CINDY A. COHN (SBN 145997)
cindy@eff.org
LEE TIEN (State Bar No. 148216)
tien@eff.org
MATTHEW ZIMMERMAN (SBN 212423)
mattz@eff.org
JENNIFER LYNCH (SBN 240701)
jlynch@eff.org
MARCIA HOFMANN (SBN 250087)
marcia@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

RICHARD R. WIEBE (SBN 121156)
rwiebe@bermanesq.com
LAW OFFICE OF RICHARD R. WIEBE
1 California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

AARON S. DYER (SBN 192991)
aaron.dyer@pillsburylaw.com
LAUREN M. LEAHY (SBN 260651)
lauren.leahy@pillsburylaw.com
PILLSBURY WINTHROP SHAW PITTMAN LLP
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406
Telephone: (213) 488-7100
Facsimile: (213) 629-1033

Attorneys for Petitioner [redacted]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Case No. 11-cv-2173 SI

PETITIONER [redacted]

(1) OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH NSL AND (2) REPLY IN SUPPORT OF PETITION TO SET ASIDE NSL AND ITS NONDISCLOSURE REQUIREMENT

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

Judge: Hon. Susan Illston
Date: October 14, 2011
Time: 9:00 a.m.
Place: Courtroom 10, 19th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

[redacted] now finds itself and [redacted] on the receiving end of an NSL. [redacted] the important public discussion regarding the appropriate scope of and limitations on government powers, [redacted] is prevented by Executive fiat from speaking out about its experience in any way.

[redacted] believes that the NSL statute violates the First Amendment and other constitutional protections, that the government has failed to meet its high burden to compel production and to gag [redacted] and that the specific NSL issued to it be set aside. As an [redacted] also seeks to publicly comment (possibly without disclosing certain information) about its receipt of the NSL and the institution of a lawsuit against it by the government. Moreover, [redacted] would like to preserve the right to notify [redacted] may also have the option to appeal to the Judiciary. Finally, [redacted] maintains that the government has failed to meet its high burden to compel production.

In response to [redacted] petition, the government contends that NSLs are a "classic and permissible request for information,"[1] ignoring the obvious differences between self-certified NSLs and other investigative tools, the First Amendment concerns that even the statute acknowledges, and the ongoing criticism of the FBI's use of the statute not only by the public and [redacted] but also by other branches of the federal government. The DOJ's own internal review has found that the FBI has grossly misused the tool since the statute was amended by the PATRIOT ACT,[2] as

[1] Government's July 22, 2011 Memorandum in Opposition to Petition to Set Aside National Security Letter ("Gov. Opp.") at 2.

[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* *(footnote continued on following page)*

detailed in [redacted] Petition at 4-6. Noting that the FBI has dismissed repeated NSL infractions as mere "administrative errors," the OIG in 2008 expressed concern that the FBI's attitude toward these matters "diminishes their seriousness and fosters a perception that compliance with FBI policies governing the FBI's use of its NSL authorities is annoying paperwork." 2008 OIG Report at 100. The government now assures the Court that the FBI has made "significant progress in implementing the recommendations" from the OIG. Gov. Opp. at 8 n.2. But this empty assurance is not supported by any evidence, nor is it sufficient to repair the constitutional defects in the statute or with this NSL.

This "nothing to see here" approach is an attempt to mask the very significant lack of checks and balances accompanying NSLs – self certification, Executive-issued gag orders, recipient-initiated judicial review, and a slanted review process, all of which fail heightened scrutiny. These constitutional deficiencies in the NSL statute are made more obvious by comparison to alternative procedures. The government could, for example, empanel a grand jury and issue a grand jury subpoena and thus have the outside check of a grand jury and much more limited ability to gag [redacted] It could also seek a court order under section 215 of the USA PATRIOT Act, thus acting in the first instance with judicial approval.[3] Both of these procedures avoid the most serious constitutional shortcomings discussed below, and both have been repeatedly suggested to the FBI by [redacted] as processes that [redacted] would be more comfortable with because they contain more checks and balances than self-certified NSLs. The government has refused.

Moreover, in response to [redacted] decision to avail itself of the statutory process designed to allow judicial review of NSLs, the government has responded aggressively, accusing [redacted] of "fail[ing] to comply with a lawfully issued National Security Letter" and "interfering with the United States' vindication of its sovereign interests in law enforcement, counterintelligence, and

---

(footnote continued from preceding page)
Other Informal Requests for Telephone Records (January 2010), *available at* http://www.justice.gov/oig/special/s1001r.pdf ("2010 OIG Report").

[3] Pub. L. No. 107-56, Title II, 15 Stat. 272 (2001) (codified at 50 U.S.C. §§ 1861 *et seq.*).

protecting national security."[4] The government's actions highlight the burden that the statute places on a recipient of NSLs and underscores the need for a strong and independent judicial role in monitoring Executive investigations, including in the area of national security. [redacted] asks that the Court play that role here and set aside both the NSL's request for [redacted] nformation and the accompanying gag.

II. ARGUMENT

A. The Court Can Consider the NSL's Constitutionality.

The government asserts that [redacted] cannot challenge the constitutionality of the NSL by using the statutory process of section 3511(a) because the government has not sufficiently waived sovereign immunity. Gov. Opp. at 6-7. Not so. Section 3511(a) expressly allows this Court to modify or set aside the request if compliance would be "unreasonable, oppressive or otherwise unlawful." This waiver is unequivocal, fully meeting the standard for a waiver of sovereign immunity in *United States v. Sherwood,* 312 U.S. 584 (1941), and the other cases cited by the government. By allowing the Court to consider whether compliance would be "unlawful," the waiver includes whether compliance would be unconstitutional, and the government cites no authority otherwise. The government's attempt to carve out the question of constitutionality from section 3511(a)'s broad waiver permitting consideration of whether the NSL is in any respect "unlawful" lacks merit.

Other independent bases exist as well. The Administrative Procedures Act, 5 U.S.C. § 702, waives sovereign immunity for all lawsuits such as this one that are brought against the United States and seek non-monetary relief, whether or not the claims arise under the APA. *See Veterans for Common Sense v. Shinseki*, 644 F3d 845, 865-67 (9th Cir. 2011); *Trudeau v. FTC*, 456 F.3d 178, 185-87 (D.C. Cir. 2006). Further, the Declaratory Judgment Act, 28 U.S.C. § 2201, empowers courts to grant declaratory relief whenever, as here, they are properly seized of

[4] Government's Complaint for Injunctive and Declaratory Relief of June 2, 2011 (N.D. Cal. Case No. 11-2667 SI) ("Gov. Compl.") at ¶ 35. *See also* Government's July 29, 2011, Memorandum in Support of Motion to Compel Compliance With National Security Letter Request for Information ("Mot. to Comp. Br.") at 3 (moving to compel compliance with the NSL at issue here on the basis of a "failure to comply" with the NSL).

jurisdiction. Even without section 3511(a) and the APA's waiver of sovereign immunity, the Court has the inherent power to decide and declare whether the NSL is unconstitutional. Ever since *Marbury v. Madison*, the Supreme Court has made clear that a court hearing a challenge to the enforcement of a statute may consider the constitutionality of the statute and in the course of doing so must "say what the law is." 5 U.S. 137, 177 (1803). "[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument." *Id.* at 180. The power to declare a statute unconstitutional at equity goes hand in hand with the Court's inherent power to decide whether a statute is unconstitutional. "'The power of the federal courts to grant equitable relief for constitutional violations has long been established.'" *American Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1038 (9th Cir. 2007) (quoting *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.)). *See also Greenya v. George Washington Univ.*, 512 F.2d 556, 562 n.13 (D.C. Cir. 1975) ("If the Constitution creates a right, privilege, or immunity, it of necessity gives the proper party a claim for equitable relief if he can prevail on the merits.").[5]

This Court may consider and rule on the constitutionality of the government's attempt to compel the disclosure of the [redacted] and the statutory nondisclosure provision that bars [redacted] from revealing the mere existence of the NSL. Indeed, the Court could not deny [redacted] Petition while refusing to decide whether the statute is unconstitutional.

B. The Government Must Demonstrate That It Meets Heightened Scrutiny By Making the Appropriate Factual Showing For the Court to Review.

Despite the government's repeated invocation of national security, it is for the Court to evaluate whether the government has met the necessary standards here. As the Supreme Court reaffirmed in *Hamdi v. Rumsfeld*, the suggestion of a "heavily circumscribed role for the courts" in traditional judicial matters where the government also has a national security interest is incorrect. 542 U.S. 507, 535-36 (2004) (plurality opinion). Instead, the Supreme Court noted that "the United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536. That role here is to carefully evaluate the factual

[5] The Supreme Court has held that a "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (internal quotation marks and citation omitted); *accord Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (noting with approval the view that "[All] agree that Congress cannot bar all remedies for enforcing federal constitutional rights.").

showing made by the government, both in support of its effort to compel production of subscriber information and in its imposition of the broad nondisclosure requirement. The government may not simply unilaterally assert that its motivations are proper and justified without the Court reviewing the basis for its claims. *See, e.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power") (citing *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)).

Given that the government's heavy redactions place [redacted] at a distinct disadvantage in attempting to rebut the government, and despite the deference that attaches the government's assertions of national security, the Court must take special care to ensure that the government's secret evidence is sufficient to support both its demand that [redacted] its otherwise [redacted] and its imposition of a complete gag on [redacted][6]

C. The Government's Exercise of its Nondisclosure Power Fails Strict Scrutiny.

1. The NSL Nondisclosure Requirement Is a Classic Prior Restraint Subject to Strict Scrutiny.

The government's attempt to bar [redacted] from speaking is a national security prior restraint, and so it must meet the strict scrutiny standard used in *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam) ("*Pentagon Papers*"), to justify its request. Mem. of Points and Authorities In Support of Petition of Pl. [redacted] to Set Aside National Security Letter and Nondisclosure Requirement Imposed In Connection Therewith ("Petitioner's Mem.") at 7-9. The government raises a flurry of arguments to try to skirt around this fundamental fact. It argues that because the nondisclosure provision in section 2709(c)

[6] *See, e.g.*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 507 (S.D.N.Y. 2004) (compelled production of identity information tied to First Amendment activity "might be beyond the permissible scope of the FBI's power under [the NSL statute] because the targeted information might not be relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, or because the inquiry might be conducted solely on the basis of activities protected by the First Amendment. These prospects only highlight the potential danger of the FBI's self-certification process and the absence of judicial oversight."), vacated on other grounds in *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) (*Gonzales II*); *Saleem v. Keisler*, 520 F. Supp. 2d 1048, 1060 (W.D. Wis. 2007) ("'[N]ational security' is not a magic talisman that can be waved in front of courts whenever the government seeks to insulate itself from judicial review.").

is not a "classic" prior restraint or content-based restriction, the standard of review should be something less than "the most rigorous First Amendment scrutiny." Gov. Opp. at 15 (citing *Doe v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008)).[7] Tellingly, while the government argues in multiple ways that the nondisclosure requirement is not properly reviewed under the standards offered by [redacted] it fails to suggest any alternative standard.[8]

The government then contends that the nondisclosure of information about any NSL has little First Amendment significance because it "is not a matter of general public concern." Gov. Opp. at 17. This premise is obviously untrue, especially as to [redacted] (without revealing the [redacted]). To make this claim, the government all but ignores the vociferous public debate over NSL authority that began with the introduction of the PATRIOT Act,[9] continued through former President Bush's attempts to make the law permanent,[10] and has been bolstered by the Inspector General's reports on the FBI's NSL abuses,[11] litigation over the constitutionality of NSL authority,[12] and an amendment to the law to

---

[7] The government in *Mukasey*, however, "conceded that strict scrutiny is the applicable standard." 549 F.3d at 878 (applying strict scrutiny but declining to decide the issue).

[8] The government does claim that the nondisclosure requirement is content-neutral, perhaps obliquely suggesting that it is merely a "time, place or manner" restriction. Gov. Opp. at 16 n.7. This is clearly not the case. The restriction is content-based because it is triggered by the content of the information. *Mukasey*, 549 F.3d at 876. Moreover, it is intended to silence NSL recipients who are likely to be publicly critical of the government if allowed to speak. *Cf. id.* at 878. Even if the restrictions were content-neutral, such regulations are invalid where they have a disproportionate effect on a particular type of speech – here, criticism of the government's use of NSLs. *See, e.g., Turner Broad. Sys. v. FCC,* 512 U.S. 622, 645 (1994).

[9] *See, e.g.*, Congressional Research Service, *National Security Letters in Foreign Intelligence Investigations: Legal Background and Recent Amendments*, RL33320 at 4-7, Sept. 8, 2009 (describing legislative history) ("CRS NSL Report"), *available at* http://opencrs.com/document/RL33320/.

[10] *See* Elizabeth Bumiller, "Bush Renews Patriot Act Campaign," *N.Y. Times*, Jan. 4, 2006, *available at* http://www.nytimes.com/2006/01/04/politics/04bush.html (noting NSLs were one of the two main "sticking points" in the congressional discussion over PATRIOT Act reauthorization).

[11] After the OIG released its first report in 2007, detailing widespread FBI NSL abuses, "bipartisan outrage . . . erupted on Capital Hill." David Stout, "F.B.I. Head Admits Mistakes in Use of Security Act," *N.Y. Times*, March 10, 2007, *available at* https://www.nytimes.com/2007/03/10/washington/10fbi.html; *see also* Dan Eggen and John Solomon, "FBI Audit Prompts Calls for Reform," *Washington Post*, March 10, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/09/AR2007030902356.html.

attempt to address its defects.[13] Many have played roles in this long-running debate, including NSL recipients like [redacted] who have [redacted] of this controversial investigative tool after fighting back against nondisclosure requirements in court.[14] The result is that the government here seeks information from [redacted] using this politically controversial method while simultaneously preventing [redacted] from talking about it. This plainly "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

The nondisclosure requirement at issue here thereby prevents [redacted] – from engaging seriously in the public discussion surrounding NSLs. Petitioner's Mem. at 3; [redacted] Decl. at 7. Were [redacted] free to speak, it could discuss its constitutional concerns about the NSL statute as an actual NSL recipient, providing a perspective that the [redacted] could also contextually discuss the FBI's record of abuse of NSL

(footnote continued from preceding page)

[12] CRS NSL Report at 6-7 ("two court decisions [] colored the debate over NSL authority during the 109th Congress) (referencing *Ashcroft*, 334 F. Supp. 2d 471 and *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) (*Gonzales I*), dismissed as moot, 449 F.3d 415 (2d Cir. 2006)).

[13] CRS NSL Report at 7 (describing NSL amendments in 109th Congress).

[14] *See, e.g., Testimony of National Security Letter Recipient George Christian at a Hearing of the Senate Judiciary Subcommittee on the Constitution*, April 11, 2007, http://www.aclu.org/national-security/testimony-aclu-client-and-national-security-letter-recipient-george-christian-hear; Press Release, Electronic Frontier Foundation, *FBI Withdraws Unconstitutional National Security Letter After ACLU and EFF Challenge,* May 7, 2008, *available at* https://www.eff.org/press/archives/2008/05/06 (NSL recipient Brewster Kahle of the Internet Archive: "While it's never easy standing up to the government – particularly when I was barred from discussing it with anyone – I knew I had to challenge something that was clearly wrong. I'm grateful that I am able now to talk about what happened to me, so that other libraries can learn how they can fight back from these overreaching demands."). *See also* Kim Zetter, "'John Doe' Who Fought FBI Spying Freed From Gag Order After 6 Years," *Wired.com*, Aug. 10, 2010, available at http://www.wired.com/threatlevel/2010/08/nsl-gag-order-lifted/ (Nicholas Merrill, former "John Doe" in *Doe v. Mukasey* (later renamed to *Doe v. Holder*): "After six long years of not being able to tell anyone at all what happened to me – not even my family – I'm grateful to finally be able to talk about my experience of being served with a national security letter. . . . The case has made me realize that just one or two people standing up can have a great effect. I either want to inspire others to follow the example . . . or develop technology that makes it more difficult for people to be snooped on.").

authority, [redacted] All of this speech could add to general public knowledge and robust debate about NSLs without revealing the specific information sought by the FBI in this NSL.

On the facts before it, the *Mukasey* court found that the NSL statute's nondisclosure requirement was "not a typical example of [a prior restraint] for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public for a."[15] In this instance, the NSL nondisclosure requirement plainly is being imposed on [redacted][16] 549 F.3d at 876. As a result, regardless of the specific factual situation in *Mukasey*, the nondisclosure requirement here operates as a prior restraint on [redacted] and must meet the stringent procedural and substantive requirements that the constitution requires of all prior restraints.

2. The NSL Nondisclosure Requirement Does Not Provide Adequate Procedural Protections.

The most obvious constitutional defect in the statute is the failure of its nondisclosure requirements to meet the standards of *Freedman v. Maryland*, 380 U.S. 51 (1965). As noted above, there is no dispute that the nondisclosure provision gives the government broad authority to decide, *ab initio*, whether [redacted] can speak about the NSL at all, even without revealing the target of the NSL. Because the statute allows the imposition of a prior restraint, *Freedman* standards apply, requiring that the statute provide narrow, definite, and objective standards to cabin the government's discretion as well as 1) a "specified brief period" of restraint prior to judicial review, 2) "the shortest fixed period compatible with sound judicial resolution" for any restraint during review, and 3) that the burden of going to court and the burden of proof in the court rests

---

[15] Even in *Mukasey* this observation appeared not to be true. Later Congressional testimony confirmed that the provider in that case did wish to speak publicly. *See supra* note 14. Regardless, [redacted]

[16] [redacted] Google's "Government Requests" tool "discloses the number of requests [Google] receive[s] from each government in six-month periods with certain limitations." *See* https://www.google.com/transparencyreport/governmentrequests/userdata/

with the government. *Mukasey,* 549 F.3d at 871 (citations omitted). Despite this, the government argues that the nondisclosure requirement is neither subject to the *Freedman* standards nor insufficient under them. Both contentions are false.

First, the government argues that *Freedman* is inapplicable because the concerns underlying general speech licensing schemes – institutional bias "[b]ecause the censor's business is to censor," *Freedman*, 380 U.S. at 57, and undue burdens on judicial review – are not present here. Gov. Opp. at 18. But both are obviously present. The FBI is biased toward imposing nondisclosure requirements on NSL recipients in a way that Article III courts are not; the FBI's business is secrecy. The nondisclosure requirement is as an executive licensing scheme over speech. It invests the FBI with discretion to determine, on a case-by-case basis, whether a nondisclosure order should be issued with respect to any given NSL, and thus conditions the NSL recipient's right to speak on the discretionary approval of executive officers. The FBI chooses at the outset whether the NSL recipient is gagged, 18 U.S.C. § 2709(c)(1), and the NSL recipient must notify the FBI even when making a statutorily permissible disclosure, 18 U.S.C. § 2709(c)(4). The nondisclosure provision, in short, is triggered by the FBI's discretionary decision regarding whether to certify. Indeed, the statutory standards amplify this institutional bias by endorsing strongly speech-restrictive judicial review. *See* II.D *infra.* This is born out by the fact that the FBI has demanded nondisclosure in 97% of the NSLs it has issued.[17] To be clear, [redacted] does not object to discretion being granted to the FBI *per se*; the point is that when such discretion is granted, it must be cabined by the *Freedman* protections in order to prevent its abuse.

Nor does the discretion disappear because of the government's characterization of the gag as "categorical." Gov. Opp. at 16. The discretion lies in whether the FBI imposes the gag in the first place and such discretion must be constrained by "narrow, objective, and definite standards." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). *See also Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("[I]f [a] permit scheme involves appraisal of

[17] *See Statement of Inspector General Glenn Fine Before the Senate Committee on the Judiciary concerning Reauthorizing the USA Patriot Act* at 6 (Sept. 23, 2009), http://www.justice.gov/oig/testimony/t0909.pdf ("Fine Statement") ("In the random sample of NSLs we reviewed, we found that 97 percent of the NSLs imposed non-disclosure and confidentiality requirements and almost all contained the required certifications. We found that some of the justifications for imposing this requirement were perfunctory and conclusory[.]").

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.") (internal quotation marks and citations omitted). The NSL statute lacks such standards: the FBI may gag NSL recipients whenever, in its view, there otherwise "may" result in a danger to national security, 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)(1). Even if construed to require a showing of "some reasonable likelihood," as the *Mukasey* court did (549 F.3d at 875), this language is subjective and sweeping, giving a court no practical ability to evaluate the scope of the secrecy needed. [redacted] does not deny that NSL gags may be legitimately aimed at ensuring investigative secrecy or that some secrecy may be warranted in some cases or as to some information. But the question is whether the authority to compel silence is accompanied by adequate standards to allow the Court to make a reasonable evaluation of them, and the answer is no.

Turning to the procedural requirements, *Freedman* requires that any restraint prior to judicial review can only be imposed for a "specified brief period." *Freedman*, 380 U.S. at 59. Moroever, that pre-determination restraint must be limited to the "shortest fixed period." The rationale for these requirements is that government discretion to delay judicial review both before and during the process will, in practice, operate to deny judicial review. Neither section 2709 nor section 3511 specifies any period, much less a brief one, before the gag must be reviewed. And the concern about broad censorship has come to pass: [redacted] has now been gagged for [redacted] months since it received the NSL on [redacted] 2011. The statute creates a default situation of a broad and lengthy gag both before and during judicial review, and that default has been imposed here.

The statute also violates *Freedman*'s third requirement by placing the burden on the NSL recipient to challenge the restraint on its speech. The problem that *Freedman* sought to solve by placing the burden on the government was to ensure that challenges to improper gags would actually occur. Here, the paucity of case law interpreting section 3511 speaks for itself. Unlike *FW/PBS Inc. v. Dallas*, 493 U.S. 215, 229-30 (1990), in which the Supreme Court justified relaxing this burden on the ground that an adult business had "every incentive" to challenge governmental business permit denials because of the fundamental impact on its livelihood (as

opposed to *Freedman* itself, where the movie exhibitor might choose to accept a censorship decision because a single movie might not be worth the fight), neither compliance with nor objection to NSL requests is a part of most communications providers' business models. Indeed, it is mainly its [redacted] that drove [redacted] to pay for counsel and then seek additional pro bono counsel in order to pursue this challenge, a course that is not likely to be replicated by other commercial providers. It is true here that "[w]ithout these safeguards, it may prove too burdensome to seek review of the censor's determination" for nearly all providers. *Freedman*, 380 U.S. at 59.

The government half-heartedly argues that the *Freedman* requirements have been satisfied in this case. Gov. Opp. at 21. It essentially contends that the FBI in fact sought judicial review. But the government admits that "the FBI informed petitioner that it would seek judicial review to enforce the NSL nondisclosure requirement, *if at all*, within 30 days after petitioner lodged its objection with the government." *Id.* (emphasis added). Clearly, the FBI did not commit to seeking judicial review and did not do so until [redacted] had already invoked its right to judicial review under section 3511. The *Freedman* requirement would be meaningless if it could be satisfied by the government's rushing to court after a would-be speaker had itself done so; one of the core points of *Freedman* and its progeny is to counteract the self-censorship that occurs when would-be speakers are unwilling or unable to initiate judicial review themselves. *Freedman*, 380 U.S. at 59. Moreover, even if the government had sought prompt judicial review, the FBI's own actions here could not possibly cure this constitutional defect. Prior restraints violate the First Amendment because of the risk of abuse of discretion, whether or not the discretion is actually abused. *Forsyth*, 505 U.S. at 133 n.10.

The failure of the statute to meet the *Freedman* requirements is clear and unequivocal. On this basis alone, the statute is unconstitutional.

3. The Government Has Not Adequately Identified a Compelling Governmental Interest With Evidence to Justify the Ban on Disclosure of Information About the NSL.

Apart from the procedural requirements imposed by *Freedman*, the First Amendment requires that the government must justify, with evidence, the national security interest behind its

desire to bar [redacted] from speaking about anything related to its receipt of the instant NSL. Here, too, the government fails. In the NSL, the government offers this bare justification for the gag:

> [T]he disclosure of the fact that the FBI has sought or obtained access to the information sought by this letter may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of a person.

Declaration of Mark F. Giuliano ("Giuliano Decl.") at ¶ 30 (attached as Attachment A to the Gov. Opp.).

A speculative statement that disclosure "may" or "could" cause harm is insufficient to justify a prior restraint. *See Pentagon Papers*, 403 U.S. at 725-26 (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press premised upon surmise or conjecture that untoward consequences may result."). Rejecting precisely this argument in adjudicating the constitutionality of an NSL nondisclosure requirement, the district court in *Doe v. Gonzales* noted that "[n]othing specific about this investigation has been put before the court that supports the conclusion that revealing Does' identity will harm it." *Doe v. Gonzales*, 386 F. Supp. 2d 66, 76-77 (*Gonzales I*). That approach should be applied here.

In support of its opposition to [redacted] Petition, the government submitted a sealed declaration purporting to provide a factual basis to support its "need for continued disclosure." *See* Giuliano Decl. The unredacted portions of the declaration are nevertheless instructive; FBI Assistant Director of the Counterterrorism Division Mark Giuliano notes that:

> Although *revealing generally that the FBI seeks subscriber information is not itself sensitive*, revealing the specific account number, service provider, or method used to obtain subscriber information *could* compromise future national security investigations.

Id. at ¶ 38 (emphasis added). This supplemental assertion is as weak as the NSL's original statement because it relies on the same speculation that revealing some information *could* compromise the underlying investigation. The FBI has not even asserted that such disclosures would pose a "reasonable likelihood" of harm. *See Mukasey*, 549 F.3d at 875 (construing "'may result' to mean more than a conceivable possibility").

Moreover, it is hard to imagine how disclosure of the "method used to obtain subscriber information" or the mere fact that [redacted] received an NSL could be sensitive. That the FBI uses NSLs pursuant to publicly known statutory authority can hardly constitute sensitive information in

light of the publicity surrounding NSLs over the past several years. Similarly, the fact that [redacted] received an NSL seems highly unlikely to be sensitive given tha[redacted] In any event, [redacted] would be alternatively interested in discussing the NSL generally without notifying its [redacted] or publicly disclosing the specific [redacted] At least then [redacted] could discuss the process [redacted] and to which it is now being subjected.[18] The government must specifically demonstrate that national security would "reasonably likely" be harmed if [redacted] were to disclose that it had received an NSL in order to satisfy the Court that a compelling governmental interest is at issue here.

4. The Nondisclosure Condition is Overbroad.

The nondisclosure requirement is additionally unconstitutional because it is overbroad on its face. Every nondisclosure order under the statute forecloses an NSL recipient – or any officer, employee, or agent of the NSL recipient – from "disclos[ing] to any person . . . that the FBI has sought or obtained access to information or records." 18 U.S.C. § 2709(c). The FBI may in some cases have a compelling interest in prohibiting a NSL recipient, for a limited period of time, from telling anyone about the NSL, much less notifying the subject of the NSL that his or her privacy has been compromised, but such sweeping secrecy is highly unlikely to be necessary in every case. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools[.]"). The government must demonstrate – specifically – why the breadth and scope of the gag is warranted.

First, as noted above in II.C.3, whether [redacted] has received an NSL is alone unlikely to be a fact that requires secrecy. Telecommunications carriers like [redacted] and [redacted] disclosing that it had received an NSL would not necessarily (or even likely) cause the [redacted]

[18] Note again that [redacted] would prefer to be able to inform the [redacted] Because [redacted] is not in a position to know or raise any additional concerns the [redacted] might have.

Second, NSL gags are highly likely to be overbroad in duration. If the government's interest in secrecy dissipates after a month, perhaps because the investigation has closed, or because the government has itself disclosed the relevant information to the target, the NSL recipient remains gagged despite the lack of any legitimate government interest in secrecy, much less a compelling one. Every such gag order endures longer than the Constitution permits. *See Doe v. Gonzales*, 449 F.3d 415, 422 (2d Cir. 2006) (Cardamone, J. concurring) (*Gonzales II*); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) ("When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape – that individual presumably will have been exonerated . . . or arrested or otherwise informed of the charges against him . . .").

It makes little difference that section 3511(b)(3) requires the government to recertify the nondisclosure requirement under certain limited circumstances. That provision is only triggered when, one year or more after an NSL is issued, the *recipient* petitions a court for an order modifying or setting aside a nondisclosure order, and permits the government 90 days within the filing of the petition to either terminate or recertify the obligation. By restricting the NSL recipient's ability to challenge the gag, and once again placing the onus on the recipient to seek to lift the gag, this procedure magnifies the basic problem that the restraint will endure longer than necessary.

Finally, the substantive statutory standards for challenging the NSL – the "no reason to believe" standard and the required deference to FBI certifications – are so stacked against challengers that as a practical matter, most challenges will fail. As noted below in II.D, this creates due process and separation of powers problems as well.

5. The Nondisclosure Provision of Section 2709 Is Different From Other Types of Government-Imposed Nondisclosure Orders Because It Is Required At the Unilateral Discretion of the Executive Branch.

Attempting to justify the broad gag order accompanying the NSL, the government argues that in other circumstances the government may require companies not to disclose information obtained in an official investigation, attempting to draw analogies between an NSL and several different types of government-imposed nondisclosure orders to make its case. But those analogies only highlight the constitutional flaws inherent in the NSL nondisclosure requirement.

As the *Mukasey* court observed, section 2709(c)'s nondisclosure provision is significantly different from the types of prohibitions discussed by the government because it "is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." *Mukasey*, 549 F.3d at 877. Section 2709(c) also has different underlying policy rationales and contains no temporal limitation. *Id.*[19] This nondisclosure provision is unlike the statute upheld in *Cooper v. Dillon*, 403 F.3d 1208, 1216 (11th Cir. 2005), for example. In that case, the publisher was not required to challenge a government imposed injunction before disclosing the information, whereas here, in violation of *Freedman*, the recipient of an NSL must challenge nondisclosure orders under section 3511(b) before it may reveal the existence of NSLs.

The government also notes that information "obtained through pretrial discovery" may be restricted pursuant to a protective order without constitutional harm, citing *Seattle Times v. Rinehardt*, 467 U.S. 20 (1984). Yet here, unlike in *Seattle Times*, the information – the [redacted] – is already known to [redacted] The information sought here is not "discovered information" and is not made available to [redacted] through "legislative grace." *Id.* at 33.

The government further analogizes to *Butterworth v. Smith* which involves a grand jury subpoena. Tellingly, in *Butterworth,* the Supreme Court held that grand jury witnesses *cannot* be gagged, so the analogy is of little use to the government here. 494 U.S. at 632. The government attempts to get around this by relying on the partially vacated ruling of the district court in *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y 2004) (partially overturned by *Mukasey*) for its reliance on *Butterworth*, allowing the gagging of a third party witness. *See* Gov. Opp. at 14; *Ashcroft*, 334 F. Supp. 2d at 518 ("laws which prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger less First Amendment concerns that laws which prohibit disclosing information a person obtains independently."). As the government admits in a footnote, however, even if grand jury witnesses can be gagged to the extent they wish to speak about the fact that they have been subpoenaed (as opposed to the underlying

[19] While the recertification requirement of section 3511(b) provides for temporal limitations under certain circumstances, it is unconstitutional as noted at II.D.

facts), the Second Circuit expressly disavowed this analogy on appeal: "the nondisclosure requirement of subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted." Gov. Opp. at 14-15 n.6, citing *Mukasey*, 549 F.3d at 877.[20]

D. The Standards of Judicial Review of the Nondisclosure Requirement of NSLs Under 18 U.S.C. § 3511(b) Are Excessively Deferential and Thus Violate Separation of Powers and Due Process.

By preventing courts from performing the independent review of prior restraints that the First Amendment requires, section 3511(b)'s excessively deferential standard of review intrudes upon their proper functioning of the courts in violation of the separation of powers and also violates due process. As explained above and in Petitioner's opening brief, the First Amendment requires courts to exercise independent review of the prior restraint imposed here. That review is impossible because sections 3511(b)(2) and (3) substitute their extremely deferential standard of review for the constitutionally required standard of review, and separately because section 3511(b) precludes courts from making an independent determination of the facts – *i.e.*, the likelihood of harm – used to justify the prior restraint. Specifically, the statute allows the gag to end only if the court:

> finds that there is *no reason to believe* that disclosure may endanger national security of the United States, interfere with a criminal counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.

Sections 3511(b)(2) and (3) (emphasis added). The statute further requires that if any one of a long list of government officials so certifies, "such certification shall be treated as *conclusive* unless the court finds that the certification was made in bad faith." *Id.* By baldly preventing courts from performing their proper role in First Amendment review, Congress "impermissibly threatens the institutional integrity of the Judicial Branch" in violation of the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Com. v. Schor*, 478

[20] While the government in its Opposition footnote 7 makes much of the fact that decisions about secrecy in section 2709 cases are made "case by case" by the Executive, this misses the point. The Second Circuit's concern was that the Executive unilaterally decides the question of secrecy, without any check from a grand jury or a court. The lack of any oversight by a purely internal Executive process is demonstrated by the Inspector General's finding that secrecy is almost always demanded by the Executive, yet is sometimes unwarranted. *See Fine Statement* at 6.

U.S. 833, 851 (1986)). The law further violates [redacted] due process rights, which require a *de novo* review by an unbiased decisionmaker. *See, e.g., Concrete Pipe & Products v. Construction Laborers Pension Trust,* 508 U.S. 602, 619-20, 626, 629-30 (1993) (due process requires a neutral adjudicator to conduct a *de novo* review of all factual and legal issues).

The government's arguments to the contrary lack merit. The government argues that Congress can mandate deferential review of [redacted] constitutional claims because a deferential standard of review is permitted under the cause of action created by section 706(2)(A) of the APA (forbidding "arbitrary and capricious" agency actions), Gov. Opp. at 25, but that cause of action is a wholly statutory creature. Indeed, the APA properly preserves independent review for constitutional claims. 5 U.S.C. § 706(2)(B). The government also relies on *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003), for this proposition, but that was not a First Amendment prior-restraint case; the passage the government cites addresses judicial review of statutory claims under the Freedom of Information Act. It is thus inapplicable.

The government similarly attempts to justify section 3511(b)'s preclusion of independent fact review by relying on cases that are not First Amendment prior-restraint cases. Gov. Opp. at 24. Two are FOIA cases (*Center for National Security Studies* and *CIA v. Sims,* 471 U.S. 159 (1985)); one is a case challenging the government's right to keep classified information secret from one of its own employees (*Dep't of the Navy v. Egan,* 484 U.S. 518 (1988)), and one is a case of a government employee contractually bound not to reveal classified secrets learned through his job (*McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983)). Regardless of whatever standards properly apply in the different circumstances in the government's cited cases, prior-restraint jurisprudence requires independent review of the facts here.

E. The Government's Effort to Compel the Production of Subscriber Information Fails Heightened Scrutiny.

Heightened scrutiny also applies to the government's attempt to compel [redacted] to disclose the [redacted] As explained in its opening brief, [redacted] business model is based on [redacted] Petitioner's Mem. at 1-3; [redacted] at ¶¶ 6, 7. Since [redacted]

[redacted] Petitioner's Mem. at 2; [redacted] Decl. at ¶ 7. [redacted] regularly engages in [redacted] *Id.* Similarly, by choosing to do business with [redacted] which strongly [redacted] a reasonable presumption exists that [redacted] has effectively (and anonymously) [redacted] Thus, the revelation of the [redacted] will also reveal the [redacted] to the FBI. So here the demand that [redacted] implicates both [redacted] and [redacted] First Amendment rights.

Congress recognized the First Amendment danger, albeit to a limited extent, posed by granting discretionary investigatory powers in the form of the NSL process. The statute provides in several places that the government must certify that the NSL was not issued "solely" on the basis of First Amendment protected activity, demonstrating that Congress was concerned about the risk that investigations would be based on protected speech.[21] However, by statutorily blocking only those NSLs issued "solely" on the basis of First Amendment protected activities, and then only for certain subsections 18 U.S.C. § 2709(b)(1)-(2), Congress did not go far enough to satisfy the Constitution.

Investigations that "intrude[] into the area of constitutionally protected rights of speech, press, association and petition" are subject to heightened First Amendment scrutiny. *Gibson v. Fla. Legislative Invest. Comm.*, 372 U.S. 539, 546 (1963). Here, especially in the shadow of an extensive, well-documented history of NSL abuse by the FBI, *see* Petitioner's Mem. at 4-6,[22] and

---

[21] Of the five NSL statutes, only three of them contain this "solely" language, and they are the same three statutes that are for the exclusive use of the FBI: 12 U.S.C. § 3414 (Right to Financial Privacy Act), 15 U.S.C. § 1681u(a) (Fair Credit Reporting Act), and 18 U.S.C. § 2709 (Electronic Communications Privacy Act).

[22] The FBI's history of abusing the overbroad powers granted to it by the NSL statute in any event provides ample affirmative justification to question the use of the NSL process. *See* Petitioner's Mem. at 4-6 (documenting 2007-10 Inspector General reports documenting abuse of the NSL process by the FBI). In its Opposition, the government implies that there is no longer cause for concern with the FBI's NSL practices because the Inspector General's 2008 Report noted that the FBI had taken significant steps to improve its practices. *See* Gov. Opp. at 8 n.2. However, this misrepresents the OIG's findings. The government neglected to mention that the OIG found in that same report that the FBI had not fully implemented the OIG's recommendations for addressing

(footnote continued on following page)

with the government refusing to disclose to [redacted] any factual basis for its use of the NSL process, heightened scrutiny is required and a mere assertion by the government that the basis of the NSL is not "solely" based on the First Amendment activities of the [redacted] is insufficient to keep the statute within constitutional boundaries.

The government attempts to avoid this conclusion by arguing that "the legally protected interest at stake" in the right to speak and associate anonymously is merely "the right not to reveal one's identity when communicating what may be an unpopular message." Gov. Opp. at 10; *see also* Mot. to Comp. Br. at 11.[23] While the First Amendment clearly protects anonymous speakers from such unwarranted intrusions based on fear of retaliation, the scope of the constitutional protection is broader than the government has stated and includes a desire to protect privacy more generally when engaged in anonymous expressive activities.[24] Moreover, since the disclosure of the [redacted] here implicates [redacted] associational interests, shielding associative connections from government scrutiny absent an appropriate showing also falls squarely within the First Amendment interests identified in *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny. The [redacted] in question need not affirmatively invoke and justify [redacted] desire to avoid insufficiently bounded government intrusion into [redacted] especially when [redacted] obviously has no opportunity to do so here. Instead, the burden falls on the government to

---

(footnote continued from preceding page)
NSL abuses. *See* 2008 OIG Report at 15. And as of September 2009, the last date on which the Inspector General testified before Congress on the FBI's NSL practices, the FBI still had yet to implement many of the OIG's recommendations and had failed to change practices that the OIG found led to the NSL abuses in the past, including failure to implement policies and compliance standards for NSL use, "failure[] to specify in NSL approval documents the relevance of records sought to authorized national security investigations," and failure to implement "aggressive independent review." *Fine Statement* at 12-14. The Inspector General concluded his testimony by reiterating that, two and a half years after the OIG's first report on the FBI's NSL abuses, it was still "too early to definitively state whether the FBI's efforts have eliminated the problems we found with its use of these authorities." *Id.* at 17.

[23] The cases cited by the government are inapposite because they involve more "routine" circumstances that do not implicate First Amendment protections, such as the SEC requiring investment managers to disclosure large holdings (*Full Value Advisors v. SEC*, 633 F.3d 1101, 1108-09 (D.C. Cir. 2011)) or the IRS requiring the reporting of cash transactions in excess of $10,000 (*United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995)).

[24] *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.").

justify its need for the information in question.[25] *See Patterson*, 357 U.S. at 464 ("Whether there was 'justification' in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists."). Whatever the motivation, speakers need not affirmatively justify their desire to remain anonymous or decision not to volunteer with whom they associate to the degree envisioned by the government.

Instead, the government here bears the burden to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *See Gibson*, 372 U.S. at 546. Unless and until the government can meet that standard with competent evidence, its efforts to compel the production of such information should be denied.

While [redacted] is not privy to the redacted sections of the government presentation, based on the portions of the Guiliano declaration that the government has allowed [redacted] to see, the government has not met this burden. Guiliano discusses in general the value of NSLs in the unredacted text, but he demonstrates no relationship between the information sought and a subject of overriding and compelling state interest, much less a substantial relation. In fact, all that the government says on the topic in the unredacted portion is "In short, through its investigation, the FBI has found credible information indicating that [redacted] pose a threat to national security." Giuliano Decl. at ¶ 26.[26] This single conclusory assertion plainly falls far below the standard required by heightened scrutiny.

[25] In evaluating First Amendment anonymity challenges to legal process in other contexts, courts have repeatedly found that conjectural or conclusory factual assertions are insufficient to pierce the First Amendment rights at stake. *See, e.g., Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 974–76 (N.D. Cal. 2005) (requiring plaintiff seeking to obtain identities of anonymous speakers pursuant to a civil subpoena to adduce "competent evidence" addressing the outstanding inferences of fact essential to support a prima facie case); *USA Technologies v. Doe*, 713 F. Supp. 2d 901, 907 (N.D. Cal. 2010) (Illston) (same). Similarly, the NSL statute impermissibly compels disclosure upon a mere assertion (and not factual demonstration) of "relevance" to an investigation.

[26] The "Unclassified Summary" provided in Attachment C to the government's Opposition provides no further support as it is focused solely on the risk of disclosure and does not address the issue of production of the information.

F. **The Statutory Provision Authorizing the Government to Submit Sensitive National Security Material to the Court *Ex Parte* and *In Camera* Is Unconstitutional.**

Section 3511(e) allows the Executive to invoke *ex parte*, *in camera* proceedings on the Executive's say-so alone. Putting the question of whether proceedings should be *ex parte* and *in camera* in the hands of the Executive rather than the Judiciary subordinates the courts to the Executive and further interferes with this Court's ability to fulfill its Article III responsibilities to review [redacted] constitutional claims. Ordinarily, it is the court and not the Executive that decides whether litigation information is deserving of secrecy. Section 3511(e) allows the Executive to usurp the Judiciary's control of judicial proceedings.

Moreover, it is well established that *ex parte, in camera* proceedings lack fundamental fairness.[27] *See, e.g., American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (As judges, we are necessarily wary of one-sided process . . . 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'" citing *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). Meaningful notice requires both "notice of the . . . allegations" and "notice of the substance of the relevant supporting evidence." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987).[28] Such principles apply in cases like this one where the government seeks to use classified or secret information to its litigation advantage to obtain a decision in its favor. In *American-Arab Anti-Discrimination Committee*, 70 F.3d 1045 at 1070 , the Ninth Circuit held that use of undisclosed classified information in alien legalization proceedings violates due process. The Court concluded that the "use of undisclosed information in adjudications should be presumptively unconstitutional" "[b]ecause of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process." 70 F.3d at 1070. *See also Kinoy v. Mitchell*, 67 F.R.D. 1, 15

[27] Petitioner has a liberty interest in its right to free speech. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

[28] *See also, e.g., Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) ("The evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.") (quoting *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959)); *Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."); *West Ohio Gas Co. v. Public Utilities Comm. (No. 1),* 294 U.S. 63, 69 (1935) ("A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.").

(S.D.N.Y. 1975) (denying government's summary judgment motion supported by *in camera* exhibits of allegedly secret information: "Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation.").

The government additionally seeks to justify *ex parte*, *in camera* review by relying on decisions that have nothing to do with review of prior restraints under the First Amendment. It relies on foreign-terrorist-designation cases in which the government was seeking to deny assets and material support to foreign terrorists, not impose prior restraints on speech. *See People's Mojahedin Organization v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003) ("*People's Mojahedin I*"); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001). Those cases, whether or not rightly decided, do not control here, where the balance of interests is radically different.

First, those cases were exercises of the foreign affairs power against foreign terrorist organizations and their agents, not the muzzling of free speech rights of a citizen or company. Second, the government has a much greater interest in denying assets and material support to foreign terrorists than it does in imposing prior restraints on United States entities. Third, in none of the foreign-terrorist designation cases did the court rely on classified information for its decision. *People's Mojahedin Organization v. Dep't of State*, 613 F.3d 220, 231 (D.C. Cir. 2010) ("*People's Mojahedin II*") ("in none [of the cases] was the classified record essential to uphold an FTO [foreign terrorist organization] designation"). In *People's Mojahedin I*, for example, the court upheld the foreign-terrorist designation on the basis of the unclassified record alone. 327 F.3d at 1243-44.

The government also relies on *Jifry v. FAA*, 370 F.3d 1174, 1176-77, 1182-83 (D.C. Cir. 2004), which involved the revocation of FAA certificates of non-resident alien pilots who flew only between foreign destinations; it was unclear whether as non-resident aliens they possessed any due process rights at all, and in any event their interest as non-resident aliens in possessing FAA certificates was minimal.

None of the justifications offered by the government as to why an *ex parte, in camera* showing is necessary or appropriate here. Accordingly, they should be rejected.

G. The Nondisclosure Provisions of the NSL Statutes are Not Severable.

As [redacted] argued in its Petition, if this Court finds that the NSL statute's non-disclosure provisions are unconstitutional, it must invalidate the substantive provisions as well. Petitioner's Mem. at 22-24. The two sets of provisions are interdependent and thus not severable or readily susceptible to a similar limiting construction.

The Supreme Court has noted repeatedly that courts should not "rewrite a law to conform it to constitutional requirements, [where] doing so would constitute a 'serious invasion of the legislative domain,' and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (citing *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997)); *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n. 26 (1995); *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)). Further, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Stevens*, 130 S. Ct. at 1592.

Here, the NSL statute is not readily susceptible to severability or a limiting construction. The NSL statute cannot function without some secrecy provision. *See* Petitioner's Mem. at 23. This is born out in the Inspector General's 2008 review of the FBI's NSL use. According to the Inspector General, fully "97 percent of the NSLs imposed non-disclosure and confidentiality requirements" despite the fact that "some of the justifications for imposing this requirement were perfunctory and conclusory." *See Fine Statement* at 6. Because the balance of the NSL statute "is incapable of functioning independently," Congress could not have intended that "this constitutionally flawed provision . . . be severed from the remainder of the statute."[29] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

As the Court noted recently in declining to sever a section of a statute that functioned as a prior restraint (instead finding the whole statute unconstitutional), "[i]t is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications." *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010). Here, if the Court finds the

[29] As [redacted] noted in its opening brief, this is further born out by the fact that Congress attempted to redraft and preserve the NSL statute's non-disclosure requirements even after multiple courts held these invalid. Petitioner's Mem. at 23.

non-disclosure provision unconstitutional, it should invalidate the substantive provisions in the NSL statute as well.

H. The Government's Motion to Compel Is Premature.

As the government itself recognizes, Gov't Opp. Mem. at 6:20-24, Congress has determined that a recipient of an NSL may seek relief from the NSL itself and any accompanying nondisclosure requirement. A district court "may modify or set aside" an NSL "if compliance would [be] unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a). And an NSL recipient may seek an order modifying or setting aside an NSL's nondisclosure requirement. 18 U.S.C. § 3511(b). This is precisely what [redacted] has done in its Petition. And yet the government initially responded with a separate lawsuit claiming that [redacted] broke the law because it pursued its statutory remedy and now brings a motion to compel claiming that [redacted] has "failed to comply" with the NSL. This is despite the fact that the Court has not yet ruled on [redacted] properly filed Petition for relief. Gov. Compl. at ¶ 35; Mot. to Comp. Br. at 3.

[redacted] has not failed to comply with the law or the NSL. It has simply exercised its right to petition the Court to modify or set aside the NSL and the accompanying nondisclosure requirement, a right provided by Congress in section 3511. The government's response is premature; it is as improper as a civil litigant filing a motion to compel production of discovery while the discovery recipient has a motion pending for a protective order. *See* Fed. Rule Civ. P. 37(d)(2) (failure to comply with a discovery request is excused if "the party failing to act has a pending motion for a protective order"). This is particularly concerning where, as here, [redacted] has raised profound First Amendment concerns about the NSL and nondisclosure requirement, since courts considering whether to quash or modify a subpoena apply a heightened standard of review where First Amendment interests might be harmed. *See Highfields Capital Mgmt.*, 385 F. Supp. 2d at 974-6 (N.D. Cal. 2005). Moreover, failure to raise those concerns before compliance could render the issue moot.

Just as a party's pending motion for a protective order is a defense to a motion to compel in civil discovery, so too here the Court should deny the government's motion to compel. There is no need for this Court to "compel" [redacted] to do anything at this point, and no basis on which it can do so before it has decided the issues raised in [redacted] Petition under section 3511. [redacted] has

repeatedly assured the government that, should the Court deny [redacted] Petition, the company will either comply with the NSL or exercise other appropriate statutory remedies. The government has made no showing to the contrary.

III. CONCLUSION

Based upon the foregoing, [redacted] respectfully requests that the NSL be set aside and that the NSL statute be declared unconstitutional. [redacted] also requests that the Court deny the government's motion to compel [redacted] to comply with the NSL.

DATED: September 9, 2011

ELECTRONIC FRONTIER FOUNDATION

By: _____
Matthew Zimmerman

Cindy A. Cohn
Lee Tien
Matthew Zimmerman
Marcia Hofmann
Jennifer Lynch
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: 415-436-9333
Facsimile: 415-436-9993

RICHARD R. WIEBE
rwiebe@bermanesq.com
LAW OFFICE OF RICHARD R. WIEBE
1 California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Facsimile: (415) 433-6382

Attorneys for Petitioner
[redacted]

CERTIFICATE OF SERVICE

I, Matthew Zimmerman, certify that on this 9th day of September, 2011, pursuant to prior agreement of the parties, I will cause to be served electronically on the government's counsel the petitioner's PETITIONER [redacted] 1) OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH NSL AND (2) REPLY IN SUPPORT OF PETITION TO SET ASIDE NSL AND ITS NONDISCLOSURE REQUIREMENT. Pursuant to prior agreement of the parties, I will serve these documents via email to the government's counsel Steven Y. Bressler, Steven.Bressler@usdoj.gov.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 9, 2011, at San Francisco, California.

Matthew Zimmerman