine
21 not implicated where regulation did not require commercial plaintiffs to publicly espouse an
22 idea); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1037-38 (9th Cir. 1999)
23 (compelled speech doctrine not implicated where no one “required to act as a courier for” or to
24 endorse “an ideological message”).

25 **2. The [REDACTED] 2011 NSL Served On [REDACTED] Does Not Impinge On The**
26 **Right To Anonymous Speech.**

27 [REDACTED] may assert that the NSL interferes with its [REDACTED] right to “anonymous”
28 speech, but such a right is inapposite here. Even assuming [REDACTED] can assert the right on behalf

1 of its [REDACTED] cases recognizing a right to anonymous speech under the First Amendment
2 make it clear that the legally protected interest at stake is the right not to reveal one's identity
3 when communicating what may be an unpopular message. See, e.g., *McIntyre v. Ohio Elections*
4 *Comm'n*, 514 U.S. 334, 341-43 (1995). The primary rationale for protecting a speaker's identity
5 is that revealing an individual's name attached to particular content could subject him to
6 retaliation, which in turn could chill controversial or unpopular but protected speech. As the
7 Supreme Court has noted, this chilling effect is most powerful if the speaker is forced to disclose
8 his identity at the same time he is speaking. Thus, in *Buckley v. American Const'l Law*
9 *Foundation*, 525 U.S. 182 (1999), the Supreme Court invalidated a Colorado statute requiring
10 petition circulators to wear a badge displaying their names because "the badge requirement
11 compels personal name identification at the precise moment when the circulator's interest in
12 anonymity is greatest." *Id.* at 199. In *McIntyre*, 514 U.S. 334, also relied on by petitioner, the
13 Court struck down a state statute prohibiting anonymous campaign literature. While noting that
14 anonymity "is an aspect of the freedom of speech," *id.* at 342, the Court invalidated the statute
15 because it was a "direct regulation of the content of speech" in which "the category of covered
16 documents is defined by their content," *id.* at 345.

17 The NSL here, however, does not target the content of a communication.⁴ And the
18 [REDACTED] in question will not, as the Court found objectionable in *Buckley v. Am.*
19 *Const'l Law Found.*, 525 U.S. 182, be linked publicly or at all to the content of any
20 communication by petitioner's compliance with the NSL. Accordingly, *McIntyre* and similar
21 cases involving direct regulation of First Amendment rights are inapplicable. The FBI's request
22 for information as part of an ongoing, authorized national security investigation does not violate
23 anyone's right to anonymous speech.

24
25
26 ⁴Nor, under the statute, could it 18 U.S.C. § 2709 does not permit the government to
27 request the content of any communication via NSL, and the NSL in question specifically directs
28 petitioner not to provide any such content. Compare 18 U.S.C. § 2703 (providing means by and
procedural protections under which government may obtain the content of an electronic
communication).

1 3. The [REDACTED] 2011 NSL Served On [REDACTED] Does Not Violate The
2 Right To Free Association.

3 Likewise, the request for information in the [REDACTED] 2011 NSL will not impinge on
4 anyone's right to anonymous association. Whatever function [REDACTED] may serve in joining like-
5 minded [REDACTED] the NSL was served on [REDACTED] solely in its
6 corporate capacity [REDACTED] *Accord Morton Salt Co.*, 338 U.S. at 652
7 (“corporations can claim no equality with individuals in the enjoyment of a right to privacy”).

8 And even if the NSL was construed to target associational rights, it would not be unconstitutional
9 unless it imposed a “serious burden[.],” *Roberts v. United States Jaycees*, 468 U.S. 609, 626
10 (1984), or affected in a “significant way,” *Board of Dirs. of Rotary Int'l v. Rotary Club of*
11 *Duarte*, 481 U.S. 537, 548 (1987), a person's associational rights. *See also NAACP v. Alabama*
12 *ex rel. Patterson*, 357 U.S. 449, 462 (1958) (regulation must be a “substantial restraint” on
13 associational rights). The limited request for information in the [REDACTED] 2011 NSL falls far short
14 of such a “serious,” “significant,” or “substantial” burden on the associational rights of petitioner
15 or its [REDACTED] and petitioner has failed to show or even argue otherwise.

16 Moreover, any burden imposed by the information request would be constitutionally
17 permissible because the government's compelling interest in national security outweighs any
18 burden imposed by petitioner's disclosure of its [REDACTED] *Compare NAACP*,
19 357 U.S. at 462 (“Petitioner has made an uncontroverted showing that on past occasions
20 revelation of the identity of its rank-and-file members has exposed these members to economic
21 reprisal, loss of employment, threat of physical coercion, and other manifestations of public
22 hostility”), with *Buckley v. Valeo*, 424 U.S. 1, 70-72 (1976) (rejecting right to associate claim
23 “where . . . any serious infringement on First Amendment rights brought about by the compelled
24 disclosure of contributors is highly speculative” and where “the substantial public interest in
25 disclosure . . . outweighs the harm generally alleged”). Here, as in *Buckley v. Valeo*, “any serious
26 infringement on First Amendment rights” brought about by [REDACTED] providing to the FBI the
27 [REDACTED] as needed for an ongoing, authorized national security and law
28

1 enforcement investigation is outweighed by “the substantial public interest” in that investigation.
2 *Id.*

3 **CONCLUSION**

4 For all of the foregoing reasons, the Court should grant the government’s motion and
5 compel [redacted] to respond to the information request in the [redacted] 2011 NSL.⁵

6 Dated: July 29, 2011

Respectfully submitted,

7 TONY WEST
Assistant Attorney General

8 MELINDA HAAG
United States Attorney

9 ARTHUR R. GOLDBERG
10 SANDRA M. SCHRAIBMAN
11 Assistant Directors, Federal Programs
12 Branch

/s/ Steven Y. Bressler

13 STEVEN Y. BRESSLER D.C. Bar #482492
14 Trial Attorney
15 U.S. Department of Justice
16 Civil Division, Federal Programs Branch
17 P.O. Box 883
18 Washington, D.C. 20044
19 Telephone: (202) 305-0167
20 Facsimile: (202) 616-8470
21 Steven.Bressler@usdoj.gov

Counsel for the U.S. Department of Justice

22
23
24
25 ⁵As noted *supra*, the [redacted] 2011 NSL also imposed a nondisclosure requirement on
26 [redacted] pursuant to 18 U.S.C. § 2709(c). [redacted] is complying with the nondisclosure
27 requirement while litigating it before this Court, and the government does not seek an order
28 compelling compliance with that portion of the NSL in this action at this time. The Department
of Justice has separately sought such relief in related a civil action. *See* Civ. No. 11-2667 SI
(N.D. Cal.) (under seal).