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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE MATTER OF NATIONAL SECURITY LETTER ISSUED TO [redacted]	No. C 11-2173 **MEMORANDUM IN OPPOSITION TO PETITION TO SET ASIDE NATIONAL SECURITY LETTER** **FILED UNDER SEAL PURSUANT TO THE COURT'S ORDER DATED MAY 11, 2011**

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PRELIMINARY STATEMENT

National security and law enforcement investigations, by their very nature, require federal government officials to collect information. Secrecy is essential to the effective conduct of such investigations; public disclosure of steps taken to investigate the activities of terrorist groups and foreign intelligence organizations poses a direct and immediate threat to the government's ability both to detect and to prevent those activities. Alerted to the existence of an investigation, its direction, or the methods and sources being used to pursue the investigation, targeted individuals or groups can take steps to evade detection, destroy evidence, mislead investigators, and change their own conduct to minimize the possibility that future terrorist and foreign intelligence activities will be detected.

Title 18 U.S.C. § 2709 is one of a number of statutes that authorize the government to collect information in service of a national security investigation and to prevent private parties to whom the government turns for information from destroying the confidentiality of the government's inquiry. Pursuant to that statute and as part of an authorized, ongoing national security investigation, the Federal Bureau of Investigation ("FBI") served a National Security Letter ("NSL") on a wire and telephone service provider [redacted] ("petitioner"). The NSL made a limited, specific inquiry for subscriber information related to [redacted] Pursuant to § 2709(c), a designee of the Director of the FBI certified that the NSL must remain secret to prevent harm to, *inter alia*, national security, and therefore that the NSL requires that petitioner not disclose the existence or contents of the NSL.

In a related statute, 18 U.S.C. § 3511, Congress provided for judicial review of NSLs. Petitioner has availed itself of that judicial review mechanism to challenge the request for information in the NSL it received as well as the nondisclosure requirement. Section 3511 is a limited waiver of sovereign immunity that permits petitioner to seek only the modification or invalidation of the individual NSL it received, so there is no warrant or jurisdiction for broader relief, such as facial invalidation of the NSL statutes. In any event, petitioner's challenge is without merit, and so petitioner must comply with the NSL.

It is axiomatic that the government may require individuals to provide information in

service of, *e.g.*, a law enforcement or national security investigation (as here), the raising of revenues, or the conduct of the census. The NSL is just such a classic and permissible request for information. It does not compel petitioner to comment publicly, or at all, on anything, and so it is not an impermissible compulsion of speech. Because the NSL does not attach the identity of petitioner's [redacted] publicly to any communication, it does not implicate that [redacted] right to "anonymous" communication. Nor does it impinge on his right to free association: the request for information does not target any political or other associative activity, petitioner's assertion of a burden on associational rights is wholly speculative, and if there was such a burden, it must to be weighed against the public interest in having petitioner provide the information to the FBI. Here, where that public interest is the compelling one of national security, the request for information is not constitutionally problematic.

Petitioner's challenge to the NSL nondisclosure requirement is also unfounded. Numerous judicial precedents make clear that Congress may constitutionally prohibit disclosure of information about a secret government investigation that a private party learns only through its own participation in the investigation. Under these precedents, the most rigorous scrutiny does not apply to the nondisclosure requirement in the NSL served on petitioner. Regardless, the nondisclosure requirement here survives even strict scrutiny, for it is designed to further the compelling governmental and public interest in effectively detecting and preventing terrorism and foreign espionage, and it is carefully tailored to restrict only information that petitioner has learned through its participation in the NSL inquiry itself.

Petitioner complains that § 2709 does not comport with the rigorous procedural requirements applied to prior restraints on speech by *Freedman v. Maryland*, 380 U.S. 51 (1965), but this argument fails for multiple reasons. First, the NSL does not present a prior restraint at all because it applies subsequent punishment to, not prior review and censorship of, a prohibited disclosure. Second, courts have recognized that the "restraint" on communication of information learned solely by participation in a government investigation is not a "classic prior restraint" of the type that receives the strictest scrutiny. And, in any event, the NSL issued to petitioner was accompanied by procedural protections that would satisfy *Freedman* if it applied: the FBI

accepted the burden of seeking judicial review of the NSL within a reasonable time (approximately 30 days) if petitioner objected to it.

Likewise, petitioner's arguments that the statutory standards of review in § 3511(b) violate the First Amendment and the separation-of-powers doctrine are without merit. The standards are substantially the same as those that courts have developed in related contexts to review government restrictions on the disclosure of national security information. They reflect the basic institutional differences between the executive and judicial branches in assessing the risks to national security posed by the disclosure of sensitive information. Nor does the separation-of-powers doctrine prevent Congress from prescribing the appropriate standard of review, even where that standard is deferential. Similarly, § 3511(e) merely allows the government to submit classified and sensitive national security information *ex parte* and *in camera*, a procedure that courts have long sanctioned.

Finally, even if the Court were to accept petitioner's invitation to expand its review beyond the only waiver of sovereign immunity at issue here, *and* it were to accept petitioner's unfounded arguments that some portion of the NSL statutes is unconstitutional, that portion should be severed from the remainder of Sections 2709 and 3511.

For all of these reasons, the Court should deny the petition to set aside the NSL.

BACKGROUND

I. Statutory Background

A. National Security Letters

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

C.F.R. § 17.17.[1] Accordingly, pursuing and disrupting, *e.g.*, terrorist plots often requires the FBI to seek information relating to electronic communications.

Title 18 U.S.C. § 2709 was enacted by Congress 25 years ago to assist the FBI in obtaining such information. Section 2709 empowers the FBI to issue an NSL, a type of administrative subpoena. Several other federal statutes also authorize government authorities to issue NSLs in connection with counterintelligence and counterterrorism investigations. *See* 12 U.S.C. § 3414(a)(5); 15 U.S.C. §§ 1681u-1681v; 50 U.S.C. § 436. Subsections (a) and (b) of § 2709 authorize the FBI to request "subscriber information" and "toll billing records information," or "electronic communication transactional records," from wire or electronic communication service providers. Section 2709 does not authorize the FBI to seek the content of any wire or electronic communication. In order to issue an NSL, the Director of the FBI, or a senior-level designee, must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities . . . ." *Id.* § 2709(b)(1)-(2). When an NSL is issued in connection with an investigation of a "United States person," the same officials must also certify that the investigation is "not conducted solely on the basis of activities protected by the first amendment . . . ." *Id.*

B. Confidentiality of National Security Letters

Counterintelligence and counterterrorism investigations are long-range, forward-looking, and prophylactic in nature; *e.g.*, the government aims to disrupt terrorist acts against the United States before they occur. Guiliano Decl. ¶ 9. Because these investigations are directed at individuals or groups taking efforts to keep their own activities secret, it is essential that targets not learn that they are the subject of an investigation. *Id.* ¶¶ 38-40. If targets learn that their activities are being investigated, they can be expected to take action to avoid detection or disrupt the government's intelligence gathering efforts. *Id.* ¶ 37. Likewise, knowledge about the scope or progress of a particular investigation allows targets to determine the FBI's degree of

[1]The government will file under seal and serve on petitioner a redacted version of Assistant Director Giuliano's declaration that does not contain classified information or other sensitive law enforcement information that cannot be shared with petitioner, and Attachment C hereto is an unclassified summary of the declaration.

penetration of their activities and to alter their timing or methods. *Id.* ¶ 38. The same concern applies to knowledge about the sources and methods the FBI is using to acquire information. *Id.*

The secrecy needed for successful national security investigations can be compromised if a telephone company discloses that it has received or provided information pursuant to an NSL. To avoid that result, Congress has placed restrictions on disclosures by NSL recipients, contained in 18 U.S.C. § 2709(c). The nondisclosure requirement requires a case-by-case determination of need by the FBI and thus prohibits disclosure only if the Director of the FBI or another designated senior FBI official certifies that "otherwise there may result 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." *Id.* § 2709(c)(1). If such a certification is made, the NSL itself notifies the recipient of the nondisclosure obligation. *Id.* § 2709(c)(2). Violation of the nondisclosure requirement is a criminal offense *if* the recipient discloses the information "knowingly and with the intent to obstruct an investigation or judicial proceeding." *Id.* § 1510.

II. Factual Background

During the course of an ongoing, authorized national security investigation, the FBI determined that it needed to identify [redacted] The investigation is discussed in the Giuliano Decl. The [redacted]n question is serviced through petitioner, [redacted] Pursuant to § 2709, the FBI served petitioner with an NSL requesting the [redacted]

The NSL served on petitioner was issued by the Acting Special Agent in Charge ("SAC") of the FBI's [redacted] under the authority of 18 U.S.C. § 2709. *See* [redacted] 2011 NSL (attached to the Petition). The Acting SAC certified, in accordance with 18 U.S.C. § 2709(b), that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *Id.* The NSL, dated [redacted] 2011, sought [redacted] The NSL informed petitioner of the prohibition against disclosing the contents of the NSL, certifying, in accordance with 18 U.S.C. § 2709(c),

that such disclosure could result in an enumerated harm that is related to an "authorized investigation to protect against international terrorism or clandestine intelligence activities." The NSL notified petitioner that petitioner had a right to challenge the letter if compliance would be unreasonable, oppressive, or otherwise illegal, under § 3511(a) and (b).

The NSL also advised that petitioner had 10 days to notify the FBI as to whether it desired to challenge the nondisclosure provision. In a letter dated [redacted] 2011, petitioner, through counsel, advised that it intended to "exercise its rights under 18 U.S.C. § 3511(a) and (b) to challenge the NSL referenced above, including the nondisclosure provision of the NSL." *See* Attachment B hereto. However, petitioner's letter also requested an extension of time for compliance with the NSL. The FBI agreed, and on May 2, 2011 [redacted] filed its petition to set aside the [redacted] 2011 NSL. The petition was served on the FBI's [redacted] Division via Federal Express on May 4, and was served on the U.S. Attorney's Office for the Northern District of California via certified mail on May 11, 2011. *See* Giuliano Decl. ¶ 33.

To date, the FBI's [redacted] Division has been unable to determine the [redacted] *Id.* ¶ 35. The FBI continues to need that information to further an ongoing national security investigation. *Id.* ¶¶ 7, 35.

ARGUMENT

I. Standard And Scope Of Review

Petitioner here seeks relief against the United States explicitly under 18 U.S.C. § 3511(a) & (b) via a petition to set aside a national security letter. *See* Petition at 2. In § 3511, Congress authorized an NSL recipient to seek relief in district court, and provided that the Court "may modify or set aside" an NSL's request for information "if compliance would be unreasonable, oppressive, or otherwise unlawful," *see id.* § 3511(a), and likewise authorized NSL recipients to seek an order modifying or setting aside an NSL's nondisclosure requirement, *see id.* § 3511(b). These are the only forms of relief authorized by § 3511, which is the only applicable waiver of sovereign immunity that petitioner has identified. *See Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992) (plaintiff must point to "'an unequivocal waiver of [sovereign] immunity.'").

It is axiomatic that "the terms of [the government's] consent to be sued in any court

define that court's jurisdiction to entertain suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Such consent cannot be implied, but must be "'unequivocally expressed' in the statutory text" and strictly construed in favor of the government. *Dep't of the Army v. Blue Fox*, 525 U.S. 255, 261 (1999). Through its petition [redacted] therefore cannot obtain relief any broader than that authorized by § 3511: an order modifying or setting aside the [redacted] 2011 NSL. *E.g.*, petitioner cannot obtain broader injunctive or declaratory relief. *See Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied").

Congress prescribed the standard of this Court's review of a petition brought under § 3511. A district court "may modify or set aside the request" for information "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a) Likewise, a court "may modify or set asie" the nondisclosure requirement if the court finds "no reason to believe" that disclosure "may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* § 3511(b)(2), (b)(3). Petitioner challenges this standard of review although, as explained *infra*, it merely codifies the courts' established practice of deference to informed executive judgments concerning national security. As also explained below, the Court need not reach that question because the NSL issued to petitioner here is appropriate under even heightened scrutiny.

II. The National Security Letter Issued To Petitioner Is Narrowly Tailored To Serve A Compelling Government Interest.

Petitioner does not assert that the government lacks a need for the information requested by the [redacted] 2011 NSL relevant to an authorized national security investigation. Nor does petitioner assert that the certification of the need for nondisclosure of the fact or contents of the NSL is unfounded. As petitioner presumably recognizes, it could not make such assertions because it lacks the requisite information and expertise. The narrow NSL request for information is well-tailored to serve the government's compelling interests.

As Assistant Director Guiliano explains in his Declaration, the NSL nondisclosure

requirement is applied to petitioner here in order to shield an ongoing, authorized investigation and, thereby, protect against a danger to the national security of the United States and/or interference with the investigation. That governmental interest is a manifestly compelling one. *See, e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation."). And the NSL here is carefully tailored to advance that interest without unnecessarily restricting speech.

By its terms, the nondisclosure requirement of the [redacted] 2011 NSL narrowly applies only to prevent the petitioner's disclosure of the fact that the government "has sought or obtained access to information or records" under 18 U.S.C. § 2709. The NSL does not purport to prohibit petitioner from disclosing any other information, and places no restriction on petitioner's ability to engage in general public discussions regarding matters of public concern. As discussed in the Giuliano Decl., the nondisclosure requirement is tailored as narrowly as possible to serve the compelling interests described above. Moreover, the FBI has afforded petitioner ample procedural protections here that exceed those required by the Constitution.[2]

Thus, the Court need not determine the applicable level of scrutiny because the NSL here survives any reasonable scrutiny -- it is narrowly tailored to serve a compelling governmental interest. Nonetheless, petitioner's analysis of the level of scrutiny to be applied is deeply flawed.

III. The Request For Information From Petitioner In The [redacted] 2011 NSL Is Validly

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[2]Petitioner does not mount a factual attack on the [redacted] 2011 NSL, but references what it terms "the well-documented history of FBI abuse of NSLs." Petitioner's Brief ("Br.") at 4-5. Petitioner relies on a 2007 report by the Dep't of Justice Inspector General, which was followed by another report in 2008. The follow-up report examines the FBI's efforts to correct errors identified in the 2007 report, and concludes that "the FBI and the Department have made significant progress in implementing the recommendations from that report and in adopting other corrective actions to address serious problems we identified in the use of national security letters." 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*, p. 6 (March 2008), *available at* http://www.usdoj.gov/oig/reports/FBI/index.htm. See also *id.* at 6-7 (discussing significant efforts and commitment of FBI staff to correcting past problems), *id.* at 13-74 (discussing corrective measures in detail).

Applied To Petitioner And Does Not Impinge On The Anonymous Speech Or Associational Rights Of Petitioner Or Its [redacted]

Contrary to petitioner's suggestion, *see* Br. at 20-21, the limited request for information in the [redacted] 2011 NSL does not run afoul of the First Amendment, including any recognized rights to anonymous speech and associational rights by petitioner or its [redacted] Rather, it is fully consistent with the government's established authority to request or demand information to further law enforcement or national security investigations.

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

Petitioner appears to claim that the NSL request for information is an impermissible attempt to compel speech from petitioner. Br. at 18, 21. But it is beyond dispute that "[a]mong the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies." *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 93-94 (1964). Moreover, "essential operations of government may require [compelled speech] for the preservation of an orderly society,-as in the case of compulsion to give evidence in court." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring). The requirement here that petitioner provide limited information to the FBI as part of an ongoing national security investigation is no more unconstitutional than a requirement that a corporation comply with a validly-issued subpoena, that it provide certain information on its taxes, or that an individual respond to the census. *See, e.g., Full Value Advisors v. S.E.C.,* 633 F.3d 1101, 1108-09 (D.C. Cir. 2011) (declining to apply heightened scrutiny and upholding requirement that corporation disclose certain information to the SEC); *United States v. Sindel,* 53 F.3d 874, 878 (8th Cir. 1995) (First Amendment not implicated by requirement of disclosure to IRS that entails no public dissemination of a political or ideological message); *Morales v. Daley*, 116 F. Supp. 2d 801, 816 (S.D. Tex. 2000) (census requirement that plaintiff provide information concerning his race was not improper compulsion of speech). *Cf. Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (the level of constitutional scrutiny of government-mandated disclosure requirements, even where the

disclosure is broadcast beyond the government agency, is "akin to the general rational basis test governing all government regulations under the Due Process Clause"). Outside the protections afforded by the Fifth Amendment, which are not at issue here, there is simply no general "right to remain silent" in the face of a legitimate governmental inquiry, particularly where, as here, the inquiry is authorized by Congress and requires no public dissemination of any "speech" by petitioner. *Full Value Advisors*, 633 F.3d at 1108-09; *see also Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 470-71 (1997) (compelled speech doctrine not implicated where regulation did not require commercial plaintiffs to publicly espouse an idea); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1037-38 (9th Cir. 1999) (same where no one "required to act as a courier for" or to endorse "an ideological message").

B. The NSL To Petitioner Does Not Impinge On The Right To Anonymous Speech.

Petitioner's claim that the NSL impinges on a right of its [redacted] to speak anonymously is also unfounded. As the cases recognizing a right to "anonymous" speech under the First Amendment make clear, the legally protected interest at stake is the right not to reveal one's identity when communicating what may be an unpopular message. *See, e.g., McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-43 (1995). The primary rationale for protecting a speaker's identity is that revealing it attached to particular content could subject him or her to retaliation and thus chill controversial or unpopular but protected speech. This chilling effect is most powerful if the speaker is forced to disclose his or her identity when speaking. Thus, in *Buckley v. Am. Const'l Law Found.,* the Supreme Court invalidated a statute requiring petition circulators to wear a badge displaying their names because "the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." 525 U.S. 182, 199 (1999). In *McIntyre*, the Court struck down a statute prohibiting anonymous campaign literature because it was a "direct regulation of the content of speech" in which "the category of covered documents is defined by their content." 514 U.S. at 345.

The NSL here, however, does not target the content of a communication. And the [redacted] in question will not, as the Court found objectionable in *Buckley*, 525

U.S. 182, be linked publicly (or at all) to the content of any communication by compliance with the NSL. Accordingly, *McIntyre* and similar cases involving direct regulation of First Amendment rights are inapplicable. The FBI's request for information as part of an ongoing, authorized national security investigation does not violate anyone's right to anonymous speech.

C. The NSL To Petitioner Does Not Violate The Right To Free Association.

Likewise, the request for information in the [redacted] 2011 NSL will not impinge on anyone's right to anonymous association. Whatever function petitioner [redacted] the NSL was served on petitioner solely in its corporate capacity as a telephone company. And even if the NSL was construed to target associational rights, it would not be unconstitutional unless it imposed a "serious burden[]," *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984), or affected in a "significant way," *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 548 (1987), a person's associational rights. *See also NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462 (1958) (regulation must be a "substantial restraint" on associational rights). The limited request for information in the [redacted] 2011 NSL falls far short of such a "serious," "significant," or "substantial" burden on the associational rights of petitioner or its [redacted] and petitioner has failed to show otherwise.

Moreover, any associational burden imposed by the information request would be constitutionally permissible because it would be outweighed by the government's compelling interest in national security. *Compare NAACP,* 357 U.S. at 462 ("Petitioner has made an uncontroverted showing that" identifying its members in the past had exposed them to harm), with *Buckley v. Valeo,* 424 U.S. 1, 70-72 (1976) (rejecting right to associate claim where alleged harm "is highly speculative" and "the substantial public interest in disclosure . . . outweighs the harm generally alleged"). Here, "any serious infringement on First Amendment rights" brought about by petitioner's providing to the FBI the [redacted] as needed for an ongoing national security investigation is outweighed by "the substantial public interest" in that investigation. *Id.*; *see Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010) ("*HLP*") (rejecting challenge to statute barring material support to terrorist groups; holding "[a]ny burden on plaintiffs' freedom of association . . . is justified" by national security).

IV. The Nondisclosure Provision Of The NSL Statute, 18 U.S.C. § 2709(c), Is Validly Applied To Petitioner.

The nondisclosure requirement of the NSL that petitioner challenges here is neither unconstitutional nor anomalous. Congress repeatedly has recognized the need for secrecy when conducting counterintelligence and counter-terrorism investigations, and each of the several statutes allowing issuance of NSLs includes a nondisclosure provision similar to 18 U.S.C. § 2709(c).[3] As Congress has explained, "the FBI could not effectively monitor and counter the clandestine activities of hostile espionage agents and terrorists if they had to be notified that the FBI sought their . . . records for counterintelligence investigations," and the "effective conduct of FBI counterintelligence activities requires such non-disclosure." H. REP. NO. 99-690(I) at 15, 18, *reprinted in* 1986 U.S.C.C.A.N. 5341, 5345 (regarding enactment of 12 U.S.C. § 3414(a)(5)). Thus, Congress also has imposed similar nondisclosure requirements in connection with the use of other investigative techniques apart from NSLs in national security investigations.[4]

As explained below, the nondisclosure requirement applied to petitioner here is no less proper than the confidentiality requirements described above. It complies with the First Amendment and survives any properly-applied scrutiny because it is narrowly tailored to serve the paramount governmental and public interest in national security.

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[3] *See* 12 U.S.C. § 3414(a)(1) (requests from certain government authorities for financial records); 12 U.S.C. § 3414(a)(5) (FBI requests to financial institutions for financial records of customers); 15 U.S.C. § 1681u (FBI requests to consumer reporting agencies for records seeking identification of financial institutions and other identifying information of consumers); 15 U.S.C. § 1681v (requests to consumer reporting agencies for consumer reports and all other information in consumers' files); 50 U.S.C. § 436(b) (requests to financial institutions or consumer reporting agencies for financial information and consumer reports needed for authorized law enforcement investigation, counterintelligence inquiry, or security determination).

[4] *See* 50 U.S.C. § 1842(d)(2)(B) (pen register or trap and trace device for foreign intelligence and counter-terrorism investigations); 50 U.S.C. § 1861(d)(2)(order for production of tangible things in connection with national security investigations); 50 U.S.C. § 1802(a)(4)(A) (electronic surveillance to intercept foreign intelligence information); 50 U.S.C. § 1822(a)(4)(A) (physical search for foreign intelligence information).

A. The Government May Validly Require That Private Parties Not Disclose Information Gained Through Participation In An Official Investigation.

The critical need for secrecy in national security investigations explained above provides the explanation and justification for the nondisclosure requirement of the NSL served on petitioner. When relevant information is in the hands only of third parties, requests from the government for the information unavoidably notify those parties of the investigation and give them knowledge to which they were not previously privy. In these circumstances, the best way to prevent the investigation from being compromised is to obligate the private party not to disclose information about the investigation that it has learned through its own participation.

Numerous judicial decisions make clear that restrictions on a party's disclosure of information obtained through participation in confidential proceedings stand on a firmer constitutional footing than restrictions on the disclosure of information obtained through independent means. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), the Supreme Court upheld the constitutionality of a judicial order that prohibited parties to a civil suit from disclosing sensitive information obtained through pretrial discovery. In rejecting a First Amendment challenge to the order, the Court noted that the parties "gained the information they wish to disseminate only by virtue of the trial court's discovery processes," which themselves were made available as a matter of legislative grace rather than constitutional right. 467 U.S. at 32. The Court found that "control over [disclosure of] the discovered information does not raise the same specter of . . . censorship that such control might suggest in other situations." *Id.*

The Supreme Court relied on this distinction again in *Butterworth v. Smith*, 494 U.S. 624 (1990), where the Court held that Florida could not constitutionally prohibit a grand jury witness from disclosing the substance of his testimony after the term of the grand jury had ended. In so holding, the Court distinguished *Rhinehart* on the ground that "[h]ere . . . we deal only with [the witness's] right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury." *Id.* at 632; *id.* at 636 (Scalia, J., concurring) ("[q]uite a different question is presented . . . by a witness' disclosure of the grand jury proceedings, which

is knowledge he acquires not 'on his own' but only by virtue of being made a witness.").[5]

Section 2709(c) is analogous to the grand jury and other investigatory nondisclosure provisions discussed above. Indeed, 18 U.S.C. § 2709 is intended explicitly to mirror grand jury subpoena powers in many key respects. *See* H. REP. NO. 107-236(I) at 61-62 (Congress sought to "harmonize" § 2709 "with existing criminal law where an Assistant United States Attorney may issue a grand jury subpoena for all such records in a criminal case."). In *Doe v. Ashcroft*, a case considering the facial constitutionality of 18 U.S.C. § 2709(c), the court concluded that "[t]he principle that *Rhinehart* and its progeny represent is directly applicable" to § 2709 because "[a]n NSL recipient or other person covered by the statute learns that an NSL has been issued only by virtue of his particular role in the underlying investigation." 334 F. Supp. 2d 471, 519 (S.D.N.Y. 2004), *vacated on other grounds*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006); *see also id.* at 518 (the "laws which prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger less First Amendment concerns tha[n] laws which prohibit disclosing information a person obtains independently."). And in *Doe v. Mukasey*, a subsequent appeal in that litigation, the Second Circuit held that "[t]he nondisclosure requirement of subsection 2709(c) is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny." 549 F.3d 861, 877 (2d Cir. 2008).[6] The *Mukasey* court declined to determine the standard of review

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[5]The Circuit Courts of Appeal likewise have upheld similar nondisclosure requirements based on this principle. *See Hoffman-Pugh* v. *Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) ("a [constitutional] line should be drawn between information the witness possessed prior to becoming a witness and information the witness obtained through her actual participation in the grand jury process"; upholding statute prohibiting disclosure of, *inter alia*, information sought by prosecution in grand jury); *In Re Subpoena to Testify*, 864 F.2d 1559, 1562 (11th Cir. 1989) (similar); *First Am. Coalition v. Judicial Review Bd.*, 784 F.2d 467, 479 (3d Cir. 1986) (*en banc*) (state may prohibit witnesses and other persons "from disclosing proceedings taking place before" a judicial misconduct investigation board). *Cf. Kamasinski v. Judicial Review Council*, 44 F.3d 106, 110-12 (2d Cir. 1994).

[6]In *Mukasey*, the Second Circuit did not fully accept the analogy between the NSL nondisclosure requirement and those in proceedings in which "interests in secrecy arise from the nature of the proceeding," such as grand juries, because "the nondisclosure requirement of subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where

applicable whether strict scrutiny or something less "'exacting'" -- because § 2709(c) survived either level of scrutiny on its face. 549 F.3d at 878.

Likewise, this Court need not decide whether strict scrutiny or a lesser standard applies to the NSL at issue here: it easily satisfies either standard. As discussed below, the nondisclosure requirement of the NSL here is no more restrictive than the nondisclosure provisions upheld in the cases above, and is justified by a far more compelling purpose.

B. The Nondisclosure Requirement Of The NSL Served On Petitioner Is Not A Classic Prior Restraint And Does Not Warrant The Most Rigorous Scrutiny.

As the Second Circuit held, the nondisclosure obligation imposed on petitioner here "is not a typical prior restraint or a typical content-based restriction[.]" *Mukasey*, 549 F.3d at 877. Because the NSL restricts limited information obtained only by participation in a confidential investigation, it does not "raise the same specter of censorship" as other restrictions. *Rhinehart*, 467 U.S. at 32. Petitioner urges the Court (Br. at 6) to apply the most stringent review available, drawing from the high-water mark First Amendment protections outlined in *New York Times v. United States*, 403 U.S. 713 (1971), and *Freedman v. Maryland*, 380 U.S. 51. But the NSL nondisclosure requirement does not "warrant[] the most rigorous First Amendment scrutiny." *Mukasey*, 549 F.3d at 877.

"The doctrine of prior restraint originated in the common law of England, where prior restraints of the press were not permitted, but punishment after publication was." *Alexander v. United States*, 509 U.S. 544, 553 (1993). The Supreme Court has recognized two types of classic

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secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." 549 F.3d at 877. But for all the often-obvious reasons discussed above why national security investigations require secrecy, those interests likewise inhere "from the nature of the proceeding" in this context. *Id.* Thus, by requiring that the FBI make a case-by-case determination before applying the nondisclosure requirement, the statute provides *greater* protection than what is constitutionally required, not less. In *Butterworth*, for example, the Supreme Court did not require a prosecutor to make a case-by-case determination of whether "witnesses would be hesitant to come forward" or "less likely to testify fully and frankly" absent Federal Rule of Criminal Procedure 6(e), nor whether "those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment." 494 U.S. at 630. Nor do the nondisclosure provisions of wiretap, pen register, and similar laws require the government to make a case-by-case determination of the scope of required confidentiality. *See* 18 U.S.C. §§ 2511, 3123(d); 50 U.S.C. §§ 1842(d), 1861(d); 12 U.S.C. § 3420(b); 31 U.S.C. § 5326.

prior restraints, neither of which applies with full force to the NSL here. The first is a licensing scheme for speech, where the plaintiff's right to speak is conditioned on prior approval from the government. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). By contrast, a categorical prohibition on certain speech with the threat of punishment for disclosure *after* the fact is not a prior restraint. *See id.* at 764 (distinguishing between statute imposing prohibition on speech and one conditioning speech on obtaining a license or permit).

Here, the [redacted] 2011 NSL categorically prohibits petitioner from disclosing that it has received the NSL. This is akin to the statute challenged in *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978), which prohibited the disclosure of information about the proceedings of a judicial investigative body and imposed criminal penalties for violation. *See id.* at 830. Such a nondisclosure provision "does not constitute a prior restraint or attempt by the State to censor the news media." *Id.* at 838.[7] Similarly, in *Cooper* v. *Dillon*, 403 F.3d 1208 (11th Cir. 2005), the Eleventh Circuit held that a state law prohibiting disclosure of non-public information obtained through participation in a law enforcement investigation "cannot be characterized as a prior restraint on speech because the threat of criminal sanctions imposed after publication is precisely the kind of restriction that the [Supreme] Court has deemed insufficient to constitute a prior restraint." *Id.* at 1215-16. In short, a categorical prohibition on disclosures enforceable by a penalty action after the fact is not a prior restraint. Were that not so, countless state and federal statutes, including every anti-espionage statute that prohibits the disclosure of classified

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[7]It is important to note that the nondisclosure requirement on petitioner is content-neutral. "The Supreme Court has stated 'the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys*.'" *Dish Network Corp. v. FCC*, 636 F.3d 1139, 1145 (9th Cir. 2011) (emphasis added, citations omitted). Here, the government has not restricted disclosure of information about the NSL because of "disagreement with the message" petitioner may wish to convey, but to avoid a disclosure of confidential information that could compromise the underlying investigation. *See id.* at 1145 ("[E]ven a statute that facially distinguishes a category of speech or speakers is content-neutral if justified by interests that are 'unrelated to the suppression of free expression.'") (citation omitted).

information, would be a prior restraint. *See, e.g.*, 18 U.S.C. §§ 793-794, 798.[8]

The second category of prior restraints takes the form of court injunctions against certain speech or speakers. *See Alexander,* 509 U.S. at 550. Here, this Court has not imposed an order prohibiting petitioner from making the disclosures prohibited by the NSL. Pursuant to 18 U.S.C. § 3511, the government has sought such an Order enforcing the nondisclosure requirements of the NSL and § 2709(c) on petitioner. *See* Civ. No. 11-2667 SI (N.D. Cal.) (under seal). However, as discussed *supra*, the Supreme Court has recognized that court orders prohibiting information acquired only by virtue of participation in an official investigation do not raise the same concerns as other injunctions on speech. *Rhinehart*, 467 U.S. at 32. At a minimum, the nondisclosure requirement of the NSL is not "the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 33; *Mukasey*, 549 F.3d at 877 (NSL nondisclosure requirement does not "warrant[] the most rigorous First Amendment scrutiny.").

For all of these reasons, the "exacting" standard to which "censorship," *Rhinehart*, 467 U.S. at 32, was held in *New York Times Co. v. U.S.* does not apply here. Moreover, this case is fundamentally different from *New York Times*, in which the government sought to enjoin the New York Times and the Washington Post from publishing the Pentagon Papers, a "classified study" discussing the evolution of the United States' involvement in the Vietnam War. *Id.* at 714. An individual NSL, unlike the nation's war policy, is not a matter of general public concern. Furthermore, Justice Stewart's concurrence recognizes that situations exist such as this one where the First Amendment would not bar an "injunction against publishing information about government plans or operations." *Id.* at 731. While the information in any given NSL is of interest to few people, disclosure of NSL information may reveal government plans or operations and may lead to widespread harm.

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[8]Whenever the executive branch classifies any item of information under Executive Order 13292, it thereby prohibits the disclosure of the information by the information's recipients. *See* 18 U.S.C. § 793 (providing criminal penalties for improper disclosure of classified information). The classification of information itself, like a categorical prohibition of disclosure with threat of subsequent punishment, does not "constitute[] a prior restraint in the traditional sense." *See McGehee* v. *Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983).

C. The NSL Nondisclosure Requirement Is Accompanied By Ample And Adequate Procedural Protections.

Premised on its faulty assumption that the NSL nondisclosure obligation is a classic prior restraint subject to strictest scrutiny, petitioner analogizes the nondisclosure requirement to the type of speech licensing scheme that the Supreme Court examined in *Freedman v. Maryland*, 380 U.S. 51. But *Freedman* does not apply here. Moreover, even under *Freedman*, petitioner's challenge to the NSL would fail because the NSL is accompanied by *Freedman*'s protections.

1. The NSL Nondisclosure Obligation Is Not Subject To *Freedman*.

Freedman involved the constitutionality of a "censorship statute" that made it unlawful to exhibit any motion picture unless and until the film was "submitted [to] . . . and duly approved and licensed by" a state Board of Censors. 380 U.S. at 735 & n.2. The statute directed the Board of Censors to "approve and license such films . . . which are moral and proper," and to "disapprove such as are obscene, or such as tend . . . to debase or corrupt morals or incite to crimes." *Id.* at 52 n.2. The statute did not place any time limit on the Board's deliberations, nor did it provide any "assurance of prompt judicial determination" regarding the Board's decisions. *Id.* at 59-60. There were two primary concerns with this scheme not present here. First, "[b]ecause the censor's business is to censor," institutional bias may lead to the suppression of speech that should be permitted. *Id.* at 57. Second, "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Id.* at 58. The "procedural safeguards" adopted by the Supreme Court were "designed to obviate the[se] dangers" by minimizing the burdens of administrative and judicial review. *Id.*

Thus, *Freedman* requires that: "'(1) any [administrative] restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'" *Thomas* v. *Chicago Park District*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion)); *Freedman*, 380 U.S. at 58-60.

The scope and origin of the information at issue is profoundly different here than in

Freedman. The statute there undertook to censor private films whose contents were created independently of the government itself. Section 2709(c), in contrast, places no restriction on the disclosure of independently obtained information, but is confined to sensitive information that the recipient learns only by his participation in the government's own investigation.

Another critical difference is that the nature of the "typical First Amendment harm" associated with a law imposing censorship on motion pictures is far greater than the First Amendment risks associated with a law prohibiting the disclosure of confidential information about a national security investigation. *See City of Littleton* v. *Z.J. Gifts D-4*, 541 U.S. 774, 782-83 (2004). In *Freedman*, the licensing scheme at issue was not confined to obscene speech, but extended to films that "tend to debase or corrupt morals," an open-ended category that reaches protected speech. 380 U.S. at 52 n.2. *See, e.g., Kingsley Intern. Pictures Corp.* v. *SUNY Regents*, 360 U.S. 684, 688-89 (1959). In contrast, § 2709(c) is aimed at protecting highly sensitive national security investigations, its reach is limited to a narrow category of information that is not characteristically political, and petitioner remains free to disseminate information obtained outside the investigation. The object of the nondisclosure provision is not to censor private speech, but to ensure that the secrecy of the government's own activities is not compromised when those activities must be made known to private persons in order to obtain their assistance. *Cf. United States* v. *Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("The Government . . . has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest."). If this is a prior restraint at all, it is "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Rhinehart*, 467 U.S. at 33. And as noted *supra*, the FBI's determination that disclosure of information concerning the [redacted] 2011 NSL may cause one or more of the harms identified in § 2709(c) is similar to a determination that government information should be classified on national security grounds -- a classification process that, itself, is not a prior restraint for First Amendment purposes. *See, e.g., McGehee*,

718 F.2d at 1147; *Marchetti*, 466 F.2d at 1317.[9]

Even if the nondisclosure requirement is considered a prior restraint, the risk that it will be applied to suppress protected speech is far smaller than the risk presented by the kind of licensing scheme at issue in *Freedman*. As discussed *infra* at 22-24, the statutory criteria in § 2709(c) are as objective as possible in light of their subject matter, and so further reduce the risk of administrative error or manipulation.

2. Assuming, *Arguendo*, That The *Freedman* Test Applies, It Is Satisfied By The NSL Served On Petitioner.

Petitioner argues that the NSL *statute* does not meet the *Freedman* test, but it ignores application of the nondisclosure requirement to petitioner in this case. The latter, however, is the question before the Court — as noted above, petitioner invokes 18 U.S.C. § 3511(a) to seek judicial review in this Court, and that statute provides a narrow waiver of sovereign immunity for the Court to "modify or set aside" only the individual NSL's nondisclosure requirement. Whether it was required to or not, the NSL served on petitioner here complies with *Freedman*.[10]

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[9]As the Fourth Circuit explained in *Marchetti*, the employee's secrecy "agreement is enforceable only because it is not a violation of" his First Amendment rights. 466 F.2d at 1317. Thus, *Marchetti* and similar decisions cannot be dismissed on the theory that the employees' contractual undertakings obviate the First Amendment.

[10]Petitioner argues at length that the Second Circuit was wrong to adopt a narrowing construction of the NSL statutes in *Mukasey* to, *e.g.*, suggest that the FBI assume the burden of seeking judicial review where an NSL recipient objects to an NSL. *See* Br. at 11-15. This argument is beside the point. In evaluating petitioner's challenge, the Court must consider the government's "'authoritative constructions'" of the NSL statute, including, critically, its implementation in the case at hand. *See Seattle Affiliate of Oct. 22nd Coalition v. City of Seattle*, 550 F.3d 788, 799 (9th Cir. 2008) (citation omitted). *See also Ward*, 491 U.S. at 795 ("Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis."); *United States v. Wunsch*, 84 F.3d 1110, 1118 (9th Cir. 1996). Pursuant to usual FBI practice, the [redacted] 2011 NSL informed petitioner that, if petitioner promptly notified the FBI that it objects to the NSL, the FBI would seek judicial review within approximately 30 days. This practice as applied to petitioner is what is before the Court, not the propriety of the Second Circuit's narrowing construction in *Mukasey*. Nonetheless, it bears noting that the *Mukasey* court's narrowing construction was entirely proper if there was, indeed, a significant question as to the constitutionality of 18 U.S.C. § 2709(c). "'[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Gonzales v. Carhart*, 550 U.S. 124, 153-54 (2007) (citations omitted); *see United States v. Santa Maria*, 15 F.3d 879, 881 (9th Cir. 1994) (same). Courts have routinely avoided alleged

a. The FBI Has Sought Judicial Review Of The NSL, Satisfying The Third *Freedman* Prong.

In the [redacted] 2011 NSL, FBI informed petitioner how the government would comply with the third *Freedman* prong that it would "bear the burden of going to court" to enforce the nondisclosure requirement if necessary. *See Thomas*, 534 U.S. at 321 (construing *Freedman*). Thus, although petitioner had voluntarily invoked its right to seek judicial review under § 3511, the government also promptly sought judicial review and filed an action to enforce the NSL. *See* Civ. No. 11-2667 SI (N.D. Cal.) (under seal).

b. The NSL Served On Petitioner Applied Its Nondisclosure Requirement For Only A Brief Period Prior To Judicial Review, Satisfying The First *Freedman* Prong.

The first *Freedman* requirement is that "'any [administrative] restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained" prior to the availability (under the second *Freedman* prong) of "expeditious judicial review." *Thomas*, 534 U.S. at 321. As noted, the FBI informed petitioner that it would seek judicial review to enforce the NSL nondisclosure requirement, if at all, within 30 days after petitioner lodged its objection with the government. That was the "specified brief period" of *Freedman*, and so the NSL at issue here satisfies the first *Freedman* prong.

c. Petitioner Lacks Standing To Challenge 18 U.S.C. § 3511(b)(2).

Seeking to make a broader challenge based on hypothetical facts, petitioner argues it is improper that, under 18 U.S.C. § 2709(c), the nondisclosure requirement may remain in effect subject to "a petition by the [electronic communication service] provider that can only be brought

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constitutional problems in time, place, and manner regulations by accepting narrowing constructions of arguably loose language advanced by permitting authorities. *See, e.g., Cox v. New Hampshire*, 312 U.S. 369, 375-78 (1941); *Stokes v. City of Madison*, 930 F.2d 1163, 1169-70 (7th Cir. 1991); *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990). For these reasons, the Court should adhere to the well-established "principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). An overbreadth exception to that rule "has not been invoked when a limiting construction *has been or could be* placed on the challenged statute." *Id.* at 613 (emphasis added, citations omitted).

annually." Mem in Support of Petition at 11. Here, petitioner was free to seek judicial review of the nondisclosure requirement at any time, *see* 18 U.S.C. § 3511(b), and chose to do so promptly. By statute, if an NSL recipient waits until one year after receipt of the NSL to challenge a nondisclosure requirement and a court rejects the challenge, then the recipient must wait one year before bringing another action for review. *Id.* § 3511(b)(2). But § 3511(b)(2) does not now apply to petitioner, which filed its petition under § 3511(b)(1). Petitioner cannot satisfy the basic requirement that it has suffered or is about to suffer a cognizable injury from the provision it is challenging. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[11]

d. The NSL Nondisclosure Requirement Applied To Petitioner Is Justified.

Perhaps because it is not in a position to dispute the need for nondisclosure of the fact and contents of the NSL it received in this case before the Court, petitioner seeks to challenge the underlying statutory standards in a hypothetical case not before the Court. Br. at 15-16. But, again, 18 U.S.C. § 3511(b) is a limited waiver of sovereign immunity that proscribes the outlines of a petition for review. As discussed in this memorandum and established by Assistant Director Giuliano's Declaration, the nondisclosure requirement applied to petitioner is well-tailored to serve the compelling government interest in national security.

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[11]Even if petitioner had standing, the waiting period is justified and appropriate in this context. The one-year period only becomes relevant when the recipient has already unsuccessfully challenged an NSL that was issued at least one year beforehand. 18 U.S.C. § 3511(b)(2). When a court rejects a request for disclosure under § 3511(b), it is obviously legitimate to require the recipient to wait for *some* period before renewing its claim; the First Amendment can hardly obligate the court and the FBI to take up the nondisclosure question again immediately after the initial judicial decision. Congress concluded that, when the reasons for nondisclosure have already been found to remain applicable more than one year after the issuance of the NSL, the additional passage of less than twelve months is unlikely to result in a significant change. That conclusion is a constitutionally permissible one. *Cf. Burson* v. *Freeman*, 504 U.S. 191, 210 (1992) (plurality opinion) (difference between legislature's designated 100-foot "campaign-free zone" and proposed alternative of 25-foot buffer zone "is a difference only in degree, not a less restrictive alternative in kind"). Moreover, national security investigations differ fundamentally from normal criminal investigations, and this difference affects the duration of secrecy necessary -- long-range investigations may require long-range secrecy. *See United States v. United States District Court*, 407 U.S. 297, 322 (1972) (discussing differences between national security and typical criminal investigations); *Doe v. Ashcroft,* 334 F. Supp. 2d at 522 (same in NSL context).

Moreover, the statutory standards do not, as petitioner claims, vest the FBI with "unfettered discretion." As described above, the nondisclosure requirement is triggered only where, as here, the Director of the FBI or his appropriate designee certifies that disclosure of the FBI's request for information "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). These are appropriately narrow and objective standards.[12]

V. The Standards Of Judicial Review Of NSLs Under 18 U.S.C. § 3511(b) Are Constitutional.

The federal courts have consistently given deference to reasoned judgments by the Executive Branch regarding the potential harms to national security that may result from disclosures of classified (and even non-classified) information about counterintelligence and counterterrorism programs. The standards of judicial review in 18 U.S.C. § 3511(b) merely

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[12]In evaluating regulations governing the time, place, and manner of expression, the Supreme Court has held that a law that leaves the regulation of speech "to the whim of the administrator" runs afoul of the First Amendment. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 133 (1992). An ordinance may not permit officials "to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community," *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Thus, an administrator must be required to rely on "narrowly drawn, reasonable, and definite standards." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). The standards of § 2709(c) meet this test. The Supreme Court has held that similar criteria, such as "health and safety" or "life and health," are sufficiently "specific and objective" to protect against licensing decisions based on the content or viewpoint of the licensee's expression. *Thomas,* 534 U.S. at 324; *accord S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1138, 1141 (9th Cir. 2004) ("We do not have to pretermit reasonable health and safety regulations on the chance that a public official might abuse his discretion and trample on First Amendment rights."). The § 2709(c) standards, including "life or physical safety," are equally specific and objective. They also include: "danger to the national security of the United States"; "interference with a criminal, counterterrorism, or counterintelligence investigation"; or "interference with diplomatic relations." 18 U.S.C. § 2709(c)(1). *See Thomas*, 534 U.S. at 322-23 ("[a] licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms . . . to considerations of public safety and the like." (quotation marks omitted)). These are objective criteria, unlike those in *Forsyth County*, where a local official was empowered to impose whatever fee he deemed "reasonable," without reference to "any objective factors." 505 U.S. at 133. They are defined as narrowly as possible, and as narrowly as those upheld in *Thomas*.

codify this well-established and well-founded deference; they do not, as petitioner asserts, violate either the separation of powers or the First Amendment.

A. The Standards Of Judicial Review In Section 3511(b) Do Not Violate The First Amendment.

The primary rationale for judicial deference in this context is the underlying difference in institutional capacities between the Judicial Branch and the Executive Branch in making judgments about the risks to national security posed by the disclosure of particular confidential information. Federal courts have traditionally exercised great restraint in reviewing decisions by the government to withhold information in the interest of national security. *See, e.g.*, *Egan*, 484 U.S. at 529; *CIA* v. *Sims*, 471 U.S. 159, 179 (1985); *Center for Nat'l Security Studies v. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003); *McGehee,* 718 F.2d at 1147-49. For their part, "the Executive departments responsible for national defense and foreign policy have unique insights into what adverse effects might occur as a result of [disclosure of] a particular classified record." *McGehee*, 718 F.2d at 1148. "It is abundantly clear that the government's top counterterrorism officials are well suited to make this predictive judgment," whereas "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." *Center for Nat'l Security Studies*, 331 F.3d at 927, 928. Thus, as the Supreme Court recently held, "when it comes to collecting evidence and drawing factual inferences in th[e] area [of national security], 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate." *HLP*, 130 S. Ct. at 2727.

Petitioner suggests that *New York Times*, 403 U.S. 713, forecloses judicial deference under § 3511(b). *New York Times* is distinguishable for the reasons discussed above at pp. 17-18. As noted, the NSL here is not a classic prior restraint like the one at issue in *New York Times*. In addition, it is far from clear that *New York Times* rests on a judicial rejection of the executive branch's assessment of national security risks. *See, e.g., id.* at 731 (White & Stewart, JJ., concurring) ("I am confident" that "revelation of these documents will do substantial damage to public interests").

Section 3511(b) permits courts to modify or set aside a nondisclosure requirement where

there is "no reason to believe" that disclosures may endanger national security, interfere with criminal, counterterrorism, or counterintelligence investigations, interfere with diplomatic relations, or endanger lives and physical safety. The "no reason to believe" standard is consistent with the standards that courts have employed to assess similar risks in other cases, both statutory and constitutional. It can be interpreted and has been interpreted in related contexts to be "interchangeable with and conceptually identical to the phrases 'reasonable belief' and 'reasonable grounds for believing.'" *United States* v. *Diaz*, 491 F.3d 1074, 1077 (9th Cir. 2007). Thus, the "no reason to believe" standard does not foreclose a court from evaluating the reasonableness of the FBI's judgments.[13]

B. The Standards Of Judicial Review Do Not Violate The Separation-Of-Powers Doctrine.

In addition to arguing that the standards of judicial review in § 3511(b) violate the First Amendment, the petitioner also argues that "[b]y purportedly restricting the authority of the courts to a particular standard of review . . . the statute violates the separation of powers," Br. at 17. This argument is meritless: Congress routinely mandates deferential standards for judicial review of Executive Branch decisions. The most well-known example is the deferential "arbitrary and capricious" standard of review prescribed by the Administrative Procedure Act. *See* 5 U.S.C. § 706(2); *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife,* 273 F.3d 1229, 1235-36 (9th Cir. 2001) ("The arbitrary and capricious test is a narrow scope of review. . . . The court is not empowered to substitute its judgment for that of the agency."). *See also, e.g.*, 2 U.S.C. § 1407(d); 7 U.S.C. § 1508(3)(B)(iii)(II); 12 U.S.C. §§ 203(b)(1), 1817(j)(5); 15 U.S.C. § 78*l*(k)(5). No decision has ever suggested that the separation-of-powers doctrine entitles courts to disregard an otherwise constitutional standard of review prescribed by Congress. As long as

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[13]Nor would the application of strict scrutiny (assuming, *arguendo*, that it applies) preclude judicial deference to executive assessments of national security harms. *See, e.g., Detroit Free Press* v. *Ashcroft*, 303 F.3d 681, 707 (6th Cir. 2002) (holding national security-related deportation rule was subject to strict scrutiny under the First Amendment while "defer[ring] to [the government's] judgment. These agents are certainly in a better position [than the court] to understand the contours of the investigation and the intelligence capabilities of terrorist organizations.").

the standard of review is not inconsistent with some substantive constitutional limitation, such as the First Amendment, Congress has plenary authority to prescribe the standard of judicial review.

Nor does adhering to Congress' deferential standard of review in § 3511(b) compel courts to abdicate their institutional responsibilities under Article III:

> In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review, we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the court to second-guess executive judgments made in furtherance of that branch's proper role.

Center for Nat'l Security Studies, 331 F.3d at 932. The same reasoning applies here.[14]

VI. The Statutory Provision Authorizing The Government To Submit Sensitive National Security Material To The Court *Ex Parte* and *In Camera* Accords With Long-Standing Judicial Practice And The Constitution.

The NSL judicial review statute, 18 U.S.C. § 3511, provides that "[i]n all proceedings under this section, the court shall, upon request of the government, review *ex parte* and *in camera* any government submission or portions thereof, which may include classified information." *Id.* § 3511(e). Petitioner argues that this is "deeply inconsistent with the separation of powers," prevents it from "meaningfully participating in judicial review," and is "inconsistent with strict scrutiny." Br. at 20. These arguments are wholly without merit.

First, even assuming that strict scrutiny applies, the Court is perfectly capable of examining classified evidence *ex parte* and under the appropriate standard.

Second, courts have uniformly rejected constitutional challenge to statutes like § 3511(e) that authorize the government to submit national security information *ex parte*. *E.g., Global Relief Found. v. O'Neill,* 315 F.3d 748, 754 (7th Cir. 2002) (also stating "[t]he Constitution would indeed be a suicide pact . . . if the only way to" enforce a national security statute "were to reveal information that might cost lives."); *In re NSA Telecom. Records Litig.*, 633 F. Supp. 2d

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[14]Petitioner lacks standing to object to the separate provision of § 3511(b) that gives conclusive effect to a good-faith certification that disclosure may endanger national security or interfere with diplomatic relations only if the certification is made by the Director of the FBI, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General. This provision does not apply here; other designated officials made the certification in this case.

949, 971-72 (N.D. Cal. 2009) (rejecting Due Process challenge to similar statute). Likewise, courts considering challenges to NSLs have reviewed sensitive government information *in camera* and *ex parte*. *E.g.*, *Doe v. Holder*, 703 F. Supp. 2d 313 (S.D.N.Y. 2010).

Even in the absence of an express statutory authorization like § 3511(e), courts have consistently recognized (and exercised) their "inherent authority to review classified material *ex parte, in camera* as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).[15] The reasons for this rule are manifest: "under the separation of powers . . . the Executive Branch has control and responsibility over access to classified information and has [a] 'compelling interest' in withholding national security information from unauthorized persons." *People's Mojahedin Org. of Iran v. Dep't of State,* 327 F.3d 1238, 1242 (D.C. Cir. 2003) (citation omitted). This paramount interest outweighs any countervailing interest of petitioner in a due process balancing analysis. *See Nat'l Council of Resistance of Iran,* 251 F.3d 192, 207 (D.C. Cir. 2001) ("[T]hat strong interest of the government clearly affects the nature . . . of the due process which must be afforded petitioners.").

Section 3511(e) merely codifies the government's ability to submit classified or sensitive information *ex parte* and *in camera*; it fully comports with the Constitution.

VII. The Nondisclosure Provisions Of The NSL Statutes Are Severable

As noted, facial invalidation of an NSL statute is outside the scope of relief available where, as here, a court considers a petition brought under 18 U.S.C. § 3511. Nonetheless, should

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[15] *See also, e.g., Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 948 n.8 (9th Cir. 2009) (noting with approval that the government had made classified declaration available to the court for *ex parte, in camera* review), *vacated upon rehearing en banc on other grounds*, 614 F.3d 1070 (9th Cir. 2010); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (upholding assertion of State Secrets Privilege based on *in camera* and *ex parte* review of classified government declarations); *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (district court's *ex parte* consideration of sealed FBI affidavit did not violate due process); *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983) (where the claimed exemption is national defense or foreign policy secrecy, it is "not necessary that additional reasons be recited for excluding Pollard's attorney from the *in camera* proceedings"); *Holy Land Found. for Relief & Dev. v. Ashcroft,* 333 F.3d 156, 164 (D.C. Cir. 2003); *National Council of Resistance of Iran v. Dep 't of State*, 251 F .3d 192, 208-09 (D.C. Cir. 2001); *Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury*, 585 F. Supp. 2d 1233, 1258-60 (D. Or. 2008).

the Court somehow reach the constitutionality of 18 U.S.C. § 2709(c) and hold the statute unconstitutional, it should decline petitioner's invitation to strike down the other portions of the statute which authorize the FBI to request information via NSL. Br. 22-23. Instead, in that circumstance the Court should sever the nondisclosure provision from the balance of the statute. *See Alaska Airlines* v. *Brock*, 480 U.S. 678, 683 (1987) ("[a] court should refrain from invalidating more of [a] statute than is necessary."); *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976).

Maintaining the secrecy of NSLs was obviously important to Congress, but it does not follow that Congress would have preferred to deprive the FBI of the ability to use NSLs altogether if nondisclosure could not be mandated by statute. Invalidating § 2709 in its entirety would force the FBI to give up the investigatory value of NSLs even in cases where the statutory nondisclosure requirement is unnecessary to ensure confidentiality. There is no reason to think that Congress would have desired such a result. Instead, it is far more probable that Congress would have preferred the FBI to have the authority contained in § 2709 and to exercise that authority when, in the agency's judgment, the recipient can be relied on to maintain the confidentiality of the NSL on a voluntary basis and the risk of disclosure is sufficiently small.[16]

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition to set aside the [redacted] 2011 NSL served on [redacted]

July 22, 2011

Respectfully Submitted,

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[16]Likewise, if a Court were to determine that the standards of judicial review in § 3511(b) are unconstitutional, they should be severed from the balance of § 3511(b), allowing judicial review to go forward.