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[redacted]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE MATTER OF NATIONAL SECURITY LETTER ISSUED TO [redacted]

[redacted]

No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION OF PLAINTIFF [redacted] TO SET ASIDE NATIONAL SECURITY LETTER AND NONDISCLOSURE REQUIREMENT IMPOSED IN CONNECTION THEREWITH

FILED UNDER SEAL

[Civil L.R. 79-5, 7-11]

Judge: Hon. William H. Alsup

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I. INTRODUCTION

The National Security Letter statute, 18 U.S.C. §2709 ("NSL Statute"), is a controversial law that, as amended by Congress in both the U.S.A. PATRIOT Act and subsequently, allows the FBI to easily issue administrative letters to service providers, such as telephone companies, demanding information about their customers. It also allows the FBI to gag the service providers permanently from revealing the fact that the demand was made, preventing them from notifying either their customers or the public. While the statute has many difficulties, one of the core constitutional issues, already recognized by the Second Circuit, is that it turns the First Amendment's procedural prior restraint doctrine on its head by allowing the Executive to issue a never-ending prior restraint on its own, then requiring the recipient service provider to undertake a legal challenge. It also dramatically limits judicial review of both the gag and the substance of the NSL. Unsurprisingly, given the combination of the lowered standard for issuance of NSLs and gag orders and the shift in the burden to seek judicial review, many more NSLs have been issued under the relaxed NSL statute than before the amendments and those NSLs have rarely been challenged by service providers.

On [redacted] 2011, petitioner [redacted] or "Petitioner") received a National Security Letter (the "NSL") numbered [redacted] from the Federal Bureau of Investigation ("FBI"). The NSL demanded that [redacted] turn over the name, address, and length of service, for all services provided to or accounts held by [redacted] The NSL also included a nondisclosure requirement.

[redacted] is an [redacted] provider of long distance and mobile phone services to its customers [redacted] Additionally, [redacted]

[redacted] and given the well-documented history of NSL abuse by the FBI, [redacted] seeks to ensure that any NSL demanding information about [redacted] and any non-disclosure demand fully meet the applicable legal and constitutional standards.

This petition challenges the constitutionality of the NSL nondisclosure provision and the NSL substantive provisions. Alternatively, if the NSL statute is held to be constitutional, Petitioner requests that the FBI be held to its burden in this instance.

II. STATEMENT OF FACTS

A. [redacted]

As noted above, [redacted] provides long distance and mobile phone services. [redacted] Declaration of [redacted] In Support of Petition to Set Aside National Security Letter and Nondisclosure Requirement Imposed In Connection Therewith [redacted] ¶ 5.[1] [redacted] Decl. ¶ 6. [redacted] Over the course of [redacted] history, its [redacted] Additionally, [redacted] Decl. ¶ 7. [redacted]

[1] *See also* [redacted]

[redacted]

B. The NSL Issued to [redacted]

On [redacted] 2011, [redacted] received an NSL addressed to [redacted] Decl. ¶ 13; [redacted] Decl. Ex. A. Though the NSL was addressed to [redacted] is the actual custodian of records, and [redacted] is the entity filing this petition and responding to the NSL. [redacted] Decl. ¶ 15. The NSL directs [redacted] "to provide to the Federal Bureau of Investigation (FBI) all subscriber information, limited to name, address, and length of service, for all services provided to or accounts held by [redacted] Decl. Ex. A.

The NSL summarily recites the boilerplate representations set forth in the NSL statute for both the NSL itself and for the nondisclosure requirement. *Id.* The NSL also informed [redacted] that it had a right to challenge the nondisclosure requirement. *Id.* The NSL specifically stated:

> If you wish to make a disclosure that is prohibited by the nondisclosure requirement, you must notify the FBI, in writing, of your desire to do so within 10 calendar days of receipt of this letter. That notice must be mailed or faxed to the [redacted] attention: [redacted] with a copy to FBI HQ, attention: General Counsel (fax number: 202-324-5366) and must reference the date of the NSL and the identification number found on the upper left corner of the NSL. If you send notice within 10 calendar days, the FBI will initiate judicial proceedings in approximately 30 days in order to demonstrate to a federal judge the need for nondisclosure and to obtain a judicial order requiring continued

nondisclosure. The nondisclosure requirement will remain in effect unless and until there is a final court order holding that disclosure is permitted.

Id.

The NSL prohibits [redacted] from disclosing information about the NSL or this petition to [redacted] to most of [redacted] employees and staff, to the press, to members of the public, and to members of Congress. It likewise prohibits [redacted] from disclosing that an NSL has been directed to [redacted] Likewise, [redacted] is prohibited from disclosing that information has been sought about [redacted]

C. The FBI Has a Documented History of Abusing NSLs

[redacted] concern about the NSL statute is based, in part, on the well-documented history of FBI abuse of NSLs. As part of the reauthorization of the PATRIOT Act in 2005, Congress directed the Department of Justice Inspector General to investigate and report on the FBI's use of NSLs. In three scathing reports issued between 2007 and 2010, the IG documented the agency's systematic and extensive misuse of this form of legal process.[2] The Inspector General concluded that "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." 2007 OIG Report 124.

Among other findings, the OIG reports concluded:

- FBI NSL requests surged from about 8,500 NSL requests in 2000, the year before the

[2] Department of Justice, Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (March 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf ("2007 OIG Report"); Department of Justice, Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* (March 2008), *available at* http://www.usdoj.gov/oig/special/s0803b/final.pdf ("2008 OIG Report"); Department of Justice, Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* (January 2010), *available at* http://www.justice.gov/oig/special/s1001r.pdf ("2010 OIG Report").

PATRIOT Act was passed, to 39,000 in 2003, after the PATRIOT Act relaxed the standards required to issue an NSL, to more than 48,106 NSL requests in 2006 alone.[3] 2007 OIG Report 120; 2008 OIG Report 107.[4]

- The possible intelligence violations reported within the FBI between 2003 and 2006 included improperly authorized NSLs, improper requests under NSL statutes, and unauthorized information collection through NSLs. 2007 OIG Report 66-67; 2008 OIG Report 138-143.

- The FBI's improper practices included requests for information based on First Amendment protected activity including acquisition of reporters' and news organizations' telephone toll billing records and other calling activity information. 2010 OIG Report 6, 89-122.[5]

- Pursuant to Executive Order, all intelligence agencies, including the FBI, must report intelligence violations to the Intelligence Oversight Board ("IOB"), an independent, civilian intelligence-monitoring board that reports to the President. Despite this, the OIG's review of 2003-2005 investigative files at four FBI field offices revealed that 22% contained one or more possible violations that had never been reported, 2007 OIG Report 78, representing an overall possible violation rate of 7.5 percent, 2008 OIG Report 76. According to the OIG, these findings suggested "that a significant number of NSL-related possible [IOB] violations throughout the FBI have not been identified or reported by FBI personnel." March 2007 OIG Report 84.

- The FBI issued hundreds of NSLs for "community of interest" or "calling circle" information to obtain multiple toll records in response to an individual NSL. 2010 OIG Report 75. These were issued without the knowledge or approval of authorized NSL signers and without any determination that the telephone numbers were relevant to authorized national security investigations. *Id.* at 60, 75-76.

- The FBI dismissed many NSL infractions as mere "administrative errors," a substantial number of which "involved violations of internal controls designed to ensure appropriate supervisory and legal review of the use of NSL authorities." 2008 OIG Report 100. The OIG expressed concern that the FBI's attitude toward these matters "diminishes their seriousness and fosters a perception that compliance with FBI policies government the FBI's use of its NSL authorities is annoying paperwork."

Id.

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[3] The report distinguishes NSL requests from NSL letters, because a single NSL letter may contain multiple requests for information. 2007 OIG Report 120. For example, the FBI issued nine NSL letters in one investigation requesting subscriber information on 11,100 different phone numbers. 2007 OIG Report 36.

[4] Many of these figures are, unfortunately, only the OIG's best estimate, as the FBI's NSL recordkeeping system was poor during the time period covered by the reports, and the available data significantly underestimated the number of NSL requests that had been made. 2007 OIG Report 34. In fact, the OIG estimated that "approximately 8,850 NSL requests, or 6 percent of NSL requests issued by the FBI during [2003-2005], were missing from the database." *Id.*

[5] The OIG stated, "We believe that these matters involved some of the most serious abuses of the FBI's authority to obtain telephone records." 2010 OIG Report 285.

The OIG Reports linked much of the FBI's NSL abuse problem to a lack of oversight within the agency. 2010 OIG Report 213-214, 279-285. Oversight outside of the agency was also lacking. The OIG determined in 2007 that the FBI failed to report nearly 4,600 NSL requests to Congress between 2003 and 2005, almost all of which were issued under section 2709. 2007 OIG Report 33.

The OIG Reports also document lack of oversight from the companies receiving the NSLs. For example, telecommunications employees who processed FBI requests for information did not request separate legal process for requests for community of interest records. 2010 OIG Report 59. And in over half of all NSL violations submitted to the Intelligence Oversight Board, the private entity receiving the NSL either provided more information than requested or turned over information without receiving a valid legal justification from the FBI.[6] As one phone company employee who was embedded with FBI stated, "personally, it wasn't my place to police the police." 2010 OIG Report 42.[7]

III. ARGUMENT

The standards required by the First Amendment are clear and unequivocal and must be applied here to both the prior restraints on speech created by the nondisclosure provisions and under the strict scrutiny standards for both the nondisclosure provisions and the substantive statutory provisions. Under them, the NSL statute fails.

A. The Nondisclosure Provision of the NSL Statute Constitutes an Unconstitutional Prior Restraint

There is no dispute that the nondisclosure provision of section 2709(c) creates a prior restraint on petitioner, since the NSL prohibits communications that would otherwise occur. *See*

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[6] https://www.eff.org/pages/patterns-misconduct-fbi-intelligence-violations#ii.

[7] While the FBI claims to have taken steps to mitigate the problems discovered by the OIG, the OIG has stated, "[w]e believe it is too soon to conclude whether the new guidance, training, and systems put into place by the FBI in response to our first NSL report will fully eliminate the problems with the use of NSLs that we identified and that the FBI confirmed in its own reviews. At the same time, we believe that the FBI has made significant progress in addressing these issues and that the FBI's senior leadership is committed to addressing misuse of NSLs." 2008 OIG Report 49.

Alexander v. United States, 509 U.S. 544, 550 (1993). A prior restraint on free speech is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any prior restraint on expression comes to [a court] with a heavy presumption against its constitutional validity," and "carries a heavy burden of showing justification." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). Accordingly, analysis of the NSL statute starts with prior restraint doctrine.

1. The NSL Statute Fails the Pentagon Papers Test for Prior Restraints in the Context of National Security

The first test for prior restraints, applicable in the context of claims of national security, is *New York Times v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971). The Supreme Court, in a brief *per curiam* decision, denied the United States' request for an injunction preventing the *New York Times* and *Washington Post* from publishing the contents of a classified historical study of U.S. policy towards Vietnam, known colloquially as the "Pentagon Papers," on the ground that the government failed to overcome the heavy presumption against the constitutionality of a prior restraint on speech. Under *Pentagon Papers*, a prior restraint on speech in the context of a government assertion of national security requires that disclosure of the information will "surely result in direct, immediate, and irreparable harm to our Nation or its people." 403 U.S. at 730 (Stewart, J. joined by White, J., concurring).[8]

The NSL statute obviously fails this demanding standard. The NSL itself is based on a written certification by the Director of the FBI or his designee that "the information sought is *relevant* to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(a)-(b) (emphasis added). The FBI may then prohibit the

[8] The Stewart-White concurrence is the holding of the case, because of the six Justices who concurred in the judgment, Justices Stewart and White concurred on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds") (internal quotation omitted).

NSL recipient from speaking about the NSL so long as the FBI certifies that a disclosure "*may result* [in] a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c) (emphasis added).

These statutory standards do not even come close to the requirements of *Pentagon Papers*, that the speech poses a "specific, articulable risk of direct, immediate and irreparable harm." Instead of "direct" harm, the statute requires only that the information be "relevant to an investigation," and there is no mention of immediacy or that the harm be irreparable. In the context of the nondisclosure order, the statute only requires that a "danger" to national security or "interference" with other activities "may result," with no requirement of harm, much less direct, immediate or irreparable harm. Requiring "immediate" harm ensures that prior restraint is the last resort, that there is no time to pursue "less restrictive alternatives." *Nebraska Press*, 427 U.S. at 571 (Powell, J., concurring).

Importantly, the *Pentagon Papers* Court articulated this test in the context of speech that several justices agreed would cause harm to national security. *See Pentagon Papers*, 403 U.S. at 763. Justice Stewart concurred with the decision despite being "convinced that the Executive was correct with respect to some of the documents involved." *Id.* at 730. Justice White concurred, expressing confidence that disclosure "will do substantial damage to public interests." *Id.* at 731. Nonetheless, the Supreme Court refused to allow publication to be enjoined. As Justice Stewart noted, "I cannot say that disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us." *Id.* at 730, *see also* White, J. concurrence at 732.

Similarly, the Supreme Court in *Nebraska Press* recognized that impairment of a defendant's right to a fair trial is a grave harm to an important interest, but required a showing that prejudicial publicity so affected the community that 12 jurors "could not be found." 427 U.S. at 569; *ibid.* (harm "not demonstrated with the degree of certainty our cases on prior restraint require.").

2. The Statute Lacks Necessary Procedural Safeguards

Section 2709(c) also lacks the procedural protections required of prior restraints. *See Freedman v. Maryland*, 380 U.S. 51, 85 (1965). In *Freedman*, the Supreme Court articulated three core procedural protections that must exist before expression can be conditioned on government permission: (1) any restraint imposed prior to judicial review must be limited to 'a specified brief period'; (2) any further restraint prior to a final judicial determination must be limited to 'the shortest fixed period compatible with sound judicial resolution'; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government. *Doe v. Mukasey*, 549 F. 3d 861, 871 (2d Cir. 2008) (citing *Freedman*, 380 U.S. at 58-59; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002)). Furthermore, any prior restraint scheme must provide narrow, definite and objective standards to cabin the government's discretion. *See, e.g., FW/PBS*, 493 U.S. at 222 (recognizing that a licensing scheme may be unconstitutional because of lack of procedural safeguard *or* unbridled discretion).

The statute's failure to provide the process protections required of a prior restraint on speech are multiple and manifest. These failures were the central concerns raised by the Second Circuit in *Doe v. Mukasey*, although, as described further in section (c), *infra*, the *Mukasey* court's attempt to save the statute by rewriting key sections and adding in entirely new requirements, simply went to far.

a. The NSL Statute Violates the Third Prong of the Freedman Test

The statute violates the third prong of *Freedman* in two ways. First, instead of requiring the government to go to court to seek permission to suppress speech, section 2709(c) turns the requirement on its head by allowing issuance of NSLs without judicial review and instead requiring the recipient of an NSL to petition for an order modifying or setting aside the nondisclosure requirement under 18 U.S.C. § 3511(b).

The effects of this transposition are profound, especially in the NSL context, because the entity with the burden to seek judicial review is not the person whose information is sought—it is a third party that may have no interest in challenging the NSL, or may lack the resources or the facts

necessary to challenge the NSL.[9] As noted above at page 7, in over half of all NSL violations submitted to the Intelligence Oversight Board, the private entity receiving the NSL either provided more information than requested or turned over information without receiving a valid legal justification from the FBI.[10]

Second, the statute fails to place the burden on the government when the matter is brought to court and deprives the Court of any meaningful authority to exercise its constitutional oversight duties. Instead, the Court may only modify or set aside the nondisclosure requirement if it finds there is no reason to believe that disclosure may endanger national security, interfere with an investigation or diplomatic relations, or endanger any person. 18 U.S.C. § 3511(b).[11]

In determining whether the disclosure may endanger national security, interfere with an investigation or diplomatic relations, or endanger any person, the Court is not permitted to evaluate the facts, but instead is required to blindly accept the FBI's representations: if, at the time of the petition, the FBI "certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. § 3511(b)(2)-(3). And, of course, there is no procedure for factual review by the Court wherein the Court could even determine whether such certification was made in bad faith. Petitioners agree with the Second Circuit that this presumption of conclusiveness is unconstitutional. *Mukasey*, 549 F.3d at 884 ("the conclusive presumption clause of subsections 3511(b)(2) and (b)(3) must be stricken").

b. The Statute Violates the First Prong of *Freedman*

The nondisclosure provisions of the NSL statute also fail *Freedman*'s first prong by failing to provide that the prior restraint lasts only for a "specified brief period." The statute instead

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[9] As described further *infra* at section (c), petitioners agree with the Second Circuit's finding that the statute violated *Freedman*'s third prong. *Mukasey*, 549 F.3d at 881. But as also described *infra*, Petitioners disagree with the Second Circuit's conclusion that the statute survives scrutiny with a judicially invented (but not required) "reciprocal notice procedure," which shifts the burden to the provider to object to the NSL. *Mukasey*, 549 F.3d at 883-84.

[10] https://www.eff.org/pages/patterns-misconduct-fbi-intelligence-violations#ii.

[11] In *Mukasey*, the Second Circuit also acknowledged this problem, but, again, as described further *infra* at section (c) improperly rewrote the statute in attempt to avoid the necessary conclusion that the statute is unconstitutional as written.

imposes an indefinite restraint, subject only to a petition by the provider that can only be brought annually. 18 U.S.C. §2709(c).[12]

c. *Mukasey* Found the Same Constitutional Infirmities But Went Too Far in Rewriting the Statute

As noted above, the Second Circuit in *Mukasey v. Doe* held that the statute failed these settled constitutional tests. Unfortunately, while acknowledging the problems, and their seriousness, the court attempted to save the statute through a radical reconstruction that included adding significant provisions that Congress did not. While the court's efforts are understandable—a court should be chary of declaring statutes unconstitutional—the *Mukasey* Court went too far in rewriting the statutes to save them from their constitutional defects.

For instance, in addressing the *Freedman* requirement that the government initiate judicial review of the gag order, the court held that the statute was unconstitutional: "in the absence of Government-initiated judicial review, subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards." *Mukasey*, 549 F.3d at 881. It then initially recognized that it was "beyond the authority of a court to 'interpret' or 'revise' the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement." *Id.* 549 F.3d at 883. Yet the court went on to do just that, determining that if the government were to assume such an obligation voluntarily, sections 2709(c) and 3511(b) would survive constitutional challenge. *Id.* at 884.

A court may construe a statute narrowly, if possible, to uphold it as constitutional. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988). A court also may sever parts of a statute that would render it unconstitutional if it is possible to do so while preserving the legislature's original vision, *United States v. Booker*, 543 U.S. 220, 258-59 (2005), or limit the applications of a statute to those that would be constitutional, *United States v. Raines*, 362 U.S. 17, 20-22 (1960).

But a court cannot save a statute by construing it to contain limitations that Congress did not include in the first place. *See American Booksellers Assn.*, 484 U.S. at 397. As the Supreme

[12] Again, the *Mukasey* Court attempted to resolve this First Amendment violation by inventing a complicated timing structure as part of the "reciprocal notice procedure" that the government could "voluntarily" adopt. *See infra* section (c).

Court noted, "this Court 'will not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (alteration in original) (quotation omitted)); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (declining to construe a statute to deny administrative order any effect until judicial review is completed because "it is for Congress, not this Court, to rewrite the statute").[13]

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a case the *Mukasey* court relied on heavily, is not to the contrary. In that case, the Supreme Court considered the constitutionality of 19 U.S.C. § 1305(a), a statute authorizing customs agents to seize obscene materials at the border. *Id.* at 366. The statute required the government to seek judicial review of the seizure, but provided no time limits for the initiation or completion of those proceedings. *Id.* The Court determined that the lack of time limits threatened to render section 1305(a) wholly unconstitutional, and so decided to impose time limits as required by *Freedman*. *Id.* at 368-69. Critically, the statute's legislative history reflected a strong congressional intent that judicial review be completed promptly. *Id.* at 370-72. Furthermore, Congress had specifically directed that the entire statute should not be found unconstitutional if its application in some cases was found to be unlawful. *Id.* at 372. Ultimately, the Court did not consider itself to be rewriting the statute at all: "We do nothing in this case but construe [section] 1305(a) in its *present form*, fully cognizant that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we may then be required to pass." *Id.* at 374 (emphasis added).[14]

The same cannot be said for the Second Circuit's approach in *Mukasey*. The *Mukasey* court determined that sections 2709(c) and 3511(b) "are unconstitutional to the extent that they impose a nondisclosure requirement without placing on the Government the burden of initiating judicial review of that requirement," and recognized the lack of a "specified brief period" required by

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[13] Congress is in fact considering amendments to the NSL statute to fix some of the problems identified in *Mukasey*. *See e.g.* S. 193, USA PATRIOT ACT Sunset Extension Act of 2011, available at http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00193.

[14] The Supreme Court encountered a similar circumstance in *Booker*, 543 U.S. 220. In that case, the Court severed the judicial review provision of the Sentencing Reform Act and decided that it should "infer[]" a new standard of review. *Id.* at 260. The Court considered a three-factor test in *Pierce v. Underwood*, 487 U.S. 552 (1988) as well as Congress's "initial and basic sentencing intent" before settling on an "unreasonableness" standard. *Id.* at 260-64.

Freedman's first prong. It then found that it did not have judicial authority to "interpret" or "revise" those provisions to impose such a requirement on the government. 549 F.3d at 883.

Yet instead of taking these observations to their rightful conclusion and requiring Congress to fix the constitutional infirmities in the statute, the court proposed a reciprocal notice procedure, along with time limits consistent with *Freedman*, for the government to initiate judicial review of a nondisclosure order, explaining:

> *If* the Government uses the suggested reciprocal notice procedure as a means of initiating judicial review, there appears to be no impediment to the Government's including notice of a recipient's opportunity to contest the nondisclosure requirement in an NSL. *If such notice is given*, time limits on the nondisclosure requirement pending judicial review, as reflected in Freedman, would have to be applied to make the review procedure constitutional. We would deem it to be within our judicial authority to conform subsection 2709(c) to First Amendment requirements, by limiting the duration of the nondisclosure requirement, absent a ruling favorable to the Government upon judicial review, to the 10-day period in which the NSL recipient decides whether to content the nondisclosure requirement, the 30-period in which the Government considers whether to seek judicial review, and a further period of 60 days in which a court must adjudicate the merits, unless special circumstances warrant additional time.

Id. (emphases added) (citing *Thirty-Seven Photographs*, 402 U.S. at 373-74). The court then went on to set forth "several options for completing the reciprocal notice procedure," *Id.* at 884, while noting the process is ultimately a matter of government discretion: "We leave it to the Government to consider how to discharge its obligation to initiate judicial review." *Id.* The Second Circuit concluded:

> In view of these possibilities, we need not invalidate the entirety of the nondisclosure requirement of subsection 2709(c) or the judicial review provisions of subsection 3511(b). Although the conclusive presumption clause of subsections 3511(b)(2) and (b)(3) must be stricken, we invalidate subsection 2709(c) and the remainder of subsection 3511(b) only to the extent that they fail to provide for Government-initiated review. The Government can respond to this partial invalidation ruling by using the suggested reciprocal notice procedure. With this procedure in place, subsections 2709(c) and 3511(b) would survive First Amendment challenge.

Id.

The Second Circuit's attempt to save sections 2709(c) and 3511(b) goes far beyond cases like *Virginia v. American Booksellers Association*, 484 U.S. 383, and *United States v. Raines*, 362 U.S. 17, which have limited statutes to avoid constitutional infirmities. A discretionary procedure or limitation voluntarily adopted by the government cannot cure a statute's facial invalidity

because nothing binds the government to observe the voluntary practice. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (court is "without power to adopt a narrowing construction of a state statute [offered by the government] unless such a construction is reasonable and readily apparent.") (quotation omitted); *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 799 (9th Cir. 2008) (voluntarily adopted factors regarding the application of city's parade licensing statute did not actually cabin discretion of police unless "'the limits the city claims are implicit in its law [are] made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'") (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988)).[15]

Second, the court's reliance on *Thirty-Seven Photographs* was misplaced. The circumstances surrounding sections 2709(c) and 3511(b) are unlike those that the Supreme Court relied upon to impose judicial review in *Thirty-Seven Photographs*. There is no indication here that Congress contemplated any notice procedure, much less the reciprocal notice procedure invented by the Second Circuit with complex, specified deadlines. Nor, as described further *infra* at section C, is there any indication that Congress intended the NSL statutes to survive in the wake of any unconstitutional applications in some situations. Congress knows how to write savings provisions, and it did not.

The Second Circuit attempted to address these conspicuous absences by concluding that "if Congress had understood that First Amendment considerations required the government to initiate judicial review of a nondisclosure requirement and precluded a conclusive certification by the Attorney General," it "would surely have wanted" the statutes to remain in force even if certain

[15] Once the Second Circuit depended on the FBI to voluntarily assume obligations that the court lacked the power to impose by construction, the remainder of the decision became an impermissible advisory opinion, because the court was declaring the constitutionality of facts not presented in an actual case. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (invalidating scheme allowing for legislative revision of judgments and holding that the judicial power is "to render dispositive judgments," rulings that "decide" cases, "subject to review only by superior courts in the Article III hierarchy"); *see also United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) ("as is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite" (internal quotation marks omitted)).

provisions were stricken. *Mukasey*, 549 F.3d at 885. But the court relied on no evidence to support this supposition, unlike the Supreme Court in *Thirty-Seven Photographs*.

The Second Circuit went too far to reinterpret sections 2709(c) and 3511(b). They are facially unconstitutional, and their constitutional infirmities cannot be cured by a complex court-created judicial review procedure with which the government need only "voluntarily" comply.

d. The NSL Statute's Nondisclosure Provision Violates the First Amendment as It Fails to Set Forth "Narrow, Objective, and Definite Standards" Guiding the Discretion of the FBI

The non-disclosure provision of 18 U.S.C. § 2709(c) also must fail because it constitutes a licensing scheme that vests in executive officers unfettered discretion with which to silence speakers about government activities. It allows the government to gag a recipient merely on a certification that disclosure "may result [in] a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c). Without any articulable statutory guidance cabining this executive discretion, the statute cannot survive constitutional scrutiny.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Supreme Court considered a local ordinance that allowed city officials to refuse a parade permit if "the public welfare, peace, safety, health, decency, good order, morals or convenience" so required. *Id.* at 149-50. Because the ordinance gave city officials "virtually unbridled discretion and absolute power" to deny a permit, the Court found the ordinance unconstitutional, noting that an ordinance that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.* at 150-51.

Any statutory licensing scheme must necessarily limit the discretion of the censor to "narrow, objective, and definite standards" to protect against the indiscriminate and unlawful deprivation of First Amendment rights. *Id.* at 150. As the Supreme Court observed in *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 131 (1992), "if the permit scheme involves the appraisal of facts, the exercise of judgment and the formation of an opinion by the

licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted."(citations omitted).

The non-disclosure provision of the NSL statute lacks the "narrow, objective, and definite standards" necessary to limit the exercise of executive authority. Rather, it authorizes an FBI official to prohibit disclosure of an NSL if that official believes—under his or her own criteria—that disclosure "may result" in, for example, "danger" to national security or interfere with a counterterrorism investigation. This sort of unfettered discretion in an executive branch official to determine whether speech can occur has repeatedly been struck down by both the Supreme Court and the Ninth Circuit. In *City of Lakewood*, 486 U.S. at 769, the Supreme Court noted: "it is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application." In *City of Seattle*, 550 F.3d at 803, the Ninth Circuit recently confirmed that an "open-ended standard, combined with the absence of a requirement that officials articulate their reasons or an administrative-judicial review process, vests the Seattle Chief of Police with sweeping authority . . . The First Amendment prohibits placing such unfettered discretion in the hands of licensing officials.".

Moreover, the absence of clear standards allows "post hoc rationalizations" and "the use of shifting or illegitimate criteria" that make it difficult for courts to assess the statute's effects on a case-by-case basis. *City of Lakewood*, 486 U.S. at 749. This problem is especially serious in the NSL context, where few cases are ever brought by service providers.

3. The Non-Disclosure Provision Violates Separation of Powers Principles as Reviewing Courts Are Precluded From Applying the Appropriate Level of Review Mandated By the First Amendment

The non-disclosure provision of the NSL statute also violates separation of powers principles, which bar Congress from assigning to the executive branch a power reserved for the judiciary. "It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). *See also Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed.

60 (1803) (declaring that "it is emphatically the province and duty of the judicial department to say what the law is. By purportedly restricting the authority of the courts to a particular standard of review to determine the legality of NSLs, the statute violates the separation of powers.

NSL recipients may petition the judiciary to modify or set aside the nondisclosure demand. *See* 18 U.S.C. 3511(b). However, the reviewing court may grant such relief only if it finds that "there is no reason to believe" disclosure "may result" in one of the harms enumerated in the statute. 18 U.S.C. § 3511(b)(2). Moreover, if authorized FBI personnel "certif[y] that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." *Id.* The statute thus not only impermissibly determines the appropriate standard of review for the court, it also essentially mandates a particular outcome.

B. The Statute as a Whole, Both Substantively and in its Non-Disclosure Provision, is a Content-Based Restriction on Speech That Fails Strict Scrutiny

Even if the non-disclosure standard could survive the prior restraint tests, the entire statute still must meet strict scrutiny review. Indeed, the government has previously "conceded that strict scrutiny is the applicable standard" for non-disclosure. *Mukasey*, 549 F.3d at 878. In addition, NSLs invade First Amendment territory because they compel production of records relating to communications and communications service and may chill speech since they may result from activities protected by the First Amendment. The statutory language acknowledges this concern by prohibiting issuance of NSLs "solely on the basis of activities protected by the first amendment to the Constitution of the United States" (18 U.S.C.§ 2709(b)(1)), but that standard is far too low to pass constitutional muster. Finally, the statute reaches into the First Amendment rights of [redacted] itself, because it requires [redacted] to speak about its users' communications activities. First Amendment law recognizes the right of speakers to decide whether to speak at all, and to whom. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

Under the strict scrutiny standard, the NSL is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). To survive strict scrutiny review, a government entity must show

that a restriction on free speech is "narrowly tailored to promote a compelling Government interest," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000), and that there are no "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," *Reno v. ACLU*, 521 U.S. 844, 874 (1997). And while the protection of national security is generally recognized as a compelling government interest, the FBI cannot simply "posit the existence of the disease sought to be cured," rather, "it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted).

1. The Substantive Standards for Issuing NSLs Fail Strict Scrutiny

The NSL here compels [redacted] to provide information about [redacted] to the government, while prohibiting [redacted] from speaking publicly or to [redacted] about the NSL. Thus, as applied to [redacted] in its role as [redacted] the NSL poses "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to . . . manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting*, 512 U.S. at 641.

The same is true for [redacted] users. The NSL statute allows [redacted] customers to be targeted for their free speech activities, so long as the FBI can claim that is has some concern that is unrelated to First Amendment activity. The only restriction that is placed upon the FBI's discretion is that the First Amendment activity may not be the "sole" reason for the NSL. Given [redacted] this presents a serious risk of unfettered abuse by the government. Indeed, because of the green light it gives the FBI to issue NSLs based in part on the exercise of free speech, these risks exist in all cases where individuals may be targeted based on their First Amendment activities.

Plainly, NSLs are not narrowly tailored. They may be issued whenever sought-after information is merely "relevant" to an "an authorized investigation" and reach broadly to allow

issuance on any basis whatsoever, as long as it is not based solely on a U.S. person's First Amendment activities. 18 U.S.C. §§ 2709(b)(1), (b)(2). NSLs are also not the least restrictive means. As mere administrative tools, they may be issued without any outside review. In contrast, grand jury subpoenas, which can seek the same information, require grand jury approval. Similarly, court orders, including those issued under the Foreign Intelligence Surveillance Act, at least require judicial approval. Even prior versions of the statute were closer to the constitutional standard, requiring that the government show "specific and articulable facts" that the information pertained to the actions of a foreign power or agent of a foreign power. 18 U.S.C. § 2709(b) (1994). Such language, raising the burden on the government and limiting the basis on which NSLs could be issued, clearly indicates that Congress could have chosen a less restrictive means of effecting the government's interest. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group*, 529 U.S. at 816.

2. The Non-Disclosure Provision Fails Strict Scrutiny

The non-disclosure provision of the NSL statute fails strict scrutiny in two different ways. First, as argued above, *infra* III.A.2., the statute's failure to adhere to the *Freedman* procedural safeguards means that it is not narrowly tailored. *Mukasey*, 549 F.3d at 881 ("in the absence of Government-initiated judicial review, subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards.... [and] does not survive either traditional strict scrutiny or a slightly less exacting measure of such scrutiny.").

Second, the non-disclosure provision authorizes overly long prior restraints. If the Court decides that the prior restraint is justified, it cannot tailor the duration of the prior restraint to the circumstances. Instead, the prior restraint is permanent unless the gagged provider exercises its right to challenge the non-disclosure obligation once a year, when the government may or may not re-certify that disclosure would cause an enumerated harm. 18 U.S.C. § 3511(b)(3). Even if the government knows—or the Court would decide, if presented with the pertinent facts—that the restraint on speech is no longer needed or can be modified, the government has no obligation to notify the Court or the provider or otherwise act to lift or modify the restraint. Because

"[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438 (1963), the statute's categorical approach to the duration of the prior restraint is not narrowly tailored to the government's interest and violates the First Amendment.

3. The Judicial Review Provision of §3511 Fails Strict Scrutiny

Furthermore, judicial review of the NSL is hobbled, creating both First Amendment and separation of powers issues, given the breadth of the government's discretion to issue NSLs. According to the statute, the Court must, at the government's request, review any affidavits in support of the certification required by § 2709(b)(2) both *ex parte* and *in camera*, whether or not the affidavits contain classified information. § 3511(e). This provision prevents [redacted] from meaningfully participating in judicial review of whether [redacted] may be compelled to speak, and is inconsistent with strict scrutiny, under which the government has the burden to justify any restriction on speech.

It is also deeply inconsistent with the separation of powers. NSLs are legally and politically controversial. This statutory exclusion of [redacted] from the judicial review of an NSL review "is designed to insulate the Government's interpretation of the Constitution from judicial challenge." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). However, courts "must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Id.* At the very least, the government must justify on a public record why [redacted] must be denied access to any unclassified information in the affidavits and provide an unclassified version of such affidavits to [redacted] so that [redacted] can respond.

4. The NSL Statute Violates the Anonymous Speech and Associational Rights of Americans

The NSL statute, authorizing the disclosure of identifying information and call records related to telecommunications subscribers, also fails to comply with First Amendment limitations on forced disclosure of anonymous associational information. Here, the specific NSL requires the [redacted] That the statute prohibits the use of NSLs to

investigate U.S. persons "solely on the basis of activities protected by the first amendment," 18 U.S.C. §§ 2709(b)(1), (b)(2), highlights Congress's awareness of the problem.

Courts have long recognized protection under the First Amendment for the right to engage in anonymous communication – to speak, read, listen, and/or associate anonymously – as fundamental to a free society. The Supreme Court has consistently defended such rights in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority ... [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation ... at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that an "author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment").

Similarly, the Supreme Court has long held that compelled disclosure of membership lists and other associational information may constitute an impermissible restraint on freedom of association. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (compelled identification violated group members' right to remain anonymous; "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association").

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce such anonymity are subject to heightened scrutiny, requiring the demonstration of a compelling need and a showing that the demand is narrowly tailored. Courts must "be vigilant . . . [and] guard against undue hindrances to ... the exchange of ideas." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999). The Supreme Court has applied such heightened scrutiny in a variety of context in which anonymous association and expression has been implicated. In *McIntyre*, 514 U.S. at 347, the Court applied "exacting scrutiny" to strike down a statute that banned the distribution of anonymous political expression, finding that the statute was not "narrowly tailored to serve an overriding state interest." In *NAACP v. Alabama*, 357 U.S. at 464-66, the Court overturned a contempt judgment against the NAACP for its refusal to turn over the identities of its Alabama members as required by a state statute, holding that no compelling need for the list had been demonstrated. In *Gibson v. Florida Legislative Investigation*

Comm., 372 U.S. 539, 546-558 (1963), the Court reversed contempt sanctions against an NAACP official who refused to produce membership list to state investigative committee, finding a lack of both a compelling state interest and a substantial relationship to the information sought. In *Bates v. City of Little Rock*, 361 U.S. 516, 522-26 (1960), the Court reversed convictions of NAACP officials who refused to disclose membership list to local tax officials, as required by municipal ordinance, finding a lack of a compelling state interest.

The NSL statute, which authorizes the compelled production of identity and associational information from a wire or electronic communication service provider, cannot meet this heightened standard. Pursuant to 18 U.S.C. § 2709, the FBI can compel the disclosure of such information based not on a "compelling need" that is "narrowly tailored" but instead on a certification that the information is "relevant to an authorized investigation." 18 U.S.C. §§ 2709(b)(1), (b)(2). Such a showing of "relevancy" is plainly insufficient to satisfy the heightened burden imposed under the First Amendment to appropriately protect anonymous expression. Here, the FBI seeks from [redacted] the production of "all subscriber information" [redacted] Such information, by definition, [redacted] Invoking an overbroad statute that permits disclosure of First Amendment protected information without the constitutionally mandated showing or tailoring to a court, the FBI's attempt must fail and the NSL set aside.

C. The Unconstitutional Portions of the NSL Statute are Not Severable

If this Court finds that the statute's non-disclosure provisions are unconstitutional, it must invalidate its substantive provisions authorizing the FBI to issue NSLs seeking information from wire and electronic communication service providers as well, because the two sets of provisions are not severable.

Severability "is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006) (question is whether "the legislature [would] have preferred what is left of its statute to no statute at all"). A court must strike down additional

provisions of a statute in the face of the unconstitutionality of particular elements of it when "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (citation omitted).

Here, there can be only one conclusion: the provisions are not severable. Not only did Congress enact the two sets of provisions together, Congress amended the non-disclosure provisions in an attempt to save the NSL statute (leading to its present form) after the initial district court decisions in the *Mukasey* litigation held that the non-disclosure provisions were unconstitutional.[16] *See Mukasey*, 549 F.3d at 866-868. And as Petitioners have shown, the amended non-disclosure provisions were crafted to make it unconstitutionally easy for the FBI to gag providers and unconstitutionally hard for providers to challenge the gag. Congress's attempt to preserve the FBI's ability to protect the secrecy of NSLs after multiple judicial invalidations makes its intent clear, especially when Congress did not include a severability clause.

Congress could not have intended the substantive NSL provisions to operate absent the non-disclosure provisions. Without some secrecy provision, a provider could immediately disclose the fact of the NSL's issuance to the targeted individual or individuals. Even for government demands for information from providers that raise no national security concerns, the Stored Communications Act authorizes the government to obtain judicial non-disclosure orders. 18 U.S.C. § 2705(a) (process for delay of notification of existence of government demand); *id.*, § 2705(b) (process for preclusion of notice to subject of government demand). Absent the non-disclosure provisions, however, the NSL statute contains no vehicle that can preserve a more narrowly tailored degree of secrecy consistent with the First Amendment. Accordingly, the substantive NSL provisions cannot be severed from the non-disclosure provisions.

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[16] *Doe v. Ashcroft*, 334 F.Supp.2d 471, 494-506 (S.D.N.Y.2004), *vacated by Doe v. Gonzales* 449 F.3d 415 (2nd. Cir., May 23, 2006) (finding substantive provisions unconstitutional. The case was vacated because the Reauthorization Act of 2006 made changes to the statute and the case was remanded to address the first amendment issues presented in the revised statute); *id.* at 511-525 (finding non-disclosure provision unconstitutional); *Doe v. Gonzales*, 386 F.Supp.2d 66, 73-75, 82 (D.Conn.2005) (finding probability of success that non-disclosure provision was unconstitutional and preliminarily enjoining enforcement).

D. The Government Must Meet a Heavy Burden to Show That This NSL Presents a Risk of Harm Related to an Authorized Investigation

Even if the constitutional defects in the statute could be overlooked, the statute itself requires a searching inquiry by this Court in response to this petition and allows the court to modify or set aside the request if compliance would be "unreasonable, oppressive or otherwise unlawful." 18 U.S.C. §3511(a).

The statute requires first that the government demonstrate to this Court that a good reason exists to expect that disclosure of [redacted] receipt of the NSL would risk an enumerated harm. The FBI's mere certification that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities," 18 U.S.C. § 2709(b), is not conclusive. *Mukasey*, 549 F.3d at 874-76. Rather, the FBI must demonstrate to the Court that a good reason exists to expect that disclosure of an NSL would risk an enumerated harm related to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *Id.* at 874-76.

Next, the government must demonstrate that the investigation "is not conducted solely on the basis of activities protected by the First Amendment." 18 U.S.C. § 2709(b)(1), (b)(2). Instead, the FBI must affirmatively demonstrate that the investigation pursuant to which it issued the NSL is not being conducted solely on the basis of activities protected by the First Amendment. This is true particularly where [redacted] In the present case, given [redacted] the government's showing must be clear, factual and not conclusory, and [redacted] must be given a meaningful opportunity to oppose.

IV. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that the NSL be set aside and that the NSL statute be declared unconstitutional.

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