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SRK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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12 *Pro hac vice applications to be filed upon the assignment of this case to a judge.

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CW

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

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

Plaintiffs,

21 v.

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

27 Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

DOCUMENT SUBMITTED UNDER
SEAL

1 1. Plaintiffs the Internet Archive ("the Archive"), the American Civil Liberties
2 Union ("ACLU"), the American Civil Liberties Union Foundation ("ACLUF"), the American
3 Civil Liberties Union of Northern California, Inc. ("ACLU-NC"), the American Civil Liberties
4 Union Foundation of Northern California, Inc. ("ACLUF-NC"), and the Electronic Frontier
5 Foundation ("EFF") challenge the facial and as-applied constitutionality of 18 U.S.C. §§ 2709,
6 3511 (collectively, "the NSL statute"), which authorize the Federal Bureau of Investigation
7 ("FBI") to issue national security letters ("NSLs") and to impose broad and effectively
8 permanent non-disclosure obligations on those served with NSLs. *See* 18 U.S.C. §§ 2709, 3511,
9 as amended by the USA PATRIOT Act, Pub. L. 107-56 ("Patriot Act"); by the USA PATRIOT
10 Improvement and Reauthorization Act of 2005, Pub. L. 109-177 ("PIRA"); and by the USA
11 PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. 109-178
12 ("ARAA").

13 2. The Archive is a digital library co-founded by Brewster Kahle and incorporated
14 as a 501(c)(3) non-profit organization in California. An agent of the FBI served an NSL (the
15 "November 2007 NSL") on the Archive through its legal representative, EFF, on November 26,
16 2007. The November 2007 NSL directed the Archive to disclose records pertaining to one of its
17 patrons. The November 2007 NSL also referenced the NSL statute's gag provisions codified in
18 18 U.S.C. §§ 2709(c), 3511(b), and expressly prohibited the Archive, its officers, employees,
19 and agents from disclosing that the FBI had demanded information from it through the NSL.

20 3. The NSL statute is unconstitutional because its gag and secrecy provisions
21 violate the First and Fifth Amendments and because those provisions are not severable from
22 the remainder of the NSL statute. The statute allows the FBI to issue gag orders prohibiting
23 NSL recipients from disclosing that the FBI has sought or obtained information from them.
24 The gag orders are issued by the FBI unilaterally, without prior judicial review. While the
25 statute permits NSL recipients to challenge gag orders in court, reviewing courts are permitted
26 to modify or vacate such orders only in extraordinary circumstances, and in some instances
27 they are required to treat the FBI's certification that secrecy is necessary as conclusive. In
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1 addition, the NSL statute throws a heavy blanket of secrecy over litigation relating to NSLs.
2 Notably, the one court that has already considered the constitutionality of the NSL statute
3 concluded that the law's gag provisions violate the First Amendment and the principle of
4 separation of powers, and that the entire statute is unconstitutional because those gag
5 provisions are not severable. *Doe v. Gonzales*, 500 F. Supp.2d 379 (S.D.N.Y. 2007).

6 4. For these reasons and others set forth below, Plaintiffs seek, *inter alia*, a
7 declaration that the NSL statute is unconstitutional on its face and an injunction prohibiting the
8 FBI from issuing NSLs under the statute. Plaintiffs also seek a declaration that the November
9 2007 NSL is unconstitutional and an injunction prohibiting the FBI from enforcing it. The
10 Archive would comply with a lawful demand for information and in the past has complied with
11 lawful government subpoenas. It should not, however, be required to comply with demands
12 issued under a statute that is unconstitutional on its face.

13 14 JURISDICTION AND VENUE

15 5. This case arises under the United States Constitution and the laws of the United
16 States and presents a federal question under Article III of the United States Constitution and 28
17 U.S.C. § 1331. The Court also has authority to grant declaratory and injunctive relief pursuant
18 to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The Court has authority to award
19 costs and attorneys' fees under 28 U.S.C. § 2412.

20 6. Venue is proper in this district under 28 U.S.C. § 1391(e).

21 22 INTRADISTRICT ASSIGNMENT

23 7. This case is properly assigned to the San Francisco Division pursuant to Civil
24 Local Rule 3-2(c) and (d) because a substantial portion of the events giving rise to this action
25 occurred in the County of San Francisco.

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PARTIES

8. The Archive is a digital library founded in 1996, incorporated as a 501(c)(3) non-profit organization with its principal place of business in San Francisco, California. The Archive offers permanent access for researchers, historians, and scholars to its vast and growing collections of books, videos, web pages, software and other digital information. The Archive sues on its own behalf.

9. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the constitutional principles of liberty and equality. The ACLU is a 501(c)(4) organization. The ACLU's activities include lobbying Congress on legislation that affects civil liberties, analyzing and educating the public about such legislation, and mobilizing ACLU members and activists to lobby their legislators to protect civil rights and civil liberties. The ACLU sues on its own behalf and on behalf of its members.

10. Plaintiff ACLUF is a 501(c)(3) organization that educates the public about civil liberties and that employs lawyers who provide legal representation free of charge in cases involving civil liberties. As counsel to the Archive and privy to the information contained in the NSL served on the Archive, lawyers employed by ACLUF are subject to the NSL statute's gag provisions.

11. Plaintiff ACLU-NC is the largest regional affiliate of the ACLU, with more than 50,000 members. The ACLU-NC is a 501(c)(4) organization. The ACLU-NC's activities include lobbying the state legislature and members of the Northern California Congressional delegation on legislation that affects civil liberties, analyzing and educating the public about such legislation, and mobilizing ACLU-NC members and activists to lobby their legislators to protect civil rights and civil liberties. The ACLU-NC sues on its own behalf and on behalf of its members.

12. Plaintiff ACLUF-NC is a 501(c)(3) organization that educates the public about civil liberties and that employs lawyers who provide legal representation free of charge in cases involving civil liberties. As counsel to the Archive and privy to the information contained in

1 the NSL served on the Archive, lawyers employed by ACLUF-NC are subject to the NSL
2 statute's gag provisions.

3 13. Plaintiff EFF is a non-profit civil liberties organization working to protect rights
4 in the digital world. EFF actively encourages and challenges industry and government to
5 support free expression and privacy in the information society. Founded in 1990, EFF is based
6 in San Francisco, California. As counsel to the Archive and privy to the information contained
7 in the NSL served on the Archive, lawyers employed by EFF are subject to the NSL statute's
8 gag provisions.

9 14. Defendant Attorney General Michael Mukasey heads the United States
10 Department of Justice ("DOJ"), which is the agency of the United States government
11 responsible for enforcing federal criminal laws and overseeing domestic intelligence
12 investigations. Defendant Mukasey has ultimate authority for supervising all of the DOJ's
13 operations and functions. The DOJ includes the FBI, the agency authorized to use the law
14 challenged in this case.

15 15. Defendant Robert Mueller is the Director of the FBI and is responsible for
16 supervising all of that agency's operations. The FBI is the agency authorized to use the law
17 challenged in this case.

18 16. Defendant Arthur M. Cummings II is a Deputy Assistant Director of the FBI's
19 Counterterrorism Division. Defendant Cummings signed the November 2007 NSL issued to
20 the Archive.

21 22 STATUTORY BACKGROUND

23 The NSL Authority

24 17. The NSL statute was enacted by Congress in 1986 as part of the Electronic
25 Communications Privacy Act of 1986. See Pub. L. 99-508, Title II, § 201 (codified as 18
26 U.S.C. § 2510 *et seq.*). As described further below, the NSL statute has been modified
27 multiple times since its initial passage.

1 18. In its current form, the NSL statute authorizes the FBI to issue NSLs ordering
2 "wire or electronic communication service provider[s]" to disclose "subscriber information,"
3 "toll billing records information," and "electronic communication transactional records" upon a
4 certification that the information sought is "relevant to an authorized investigation to protect
5 against international terrorism or clandestine intelligence activities." 18 U.S.C. §§ 2709(a),
6 (b)(1). The NSL statute also allows the FBI to impose non-disclosure obligations, or gag
7 orders, on anyone it serves with an NSL.

8 19. As originally enacted, the NSL statute could be used exclusively against people
9 suspected of espionage. The FBI could issue NSLs only if it certified that (i) the information
10 sought was relevant to an authorized foreign counterintelligence investigation; and (ii) there
11 were specific and articulable facts establishing reason to believe that the subject of the NSL
12 was a foreign power or foreign agent. 18 U.S.C. § 2709 (1986). Congress subsequently
13 amended the statute in 1993 and 1996, each time extending its reach. See Pub. L. 103-142
14 (1993); Pub. L. 104-293, Title VI, § 601(a) (1996).

15 20. In 2001, through the Patriot Act, Congress expanded the FBI's power to issue
16 NSLs once again by, *inter alia*, removing the individualized suspicion requirement. Pub. L.
17 107-56, Title V, § 505(a). The NSL statute now permits the FBI to issue an NSL if the
18 information sought is believed to be "relevant" to "an authorized investigation to protect
19 against international terrorism or clandestine intelligence activities." See 18 U.S.C.
20 § 2709(b)(1). Consequently, the FBI may now use NSLs to obtain sensitive information about
21 innocent individuals who have no connection to terrorism or espionage. The statute does not
22 require the FBI to seek judicial approval prior to issuing an NSL.

23 21. Pursuant to amendments made to the NSL statute in 2006, the Attorney General
24 may compel compliance with the NSL request by "invok[ing] the aid of any district court of
25 the United States within the jurisdiction in which the investigation is carried on or the person or
26 entity [served with the NSL] resides, carries on business, or may be found." 18 U.S.C.
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1 § 3511(c). If a court issues an order requiring compliance with an NSL, non-compliance may
2 be punished by the court as contempt. *Id.*

3 22. Although NSL recipients were initially prohibited from challenging NSLs,
4 Congress amended the statute in 2006 to permit those served with NSLs to “petition for an
5 order modifying or setting aside the request.” *Id.* § 3511(a). If the recipient of an NSL files
6 such a petition, the reviewing court may modify or set aside the NSL “if compliance would be
7 unreasonable, oppressive, or otherwise unlawful.” *Id.*

8 Gag and Secrecy Provisions

9 23. In its current form, the NSL statute allows the Director of the FBI or his
10 designee (including a Special Agent in Charge of a Bureau field office) to impose a broad and
11 effectively permanent non-disclosure order – or gag order – on any person or entity served with
12 an NSL. 18 U.S.C. § 2709(c).

13 24. The Director or his designee can impose this gag order simply by “certifying” to
14 himself or herself that, absent the non-disclosure obligation, “there may result a danger to the
15 national security of the United States, interference with a criminal, counterterrorism, or
16 counterintelligence investigation, interference with diplomatic relations, or danger to the life or
17 physical safety of any person.” *Id.* § 2709(c)(1). Once the Director of the FBI or his designee
18 so certifies and notifies the NSL recipient, the recipient of the NSL is prohibited from
19 “disclos[ing] to any person (other than those to whom such disclosure is necessary to comply
20 with the request or an attorney to obtain legal advice or legal assistance with respect to the
21 request) that the [FBI] has sought or obtained access to information or records under [the NSL
22 statute].” *Id.* The gag order extends to any person consulted in order to comply with the NSL,
23 and to any attorney consulted for legal advice or assistance with respect to the request. *Id.*

24 25. The gag order is imposed upon the FBI’s certification. No judge considers,
25 before the gag order is imposed, whether secrecy is necessary or whether the gag order is
26 narrowly tailored.

1 26. The gag provisions permit the recipient of an NSL to petition a court "for an
2 order modifying or setting aside a nondisclosure requirement." *Id.* § 3511(b)(1). The
3 reviewing court, however, may modify or set aside the nondisclosure requirement only if it
4 finds that there is "no reason to believe that disclosure may endanger the national security of
5 the United States, interfere with a criminal, counterterrorism, or counterintelligence
6 investigation, interfere with diplomatic relations, or endanger the life or physical safety of any
7 person." *Id.* § 3511(b)(2). If a designated senior government official certifies that "disclosure
8 may endanger the national security of the United States or interfere with diplomatic relations,"
9 the certification must be "treated as conclusive unless the court finds that the certification was
10 made in bad faith." *Id.*

11 27. In the case of a petition filed under § 3511(b)(1) "one year or more after the
12 request for records," the FBI Director or his designee must either terminate the non-disclosure
13 obligation within 90 days or recertify that disclosure may result in one of the enumerated
14 harms. *Id.* § 3511(b)(3). If the FBI recertifies that disclosure may be harmful, however, the
15 reviewing court is required to apply the same extraordinarily deferential standards it applies to
16 petitions filed within one year. *Id.* If a designated senior official recertifies that disclosure
17 may endanger the national security of the United States or interfere with diplomatic relations
18 the recertification must be "treated as conclusive unless the court finds that the recertification
19 was made in bad faith." *Id.*

20 28. Those who violate a gag order issued under the NSL statute may be subject to
21 criminal penalties. *See* 18 U.S.C. § 1510(e) ("Whoever, having been notified of the applicable
22 disclosure prohibitions or confidentiality requirements of [the NSL statute] . . . knowingly and
23 with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or
24 requirements applicable by law to such person shall be imprisoned for not more than five years,
25 fined under this title, or both.").

26 29. Petitions challenging NSL record demands and gag orders are required by the
27 PIRA and ARAA to be heard in extraordinary secrecy. A reviewing court must "close any
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1 hearing to the extent necessary to prevent an unauthorized disclosure of a request for records.”
2 18 U.S.C. § 3511(d). The court must also keep petitions, records, filings, orders and subpoenas
3 under seal “to the extent and as long as necessary to prevent the unauthorized disclosure.” *Id.*
4 Upon request of the government, the reviewing court is also required to “review *ex parte* and *in*
5 *camera* any government submission or portions thereof, which may include classified
6 information.” *Id.* § 3511(e).

8 FACTUAL BACKGROUND

9 30. The Archive was established as a digital library in 1996. Its overarching
10 mission is to provide universal access to all knowledge. Located and incorporated as a
11 501(c)(3) non-profit in California, the Archive is governed by a three-member board of
12 directors. The Archive has more than one hundred employees.

13 31. The Archive is not a traditional library, but it is a library nonetheless. It is
14 formally recognized as a library by the State of California, enabling it to satisfy the statutory
15 definition of a library found in the 1996 Library Services and Technology Act, 20 U.S.C.
16 § 9122(1)(E). The Archive has been a member of the American Library Association since
17 2000.

18 32. To fulfill its mission, the Archive works with national libraries, museums,
19 universities, and the general public to collect and offer free access to materials in digital
20 format. Some of its partners include the Library of Congress, the National Archives, and the
21 British Library. The Archive has collected snapshots of billions of public web pages, except
22 those that have opted not to be archived, every two months for the last ten years. In addition,
23 the Archive has digitized archival and educational movies since 1999. The Archive also
24 accepts donated material, including audio and video recordings, from individual patrons. To
25 ensure continued access, the Archive provides permanent, archival storage and preservation
26 services for this extensive digital material.

1 33. The Archive has been involved in several book digitization projects and has
2 formed the Open Content Alliance, which includes contributions from more than seventy
3 contributing libraries, to build joint collections of digitized public domain books. The
4 Archive's book collection now contains over 200,000 volumes.

5 34. As a library, the Archive actively works to serve its patrons as a resource for
6 exploration, research, and learning. Many of the Archive's resources come from patrons'
7 donations. Providing a safe environment for patrons' activities has long been an important
8 function of libraries with physical materials. The Archive seeks to continue this practice for
9 those patrons interacting with digital materials through its website.

10 35. Just as an individual may anonymously walk into a non-digital library and
11 browse its shelves, an individual wishing to view digital materials may browse those materials
12 on the Archive's website as an "anonymous user" – that is to say, without logging in to the
13 website. However, individuals who would like to upload materials, post reviews, or
14 communicate on message boards must first register with the Archive and be logged into his or
15 her account. To register, an individual must agree to "Terms of Use," provide a "valid"
16 (although unverified) e-mail address, create a password, and supply a screen name.

17 The November 2007 NSL

18 36. The Archive has worked with various federal government agencies, including
19 the DOJ, the FBI, and the Central Intelligence Agency. Many U.S. Attorneys and other law
20 enforcement officials find the Archive a valuable resource, and the Archive has regularly
21 received requests for information about its collections (most frequently, for information stored
22 in the Wayback Machine, a historical archive of websites).

23 37. In July of 2007, Special Agent Scott Rakowitz and Supervisory Special Agent
24 Chuck Esposito of the San Francisco office of the FBI met with EFF, whose attorneys
25 represent the Archive for various purposes. At that meeting, EFF agreed that it would accept
26 service of legal process from the United States on behalf of the Archive.

1 38. On Monday, November 26, 2007, Supervisory Special Agent [REDACTED] left a
2 voicemail message for Kurt Opsahl, a Senior Staff Attorney at EFF. Similar messages were
3 left with Senior Staff Attorney Lee Tien and Staff Attorney Kevin Bankston. The messages
4 informed them that an FBI agent would be coming to EFF's office that day. Bankston returned
5 the message, spoke with Supervisory Special Agent [REDACTED] and learned that an FBI agent
6 would be serving an NSL at EFF's office.

7 39. Later that morning, Special Agent [REDACTED] arrived at EFF's office, met
8 with Bankston, and served an NSL dated November 19, 2007 ("November 2007 NSL"). The
9 November 2007 NSL is printed on FBI letterhead, is addressed to the Internet Archive, and is
10 signed by Arthur M. Cummings II, Deputy Assistant Director, Counterterrorism Division of the
11 FBI.

12 40. The November 2007 NSL letter states that the Archive is "hereby directed to
13 provide the [FBI] the subscriber's name, address, length of service, and electronic
14 communication transactional records, to include existing transaction/activity logs and all
15 electronic mail (e-mail) header information (not to include message content and/or subject
16 fields)" pertaining to [REDACTED]
17 [REDACTED]

18 41. The November 2007 NSL also includes a certification that "the information
19 sought is relevant to an authorized investigation to protect against international terrorism or
20 clandestine intelligence activities."

21 42. Parroting the language of the NSL statute's gag certification provision, the
22 November 2007 NSL includes a certification that the "disclosure of the fact that the FBI has
23 sought or obtained access to the information sought by this letter may endanger the national
24 security of the United States, interfere with a criminal, counterterrorism, or counterintelligence
25 investigation, interfere with diplomatic relations, or endanger the life or physical safety of a
26 person." The certification does not specify which of these harms may result from disclosure.

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1 43. The November 2007 NSL further advises the Archive that the NSL statute
2 "prohibits you, or any officer, employee, or agent of yours, from disclosing this letter, other
3 than to those to whom disclosure is necessary to comply with the letter or to an attorney to
4 obtain legal advice or legal assistance with respect to this letter."

5 44. Appended to the November 2007 NSL is a page titled "ATTACHMENT" that
6 states, "In preparing your response to this National Security Letter, you should determine
7 whether your company maintains the following types of information which may be considered
8 by you to be an electronic communications transactional record in accordance with Title 18
9 United States Code Section 2709." The page then lists, among other things [REDACTED]
10 [REDACTED]
11 [REDACTED] and "Any other information which you consider
12 to be an electronic communication transactional record."

13 45. The November 2007 NSL requires that the Archive provide the requested
14 information "personally to a representative of the FBI [REDACTED] or through use of
15 delivery service or through secure fax within fourteen (14) business days of receipt of this
16 letter."

17 46. On Tuesday, November 27, 2007, Opsahl and EFF Staff Attorney Marcia
18 Hofmann brought the November 2007 NSL to the Archive and showed it to Brewster Kahle,
19 Chair of the Archive's Board of Directors as well as one of the Archive's Digital Librarians.

20 47. On Wednesday, November 28, 2006, Special Agent [REDACTED] left a message for
21 Bankston inquiring about the status of the Archive's response. Later that day, Opsahl spoke by
22 telephone with Special Agent [REDACTED] and informed him that the Archive was reviewing and
23 considering the letter, and notified him, pursuant to 18 U.S.C. § 2709(c)(4), that the Archive
24 would be bringing in additional counsel.

25 48. The NSL statute and the November 2007 NSL have prevented the Archive from
26 disclosing information about the November 2007 NSL and this lawsuit to the Archive's Board
27 of Directors and staff.

1 49. The NSL statute and the November 2007 NSL have prevented the Archive from
2 disclosing information about the November 2007 NSL and this lawsuit to the Archive's
3 patrons.

4 50. The NSL statute and the November 2007 NSL have prevented the Archive from
5 disclosing information about the November 2007 NSL and this lawsuit to other libraries.

6 51. The NSL statute and the November 2007 NSL have prevented the plaintiffs
7 from disclosing information about the November 2007 NSL and this lawsuit to the press and
8 public.

9 52. The NSL statute and the November 2007 NSL have prevented the plaintiffs
10 from disclosing information about the November 2007 NSL to Congress, where bills to amend
11 the NSL statute are currently pending in both the House and Senate. The NSL statute and the
12 November 2007 NSL have prevented the plaintiffs from publicly advocating for legislative
13 change with respect to the NSL statute.

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CAUSES OF ACTION

16 53. The NSL statute, on its face and as applied through the November 2007 NSL,
17 violates the First Amendment by investing the FBI with the authority to suppress speech
18 without meaningful judicial review, unconstrained by definite and objective standards, and
19 without requiring that gag orders issued under the statute be narrowly tailored to a compelling
20 government interest.

21 54. The NSL statute, on its face and as applied through the November 2007 NSL,
22 violates the principle of separation of powers by effectively transferring to the executive branch
23 the final authority to determine whether speech should or should not be suppressed.

24 55. The NSL statute, on its face and as applied through the November 2007 NSL,
25 violates the First and Fifth Amendments by requiring courts that review non-disclosure orders
26 and challenges to NSLs to close hearings and seal judicial documents even where there is no
27 compelling need for secrecy.

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1 56. The NSL statute, on its face and as applied through the November 2007 NSL,
2 violates the First and Fifth Amendments by requiring courts that review non-disclosure orders
3 and challenges to NSLs to review government filings *ex parte* and *in camera* upon the
4 government’s request.

5 57. The gag order imposed by the November 2007 NSL is unlawful because it fails
6 to certify the specific harm that may result from disclosure.

7 58. The November 2007 NSL is unlawful because the Archive is not an electronic
8 communication service provider.

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PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that the Court:

1. Declare that 18 U.S.C. §§ 2709(c) and 3511(b) violate the First Amendment and the principle of separation of powers.
2. Declare that 18 U.S.C. §§ 3511(d) and 3511(e) violate the First and Fifth Amendments.
3. Declare that 18 U.S.C. §§ 2709(c) and 3511(b) are not severable from the remainder of the NSL statute.
4. Declare that the November 2007 NSL is unconstitutional under the First and Fifth Amendments and under the principle of separation of powers.
5. Permanently enjoin the defendants from seeking to enforce the November 2007 NSL or from penalizing plaintiffs for failing to comply with it.
6. Permanently enjoin the defendants from using the NSL statute against the plaintiffs or any other person or entity.

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- 7. Award the plaintiffs fees and costs.
- 8. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

MELISSA GOODMAN
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L. DANIELLE TULLY
American Civil Liberties Union
Foundation
National Security Project

ANN BRICK
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By: 
ANN BRICK
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December 14, 2007