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UNDERSEAL

WHA

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 CV 13 80 089MISC

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21 IN RE MATTER OF NATIONAL SECURITY)
LETTERS)

) Case No. _____
)
) PETITION TO SET ASIDE NATIONAL
) SECURITY LETTERS AND
) NONDISCLOSURE REQUIREMENTS
) IMPOSED IN CONNECTION
) THEREWITH
)
) [18 U.S.C. §3511(a), (b), Civil L.R. 79-5, 7-11]
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) FILED UNDER SEAL
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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
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18) Case No. _____
19)
20) **PETITION TO SET ASIDE NATIONAL**
21) **SECURITY LETTERS AND**
22) **NONDISCLOSURE REQUIREMENTS**
23) **IMPOSED IN CONNECTION**
24) **THEREWITH**
25)
26) [18 U.S.C. §3511(a), (b), Civil L.R. 79-5, 7-11]
27)
28) FILED UNDER SEAL
_____)

PETITION

1
2 Petitioner [REDACTED] or
3 “Petitioner”) has received two National Security Letters (“NSLs”) issued by the Federal Bureau of
4 Investigation (“FBI”) demanding certain customer records in the Petitioner’s possession pursuant
5 to 18 U.S.C. § 2709 (“NSL Statute”). Pursuant to section 2709(c), the NSLs prohibit Petitioner
6 from disclosing the existence of the demands to its customer or to the public.

7 Petitioner hereby petitions the Court under 18 U.S.C. §§ 3511(a) and (b) for an order setting
8 aside both NSLs, including the requests for records and the nondisclosure requirements imposed in
9 connection with the NSLs, on the following legal grounds, as explained further in the
10 accompanying Memorandum of Points and Authorities and Declaration of [REDACTED]

11 1. With the district court already finding that the NSL Statute is unconstitutional on its
12 face in *In re National Security Letter*, No. 11-2173 SI, 2013 WL 1095417 (N.D. Cal. Mar. 14,
13 2013), in which a functionally identical dispute between the same parties was resolved by the
14 district court, the government is barred by the doctrine of issue preclusion for the statute’s
15 constitutionality again here.

16 2. The nondisclosure provision of the NSL Statute on its face violates the First
17 Amendment in at least four ways:

18 a. The nondisclosure provision of the NSL Statute fails the *Pentagon Papers*
19 test for national security prior restraints as the statute authorizes the FBI to impose a nondisclosure
20 requirement without making a sufficient evidentiary showing that the disclosure of information
21 about the receipt of the NSL will “surely result in direct, immediate and irreparable harm to our
22 nation or its people.”

23 b. The nondisclosure provision of the NSL Statute fails the procedural
24 requirements for prior restraints first articulated in *Freedman v. Maryland*, 380 U.S. 51 (1965).

25 c. The nondisclosure provision of the NSL Statute lacks the “narrow, objective,
26 and definite standards” necessary to limit the exercise of executive authority as set forth in
27 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

1 d. The nondisclosure provision of the NSL Statute authorizes overly long and
2 overly broad prior restraints that are not narrowly tailored to serve a compelling state interest.

3 3. The nondisclosure provision of the NSL Statute violates separation of powers
4 principles by preventing reviewing courts from applying the appropriate level of review mandated
5 by the First Amendment and by binding a court to treat an FBI certification of harm as
6 “conclusive.”

7 4. The compelled production provision of the NSL Statute violates the First and Fifth
8 Amendments as it does not include sufficient judicial oversight of the FBI’s exercise of its
9 authority such that the First Amendment rights of the targets of NSLs are meaningfully protected.

10 5. The Government has not demonstrated with sufficient evidence regarding the NSLs
11 issued to the Petitioner that it can meet the requirements for either the compelled production of
12 customer records or the nondisclosure requirement by making the appropriate factual showing for
13 the court to review:

14 a. The Government has made no factual showing of any kind that supports its
15 assertion that the information sought is “relevant to an authorized investigation to protect against
16 international terrorism or clandestine intelligence activities.”

17 b. The Government has made no factual showing of any kind as to whether the
18 authorized investigation is “of a United States person,” and if so, that the investigation “is not
19 conducted solely on the basis of activities protected by the first amendment to the Constitution of
20 the United States.”

21 c. The Government has made no factual showing of any kind that supports its
22 assertion that the disclosure of the existence of the NSLs “may result” in a harm enumerated in the
23 NSL Statute.

24 6. As the nondisclosure provision of the NSL Statute is non-severable from the
25 remaining portions of the statute, including the provision permitting the compelled production of
26 customer records, the NSL Statute must be set aside if the non-disclosure provision is found to be
27 unconstitutional.

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