IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-cv-001180 **FILED UNDER SEAL** PURSUANT TO 18 U.S.C. § 3511(d)

UNOPPOSED MOTION FOR PARTIAL UNSEALING

Petitioner, the Attorney General of the United States of America, moves the Court for an Order partially unsealing this matter, including by partially unsealing the following substantive filings in this matter that are currently under seal:

(1) The Attorney General's Petition for Judicial Review and Enforcement of a National Security Letter ("NSL");

(2) The Memorandum of Law in Support of the Petition;

(3) The Unclassified Declaration of Acting Assistant Director Donald Good;

(4) Respondent's Opposition to Petition;

(5) Exhibit 1 to Respondent's Opposition to Petition;

(6) The NSL attached to Exhibit 1;

(7) Petitioner's Reply in Support of the Petition;

(8) Respondent's Sur-Reply in Opposition to Petition;

(9) Petitioner's Further Response in Support of Petition;

(10) The Court's September 17, 2015 Memorandum and Order.

The grounds for this motion are:

1) The Attorney General's Petition and memorandum in support thereof asked the Court to enforce the nondisclosure obligation of a National Security Letter ("NSL") issued to and served upon respondent by the FBI as authorized by statute, 18 U.S.C. § 2709. The Attorney General brought her Petition pursuant to 18 U.S.C. § 3511, which provides that "[p]etitions, filings, records, orders, and subpoenas must . . . be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) . . . ." 18 U.S.C. § 3511(d).

2) On September 17, 2015, the Court issued a Memorandum and Order granting the Attorney General's Petition. In doing so, the Court found that "[t]he materials in this case must be kept under seal to prevent the unauthorized disclosure of the Government's investigative activities."

3) In its September 17, 2015 opinion, the Court also noted that the Government had "promised redacted versions of the filings in this case and [a] motion to partially unseal the redacted filings."

4) In accord with 18 U.S.C. § 3511(d), in the attached, public versions of the ten documents listed above, the FBI has redacted sensitive national security and/or law enforcement information. This material would, if made public, lead to the unauthorized disclosure of factual information concerning the NSL or otherwise may be expected to "result [in] a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *See* 18 U.S.C. § 2709(c)(1).

5) The properly sealable, and still-sealed information redacted by Petitioner in the proposed public versions of the ten documents includes, but is not limited to, the identity of respondent and information that could lead to the identification of respondent or to conclusions about the scope, nature, or other important facts pertaining to the underlying FBI investigation.
6) Petitioner has consulted with counsel for Respondent, and the parties have agreed that the ten documents listed above can and should be made public in the attached, redacted versions.

Accordingly, Petitioner requests that the Court enter an Order granting this motion and unsealing this case on the public docket, as follows:

1) The case should be captioned as *Loretta E. Lynch, Attorney General v. Under Seal*, with Respondent's counsel identified as "Under Seal"[1];
2) The attached, redacted versions of the ten documents listed above should be placed on the public record;
3) This motion should be unsealed and placed on the public record, along with the Court's order partially unsealing this matter.
4) Any other document currently under seal in this case should not be unsealed.

Dated: November 19, 2015

Respectfully submitted,

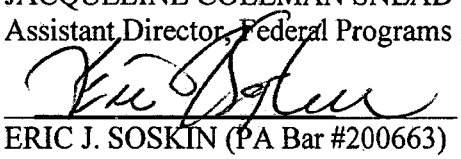
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROD J. ROSENSTEIN

[1] It is public information that counsel in this matter represent Respondent. Thus, there is good reason to believe that public identification of counsel could assist in the exposure of the identity of Respondent.

United States Attorney

JACQUELINE COLEMAN SNEAD
Assistant Director, Federal Programs Branch



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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

IN RE NATIONAL SECURITY LETTER	Case No.
	FILED UNDER SEAL
	PURSUANT TO 18 U.S.C. § 3511(d)

PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF A NATIONAL SECURITY LETTER PURSUANT TO 18 U.S.C. § 3511(c)

Petitioner Eric Holder, Attorney General of the United States of America, brings this petition for judicial review to enforce compliance with the nondisclosure provisions of a National Security Letter, and states as follows:

INTRODUCTION

1. As part of an authorized national security investigation by the Federal Bureau of Investigation ("FBI"), on [(G)] the FBI served on and/or issued to respondent [(G)] ("respondent") a National Security Letter ("the NSL"), as authorized by statute, 18 U.S.C. § 2709, seeking limited and specific information necessary to the investigation. In the NSL, an authorized FBI official certified to respondent that disclosure of the fact or contents of the NSL may, *inter alia*, endanger national security. As a result, disclosure of the fact or contents of the NSLs is prohibited by statute, 18 U.S.C. § 2709, as applied to respondent.

2. The NSL informed respondent that, if respondent objected to the nondisclosure obligation imposed by statute and the NSL and so informed the FBI, then the FBI would initiate judicial review of the nondisclosure requirement within 30 days thereafter.

3. Respondent did not object to providing the information requested in the NSL or to complying with the nondisclosure requirement. Respondent provided the information requested and, upon information and belief, has complied with the nondisclosure requirement to date.

4. Respondent will no longer voluntarily comply with the nondisclosure requirement of the NSL. On March 24, 2015, respondent provided constructive and actual notice to the FBI that it will not continue to comply with the NSL nondisclosure requirement absent Court action. However, authorized FBI officials have certified pursuant to law, 18 U.S.C. § 2709(c), that there is good reason to believe that disclosure of the fact or contents of the NSLs will result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person. An authorized, senior FBI official has likewise recently determined that there is good reason to believe that disclosure of the fact or contents of the NSL will result in one of those harms. For those reasons, the Attorney General brings this petition to protect the national security and enforce the law. This Court should enter an Order declaring that the respondent is bound by the nondisclosure provisions of 18 U.S.C. § 2709(c), as applied to respondent here.

JURISDICTION AND VENUE

5. The Court has jurisdiction pursuant to 18 U.S.C. § 3511(c), which provides that, when the recipient of an NSL "fail[s] to comply with [the] request for records, a report, or other information," the Attorney General "may invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request." The NSL requests at issue here included notification and imposition of the nondisclosure requirement. *Accord* 18

U.S.C. § 2709(c)(2) (among other things, an NSL "notif[ies] the person or entity to whom the request is directed of the nondisclosure requirement."). Under section 3511(c), this Court "may issue an order requiring the person or entity to comply with the request," including its nondisclosure requirement, and failure to obey the order of the Court may be punished as contempt. *Id.* The Court also has jurisdiction under 28 U.S.C. § 1345.

6. Venue lies in the District of Maryland pursuant to 18 U.S.C. § 3511(c) and 28 U.S.C. § 1391. (G)

PARTIES

7. Petitioner is the Attorney General of the United States. The Attorney General is the nation's chief law enforcement officer and the head of the United States Department of Justice, an Executive Agency of the United States of America. The FBI is a law enforcement agency within the Department of Justice.

8. Respondent is a corporation organized and existing under the laws of (G) with a principal place of business at (G) Respondent offers electronic communications services to its customers.

STATUTORY BACKGROUND

9. Title 18 U.S.C. § 2709 authorizes the FBI to issue NSLs in connection with foreign counterintelligence and counterterrorism investigations. The FBI has similar authority to issue NSLs under the National Security Act of 1947, the Fair Credit Reporting Act, and the Right to Financial Privacy Act. *See* 12 U.S.C. §§ 3414(a)(1), 3414(a)(5); 15 U.S.C. § 1681u, 1681v; 50 U.S.C. § 436.

10. Subsections (a) and (b) of § 2709 authorize the FBI to request "subscriber information" and "toll billing records information," or "electronic communication transactional

records," from wire or electronic communication service providers. In order to issue an NSL, a designated official must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities . . . ." *Id.* § 2709(b)(1)-(2). When an NSL is issued in connection with an investigation of a "United States person," the same officials must certify that the investigation is "not conducted solely on the basis of activities protected by the first amendment . . . ." *Id.*

11. To protect the secrecy of counterintelligence and counterterrorism investigations, § 2709(c) permits the application of a nondisclosure obligation to an NSL recipient. Section 2709(c) prohibits disclosure when a designated FBI official certifies, prior to the issuance of the NSL, that "otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 2709(c)(1). When such a certification is made, the NSL itself notifies the recipient of the nondisclosure requirement. *Id.* § 2709(c)(2).

12. Title 18 U.S.C. § 3511 provides for judicial review of an NSL that has been issued.

13. Section 3511(a) authorizes the recipient of an NSL to petition a district court "for an order modifying or setting aside the request" for information contained in the NSL.

14. Section 3511(b) authorizes the recipient of an NSL to petition a district court "for an order modifying or setting aside a nondisclosure requirement imposed in connection with" the NSL. *Id.* § 3511(b)(1).

15. Section 3511(c) authorizes the government to petition a district court for enforcement of an NSL. Section 3511(c) provides that, when the recipient of an NSL "fail[s] to

comply with [the] request for records, a report, or other information," the Attorney General "may invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request." Where a designated official has certified the need for nondisclosure pursuant to 18 U.S.C. § 2709(c), the NSL "request" includes notification and imposition of the nondisclosure requirement. *Id.* § 2709(c)(2). Pursuant to 18 U.S.C. § 3511(c), a court "may issue an order requiring the person or entity to comply with the request," including its nondisclosure requirement, and failure to obey the order of the court may be punished as contempt. *Id.*

16. In response to the holding of the United States Court of Appeals for the Second Circuit in *John Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (modifying a nationwide injunction by the Southern District of New York), in February 2009 the FBI modified its NSL practices to ensure that government-initiated judicial review is available to all recipients of NSLs that impose a nondisclosure obligation pursuant to 18 U.S.C. § 2709(c). Since February 2009, therefore, all such NSLs are required to include a notice that informs recipients of the opportunity to contest the nondisclosure requirement through government-initiated judicial review.

17. Since February 2009, all NSLs issued nationwide and including imposition of a nondisclosure obligation pursuant to 18 U.S.C. § 2709(c), including the NSL to respondent, have informed the recipient that, *inter alia*, the recipient has a right to challenge the NSL in accordance with 18 U.S.C. § 3511(a) and (b)(1) if compliance would be unreasonable, oppressive, or otherwise unlawful.

18. Since February 2009, all NSLs issued nationwide and including imposition of a nondisclosure obligation pursuant to 18 U.S.C. § 2709(c), including the NSL to respondent, have

informed the recipient that, *inter alia*, the recipient has the right to challenge the nondisclosure requirement; and that if the recipient wishes to make a disclosure that is prohibited by the nondisclosure requirement, it must notify the FBI, in writing, of its desire to do so within 10 calendar days of receipt of the NSL. Such NSLs have provided an appropriate address or fax number where such objection may be sent, and stated that, if the recipient sends such notice within 10 calendar days, the FBI will initiate judicial proceedings in approximately 30 days in order to demonstrate to a federal judge the need for nondisclosure and to obtain a judicial order requiring continued nondisclosure.

19. In light of respondent's objection to compliance with the NSL absent court action, *see* ¶ 4, *supra*, the Attorney General hereby petitions for judicial review of the NSL and, therefore, seeks judicial review and enforcement of the NSL.

STATEMENT OF THE CLAIM

Respondent and Electronic Communication Services

20. Respondent offers services that provide its subscribers the means to communicate electronically with others.

21. The various communications features that respondent provides to its users are a "wire" or "electronic communications service" as that term is defined in 18 U.S.C. § 2510(15). Respondent is the provider of this electronic communications service.

The FBI's Investigation

22. During the course of an authorized national security investigation carried on by the FBI, the FBI determined that it required certain limited information relating to an account for services from respondent. The Attorney General will provide a fuller description of that underlying investigation, including the FBI's legitimate need for continued nondisclosure of the

NSL request, in a classified, *ex parte* submission to the Court for *in camera* review pursuant to 18 U.S.C. § 3511(e).

23. To obtain information to further the FBI's authorized investigation, the FBI issued to and/or served respondent with the NSL on (G) requesting limited, specific information as authorized by § 2709. The NSL did not request the content of any communication. Though not issued to and/or served on respondent until (G) the NSL is (G)

24. The NSL served on respondent was issued (G) (G) under the authority of 18 U.S.C. § 2709. (G) certified in the NSL, in accordance with 18 U.S.C. § 2709(b), that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.

25. The NSL directed respondent to provide the records requested to the FBI.

26. The NSL also informed respondent of the prohibition against disclosing the contents of the NSL, certifying, in accordance with 18 U.S.C. § 2709(c), that such disclosure could result in an enumerated harm that is related to an "investigation to protect against international terrorism or clandestine intelligence activities."

27. The NSL notified respondent that, in accordance with 18 U.S.C. § 3511(a) and (b), respondent had a right to challenge the letter if compliance would be unreasonable, oppressive, or otherwise illegal.

28. The NSL also advised that respondent had 10 days to notify the FBI as to whether it desired to challenge the nondisclosure provision. The NSL further advised that if respondent advised the FBI within 10 calendar days that it objects to the nondisclosure provision, the

government would initiate judicial proceedings within approximately 30 days thereafter in order to demonstrate to a federal judge the need for nondisclosure pursuant to § 2709(c).

29. As noted, respondent provided the FBI with the information requested by the NSL and, upon information and belief, has complied with the nondisclosure requirement to date.

Respondent's Objection to Continued Compliance with the National Security Letter

30. Respondent has actually and constructively objected to continued compliance with the nondisclosure requirement of the NSL by letter transmitted to the FBI on March 24, 2015.

31. Designated FBI officials have certified pursuant to 18 U.S.C. § 2709 that the information sought in the NSL at issue here is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and that disclosure of the fact that the FBI has sought or obtained access to the information sought by the NSL 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. *See* 18 U.S.C. §§ 2709(b), (c)(1). A designated, senior FBI official has recently reviewed, *inter alia*, the NSL to respondent and redetermined as of April 2015 that disclosure of the facts that the FBI has sought or obtained access to the information sought by the NSL 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.

32. Pursuant to 18 U.S.C. § 3511(e), the Attorney General will make available to the Court *ex parte* and *in camera* further evidence, including classified information, supporting the

need for obtaining the information sought by the NSL to respondent and the damage reasonably expected to flow from disclosure of the NSL.

33. Respondent has demonstrated that, absent Court action, it will not continue to comply with the nondisclosure requirement of the NSL lawfully issued pursuant to 18 U.S.C. § 2709.

34. Respondent's failure to comply with the nondisclosure requirement of the lawfully issued NSL would violate federal law, 18 U.S.C. § 2709.

35. Respondent's failure to comply with the nondisclosure requirement of the lawfully issued NSL would interfere with the United States' vindication of its sovereign interests in law enforcement, counterintelligence, and the protection of national security.

RELIEF REQUESTED

WHEREFORE, the Attorney General of the United States requests the following relief:

1. That this Court enter an Order pursuant to 18 U.S.C. § 3511(c) declaring that the respondent is bound by the provisions of 18 U.S.C. § 2709 as applied to respondent and the NSL, including the requirement that the respondent continue to abide by the nondisclosure provision of 18 U.S.C. § 2709(c) and the NSL.

2. That this Court enter an Order pursuant to 18 U.S.C. § 3511(c) affirming that there is good reason to believe that disclosure of the NSL served on respondent may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of a person; and that the respondent is bound by the nondisclosure provisions of 18 U.S.C. § 2709 as applied to respondent and the NSL, including the requirement that respondent not disclose the fact or contents of the NSL to any person (other

than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request).

3. That this Court enjoin respondent, in accordance with 18 U.S.C. §§ 2709(c) and 3511(c) as applied here, from disclosing to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the FBI has sought from respondent or obtained access to the information or records requested by the NSL under 18 U.S.C. § 2709.

5. That this Court grant the Attorney General such other and further relief as may be just and proper.

Dated: April 23, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROD J. ROSENSTEIN
United States Attorney

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Attorneys for the Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE NATIONAL SECURITY LETTER	TO BE ~~FILED UNDER SEAL~~ Case No. 15-cv-01180-JKB *SEALED*

DECLARATION OF DONALD GOOD,
ACTING ASSISTANT DIRECTOR,
CYBER DIVISION, FEDERAL BUREAU OF INVESTIGATION

I, Donald Good, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I currently am the Acting Assistant Director of the Cyber Division, Federal Bureau of Investigation (FBI), United States Department of Justice, a component of an Executive Department of the United States Government. I also serve as the permanent Deputy Assistant Director of Intelligence for the Cyber Division.

2. The Cyber Division manages investigations to identify, pursue, and defeat cyber adversaries targeting global U.S. interests, national information infrastructure, and Internet-facilitated criminal activity. It also supports FBI Counterterrorism, Counterintelligence, and Criminal investigations that call for technical expertise. These investigations often have international facets and national economic implications.

3. I base the statements contained in this declaration upon my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and information obtained from Special Agents and other FBI and Department of Justice employees. I have reached my stated conclusions in accordance with this information.

4. The FBI is providing this sealed, but unclassified, declaration to demonstrate two things. First, I discuss generally the importance of NSLs as a tool as well as the importance of continued nondisclosure of information that could endanger national security or interfere with authorized national security investigations. See 18 U.S.C. § 2709(c); 18 U.S.C. § 3511(b). Additional information, addressing the NSL at issue in this case, is contained in a classified declaration submitted ex parte and in camera. Second, I address the FBI's adherence to Doe v. Mukasey, 549 F.3d 861 (2d Cir. 2008).

5. As an official charged with general supervisory responsibilities for the FBI's cyber investigations, I have concluded the disclosure of information contained in the NSL in question would reveal sensitive FBI (G)

(G)

I. NSLs Are A Critical Tool In National Security Investigations

6. NSLs serve a similar function as administrative or grand jury subpoenas in that they allow the FBI to obtain information, without advance court authorization but subject to judicial review. Unlike grand jury subpoenas, however, NSLs only permit the FBI to obtain a narrow set of types of information and from limited sources, such as communications service providers and financial institutions. The FBI typically uses NSLs early in national security

investigations to develop leads to assist in determining, among other things, investigative subjects' true identities, actions, intent, associates, and financial transactions. Just as critically, as with the use of grand jury subpoenas, the FBI uses NSLs to remove individuals from suspicion and to permit us to focus on more promising leads with our resources.

7. The FBI's legal authority to issue NSLs derives from multiple sources: the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2709; the Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5); the Fair Credit Reporting Act, 15 U.S.C. § 1681u and v; and the National Security Act, 50 U.S.C. § 436.

8. Under ECPA, the FBI may obtain non-content subscriber information, toll billing records, and electronic communication transactional records from a wire or electronic communications service provider, such as a telephone company or an Internet service provider. The FBI uses this NSL authority most frequently.

9. Examples of electronic communication transactional records that the FBI may obtain lawfully are account numbers, physical addresses, subscriber telephone numbers, and other non-content information that is analogous to subscriber information or toll billing records for telephones. Significantly, the FBI cannot obtain any contents of communications through an ECPA NSL.

10. FBI policy requires that all NSLs incorporate a certification by a high ranking official, at the level of a Special Agent in Charge or above, that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted

solely on the basis of activities protected by the First Amendment to the Constitution of the United States. NSLs are an important and frequently used tool for the FBI.

II. The Importance Of Nondisclosure

11. By definition, the information sought through an NSL is relevant to an ongoing investigation of international terrorism or clandestine intelligence activities. Thus, only under highly unusual circumstances such as where the investigation is already overt is an NSL sought without invoking the nondisclosure provision. In the vast majority of cases, the investigation is covert and thus disclosure of receipt of an NSL and the information it seeks would seriously risk one of the statutory harms, i.e., a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person.

12. Disclosure of NSLs to targets or other individuals who may publicize the receipt or information sought may prematurely reveal national security investigations to targets, causing them to change behavior patterns, such as by circumventing detection, destroying evidence, and expediting plans of attack.

13. Moreover, disclosure can compromise the safety of confidential human sources or undercover employees participating in investigations, and can also cause individuals who are in league with the subjects of investigations to alter their behavior, such as avoiding detection, using other operatives who are not known to the United States or other deleterious actions. Disclosure of NSLs could also prompt subjects to communicate with the subjects of related investigations, jeopardizing those investigations as well.

14. Finally, if targets or others could learn of NSLs and their contents through the expedient of public civil litigation, this could harm the FBI's relationships with other intelligence agencies or nations that share information with the FBI, as these entities may well conclude the FBI is not a suitable and reliable intelligence partner, capable of acting covertly, when legally justified to protect an investigation.

15. In light of these concerns and those set forth in the ex parte submission, I certify, in accordance with Section 2709(c), that disclosure of the NSL at issue in this case, including its contents, may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person.

III. FBI Compliance With Doe v. Mukasey

16. In Doe, 549 F.3d 861, the recipient of an ECPA NSL challenged the constitutionality of the nondisclosure requirements found in Sections 2709(c) and 3511(b) of Title 18. The court of appeals struck down as unconstitutional the nondisclosure provisions to the extent that those provisions failed to provide for government-initiated judicial review. However, the court of appeals said that the government could conform its NSL practice to the Constitution if it advised NSL recipients that they could give the government prompt notice of their intent to contest the nondisclosure requirements, triggering a reciprocal obligation on the government's part to initiate proceedings to enforce the nondisclosure requirements. Pursuant to the Doe opinion, the government bears the burden to prove that there exists good reason to believe that disclosure may risk one of the enumerated harms.

17. After the Doe decision, the FBI promptly implemented the Second Circuit's reciprocal notice procedure. Since February 2009, the FBI has given each recipient of an NSL that included a nondisclosure certification specific written notice that the recipient can notify the FBI if the recipient wishes to be released from its nondisclosure obligation and to have the FBI initiate a court proceeding to justify the nondisclosure certification. The computer system used to generate NSLs, more fully described below, automatically includes this language for all NSLs that have nondisclosure provisions.

18. Specifically, the FBI includes the following text, or text that is substantially similar, in every NSL containing nondisclosure certifications, including the NSL served on respondent:

> You also have the right to challenge the nondisclosure requirement set forth above. If you wish to make a disclosure that is prohibited by the nondisclosure requirement, you must notify the FBI, in writing, of your desire to do so within 10 calendar days of receipt of this letter. That notice must be mailed or faxed to the XXXXX Division, attention: XXXX XXXXX (phone number: XXX-XXX-XXXX), with a copy to FBI HQ, attention: General Counsel (fax number: XXX-XXX-XXXX) and must reference the date of the NSL and the identification number found on the upper left corner of the NSL. If you send notice within 10 calendar days, the FBI will initiate judicial proceedings in approximately 30 days in order to demonstrate to a federal judge the need for nondisclosure and to obtain a judicial order requiring continued nondisclosure. The nondisclosure requirement will remain in effect unless and until there is a final court order holding that disclosure is permitted.

19. The FBI has developed an automated computer program--the NSL subsystem--through which the FBI generates standardized NSLs. The NSL subsystem is part of the FBI's [redacted] (H) and functions as a workflow tool that standardizes NSLs. Through this and other processes, the FBI ensures that it meets applicable legal and administrative requirements, including those set forth by the Second Circuit in Doe.

20. The NSL subsystem automatically populates NSLs with the above-referenced text advising recipients of their right to challenge the NSLs' non-disclosure requirements. By automating this process, the FBI is able to ensure that every NSL recipient receives appropriate notice of its rights and that the FBI complies with Doe's reciprocal notice requirements.

21. The NSL subsystem also ensures and documents that NSLs and supporting documentation receive review and approval in accordance with FBI policy, including review by FBI legal counsel. The FBI only prepares NSLs outside of the NSL subsystem in highly unusual circumstances such as, for example, sensitive intelligence investigations where a subject may have access to government databases. But even in the rare case when such NSLs are used, they must include the language described above, if nondisclosure is sought.

22. This NSL process has been publicly described. On March 15, 2011, former Assistant Attorney General Ronald Weich forwarded to the U.S. House Judiciary Committee the FBI's written explanation of its reciprocal notice policy and of the functioning of the FBI's NSL subsystem. This information was provided in response to questions for the record arising from a May 20, 2009, House Judiciary Committee hearing at which FBI Director Mueller testified. In addition to explaining the NSL subsystem and providing the Committee with the standard,

automatically-generated text quoted above, these responses confirmed that, "[s]ince 2/10/09, the FBI has been including the reciprocal nondisclosure language in all types of NSLs, not just in NSLs issued pursuant to 18 U.S.C. § 2709." I have attached a copy of the portion of the FBI's response providing this information as Exhibit A.

23. Attorney General Eric Holder further described the FBI's policy in a December 9, 2010 letter addressed to the Honorable Patrick Leahy, Chairman of the U.S. Senate Committee on the Judiciary. Specifically, Attorney General Holder stated that, "as of February 2009, all NSLs are required to include a notice that informs recipients of the opportunity to contest the nondisclosure requirement though the government initiated review. In most cases, this notice is automatically generated by the NSL subsystem."

24. For the NSL at issue in this litigation, the FBI provided the notice discussed above, advising the respondent of its legal right to contest the NSL's nondisclosure requirement through government-initiated judicial review, pursuant to the standard operating procedure I have described. The respondent did not object to the nondisclosure requirement at that time.

25. However, on March 24, 2015, the respondent, through counsel, advised the FBI that the respondent intended to file a petition pursuant to 18 U.S.C. 3511(b)(3) to set aside the non-disclosure provisions of the NSL. The respondent also inquired whether the government would take on the burden of initiating judicial review, as the government would have done if the respondent objected within the 10 days described in the NSL. The government informed respondent through counsel that it would assume the burden of initiating judicial review in this instance.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of May 2015.

Donald Good
Acting Assistant Director
Cyber Division
Federal Bureau of Investigation
Washington, D.C.

EXHIBIT A

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 15, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of FBI Director Robert Mueller before the Committee on May 20, 2009, at an oversight hearing. We apologize for the lengthy delay and hope that this information is of assistance to the Committee.

Please note that these responses are current as of August 19, 2009. The Office of Management and Budget has no objection to our submitting these responses to the Committee with that caveat. Please do not hesitate to call upon us if we may be of additional assistance.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

b. Please provide the exact number of NSLs issued since December 15, 2008, broken down both by the number with and without a nondisclosure requirement and by the number with and without a notice of the right to challenge the nondisclosure requirement.

Response:

From 12/15/08 through 6/30/09, the FBI issued 8,509 NSLs. Of those NSLs, 8,338 contained nondisclosure language, while 171 did not. During the same period, 6,267 NSLs contained language notifying the recipient of a right to challenge the nondisclosure provision, while 2,242 did not. It should be noted that the FBI began including language regarding the right to challenge the nondisclosure provision on 2/10/09 and all 6,267 NSLs issued since that date have included this language. No challenges have been received to date.

c. Has the FBI provided this notice to recipients of NSLs in all jurisdictions, and not just to recipients in the Second Circuit? In the future, will the FBI be providing this notice to recipients of NSLs in all jurisdictions, and not just in the Second Circuit?

Response:

The FBI has been including this "challenge" notice in all NSLs containing a nondisclosure provision since 2/10/09, regardless of jurisdiction.

d. Has the FBI been providing this notice to all recipients of NSLs, and not just to recipients constrained by a nondisclosure requirement issued pursuant to 18 U.S.C. § 2709? In the future, will the FBI be providing this notice to all recipients of NSLs, and not just to recipients constrained by a nondisclosure requirement issued pursuant to 18 U.S.C. § 2709?

Response:

Since 2/10/09, the FBI has been including the reciprocal nondisclosure language in all types of NSLs, not just in NSLs issued pursuant to 18 U.S.C. § 2709.

e. Please provide a copy of the notice the FBI is sending to NSL recipients that informs them of their right to challenge the nondisclosure provision.

Response:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-CV-001180 FILED UNDER SEAL PURSUANT TO 18 U.S.C. § 3511(d)

RESPONDENT'S OPPOSITION TO PETITION TO ENFORCE NONDISCLOSURE PROVISION

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PRELIMINARY STATEMENT

By this action, (G) is challenging the continued application of the gag order provision contained in 18 U.S.C. § 2709(c), which prevents it from disclosing information about a National Security Letter ("NSL") it received from the government over (G) Not only does the government contend that the statute prevents (G) from providing notice to the account-holder targeted in the NSL, but the government would have the Court interpret Section 2709(c) as prohibiting (G) from even acknowledging that it received an NSL during the 12-month time period in which the letter was received.

(G) is challenging the constitutionality of the application of the gag order both on a facial and as-applied basis, both with regard to its ability to inform the target of the NSL and its ability to generally acknowledge receipt of the NSL. Facially, Section 2709(c) is unconstitutional because it is an indefensible prior restraint on speech, impermissibly restricts judicial review of (G) challenge to the need for the gag order, and violates the separation of powers doctrine. Indeed, two courts that have confronted the constitutionality of Section 2709(c) have found the provision unconstitutional as written. This Court should do so as well.

On an as-applied basis, the government likely has not made a sufficient showing to prevent (G) from disclosing the information in the NSL[1] but certainly has not demonstrated what is needed under any standard of review to require (G) to hide the mere fact of receipt

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(G) believes as a matter of policy that service providers should be able to, when appropriate, disclose to a customer who is the target of the NSL that the provider received and complied with an NSL regarding the customer. Here, any government claims regarding the harms of such disclosure were made in the Classified Declaration of Donald Good, which (G) does not have access to. Thus (G) is not able in this particular situation to take a position regarding whether there is a "good reason," or any reason for that matter, to believe that disclosing the existence of the NSL to the target would result in one of the harms enumerated in the statute. (G) also believes it is entitled to know more about the basis asserted in the classified declaration given the clearance level of its counsel.

of the NSL. The government has failed to show that it would cause serious damage to national security if (G) —a company with more than (G) registered users—disclosed that it received (G) In fact, under the Department of Justice's ("DOJ") own reporting guidelines, the DOJ has essentially conceded that an entity reporting that it has received (G) (G) causes no harm.

In light of the unconstitutionality of the statute, as already determined by two prior courts, and in light of the insufficient showing made by the government in the instant case, (G) should not be restrained from disclosing the information in the NSL served in this case and certainly not from acknowledging the mere receipt of that NSL.[2]

BACKGROUND

A. The National Security Letter Statutory Framework

The statute under which the government issued the NSL to (G) —18 U.S.C. § 2709—grants sweeping powers to the FBI. First, Sections 2709(a) and (b) together allow the FBI to, without any prior judicial authorization or review, compel electronic communication

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[2] (G) does not believe that this dispute should be litigated before this Court in secret. Rather, given the ongoing active public debate about the appropriate balance between transparency and law enforcement's interest in conducting secret investigations, the briefing in this matter should be unsealed, with appropriate redactions to conceal the name of the service provider at issue and any details regarding the specific NSL at issue. As the Fourth Circuit has acknowledged, the public has an "understandable interest in law enforcement systems and how well they work" and "legitimate concerns about methods and techniques of police investigation." *In re Application and Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991). Blanket assertions of the need to maintain secrecy to ensure the success of an ongoing investigation cannot justify litigating this matter entirely under seal. *See Virginia Dep't. of State Police v. Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) ("[N]ot every release of information contained in an ongoing criminal investigation will necessarily affect the integrity of the investigation."). (G) s prepared to bring a motion to initiate the unsealing process if necessary, although the Court can also do so on its own initiative. *See, e.g., Id.* at 575 (*citing Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978)) (noting "the decision whether to grant or restrict access to judicial records or documents is a matter of a district court's 'supervisory power,' and . . . discretion"). *See also Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497, 506 (E.D. Pa. 2004) ("The law is clear that it is within the Court's discretion, *sua sponte*, to unseal the record.").

service providers such as (G) to provide customer records[3] if the FBI believes that such information is "relevant" to an authorized investigation to protect against international terrorism or clandestine intelligence activities. Second, Section 2709(c) provides that upon a certification from the Director of the FBI, the recipient of an NSL cannot disclose to any person "that the [FBI] has sought or obtained access to information or records under this section." Thus, not only can the FBI prohibit an NSL recipient from disclosing the NSL to the customer whose information the government requested, the recipient cannot even disclose that it received an NSL at all. And as long as the FBI certifies that nondisclosure is "necessary," the prohibition extends indefinitely absent any action on the part of the service provider.

The FBI can—and with alarming regularity does—serve on providers NSLs containing blanket prohibitions on the disclosure of their existence. At least as of 2007, 97 percent of the more than 200,000 NSLs issued by the government were issued with nondisclosure orders. *In re Nat'l Sec. Letter*, 930 F.Supp.2d 1064, 1074 (N.D. Cal. 2013). Such NSLs are not subject to any court oversight at all unless and until the NSL recipient petitions a district court to review the NSL or its nondisclosure requirement. The secrecy required by the NSL statute is not "analogous to [] grand jury and other investigatory nondisclosure provisions" as the government suggests. *See* Gov't Mem. of Law in Support of Petition to Enforce Nondisclosure Provision ("Mem.") at 15. For example, a grand jury witness can only be prevented from communicating information he or she learned "as a result of his participation in the proceedings of the grand jury." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). He or she cannot be gagged from disclosing the fact of her subpoena or testimony. *Id.* at 636-37.

[3] The FBI may only request name, address, length of service, and long distance toll billing records under Section 2709, and cannot demand electronic communication transactional records. *See* Letter re: Requests for Information Under the Electronic Communications Privacy Act, Nov. 5, 2008 ("2008 OLC Letter") at 2-3.

The secrecy requirements in the NSL statute are also unlike confidentiality requirements in civil discovery where a party *voluntarily* seeks out information, and as a condition of receiving it *agrees* to keep the information confidential.

Put simply, NSL statutes are unique in that the executive branch can self-issue both demands for customer information and accompanying nondisclosure requirements without any prior judicial involvement or opportunity for the ultimate target of an investigation to contest the underlying information request. NSLs are also unique because unlike other forms of legal process, they are not issued in connection with an ongoing criminal proceeding. Thus, absent action by a service provider recipient, NSLs may never be subject to any scrutiny in the way that grand jury subpoenas, warrants, or other orders seeking evidence for prosecution are. As one district court explained, "NSLs such as the ones authorized by § 2709 provide fewer procedural protections to the recipient than any other information-gathering technique the Government employs to procure [similar] information. . . ." *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 484-491 (S.D.N.Y.2004) (describing the differences between NSLs and other processes), *vacated sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006). *See also* Liberty and Security in a Changing World: Report and Recommendations from the President's Review Group on Intelligence and Communications Technologies 91-93 (2013) (noting that other investigative tools have independent judicial checks and/or allow a target to challenge them in court).[4]

Even where a service provider does undertake to seek judicial review of an NSL or its nondisclosure requirement, that review is unconstitutionally limited by statute. The only mechanism for judicial review of NSLs and any accompanying nondisclosure orders is 18 U.S.C.

[4] *Available at* http://www.whitehouse.govlsites/default/files/docs/ 2013-12--12_rg_final_ report.pdf.

§ 3511. Under that statue, a court may only modify or set aside an NSL "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a).

Judicial review of the nondisclosure provision is even more curtailed. If, like here, the NSL is (G) old, a specified government official need only re-certify that disclosure ***may*** result in "a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 3511(b)(3). If the government provides such certification, the court can only alter or modify the NSL's nondisclosure requirement if there is "no reason to believe that disclosure may" have the impact the government says it may, and the court must treat the certification as "conclusive unless the court finds that the recertification was made in bad faith." *Id.*

B. The *Mukasey* and *In re National Security Letter* Decisions

Two courts have found the NSL statute, and particularly the nondisclosure provision in Section 2709(c), to be unconstitutional as written. The Second Circuit in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), found the plain language of the statute unconstitutional but interpreted the statute in a way that purportedly saved the statute constitutionally. The other court, the Northern District of California in *In re National Security Letter*, struck the statute down because it violated the First Amendment. *In re Nat'l Sec. Letter*, 930 F.Supp.2d at 1081.

In *Mukasey*, the Second Circuit concluded that while Section 2709(c) may not be a "classic prior restraint" or a "typical" content-based restriction on speech, its nondisclosure provision clearly restrained speech of a particular content—significantly, speech about government conduct. *Mukasey*, 549 F.3d, at 877-8. It also found that application of the procedural safeguards announced in *Freedman v. State of Md.*, 380 U.S. 51 (1965), particularly

the third *Freedman* prong requiring the government to initiate judicial review, was necessary. *Mukasey*, 549 F.3d at 881 ("in the absence of Government-initiated judicial review, subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards.")[5]

The Second Circuit concluded that as written, the statute failed to satisfy *Freedman's* procedural safeguards. But to avoid constitutional deficiencies, the Court read into the statute various requirements that do not exist anywhere in the statute's text. For example, the Second Circuit added a requirement that the government inform NSL recipients they could contest the nondisclosure requirements and if contested, the government would initiate judicial review within 30 days, and that the review could conclude within 60 days. *Mukasey*, 549 F.3d at 879, 883-884.[6]

With respect to the district court's ability to review the adequacy of the FBI's justification for nondisclosure, the Second Circuit adopted three concessions by the government that allegedly narrowed the limitations on judicial review. First, the Second Circuit accepted the government's litigation position that the nondisclosure requirement applies *only* if the FBI certifies that an enumerated harm related to an authorized investigation to protect against international terrorism or clandestine intelligence activity may occur. *Id.* 875. Second, it accepted the government's position that Section 3511(b)(2) should be read to mean that a court may alter or modify the nondisclosure agreement unless there is "some reasonable likelihood" that the enumerated harm will occur. *Id.* at 874. Third, the court accepted the government's agreement that it would bear the burden of proof to persuade a district court that there is a good

[5] The procedures required by *Freedman* are that (1) any restraint imposed prior to judicial review must be limited to a specified brief period; (2) any restraint prior to final judicial determination must be limited to the shortest fixed period compatible with sound judicial restraint; and (3) the burden of going to court to suppress speech and the burden of proof must be placed on the government. *Freedman*, 380 U.S. at 58-59.

[6] This process was followed in this case. (G) is therefore not challenging the NSL on this ground.

reason to believe that disclosure may risk one of the enumerated harms; and that the district court must find that such a good reason exists. *Id.* at 875–76. The Second Circuit affirmed, however, the district court's holding that Section 3511(b)(2) and (b)(3)'s provision that government certifications must be treated as "conclusive" is not "meaningful judicial review" under the First Amendment, and read that language out of the statute. *Id.* at 882.

Five years after the Second Circuit's ruling in *Mukasey*, the *In re National Security Letter*, court likewise concluded that Sections 2709(c) and 3511(b) were unconstitutional. The court found that the nondisclosure provisions were not narrowly tailored to serve the compelling government interest without unduly burdening speech. *In re Nat'l Sec. Letter*, 930 F.Supp.2d at 1075. The court reasoned that "the pervasive use of nondisclosure orders, coupled with the government's failure to demonstrate that a blanket prohibition on recipients' ability to disclose the mere fact of receipt of an NSL is necessary to serve the compelling need of national security, creates too large a danger that speech is being unnecessarily restricted." *Id.* at 1076 (*citing 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 more sensitive tools ....")). The court also found that "[i]n addition to the breadth of the non-disclosure provision, the Court is concerned about its duration. Nothing in the statute requires, or even allows the government to rescind the non-disclosure order once the impetus for it has passed." *In re Nat'l Sec. Letter*, 930 F.Supp.2d at 1076.

The *In re National Security Letter* court also concluded that the way in which the statute "circumscribe[d]" a court's ability to modify or set aside nondisclosure NSLs—only if it found that there was no reason to believe that a harm may result—was "incompatible with the court's

duty to searchingly test restrictions on speech." *Id.* at 1077-78. Finally, the court "agree[d] with the Second Circuit that the statute's direction that courts treat the government's certification as 'conclusive' is likewise unconstitutional." *Id.* at 1078.

In finding the NSL statute unconstitutional, the Northern District of California expressly rejected the Second Circuit's "narrowing" constructions of the statute in *Mukasey*. Specifically, the court explained that "even if the FBI is in fact complying with both the procedural and substantive requirements imposed by the Second Circuit for all NSLs issued, the fact that the statute is facially deficient . . . presents too great a risk of potential infringement of First Amendment rights to allow the FBI to side-step constitutional review by relying on its voluntary, nationwide compliance with the Second Circuit's limitations." *Id.* at 1074 (internal citations omitted). The Northern District of California thus enjoined the government from issuing NSLs under Section 2709 or from enforcing the nondisclosure provision in the case before it or any other case. *Id.* at 1081. The District Court stayed enforcement of its judgment, however, pending appeal. The matter is currently on appeal to the Ninth Circuit.

C. The Attorney General's Modified Reporting Allowances

In addition to the *Mukasey* and *National Security Letter* cases, providers have challenged the restrictions on speech posed by various forms of national security process with similar nondisclosure provisions in the Foreign Intelligence Surveillance Court ("FISC"). Specifically, in June 2013 Google instituted a FISC action seeking a declaratory judgment that it had a First Amendment right to publish the total number of requests it receives under various national security authorities and the total number of users or accounts encompassed within such requests. *See* Motion For Declaratory Judgment Of Google's First Amendment Right To Publish Aggregate Information About FISA Orders, June 18, 2013, Docket No. Misc. 13-03. Similar

actions were subsequently filed by Microsoft, Facebook, Yahoo!, and LinkedIn, and consolidated in a single proceeding.[7]

Rather than fully litigating the issue, the government offered a modest change in its interpretation of the nondisclosure provisions accompanying these forms of process. Specifically, on January 27, 2014, Deputy Attorney General James Cole issued a letter outlining certain "additional ways in which the government will permit [companies] to report data concerning requests for customer information." *See* Letter from James Cole, Deputy Att'y General, Wash. D.C. to Colin Stretch, Vice President and General Counsel, Facebook, et al. (Jan. 27, 2014) (on file with the Federation of American Scientists).[8] Under these new guidelines, the government will not seek to enforce various nondisclosure provisions where providers report in separate categories "the number of NSLs received, reported in bands of 1000 starting with 0-999." *Id.* at 2.

Even after this change, however, a provider that has never received an NSL can still report it has never received an NSL because the non-disclosure requirements under Section 2709(c) only apply once a provider first receives an NSL. But a provider that receives one NSL can only report that it has received between 0-999 NSLs. And a provider who receives 1,200 NSLs can acknowledge receiving between 1,000 and 1,999 NSLs. *Id.* The new guidelines also give providers the option of reporting in bands of 250, "the total number of all national security process received, including all NSLs and FISA orders, reported as a single number." *Id.* at 3. The guidelines still seek to prohibit providers from disclosing the precise number of surveillance requests they received. But they undermine any argument that for a provider to acknowledge

[7] *See Microsoft, Facebook, Google and Yahoo Release US Surveillance Requests*, The Guardian (Feb. 3, 2014) http://www.theguardian.com/world/2014/feb/03/microsoft-facebook-google-yahoo-fisa-surveillance-requests.

[8] *Available at* Available at http://fas.org/irp/news/2014/01/dag-012714.pdf.

that some process has been received automatically harms national security.

D. (G) Business and the NSL at Issue

(G) licenses and operates (G) (G) to provide users with (G) (G) (the (G) Service"). *See* Declaration of (G) ¶ 3. The (G) allows users to (G) *Id.* ¶ 4. Users can (G) (G) *Id.* (G) (G) *Id.* ¶ 5. Currently, (G) has more than (G) registered users. *Id* ¶ 6.

On (G) the FBI issued an NSL to (G) which the FBI served on (G) *See* Ex. A to (G) The NSL demanded the names, addresses, length of service, and electronic communications transactional records[9] for the account in question. *Id.* In addition, the NSL informed (G) that "a 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 and thus prohibited (G) from "disclosing this letter, other than to those to whom disclosure is necessary to comply with the letter" or to an attorney. *Id.* at 2.

(G) complied with the lawful demands contained within the NSL. Specifically, on (G) (G) provided to the FBI the (G) record for the accounts

[9] This demand was included notwithstanding the fact that 18 U.S.C. § 2709 does not authorize the FBI to seek electronic communication transactional records. *See* 2008 OLC Letter at 2-3.

in question (G) ¶ 8. (G) did not disclose either the fact that it received the NSL or the information requested by the NSL to anyone (other than its attorneys). (G) (G) (G) *Id.* ¶ 9. On March 24, 2015 (G) NSL was issued (G) contacted the FBI to determine whether, given the age of the NSL and the passage of time, the non-disclosure provision was still needed. *See* Mem. at 7. The FBI responded that the justifications for the non-disclosure provisions in the NSL continued to be valid, taking the position that not only could (G) not inform the target of the NSL about the letter's existence, (G) could not even disclose the fact that it received the NSL. *Id.* The government subsequently initiated the instant action.

ARGUMENT

I. Legal Standard

(G) challenges the constitutionality of the application of the gag order facially and on an as-applied basis. Under a facial challenge, a plaintiff may sustain its burden in one of two ways: First, a party asserting a facial challenge "may demonstrate 'that no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep.'" *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 282 (4th Cir. 2013) (en banc) (alterations omitted) (quoting *United States v. Stevens*, 559 U.S. 460 (2010)). Second, a party asserting a facial challenge may also prevail if he or she "show[s] that the law is 'overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* Under either scenario, a court considering a facial challenge is to assess the constitutionality of the challenged law "without regard to its impact on the [party] asserting the facial challenge." *Educ. Media Co.*

at Virginia Tech v. Swecker, 602 F.3d 583, 588 (4th Cir. 2010). Here, Section 2709(c) is facially unconstitutional because it is an improper prior restraint and content-based restriction of speech. Section 3511(b) is also facially unconstitutional because the unduly deferential standard of review it imposes violates the separation of powers doctrine. Two courts—the Second Circuit in *Mukasey* and the Northern District of California in *In re National Security Letter*—have already found these provisions facially unconstitutional as written.

An as-applied challenge is based on "the application of a statute to a specific person[.]" *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir.2009) (en banc). *See also Educ. Media Co. at Virginia Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.5 (4th Cir.2013). In an as-applied challenge, "the state must justify the challenged regulation with regard to its impact on the plaintiffs." *Id.* at 298. Here, regardless of what standard is used, the government cannot justify prohibiting (G) from disclosing its receipt of an NSL. More specifically, even if the statute is constitutional under certain circumstances, the government has not met its burden to demonstrate that the potential harms caused by the disclosure of the receipt of the NSL justify the restraint on (G) speech.

II. Section 2709(c) is Facially Invalid as an Unconstitutional Prior Restraint and as a Content-Based Restriction on Speech

A. NSL Nondisclosure Orders Constitute a Prior Restraint

The NSL statute's provision authorizing the government to prevent NSL recipients from disclosing the fact that they have received an NSL or anything about their interaction with the government is a prior restraint. In *Alexander* v. *United States*, 509 U.S. 544 (1993), the Supreme Court explained that "[t]he term 'prior restraint' is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such

communications are to occur." *Id.* at 550 (emphasis and internal quotation marks omitted). Section 2709(c) provides for just such administrative orders.

Specifically, the statute authorizes the FBI to prohibit the recipient of an NSL from "disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained access to information or records" by means of an NSL. 18 U.S.C. § 2709(c)(1). A party who receives such an NSL containing a nondisclosure order and wishes to speak about it must litigate the validity of the order prior to speaking. 18 U.S.C. § 3511(b)(1). Yet, the prior-restraint doctrine recognizes that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Section 2709(c) does the exact opposite.

The government argues that the NSL's nondisclosure provision is not a prior restraint (or at least a "classic" prior restraint) because it allegedly "restricts limited information obtained only by participation in a confidential investigation." Mem. at 16. As support for this position, the government points to *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838-839 (1978) and *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005). The statutes in those cases, however, are unlike Section 2709(c). If anything, those cases confirm that NSL nondisclosure provisions are prior restraints.

The statute at issue in *Cooper* made it a misdemeanor for a participant in an internal investigation of a law enforcement officer to disclose information obtained pursuant to that investigation before it became public record. *Cooper*, 403 F.3d at 1211. The court found that such statute was not a prior restraint, but only because "the threat of criminal sanctions [was]

imposed after publication" of the information. *Id.* at 1215-16. In doing so, the court expressly explained "[t]hat Florida's statutory scheme was not a prior restraint is underscored by the fact that Cooper was able to publish the information he obtained pursuant to the FDLE investigation without first having to obtain a government-issued license or challenge a government-imposed injunction." *Id.* at 1216. The opposite is the case here, where (G) must either obtain government permission or challenge the government's injunction in federal court prior to disclosing the mere fact that it received an NSL. The NSL statute is therefore unlike the statute in *Cooper* that "did not silence Cooper before he could speak." *Id.*

Likewise, *Landmark* involved the constitutionality of a statute imposing criminal sanctions for divulging information regarding proceedings before a state judicial review commission authorized to hear complaints as to a judge's disability or misconduct. *Landmark*, 435 U.S., at 830. Again unlike here, "the issue was not one of prior restraint but instead involved a sanction subsequent to restraint." *Id.* at 833. In fact, the appellant in that case did not even allege that the statute constituted a prior restraint. *Id.* at 838.

Equally unavailing is the government's argument that Section 2709(c) does not constitute a prior restraint because the prohibition on disclosure is allegedly "confined to sensitive information that the NSL recipient learns only by his involvement in the government's own investigation." Mem. at 18. As an initial matter, the fact that (G) received (G) among its over (G) registered users is not "sensitive information." But even putting that aside, the precedent the government cites is inapplicable. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), for example, the Supreme Court held that, as a condition of obtaining access to information through civil discovery, a party may be subjected to a protective order requiring that it preserve the confidentiality of that information. That case, however, involved a party that

voluntarily sought out the information at issue and to obtain it accepted limitations on its speech. NSL recipients, on the other hand, have not asked to be sent NSLs. That distinction is critical to the First Amendment analysis: It is one thing to say that a party seeking access to confidential information can be prohibited from disclosing that information, another to say that the government may impose a gag order on a party where it has demanded that the party assist in an investigation.

Finally, the government claims that Section 2709(c) does not constitute a prior restraint because it is limited "to a narrow category of information that is not characteristically political." Mem. at 19. But the speech at issue here is core "political" speech. The question of the extent to which the government can conduct investigations into United States citizens without any oversight or prior approval from the court, and the means by which the government can compel recipients of NSLs to participate in those investigations without the ability to disclose such participation either to the target of the NSL or to the public, is highly political and currently the subject of robust public debate.[10]

B. The Statute Does Not Satisfy the Substantive Standards Governing Prior Restraint

"Any system of prior restraints of expression" is subject to "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963); *see Near* v. *State of Minnesota ex rel. Olson*, 283 U.S. 697, 721 (1931). That is, it must be necessary to further a governmental interest of the highest magnitude. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976). A prior restraint is necessary only if: (1) the harm to the governmental interest will definitely occur; (2) the harm will be irreparable; (3) no alternative

[10] *See e.g., The Gaping Hole in Obama's FBI Surveillance Reform*, Huffington Post, Feb. 4, 2015; *Congress Turns Away From Post-9/11 Law, Retooling U.S. Surveillance Powers*, Washington Post, June 2, 2015 (discussing USA Freedom Act's rejection of "some of the sweeping intelligence-gathering powers [] granted national security officials after the 9/11 terrorist attacks.").

exists for preventing the harm; and (4) the prior restraint will actually prevent the harm. *See id.* As explained more fully below, the statutory standard governing the issuance of a nondisclosure order—that disclosure "may result" in various specified harms, 18 U.S.C. § 2709(c)(1)—is too low to satisfy ordinary strict scrutiny. It therefore does not meet the "necessary" standard sufficient to justify a prior restraint. *See New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (reversing injunction against publication of the Pentagon Papers because "I cannot say that disclosure of any of them will ***surely*** result in direct, immediate, and irreparable damage to our Nation or its people") (emphasis added). And even if that were not the case, the government cannot meet its burden to show that any harm would come to the government from (G) disclosing that it received (G) out of over (G) users, let alone that such alleged harm is irreparable or that restraining (G) from speaking is the only alternative to prevent the harm.

The government incorrectly argues that the NSL gag provision satisfies heightened strict scrutiny because it is "consistent" with a prior restraint on publication of national security information that the Fourth Circuit previously upheld. Mem. at 23 (*citing United States v. Marchetti*, 466 F.2d 1309 (1972)). In *Marchetti*, the United States sought to enjoin a former CIA employee from publishing a book containing classified information without first allowing the CIA to review that information. Mem. at 23-4. But the issue in *Marchetti* was the "enforceability of a secrecy agreement exacted by the government in its capacity as employer, from an employee of the Central Intelligence Agency." *Marchetti*, 466 F.2d at 1311. The court specifically found that the government's need for secrecy in national security "len[t] justification to a system of prior restraint against disclosure ***by employees and former employees of classified information obtained during the course of employment.***" *Id.* at 1316-17 (emphasis added). In

doing so, the court reasoned that "Marchetti, of course, could have refused to sign, but then he would not have been employed, and he would not have been given access to the classified information he may now want to broadcast." *Id.* at 1316. Thus, *Marchetti* is no different from *Seattle Times*. In both, the party subject to a prior restraint voluntarily sought access to confidential information: In *Seattle Times* the recipient sent a subpoena and in *Marchetti* the recipient sought employment. But here (G) did not seek out the NSL. And it did not obtain knowledge about the existence of the NSL during the course of employment or sign any agreements with the government agreeing not to disclose that it received an NSL.

C. Section 2709(c) is an Unconstitutional Content-Based Restriction on Speech

1. A nondisclosure order in an NSL imposes a content-based restriction

The government does not appear to dispute that Section 2709(c) imposes a content-based restriction on speech. Nor can it. Section 2709(c)'s restriction is content based because it prohibits an NSL recipient from disclosing "that the Federal Bureau of Investigation has sought or obtained access to information or records." 18 U.S.C. § 2709(c). Determining whether speech by the recipient falls within the statute's prohibition requires examining the content of that speech. If the speech is about the fact "that the Federal Bureau of Investigation has sought or obtained access to information or records," it is unlawful; if it is about something else, it is not. In other words, the applicability of the prohibition turns on the content of the speech. Because "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," the statute is content-based. *Carey v. Brown*, 447 U.S. 455, 462 (1980).

2. The statute does not satisfy strict scrutiny

As a content-based restriction on speech, Section 2709(c) fails the required strict scrutiny analysis. Content-based speech restrictions are invalid unless the government "can demonstrate

that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). There is no dispute that the government has a compelling interest in protecting national security. Section 2709(c), however, is not narrowly tailored to promote that interest. The narrow-tailoring component of the test requires the government to show that there are no "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997). Under the strict-scrutiny standard, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

The government cannot make the required showing with respect to Section 2709(c). The district court in *In re National Security Letter* found that Section 2709(c) failed strict scrutiny for multiple reasons. First, it found that the provision was over-inclusive because it allowed the FBI to gag recipients about not only the content of the NSL but also as "to the very fact of having received one." *In re Nat'l Sec. Letter,* 930 F. Supp. 2d at 1075. Specifically, the court noted:

> [T]he government has not shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs. The statute does not distinguish-or allow the FBI to distinguish-between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The statute contains a blanket prohibition: when the FBI provides the required certification, recipients cannot publicly disclose the receipt of an NSL.

Id. at 1076. Second, it found the gag provision over-inclusive because it imposed prior restraints of unlimited duration. Specifically, the district court held that "[b]y their structure . . . the review provisions are overbroad because they ensure that nondisclosure continues longer than necessary to serve the national security interests at stake." *Id. See also Doe v.*

Gonzales, 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007).

In addition to the reasons identified in *In re National Security Letter*, the gag provision is not narrowly tailored for two additional reasons. First, the statute is satisfied whenever the FBI director says that the specified harms "may" occur. That imposes hardly any limit at all, as the word "may" requires only a mere possibility. *See Black's Law Dictionary* 1068 (9th ed. 2009) (defining "may" as "[t]o be a possibility"). Narrow tailoring requires more. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (holding that narrow tailoring is satisfied "only if each activity within the proscription's scope is an appropriately targeted evil"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (stating that "[b]road prophylactic rules in the area of free expression are suspect."). Second, the enumerated harms in the statute cover more than national security harms. For example, "interference with a criminal . . . investigation" could refer to even minor interference with an investigation of a misdemeanor offense having nothing to do with national security. Similarly, as the Second Circuit observed in *Mukasey*, the "danger to the . . . physical safety of any person" clause "could extend the Government's power to impose secrecy to a broad range of information relevant to such matters as ordinary tortious conduct." *Mukasey*, 549 F.3d at 874.

Having correctly identified the constitutional deficiencies in Section 2709(c)'s broad language, the court in *Mukasey* mistakenly concluded that they could be avoided by reading the statute to require that there be "an adequate demonstration that a good reason exists reasonably to apprehend a risk of an enumerated harm," *id.* at 882, and that the harm be "related to 'an authorized investigation to protect against international terrorism or clandestine intelligence activities.'" *Id.* at 875 (*quoting* 18 U.S.C. § 2709(b)). Although that reading may mitigate the First Amendment problems to some degree, it cannot be reconciled with the statutory text and is

thus improper. As the *In re National Security Letter* court explained, "even if the FBI is in fact complying with both the procedural and substantive requirements imposed by the Second Circuit for all NSLs issued, the fact that the statute is facially deficient—by not mandating the procedural and substantive protections discussed below—presents too great a risk of potential infringement of First Amendment rights to allow the FBI to side-step constitutional review by relying on its voluntary, nationwide compliance with the Second Circuit's limitations." *In re Nat'l Sec. Letter,* 930 F. Supp. 2d at 1075. *See also Miller v. French*, 530 U.S. 327, 341 (2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.") (internal quotation marks and citation omitted).

Finally, even if the broad statutory language of Section 2709(c) could be read as suggested by the *Mukasey* court, it still does not meet strict scrutiny. A prohibition on speech might satisfy strict scrutiny if "a good reason exist[ed] reasonably to apprehend a risk" of a serious harm from the speech. *Mukasey*, 549 F.3d at 882. But even as rewritten by the Second Circuit, the statute does not require that the harm be serious—or even more than *de minimis*—only that it be somehow related to a terrorism investigation. That is, it permits speech to be suppressed upon a determination that there is a risk that it might lead to some kind of "interference with [an] investigation" that is in some way related to terrorism, no matter how minimal the interference may be. The statute is not narrowly tailored to promote the interest in national security.

III. The Judicial Review Standards of the Nondisclosure Requirement in 18 U.S.C. § 3511(b) Violate Separation of Powers

The applicable provisions of Sections 3511(b)(2) and (3) also fail to pass constitutional muster because they impose an unduly deferential standard of review, thus violating the separation of powers doctrine. Under the statute, the court may dissolve the gag order only if the

court:

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

18 U.S.C. §§ 3511(b)(2); (3). The statute further requires that if certain government officials so certify, "such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." *Id.*

In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that executive certifications that supplant judicial scrutiny are an unconstitutional substitute because the court "must have sufficient authority to conduct a meaningful review" and "have the means to correct errors that occurred during the [executive fact finding] proceedings." *Id.* at 783-86. The court focused on the importance of the separation of powers when balancing national security with individual liberty, observing that while "[s]ecurity depends upon a sophisticated intelligence apparatus," security is equally dependent on "fidelity to freedom's first principles" including "the personal liberty that is secured by adherence to the separation of powers." *Id.* at 797.

While *Boumediene* specifically addressed *habeus corpus*, other courts have applied the same logic to Section 3511. The district court in *In re National Security Letter* noted that it could "only sustain nondisclosure based on a searching standard of review, a standard incompatible with the deference mandated by Sections 3511(b) and (c)." 930 F. Supp. 2d at 1077. In *Mukasey*, the Second Circuit likewise emphasized the importance of separation of powers in rejecting this overly deferential review standard. 549 F.3d at 882-83. ("The fiat of a governmental official, though senior in rank and doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements.")

The Supreme Court has continually emphasized that despite potential interplay among the three branches, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). *See also United States v. Klein*, 80 U.S. 128, 145-48 (1871). Similarly, it is well settled that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark*, 435 U.S. at 843. Here, Section 3511 violates the tenet of separation of powers by limiting the Court's ability to review the nondisclosure provisions, and thus "impermissibly threatens the institutional integrity of the Judicial Branch." *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (*quoting Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 851 (1986)). *See also United States v. Moussaoui*, 382 F.3d 453, 469 (4th Cir. 2004) ("Stated in its simplest terms, the separation of powers doctrine prohibits each branch of the government from intrud[ing] upon the central prerogatives of another. Such an intrusion occurs when one branch arrogates to itself powers constitutionally assigned to another branch or when the otherwise legitimate actions of one branch impair the functions of another.").

IV. The Statute is Unconstitutional as Applied to (G) Even if the Purported Mukasey Narrowing Provisions are Used

Even if it were appropriate for this Court to apply the purported *Mukasey* narrowing provisions to try to save Sections 2709(c) and 3511(b), the government cannot meet that artificial standard here. Specifically, in *Mukasey* the Second Circuit accepted the government's agreement that it would bear the burden of proof to persuade a district court that there is a "good reason" to believe that disclosure may risk one of the harms enumerated in Section 3511(b)(3) in order to allow a nondisclosure provision to stay in place. *Mukasey*. 549 F.3d at 875–76. Those enumerated harms are that disclosure "may result in a danger to the national security of the

United States, interference with criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person. 18 U.S.C. § 3511(b)(3). The government has not made such showing here.

There is nothing in the unclassified Declaration of Donald Good suggesting that (G) disclosure of the existence of the NSL would risk one of the enumerated harms. The unclassified portion of the declaration does not mention any facts specific to this particular NSL or to (G) Instead, it simply discusses NSLs generally, including how they are used in investigations, and details the FBI's automated procedure for generating NSLs. *See e.g.*, Unclassified Good Declaration, ¶¶ 6-10, 19-21. The declaration then summarily concludes that "in light of these concerns," Mr. Good certifies that disclosure of the NSL at issue in this case, including its contents, "may result" in "a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations or danger to the life or physical safety of any person." *Id.* at ¶ 15. Mr. Good does not state that he has "good reason" to believe as much. Nor does he explain how the disclosure of the mere fact of receipt could bring about these harms. This is not enough, even under the *Doe* framework. Instead, the Government seeks to place a prior restraint on (G) speech based on generalized statements about process the FBI generates by automated means. That does not begin to approach the burden the Government must carry to satisfy strict scrutiny.

It is not surprising that the government cannot meet its burden. (G) currently has more than (G) registered users. (G) ¶ 6. (G) seeks to disclose, at a minimum, that it received, and complied with, (G) over (G) related to (G) more than (G) registered users. This cannot risk any of the harms enumerated in Section 3511(b)(3). It cannot even risk any of the harms vaguely referenced in the

government's memorandum. For example, (G) disclosure that it received (G) more than (G) would not provide (G) target with "knowledge about the scope or progress of a particular investigation" that would allow him or her "to determine the FBI's degree of penetration of their activities and to alter their timing or methods." Mem. at 5. Nor would such disclosure alert "targeted individuals" "to the existence of an investigation." *Id.* This is unlike even the hypothetical example offered by the Northern District of California in *In re National Security Letter* where disclosure of the existence of the NSL could potentially compromise a national security investigation because the electronic communications service provider "has only a handful of subscribers." *In re Nat'l Security Letter*, 930 F. Supp. 2d at 1076.

The fact that the NSL was issued more than (G) further suggests that the government cannot meet even the artificial "good reason" standard. There can be little dispute that, at least in many instances, the need for secrecy of NSLs wanes with the passage of time. For this reason, the Presidential Review Group recommended in December 2013 that NSL nondisclosure orders should remain in effect for no longer than 180 days without judicial re-approval. *See* Liberty and Security in a Changing World: Report and Recommendations from the President's Review Group on Intelligence and Communications Technologies at 27

(G)

Finally, the government has effectively conceded that a provider saying that it has

(G)

received (G) causes no harm. Specifically, there can be no dispute that a provider that has never received an NSL can disclose as much. This is because the non-disclosure provision in Section 2709(c) can only be invoked where the FBI "has sought or obtained access to information or records under this section." 18 U.S.C. § 2709(c). Thus it would be proper for (G) or any other provider to say (if true) that it had never received an NSL. The Attorney General's guidelines allow a provider to disclose within certain bands if it has received an NSL. Specifically, a provider can disclose that it has received between 0-999 NSLs. But that disclosure itself is essentially saying that a provider has received (at least) one NSL. Otherwise, the provider would unambiguously disclose that it received no NSLs. Moreover, providers who receive 1,200 NSLs are allowed to acknowledge receiving 1,000 of them. In light of that permitted disclosure, it is hard to fathom how the disclosure of the receipt of (G) by a provider with (G) users could cause greater harm. This distinction is unjustifiable in law.

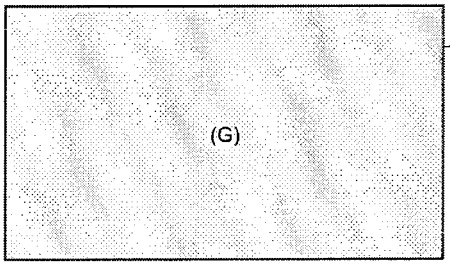
Even assuming that *Mukasey's* narrowing provisions are appropriate to save the NSL statute, the government would still bear the burden of proof to persuade a district court that there is a "good reason" to believe that disclosure may risk one of the harms enumerated in Section 3511(b)(3) in order to allow the nondisclosure provision to stay in place. Here, the government does not meet that standard with respect to (G) potential disclosure of the mere fact that it received (G) And based on the limited information available to (G) it is unclear if the government has met that standard for the contents of the NSL.

CONCLUSION

For the foregoing reasons, (G) respectfully requests that the Court deny the

Government's petition for enforcement of the entire nondisclosure provision of 18 U.S.C. § 3511 or, at a minimum, allow (G) to disclose the mere fact of receipt of the NSL at issue.

Dated: June 8, 2015



Counsel for (G)

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2015, the foregoing Respondent's Opposition to Petition to Enforce Nondisclosure Provision was filed manually with the clerk of the court and served upon the below counsel for the United States via electronic mail.

Eric J. Sokin
Steven Y. Bressler
U.S. Department of Justice, Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel: (202) 353-0533
Eric.Soskin@usdoj.gov
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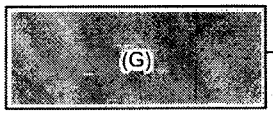


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-CV-001180 ~~FILED UNDER SEAL~~ PURSUANT TO 18 U.S.C. § 3511(d)

DECLARATION OF (G)

I, (G) hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am currently (G) Counsel at (G) (G). I have held that position since August 2014. Prior to that, my title at (G) was (G) Counsel. I held that position from (G) (G)

2. One of my responsibilities is overseeing (G) compliance with global privacy and data protection laws. This includes overseeing (G) responses to government requests for information regarding (G) users. As such, I am familiar with (G) efforts to respond to the National Security Letter ("NSL") the Federal Bureau of Investigation ("FBI") issued to (G) on (G). I am also generally familiar with (G) business and

operations. The statements in this declaration are based upon my personal knowledge. If called upon to do so, I could and would testify thereto under oath.

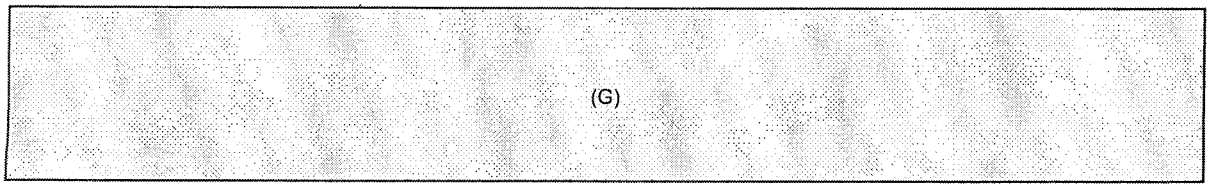
3. (G) licenses and operates the (G) which consists of (G) (G) to provide users with (G) (G)

4. The (G) allows users to (G) (G) Users can (G) (G)

6. Currently, (G) has more than (G) registered users.

7. On (G) the FBI served (G) with a NSL dated (G) which sought information regarding the accounts (G) A true and correct copy of that NSL is attached as Exhibit A hereto.

8. In response to that NSL, on (H) provided to the FBI the (G) record for the accounts in question.



I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of June 2015.

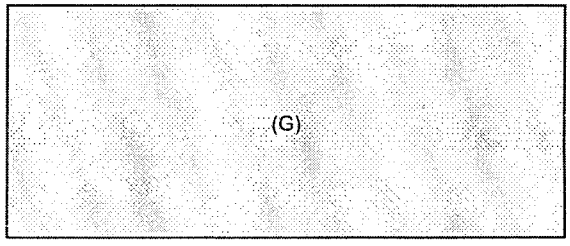


EXHIBIT A

Pages 38 through 42 redacted for the following reasons:

Code G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH Attorney General v. UNDER SEAL	Case No. 15-cv-001180 FILED UNDER SEAL PURSUANT TO 18 U.S.C. § 3511(d)

EXHIBIT 1

03/24/2015 03:01 #615 P.001/004

From:

(G)

(G)

C4-1

FACSIMILE SHEET

To: (G)

FBI (G)

Fax: (G)

From: (G)

Date: March 23, 2015

Re: CONFIDENTIAL MATTER

Pages (w/cover): 4

(G)

(G)

(G)

March 23, 2015

Via Fax and Certified Mail

(G)
FBI (G)
(G)

James Baker
FBI Headquarters
Attention: General Counsel
935 Pennsylvania Avenue, NW
Washington, DC 20535-001
Fax: (202) 324-5366

FBI
(G)

Re: Petition to Set Aside Non-Disclosure Provision of NSL

Dear Messrs (G) and Baker:

I am writing on behalf of (G) to inform you that (G) intends to file a petition pursuant to 18 U.S.C. 3511(b)(3) to set aside the non-disclosure provisions of the National Security Letter dated (G) bearing the file number (F) (F) In advance of filing the petition, however, (G) is sending this letter for the purposes described below.

First, in this case, there remains a possibility that the government may agree that given the age of the NSL and the passage of time, the non-disclosure provision is no longer needed. If this is the case (G) petition may be unnecessary. Please let us know your response as soon as possible, but in no event later than April 3, 2015, after which time such a petition will be filed.

Second, even if the government does not agree to lift the non-disclosure provision of the NSL, the government has represented to courts in the Ninth Circuit that when it receives a notice that a provider intends to challenge the non-disclosure aspects of a petition, it will initiate the judicial proceeding.[1] My understanding is that although the government has not adopted a formal policy, the usual practice is to seek judicial review within 30 days of a recipient objecting to an NSL, a practice adopted in order to remedy the constitutional deficiencies identified by the United States Court of Appeals for the Second Circuit in John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008), as modified (Mar. 26, 2009).[2]

While the government's prior representations on this point may be confined to initial challenges to petitions (G) wants to give the government the opportunity to apply that policy to petitions that are sought to be commenced as part of the annual challenges set forth in 18 U.S.C. § 3511(b)(3). In the event that the government does intend to defend all aspects of the non-disclosure provision, please let us know by April 3, 2015 if the government intends to commence this proceeding. If it does not, (G) believes that the government's position on this matter should be made clear to the Court of Appeals for the Ninth Circuit, as a clarification of its prior statements, as the court considers its decision in In re Nat'l Security Letter, No. 13-16732 (9th Cir. 2013).

(G)

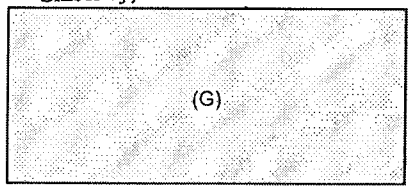
[1] In re Nat'l Sec. Letter, 930 F. Supp. 2d 1064, 1070 (N.D. Cal. 2013) ("...at the hearing before this Court, the government asserted that it was following the mandates imposed by the Second Circuit in the *John Doe, Inc. v. Mukasey* decision for *all* NSLs being issued, since it would be impracticable to attempt to comply with that decision only in the Second Circuit.").

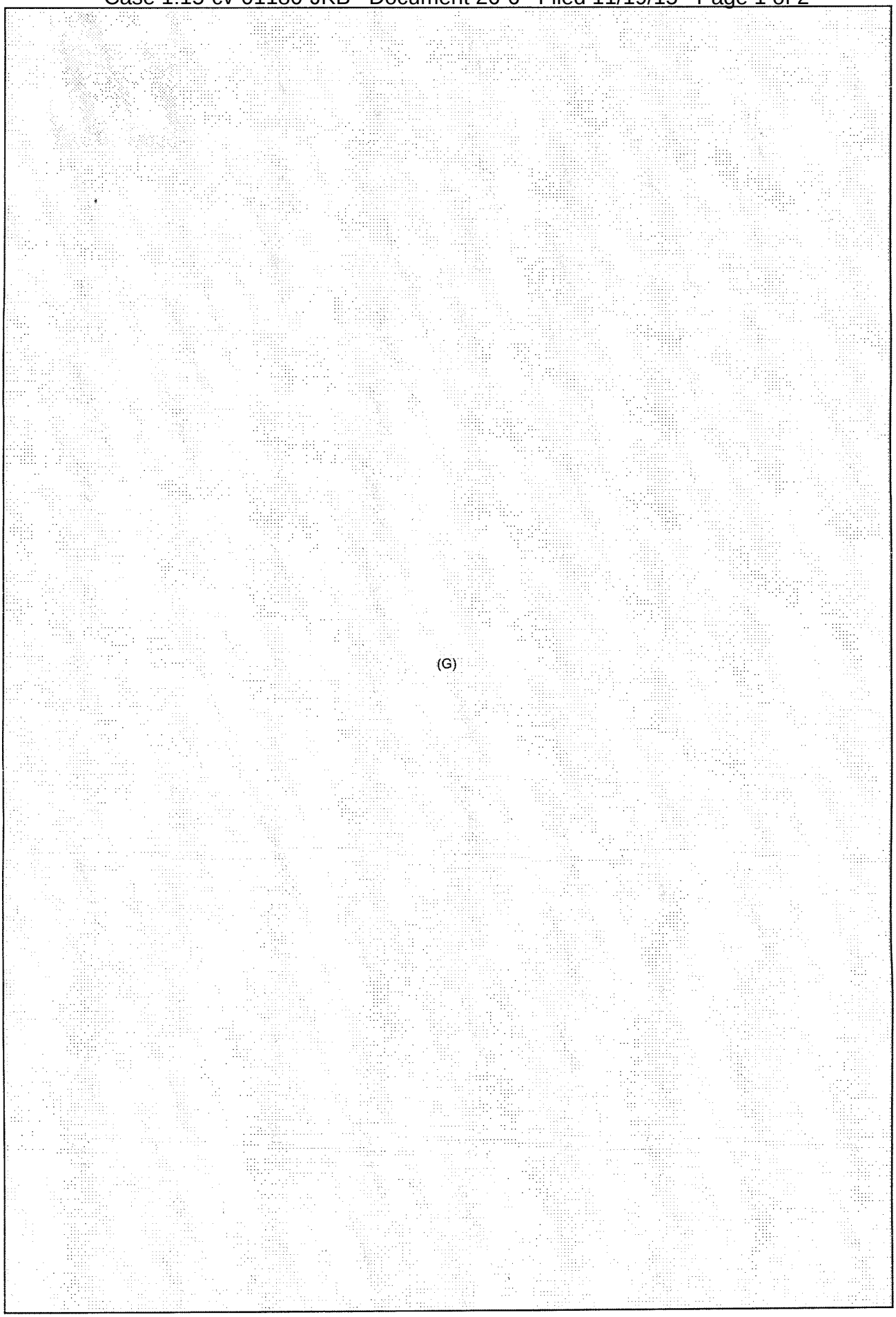
[2] *See also* In re National Security Letter, Under Seal v. Holder (Sealed), U.S. Courts for Ninth Circuit (providing a download link for the audio recording of oral argument of October 8, 2014), http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000715; In re Nat'l Sec. Letter, 930 F. Supp. 2d 1064, 1070 (N.D. Cal. 2013).

(G)

If you have questions or are prepared to discuss the government's position in this matter, please feel free to contact me.

Sincerely,




(G)

Pages 2 through 5 redacted for the following reasons:

Code G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-CV-001180 FILED UNDER SEAL PURSUANT TO 18 U.S.C. § 3511(d)

RESPONDENT'S SUR-REPLY IN OPPOSITION TO PETITION TO ENFORCE NONDISCLOSURE PROVISION

PRELIMINARY STATEMENT

Passage of the USA FREEDOM Act of 2015 (the "USAFA") does not resolve (G) objection to continued application of the nondisclosure provision in the National Security Letter ("NSL") served on (G) Put simply, while the USAFA makes many laudable changes to the national security legal process framework, it does not change the fact that the government has not shown why (G) should still be prevented from disclosing that it received an NSL.

On an as-applied basis, the government has not met its burden under the USAFA of establishing that there is "reason to believe" that disclosure of information subject to the nondisclosure requirement—particularly the mere fact that (G) NSL over (G) —may result in an enumerated harm.[1] Nor does the USAFA resolve the problems with the gag order provision of 18 U.S.C. § 2709(c) that render it constitutionally deficient: Section 2709(c) still allows the FBI to gag recipients about both the content of an NSL and the mere fact of receipt. And it still imposes a gag order of indefinite duration, at least until procedures are implemented to provide for the automatic expiration of gag orders. Thus, the NSL nondisclosure requirement remains an improper prior restraint and content-based restriction on speech—the USAFA doesn't change that.

THE USA FREEDOM ACT

The most relevant change the USAFA made to the statute authorizing issuance of NSLs is the addition of subsection (d) stating that a nondisclosure requirement imposed by the NSL statute is subject to judicial review under 18 U.S.C. § 3511. *See* USA FREEDOM Act of 2015, Pub. L.

[1] Of course, (G) has not been allowed to see the document that the government contends makes that showing, and requests that the Court order the document produced to (G) counsel before the Court rules on the government's petition, or else refuse to consider it, as (G) is precluded from being able to specifically respond to it, but finds it inconceivable that the submission supports the argument that (G) disclosing the mere fact of (G) NSL in (G) meets the USAFA's heightened standard.

No. 114-23, § 503(a). With respect to Section 3511, the USAFA changes the procedures for initiating judicial review of an NSL to incorporate the narrowing procedures identified by the Second Circuit in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). *See* Reply in Support of Petition for Judicial Review and Enforcement of a National Security Letter ("Reply") at 4. Even according to the government, this change is irrelevant because litigation was initiated under the prior version of the statute. *Id.* at 3, n.4. The government does believe, however, that the USAFA's modifications to the standard of review of an NSL do apply here. *Id.* Even if that is the case, it does not dictate a different outcome.

Under the prior version of the NSL statute, a district court could only modify a nondisclosure requirement if there was "no reason to believe" that disclosure "may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 3511(b)(3). After the USAFA, a district court must extend a nondisclosure requirement if "there is reason to believe" that disclosure of information subject to the nondisclosure requirement may result in one of the same harms. *See* Pub. L. 114-23 § 502(g). But prior to the USAFA's passage, the government had already been holding itself to that standard as a result of the *Mukasey* ruling. *See* Reply at 2, n.1. Thus, while the USAFA struck Section 3511's clearly unconstitutional "no reason to believe" language, the USAFA does not change the legal standard to be applied in this case.

With respect to termination of nondisclosure requirements in NSLs, the USAFA merely requires the Attorney General to in the future "adopt procedures" to "review at appropriate intervals" nondisclosure requirements to assess whether facts supporting nondisclosure continue to exist, and to terminate such nondisclosure requirements if facts no longer support nondisclosure.

See Pub. L. 114-23 § 502(f). As the government acknowledges, however, those procedures are not currently in place and need not be adopted until December 2015. *See* Reply at 5. Further, the USAFA imposes no specific parameters on the contemplated procedures with respect to the outer limit of when the review of any particular NSL can occur, the frequency with which such reviews will occur, or the standards for determining when a nondisclosure requirement is no longer supported. Regardless, since no such procedures are in place now, they cannot help the government justify the prior restraint Section 2709(c) imposes on (G)

Finally, with respect to permitted disclosures regarding NSLs, the USAFA amends and codifies the reporting guidelines described in Deputy Attorney General Cole's January 27, 2014 letter. *See* Respondent's Opposition to Petition for Judicial Review and Enforcement of National Security Letter ("Opp.") at 9. Under those guidelines, the government said that it would not enforce nondisclosure provisions where providers report in separate categories "the number of NSLs received, reported in bands of 1000 starting with 0-999." *Id.* And while the USAFA allows providers to report the number of NSLs received in either bands of 1000 or 500, providers are still not permitted to disclose the number of NSLs received in bands smaller than 500 without either court order or government permission. *See* Pub. L. 114-23 § 604(a), (b). Again, the USAFA does not resolve the issues presented here.

ARGUMENT

I. Prohibiting (G) from Disclosing that it (G) Remains Unconstitutional Notwithstanding the USAFA

Passage of the USAFA does not change the burden the government must meet to justify muzzling (G) The USAFA merely codifies one of the *Mukasey* narrowing provisions that the government claims it was already voluntarily following; that is, in order for the nondisclosure provision to stay in place, the government must demonstrate that there is "reason to believe" that

the disclosure sought "may result in: a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person." Pub. L. 114-23 § 502(g). As explained in (G) opposition, the government has not met its burden with respect to (G) disclosure that it (G) when (G) has more than (G) registered users. *See* Opp. at 22-25.

The government proffers several arguments in its reply for why it has met its burden, all of which rely on the classified declaration of Donald Good. None of these arguments withstand scrutiny. The government first argues that (G) "more limited" disclosure that it (G) (G) during a (G) "would link Respondent to a ***particular*** NSL, served in a ***particular*** point in time in a ***particular*** geographic area of the United States." Reply at 9-10 (emphasis added). Even without the benefit of seeing the classified Good Declaration, such a statement cannot be true as a matter of language. "Particular" is defined as "of, relating to, or being a single person or thing" and "of, relating to, or concerned with details."[2] A disclosure that (G) during a (G) without more, reveals nothing about any (G) and provides no "details" regarding any NSL. And such disclosure says literally nothing about geographic area—(G) services are global and not circumscribed by geography.

The government next disputes (G) assertion that given (G) registered users disclosure of receipt of (G) unspecified (G) cannot cause any of the enumerated harms by asserting that "the relevant pool is not Respondent's base of innocent,

[2] *Particular*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/particular (last accessed July 15, 2015).

registered users" but rather "the set of active users knowingly engaged in unlawful activities likely to subject them to FBI surveillance in a particular geography at a particular time." Reply at 10. The government does not quantify this universe. It also ignores the fact that (G) is not seeking to disclose in real time that it received an NSL such that it might cause a target to modify his ongoing behavior. Moreover, no target would understand that such a disclosure pertains to his activities (G) as he would have no way of knowing how many other possibly culpable users are or were using (G). Further, the NSL does not entitle the government to ongoing information, so disclosure cannot cut off a source of evidence. What it might convey is that the government is aware of (G) and very occasionally (G) serves NSL process on it. Yet this would be equally clear if (G) (G) Thus,

Even more implausible is the government's claim that if (G) disclosed (G) (G) during (G) time period, it "would provide a wealth of detailed information to our adversaries, contrary to the structure and intent of the statutory scheme, and would help detection and evasion of our intelligence and counter-terrorism efforts." Reply at 10. (G) does not seek to disclose a "wealth" of information. In fact, what (G) seeks to disclose is the exact opposite of "detailed." Nor does the government explain how it would be "contrary to the structure and intent of the statutory scheme" and "help to facilitate detection and evasion of our intelligence and counter-terrorism efforts," for a provider that (G) to disclose as much, particularly given that a provider that receives 1,200 NSLs can acknowledge receiving between 1,000 and 1,499 of them under the USAFA. *See* Pub. L. 114-23 § 604(a)(2).

Lastly, the government argues it has met its burden because (G) requested

disclosure will result in harm to national security "by adding to the information available to adversaries." Reply at 11. This is a tautology. The definition of "disclose" is "to make known or public."[3] If (G) requested disclosure were sufficient to cause an enumerated harm, disclosure would never be allowed. The NSL statute cannot be read to yield such absurd results. *See e.g.*, *In re Total Realty Mgmt.*, LLC, 706 F.3d 245, 251 (4th Cir. 2013) ("Principles of statutory construction require a court to construe all parts to have meaning and, accordingly, avoid constructions that would reduce some terms to mere surplussage."). In fact, the USAFA expressly permits providers to disclose the fact of receipt of NSLs and similar national security process.

II. The USAFA Does Not Cure (G) Facial Challenge

In its Opposition, (G) identifies several ways in which Section 2709(c)'s gag provision is facially unconstitutional: It is a content-based restriction on speech that is not narrowly tailored to serve the government's interest in protecting national security. *See* Opp. at 17-20. And it is a prior restraint that seeks to silence (G) before it can speak, but does not meet the standards sufficient to justify a prior restraint. *See id.* at 12-16. Passage of the USAFA does not cure these deficiencies.[4]

Even with passage of the USAFA, Section 2709(c)'s gag provision is still not narrowly tailored to protect national security because it allows the FBI to gag recipients not only about the content of the NSL, but also the mere fact of receipt. *See id.* at 19; *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1076 (N.D. Cal. 2013) ("[T]he government has not shown that it is generally necessary to prohibit recipients from disclosing the mere fact of their receipt of NSLs.").

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[3] *Disclose*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/disclose (last accessed July 15, 2015).

[4] (G) acknowledges that the USAFA's removal of Section 3511's requirement that the district court treat a government recertification as "conclusive unless the court finds that the recertification was made in bad faith" moots the argument that such a deferential standard violates the separation of powers doctrine. *See* Opp. at 20-22.

Likewise, the gag provision still imposes a restraint of unlimited duration. *See* Opp. at 18-19; *In re Nat'l Sec. Letter*, 930 F.Supp.2d at 1076-77 ("By their structure . . . the review provisions are overbroad because they ensure that nondisclosure continues longer than necessary to serve the national security interests at stake.").

The government claims that the USAFA cures the unlimited duration problem because it requires the Attorney General to create procedures to review nondisclosure requirements to assess whether facts supporting nondisclosure continue to exist. *See* Reply at 5. ("The [USAFA] not only 'allows' but 'requires' the Government to rescind the non-disclosure order once the impetus for it has passed."). But the USAFA itself does not "require" the government to rescind any nondisclosure order; it only requires that the government implement procedures for reviewing and rescinding such orders. Moreover, these procedures are not in place now, and do not need to be until December 2015. There also is no guarantee that the procedures ultimately implemented will pass constitutional muster because the USAFA sets no specific parameters governing the procedures.

Section 2709(c) is also still not narrowly tailored even after the USAFA because its gag provision is still satisfied whenever any of the specified harms "may" occur. *See* Pub. L. 114-23 § 502(g); Opp. at 19. The harms enumerated in the statute also still extend to more than just national security harms, including "interference with a criminal . . . investigation" and "danger to the . . . physical safety of any person." *Id.* Moreover, because the gag provision still fails to satisfy strict scrutiny, it also still does not meet the standard to justify prior restraint. *See* Opp. at 16-17.

The government next argues that the Court should ignore the constitutional infirmities of Section 2709(c) because the statute has been constitutionally applied t[(G)]and "a person to whom a statute may constitutionally be applied will not be heard to challenge the statute on the

ground that it may be conceivably applied unconstitutionally to others, in other situations not before the Court." Reply at 6 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). As discussed above, the statute has not been constitutionally applied to (G) Moreover, first amendment overbreadth challenges are the exception to the rule the government cites. *See e.g., Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999). And in a case brought under the Fourth Amendment, the Supreme Court recently reaffirmed that facial challenges are not disfavored and that the Court has allowed such challenges to proceed under a diverse array of constitutional provisions. *See City of Los Angeles, Calif. v. Patel*, No. 13-1175, 2015 WL 2473445, at *5 (U.S. June 22, 2015).

Broadrick is also inapplicable. There, appellants who were alleged to have violated an Oklahoma statute restricting the political activities of state civil servants conceded that the statute was constitutionally applied to the conduct they engaged in (soliciting money from coworkers for the benefit of their superior), but argued that the statute was nonetheless unconstitutional because it could be construed to cover other protected political expression such as wearing buttons. *Broadrick*, 413 U.S. at 2911, 2914-5. Here, by contrast, (G) facial challenge to Section 2709 is based on the same improper restriction on speech being imposed on (G)

Nor should the Court ignor (G) facial challenge to Section 2709's gag provision because other courts have enforced NSLs challenged by other recipients. *See* Reply at 7, n.6. None of the government's cases stand for the proposition that a facial challenge cannot be brought once a court enforces a statute. In fact, such suggestion is undermined by the fact that an instance of previous enforcement the government cites, *In re National Security Letter*, Case No. 12-mc-0007, Dkt. No. 17-3 (AJT/IDD)(E.D. Va. April 24, 2012), occurred nearly a year before the court's decision in *In re Nat'l Sec. Letter*, 930 F.Supp.2d 1064 (N.D. Cal. 2013). But that did not stop the

Northern District of California from not only taking up the facial challenge, but also finding the statute unconstitutional.

Two other cases the government cites (*In re Matter of NSLs*, Case No. 13-cv-1165 SI (N.D. Cal.) and *In re Matter of NSLs*, Case No. 13-mc-80089 SI (N.D. Cal.)) relate to the same petitioner, who sought to set aside the NSL entirely as opposed to just the nondisclosure provision. In those instances, the court denied the petitioner's challenges "given the as-applied showings, given that the constitutionality of the statute as written was under review at the Ninth Circuit, and given that the petitioner did not raise arguments *specific* to the two NSLs at issue why the nondisclosure orders should not be enforced." *See e.g. In re Matter of NSLs*, No. 13-cv-1165 SI, Order Denying Petition to Set Aside and Granting Cross Motion to Enforce, Aug. 12, 2013, at 3. Those rationales do not apply here.

Finally, the government asserts that restricting (G) speech is allowable because, like limitations on information obtained in grand jury proceedings or voluntarily in civil discovery, the statute restricts only information learned through participation in confidential proceedings. *See* Reply at 12. But the government's cases deal with disclosure of substantive information provided or received in confidential proceedings, not the mere fact of participation in such proceedings.[5] In fact, one of those cases, *First Am. Coalition v. Judicial Review Bd.*, 784 F.2d 467 (3d Cir. 1986), supports the conclusion that the mere fact of participation in a confidential proceeding is not confidential. In that case, the district court entered an order imposing confidentiality on any witness appearing before a judicial review board, including "concerning the fact of the witness'

[5] *See e.g., Hoffman-Pugh v. Keenan*, 338 F.3d 1136, 1139-40 (10th Cir. 2003)(grand jury witness sought "to relate publicly her experience and testimony before the grand jury" including "questions addressed to her before the Boulder grand jury and her answers."); *In re Subpoena to Testify*, 864 F.2d 1559, 1562 (11th Cir. 1989)(finding that district court had the authority to prevent witness from disclosing materials prepared for or testimony given in the grand jury proceedings or related proceedings).

appearance and the substance of any testimony." *Id.* at 470. The Third Circuit upheld the confidentiality requirement in part, but concluded that "to the extent the Board regulation and the district court's order prevent witnesses from disclosing their own testimony, those directives run afoul of the First Amendment as impermissibly broad prior restraints." *Id.* at 479.

CONCLUSION

Passage of the USAFA does not resolve (G) as-applied or facial challenges to continued enforcement of the nondisclosure provision of the NSL issued to (G) (G) respectfully requests that the Court deny the Government's petition for enforcement of the entire nondisclosure provision of 18 U.S.C. § 3511 or, at a minimum, allow (G) to disclose the mere fact of receipt of the NSL at issue.

Dated: July 15, 2015

/s/ (G)

(G)

Counsel for (G)

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2015, the foregoing Respondent's Sur Reply in Opposition to Petition to Enforce Nondisclosure Provision was filed manually with the clerk of the court and served upon the below counsel for the United States via electronic mail.

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(G)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General	)	Case No. 15-cv-001180
v.	)	
UNDER SEAL	)	PURSUANT TO 18 U.S.C. § 3511(d)

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-cv-001180 ~~FILED UNDER SEAL~~ PURSUANT TO 18 U.S.C. § 3511(d)

FURTHER RESPONSE IN SUPPORT OF PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF A NATIONAL SECURITY LETTER PURSUANT TO 18 U.S.C. § 3511

INTRODUCTION

Respondent's Sur-Reply confirms that the enactment of the USA FREEDOM Act of 2015, Pub. L. No. 114-23 (June 2, 2015) ("USAFA"), directly impacts Respondent's claims in this case by buttressing the facial constitutionality of the statutes governing the FBI's issuance and enforcement of National Security Letters ("NSLs"), including the nondisclosure requirements sometimes contained therein, in contrast to Respondent's professed view that "the USAFA does not resolve its objections to enforcement of the National Security Letter" at issue here. Respondent's remaining arguments in support of its facial challenge are meritless. As to Respondent's as-applied challenge to the enforcement of *this* NSL nondisclosure provision, Respondent's effort to downplay the nature of its requested disclosure in its latest brief is inconsistent with its entreaty in its prior brief that it be permitted to make a specific disclosure regarding its receipt and compliance with the NSL to the target of the FBI's investigation. Further, as the Declaration of Acting Assistant Director Donald Good makes clear, even a limited disclosure – and certainly the disclosure to the target that Respondent previously demanded

explicitly – would reasonably be expected to harm national security. For these reasons, the Court should enforce the challenged NSL nondisclosure provision.

ARGUMENT

I. The Nondisclosure Requirement in the NSL Served on Respondent Should Be Enforced and is Constitutional.

In its latest brief, Respondent asserts that application of the nondisclosure requirement is unconstitutional because Respondent seeks to make only a "'limited' disclosure (G) (G) Respondent's Sur-reply in Opposition to Petition to Enforce Nondisclosure Provision, at 4 (July 15, 2015) ("Resp. Sur-Reply"). As the Classified Declaration of Acting Assistant Director ("(A)AD") Donald Good of the Cyber Division of the Federal Bureau of Investigation ("FBI") stated in detail, even a limited disclosure would reasonably be expected to alert the target to the possibility of an investigation, potentially causing the target to change its tactics and frustrating the underlying investigation. *See* Classified Good Declaration at ¶ 29, previously submitted to the Court *ex parte* and *in camera*. Respondent's suggestion that (A)AD Good's explanation of these harms should be disregarded is unpersuasive. Contrary to Respondent's repeated suggestion (G) (A)AD Good specifically examined the national security harm reasonably to be expected *now* from a disclosure and reached his conclusions regarding such harm *at this time*. *See* Classified Good Decl. at ¶¶ 23-34. For this reason, Respondent is simply wrong to suggest that (A)AD Good's analysis of the harm be disregarded (G)

Respondent's assertion that a disclosure would present no risk of linking Respondent to an NSL served in a particular geographic area at a particular point in time is likewise flawed. The government's

concern about this (G) exists because, (G) (G) *See* Classified Good Decl. ¶ 18. Further, (G) In the event Respondent discloses receipt of an NSL (G)

Respondent fares no better in its attempt to insist that disclosure of its receipt of an NSL would tell the target no more (G) The understanding that a probabilistic estimate, rather than specific knowledge, could be "considered with other bits and pieces of information," by the target to develop a picture "detrimental to the national security of the United States" is a reality routinely relied on by courts in considering the government's need to prevent such harms. *See Bowers v. Dep't of Justice*, 930 F.2d 350, 355 (4th Cir. 1991) (expert

intelligence declarations can establish that even "dull," "repetitious," or "tedious" bits of intelligence may be composited to harm national security through their "total").

In addition, Respondent repeats the already-refuted canard that its "use of" the aggregate reporting bands previously authorized by the Director of National Intelligence and now authorized by the USA FREEDOM Act "already suggests it received at least one NSL." Respondent's Sur-Reply at 5. As Petitioner explained in its Reply, a disclosure that a provider has received aggregate national security process in a band between 0 and several hundred "*does not* necessarily reveal that the provider has received an NSL at all . . [redacted (G)] [redacted (G)] [redacted] In addition, because the lower limit of the band starts at zero and not at one, even reporting receipt specifically of "0-499 NSLs" [redacted] [redacted (G)] [redacted] does not necessarily indicate receipt of any NSLs at all because Respondent (and other providers) could report accurately in that band regardless of whether it had actually received an NSL. *See* USA FREEDOM Act § 603(a) (codified at 50 U.S.C. § 1874(a)).

Respondent's effort to recast its challenge in the narrow terms of a "limited disclosure," Resp. Sur-Reply at 4, should also be discounted because Respondent's opening brief challenging application of the NSL nondisclosure requirement to Respondent was not so limited. Rather, Respondent insisted therein that the Constitution required that it be permitted to "disclose to a customer who is the target of the NSL that the provider received and complied with an NSL regarding the customer." Respondent's Opposition to Petition at n.1 (June 8, 2015) ("Resp. Opp. Br."); *see also id.* at 23 (arguing that the

Constitution required permitting disclosure of the fact of receipt of an NSL "at a minimum," without specifying the time period). Respondent has not renounced its earlier position regarding a broader disclosure, and there is therefore no justification for considering its challenge to be a narrow, "limited" one here.[1] In any event, as explained above, even a purportedly "limited" disclosure would be reasonably expected to cause national security harm.

In sum, Respondent's Sur-Reply provides no reason to disregard (A)AD Good's explanation of the national security harms that would reasonably be expected from informing the target, either directly or by potential implication, about the FBI's investigation of the target and its use of an NSL in that investigation. Consistent with the conclusions of other courts, the nondisclosure requirement in this NSL is therefore constitutional and should therefore be enforced. *See, e.g.*, *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008); *In re National Security Letter*, No. 1:12-mc-007 (AJT/IDD) (E.D. Va. April 24, 2012); *In re Matter of NSLs*, No. 13-cv-1165-SI (N.D. Cal. Aug. 12, 2013).

II. Respondent's Facial Challenge to the NSL Nondisclosure Statutes, as Amended by the USA FREEDOM Act, Should Be Rejected.

As Petitioner previously explained, given that the NSL nondisclosure requirement may be constitutionally applied to Respondent here, there is no basis for the Court to entertain a facial challenge at all. *See* Reply Br. at 6-7 (*citing, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007); *Parker v. Levy*, 417 U.S. 733, 759 (1974)). Petitioner's only response is that "first amendment overbreadth challenges

[1] Respondent's answer to the government's explanation that permitting Respondent to make a more "limited" disclosure would, if repeated in the context of other providers receiving NSLs, "provide a wealth of detailed information to our adversaries" once considered "on an aggregate basis" is a non sequitur. *See* Reply Br. at 10; Resp. Sur-Reply at 5. The fact that information about Respondent itself does not, on its own, lead to the harm does not mitigate the national security harms that would reasonably be expected to result from the position Respondent advocates: "[that] as a matter of policy [] service providers should be able to, when appropriate, disclose to a customer who is the target of the NSL that the provider received and complied with an NSL regarding the customer." Resp. Opp. Br. at n.1.

are the exception to the rule" that courts should refrain from unnecessarily deciding facial challenges in circumstances where a statute is constitutional as-applied. *Compare* Resp. Sur-Reply at 8 *with* Reply Br. at 6. But Respondent fails to acknowledge that Petitioner specifically addressed whether the overbreadth exception is applicable and explained that, to bring a facial overbreadth challenge here, where the statute is constitutional as-applied, Petitioner must "describe the instances of arguable overbreadth" and demonstrate "from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." Reply Br. at 7 (*quoting Wash St. Grange*, 552 U.S. at 450); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988)). Respondent does not address either of these First Amendment cases, and instead, specifically declines to accept the burden imposed by this precedent of identifying other instances where the NSL nondisclosure requirement is unconstitutional, *see* Resp. Sur-Reply at 8 ("[Respondent's] facial challenge [] is based on the *same improper restriction* on speech being imposed on [Respondent]").[2] Respondent has therefore failed to satisfy the requirements for its facial challenge to be heard.

Respondent's facial challenge is unpersuasive at any rate, especially when considered in the context of the enactment of the USA FREEDOM Act. As Petitioner explained in its previous briefing, the NSL nondisclosure requirement "is not a typical prior restraint or a typical content-based restriction in which a person's right to speak is conditioned on prior approval from the government." Reply Br. at 15 (*quoting Mukasey*, 549 F.3d 877). Rather, enforcement of NSLs should be treated as a categorical prohibition on disclosures of information learned only from the government by participation in a

[2] Respondent's attempt to distinguish *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), on the grounds that the plaintiffs in that case had "conceded that the statute was constitutionally applied," Resp. Sur-Reply at 8, has no relevance here. Petitioner relied not on *Broadrick*, but on subsequent Supreme Court precedent that did not involve similar concessions. *See generally Parker*, 417 U.S. 733; *Gonzales*, 550 U.S. 124 (cited in Petitioner's Reply Brief at 6-7).

confidential investigation, and punishable by the threat of criminal sanctions imposed after disclosure. *See* Reply Br. at 15 (*citing, e.g.*, *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978)). And, even if reviewed as a prior restraint, the NSL statute survives First Amendment scrutiny as a proper method to protect the government's own interests in secrecy while providing the recipients with the appropriate safeguards of government-initiated judicial review. Reply Br. at 15-18; *see Mukasey*, 529 F.3d 877; *Marchetti*, 466 F.2d at 1317.[3] As the House Committee Report for the USA FREEDOM Act explains, the statutory amendments in the USA FREEDOM Act reinforce the constitutionality of the NSL provisions in this regard by "correct[ing] the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit in [*Mukasey*], and adopt[ing] the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109 at 24.

Respondent's other arguments regarding the facial validity of the NSL statutory scheme are also untenable. First, relying on the district court opinion in *In re NSL*, 930 F. Supp. 2d 1064, 1075 (N.D. Cal. 2013), Respondent asserts that the government's nondisclosure authorities are "not narrowly tailored to protect national security" because the government may restrict "the mere fact of receipt" of an NSL, and not merely its content. Resp. Sur-Reply at 6. Respondent fails to recognize, however, that the USA FREEDOM Act renders that analysis inapplicable, because the district court relied on the fact that "[t]he statute does not distinguish – or allow the FBI to distinguish – between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The statute contains a blanket prohibition . . . ." 930 F. Supp. 2d at 1076 (*quoted in* Resp. Opp. Br. at 18). Although the government

[3] Respondent concedes that passage of the USA FREEDOM Act moots its claim about the standard of review applied in judicial proceedings, *see* Resp. Sur-Reply at n.4. Respondent makes no mention of its prior argument that the narrowing construction applied by the Second Circuit in *Mukasey* "cannot be reconciled with the statutory text," which is similarly mooted by the amendments in the USA FREEDOM Act. *Compare* Resp. Opp. Br. at 7-8 *and* 18-19 *with* Reply Br. at 3-4 (identifying effect of Sections 502 and 503 of USA FREEDOM Act).

respectfully disagrees with and has appealed that ruling, *see In re NSL*, *appeal docketed* No. 13-15957 (9th Cir.); *compare Mukasey*, 549 F.3d at 884 n.16 (noting that the judicial review provisions already enabled courts to modify or set aside a nondisclosure requirement that was no longer necessary), this objection is now moot because the USA FREEDOM Act provides the FBI with explicit statutory authority to agree to other disclosures in certain circumstances. *See* USA FREEDOM Act at § 502; 18 U.S.C. § 2709(c)(2)(A)(iii). In any case, as the facts here illustrate, there are unquestionably circumstances in which not only the contents of an NSL, but the fact of its issuance and receipt, must be kept secret in order to prevent the enumerated national security harms. *See supra* Part I.

Similarly, the review procedures created by the USA FREEDOM Act resolve Respondent's claim that the potential duration of a nondisclosure requirement is constitutionally problematic. *See* Reply Br. at 5; USA FREEDOM Act § 502(f)(1). Respondent claims that the USA FREEDOM Act has provided no answer because it requires only "procedures" for rescinding nondisclosure orders, and not the actual "rescind[ing] [of] any nondisclosure order." Resp. Sur-Reply at 7. The distinction Respondent describes has no meaning in the context of Respondent's challenge to the duration of a nondisclosure requirement "longer than necessary to serve the national security interests at stake." Resp. Opp. Br. at 18 (*quoting In re NSL*, 930 F. Supp. 2d at 1076). Congress has required that the procedures to be implemented *will* provide for "the termination of [] a nondisclosure requirement if the facts no longer support nondisclosure." USA FREEDOM Act § 502(f)(1)(B)-(C). This amendment thereby addresses precisely the circumstances challenged by Respondent by minimizing the possibility that NSL nondisclosure requirements will remain in effect after the need for them has lapsed.[4] And

[4] Respondent also complains that "these procedures are not in place now, and do not need to be until December 2015," but here, where Congress has already amended the statute and provided for implementation by the government within a matter of months, the Court should not address

Respondent cannot yet argue that these future procedures will fail to "pass constitutional muster," *see* Sur-Reply Br. at 7, because the issue is not yet ripe "when the issues are purely legal and when the action in controversy is [not yet] final and [] dependent on future uncertainties," such as the content of the procedures to be adopted. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("doctrine of ripeness prevents judicial consideration of issues until . . . presented in clean-cut and concrete form.").

Finally, Respondent objects that the USA FREEDOM Act does not require absolute certainty that a harm to national security, or other enumerated harm, will occur before authorizing imposition of a nondisclosure requirement. *See* Resp. Sur-Reply at 7. Even before the USA FREEDOM Act, the NSL statute placed the burden of persuasion in Court on the government, as the Second Circuit held in *Mukasey*. *See* 549 F.3d at 875. The USA FREEDOM Act's enactment further clarifies this burden: where the statute previously provided that a court could set aside or modify a nondisclosure requirement where "there is no reason to believe" that harm would result, the amended statute provides for a court to issue a nondisclosure order or extension thereof if "there *is* reason to believe" that a harm will result. *Compare* 18 U.S.C. § 3511(b)(2) – (3) (2012) *with* USA FREEDOM Act § 502(g), codified as 18 U.S.C. § 3511(b)(3) (emphasis added). This new language makes clear that the onus is on the government to make the requisite showing. Moreover, as Petitioner previously demonstrated, forecasts of future consequences are routinely affirmed even though such predictions are not measurements of "certainty." *See* Reply Br. at 19 (citing cases regarding harms from the disclosure of classified information, grand-jury proceedings, and judicial misconduct investigations). Because certainty cannot be had, particularly regarding predictions about national security and law-enforcement harms, the proper course is for

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constitutional issues that have been significantly altered by Congress's substantial modifications of the statute. *Cf. ACLU v. Clapper*, Case No. 14-42-cv (2d Cir. May 7, 2015) at 94-95 (declining to enjoin intelligence collection program pending likely action by Congress).

reviewing courts to ascertain whether the proffered national security harms are sufficiently persuasive, weighing heavily in that assessment is the Executive Branch's expertise in evaluating the United States' national security and similar interests. *See id.* For this reason, Respondent's argument that the statute is unconstitutional because it does not require a certainty of harm is unconvincing.

CONCLUSION

The challenged NSL nondisclosure requirement is constitutional and justified under the facts set forth by Petitioner here, and the statutory authority for NSLs, particularly as amended by the USA FREEDOM Act, is also constitutional. For these reasons, the Court should grant the Attorney General's Petition, declare the nondisclosure requirement valid, and enjoin respondent to comply.

Dated: July 30, 2015

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE NATIONAL SECURITY LETTER	*	
LORETTA E. LYNCH, *United States Attorney General,* **Petitioner**	*	
v.	*	**CIVIL NO. JKB-15-1180**
UNDER SEAL, **Respondent**	*	

* * * * * * * * * * * *

MEMORANDUM

Pending before the Court is United States Attorney General Loretta E. Lynch's petition for judicial review and enforcement of a National Security Letter ("NSL") pursuant to 18 U.S.C. § 3511(c). (Pet., ECF No. 1.) The matter has been thoroughly briefed by the parties (ECF Nos. 6, 11, 12, 15, 16, 19, 20), and no hearing is required, Local Rule 105.6 (D. Md. 2014). The petition, as modified herein, will be granted.

(G) the Federal Bureau of Investigation ("FBI") issued an NSL to Respondent Under Seal ("Respondent"). Respondent has not contested that it is a "wire or electronic communication service provider" ("ECSP") within the meaning of 18 U.S.C. § 2709(a), which authorizes the FBI to issue an NSL requiring an ECSP to provide "subscriber information and toll billing records, or electronic communication transactional records in its custody" to the FBI. Respondent concedes it supplied the requested information after it received the NSL and did not contest it. (Resp.'s Opp'n 10.) Further, Respondent abided by the nondisclosure requirement contained in the NSL. (*Id.* 11.) (G) Respondent notified the FBI that it intended to file a petition to set aside the nondisclosure

provision of the NSL. (Pet., Ex. 1.) Respondent opined that the nondisclosure provision may no longer be needed. Respondent also invited the Government to initiate a judicial review proceeding in lieu of Respondent's filing a petition. (*Id.*) The Government responded by initiating the instant proceeding.

Just prior to Respondent's filing of its opposition to the petition, the laws governing NSLs were amended via the USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268.[1] Accordingly, the Court will conduct its judicial review under the most recent version of the relevant statutes, specifically, sections 2709 and 3511 of Title 18, United States Code.

Respondent argues the Government has not met its burden of establishing a justification for a continued nondisclosure requirement. Understandably, Respondent makes this argument in the dark since it is not privy to the classified materials supplied to the Court on an *ex parte* basis, as permitted under § 3511(e). However, after reviewing those materials, the Court makes the following findings:

1. The information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. 18 U.S.C. § 2709(b)(1).
2. There is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person. 18 U.S.C. § 3511(b)(3).
3. The materials in this case must be kept under seal to prevent the unauthorized disclosure of the Government's investigative activities. 18 U.S.C. § 3511(d).

[1] "USA FREEDOM" is an acronym for Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring.

As to the last point, the Court awaits the Government's promised redacted versions of the filings in this case and its promised motion to partially unseal the redacted filings. (Pet.'s Reply 2 n.2.)

The Court further concludes Respondent is not entitled to access to the classified materials that form the basis for the Court's determination. Respondent has presented no authority for that proposition. The statute governing judicial review clearly sets up a mechanism for *ex parte* judicial review of the classified materials. It follows, then, that Congress did not envision allowing recipients of NSLs also to review those materials.

Respondent has argued the NSL's nondisclosure requirement infringes upon its constitutional right of free speech. (Resp.'s Opp'n 1.) Assuming without deciding that the statutes as revised implicate First Amendment concerns of free speech, the Court holds the statutory authorization for an NSL to include a nondisclosure requirement and the particular nondisclosure requirement at issue here pass strict scrutiny. The first part of this inquiry is "whether the practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (internal alteration and quotation marks omitted). As the Supreme Court has said, "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The other part of the constitutional inquiry is "whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times*, 467 U.S. at 32 (internal alteration and quotation marks omitted). The statute's allowance of a nondisclosure requirement and the scope of the requirement in the NSL in the instant case are

necessary, in the Court's judgment, to the protection of national security. The NSL's infinite duration for the nondisclosure requirement is problematic, however.

At present, the nondisclosure requirement in this case has no ending date, and the Court's review of its continued viability falls within an interim period between the effective date of the USA FREEDOM Act of 2015, which directs the Attorney General to "adopt procedures with respect to nondisclosure requirements . . . to require . . . review at appropriate intervals . . . and termination . . . if the facts no longer support nondisclosure," Pub. L. 114-23, title V, § 502(f)(1) (*see* Note foll. 12 U.S.C. § 3414), and the anticipated but unknown date when the Attorney General will have actually promulgated such procedures. In the absence of those governing procedures, the Court will require the Government to review every 180 days the rationale for the nondisclosure requirement's continuation. Once the Attorney General's procedures are in place, then the nondisclosure requirement will be subject to review thereunder, and this Court's mandate of review every 180 days will no longer be in force.

One other observation is that the USA FREEDOM Act of 2015 included a new United States Code section, 50 U.S.C. § 1874, that permits public reporting of the receipt of national security process by persons subject to such orders, including NSLs. Prior to this new law's enactment, Deputy Attorney General James M. Cole in January 2014 issued a letter to several ECSPs and clarified what reports about national security process by ECSPs to the public would be acceptable to the Government. Letter, James M. Cole to Colin Stretch *et al.*, Jan. 27, 2014, http://www.justice.gov/iso/opa/resources/366201412716018407143.pdf (accessed Sept. 16, 2015).

(G)

(G)

The methods of reporting established in § 1874—with reporting allowed in "bands" of numbers and with restriction on the period of time for which a report may be issued—are a reasonable accommodation of an ECSP's desire for transparency and the Government's compelling interest in national security.

In conclusion, the Government has justified its petition for enforcement of the nondisclosure provision in the NSL directed to Respondent. A separate order will issue granting enforcement, as modified herein.

DATED this 17th day of September, 2015.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE NATIONAL SECURITY LETTER *

LORETTA E. LYNCH, *
United States Attorney General,
Petitioner *

v. * **CIVIL NO. JKB-15-1180**

UNDER SEAL, *
Respondent
*

* * * * * * * * * * * *

ORDER

In accordance with the foregoing memorandum, IT IS HEREBY ORDERED:

1. The Government's Petition for Judicial Review and Enforcement of a National Security Letter Pursuant to 18 U.S.C. § 3511(c) (ECF No. 1) IS GRANTED.
2. The nondisclosure requirement in the National Security Letter ("NSL") issued to Respondent IS MODIFIED so that the Government must review the necessity for nondisclosure every 180 days following the date of this order.
3. The Government's duty to conduct the review mandated in Item 2 SHALL EXPIRE upon the Attorney General's promulgation of review procedures pursuant to Pub. L. 114-23, title V, § 502(f)(1) (*see* Note foll. 12 U.S.C. § 3414). Thereafter, the Attorney General SHALL REVIEW the nondisclosure requirement at issue in the instant matter in accordance with the Attorney General's duly promulgated review procedures.
4. Respondent SHALL COMPLY with the nondisclosure requirement of the NSL and SHALL NOT DISCLOSE the fact of receipt of the NSL, the contents of the NSL, or any attachment to the NSL to anyone other than those persons to whom disclosure is

necessary in order to comply with the request, an attorney in order to obtain legal advice or assistance regarding the request, or other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director; further, disclosure may only be made to the above-listed individuals pursuant to the conditions specified in 18 U.S.C. § 2709(c)(2).

5. Any failure to obey this order may be punished by the Court as contempt thereof. 18 U.S.C. § 3511(c).
6. The Clerk SHALL ENSURE all counsel of record receive a copy of this order and the accompanying memorandum.
7. The Clerk SHALL CLOSE this case.

DATED this 17th day of September, 2015.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General	)	Case No. 15-cv-001180
v.	)	
UNDER SEAL	)	**FILED UNDER SEAL** PURSUANT TO 18 U.S.C. § 3511(d)

[PROPOSED] ORDER

Upon consideration of the Petitioner's Unopposed Motion for Partial Unsealing, it is hereby ORDERED that:

1) Petitioner's Motion is Granted;
2) This case shall be placed on the public docket as a matter containing material that is under seal, which shall include the identity of Respondent and Respondent's counsel;
3) This case shall be captioned on the public docket as *Loretta E. Lynch, Attorney General v. Under Seal*;
4) Respondent's counsel shall be identified on the public docket as "Under Seal";
5) The redacted versions of the documents filed with Petitioner's Motion shall be placed on the public docket, along with Petitioner's Motion and this Order;
6) All other documents currently under seal in this case shall remain sealed.

IT IS SO ORDERED.

(Date)

JAMES K. BREDAR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-cv-001180 [redacted] PURSUANT TO 18 U.S.C. § 3511(d)

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH[1], Attorney General	Case No. 15-cv-001180
v.	
UNDER SEAL	[redacted] PURSUANT TO 18 U.S.C. § 3511(d)

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF A NATIONAL SECURITY LETTER PURSUANT TO 18 U.S.C. § 3511

PRELIMINARY STATEMENT

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

18 U.S.C. § 2709 is one of a number of statutes that authorize the government to collect information in service of a national security investigation and to prevent private parties from whom the

[1] Upon taking office on April 27, 2015, Attorney General Lynch has been "automatically substituted as a party" to this action. Fed. R. Civ. P. 25(d).

government requests information from destroying the confidentiality of the government's inquiry. Pursuant to that statute and as part of an authorized, ongoing national security investigation, the [redacted]Federal Bureau of Investigation ("FBI") served a National Security Letter ("NSL") [redacted] [redacted]("Respondent"). The NSL made a limited, specific inquiry for subscriber information related to an electronic account with Respondent. Pursuant to § 2709(c), a designee of the Director of the FBI certified that the NSL must remain secret to prevent harm to, *inter alia*, national security, and therefore that the NSL requires that respondent not disclose the existence or contents of the NSL.

The NSL nondisclosure obligation was imposed on respondent in compliance with the statutory requirement that a designated, senior FBI official personally certify the need for nondisclosure. And as set forth in the classified Declaration of Donald Good, Acting Assistant Director of the Cyber Division of the FBI ("Classified Good Decl."), to be submitted to the Court *ex parte* and *in camera* pursuant to 18 U.S.C. § 3511, there was and remains good reason to impose the nondisclosure requirement. The Court should therefore enforce the requirement that Respondent maintain the secrecy of the NSL.

While the nondisclosure requirement prohibits respondent from disclosing certain, limited information, it passes muster under the First Amendment. Numerous judicial precedents make clear that Congress may constitutionally prohibit disclosure of information about a secret government investigation that a private party learns only through its own involvement in the investigation. Indeed, courts have recognized that the "restraint" on communication of information learned solely by involvement in a government investigation is not a classic prior restraint of the type that receives heightened scrutiny. Regardless, the nondisclosure requirement here would survive even the strictest scrutiny, for it is designed to further the compelling governmental and public interest in effectively

detecting and preventing terrorism and foreign espionage, and it is carefully tailored to restrict only information that respondent has learned through its involvement in the NSL inquiry itself.

In addition, the NSL issued to respondent was accompanied by procedural protections that would satisfy the most searching test applied to prior restraints, and the government has applied those procedural protections here by: 1) accepting the burden of seeking judicial review of the NSL nondisclosure requirement; and 2) initiating this action within a reasonable time – approximately thirty days – after respondent objected to the NSL nondisclosure requirement.

For all of these reasons, the Court should grant the Attorney General's petition and order that respondent is bound by the nondisclosure requirement of the NSL and 18 U.S.C. § 2709.

BACKGROUND

I. Statutory Background

A. National Security Letters

The President of the United States has charged the FBI with primary authority for conducting counterintelligence and counterterrorism investigations in the United States. *See* Exec. Order No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg 59941 (Dec. 4, 1981). The FBI's experience with national security investigations has shown that electronic communications play a vital role in advancing terrorist and foreign intelligence activities and operations. *See* Classified Good Decl. (to be submitted *ex parte* and *in camera* to the Court pursuant to 18 U.S.C. § 3511(e) and 28 C.F.R. § 17.17), at ¶ 10.[2] Accordingly, pursuing and disrupting the actions of adversaries, including, *e.g.*, terrorist plots and espionage activities, often requires the FBI to seek information relating to electronic communications. *Id.*

[2]The Attorney General will lodge (A)AD Good's declaration with the Classified Information Security Officer on May 8, 2015 and provide notice of its lodging to the Court once it has done so. As explained therein, the declaration contains classified information or other sensitive law enforcement

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

B. Confidentiality of National Security Letters

Counterintelligence and counterterrorism investigations are frequently long-range, forward-looking, and prophylactic in nature; that is, the government aims to disrupt terrorist acts against the United States before they occur or thwart espionage before it is carried out. Because these investigations are directed at individuals or groups taking efforts to keep their own activities secret, it is

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information that the FBI has specifically determined cannot be shared with the public, respondent, or its counsel. The government will file under seal and serve on respondent an unclassified version of (A)AD Good's declaration that does not contain the classified information or other sensitive law enforcement information that cannot be shared with respondent. These measures to protect classified and sensitive law enforcement information are consistent with the judicial review procedures set forth by Congress for review of NSL nondisclosure requirements, *see* 18 U.S.C. § 3511(e), and comport with well-established precedent regarding the handling of classified information in civil litigation, *see, e.g., Stillman v. CIA*, 319 F.3d at 548–49 (in cases challenging agency determinations that information cannot be published because it is classified, "in camera review of affidavits, followed if necessary by further judicial inquiry, will be the norm" with the "appropriate degree of deference" given to the Executive Branch concerning its classification decisions) (*quoting McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

essential that these targets not learn that they are the subject of an FBI investigation. *See* Classified Good Decl. ¶¶ 24-31; *see also* Unclassified Declaration of Donald Good at ¶¶ 12-14 (to be served on Respondent in conjunction with this Brief and to be filed as an exhibit to the Notice Regarding *Ex Parte* Submission of the Classified Good Declaration) ("Unclassified Good Decl."). If targets learn that their activities are being investigated, they can be expected to take action to avoid detection or disrupt the government's intelligence gathering efforts. *See* Classified Good Decl. ¶¶ 25-27, 30, 31; Unclassified Good Decl. at ¶¶ 12-14. Likewise, knowledge about the scope or progress of a particular investigation allows targets to determine the FBI's degree of penetration of their activities and to alter their timing or methods. *See* Classified Good Decl. at ¶¶ 25, 30, 31. The same concern applies to knowledge about the sources and methods the FBI is using to acquire information. *See id.* ¶¶ 25, 30, 33-35.

The secrecy needed for successful national security investigations can be compromised if an electronic communications service provider discloses that it has received an NSL or provided information pursuant to an NSL. *See* Classified Good Decl. at ¶¶ 25, 32-35. To avoid that result, Congress has placed restrictions on disclosures by NSL recipients, contained in 18 U.S.C. § 2709(c). The nondisclosure requirement requires a case-by-case determination of need by the FBI and thus prohibits disclosure only if the Director of the FBI or another designated senior FBI official certifies that "otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 2709(c)(1). If such a certification is made, the NSL itself notifies the recipient of the nondisclosure obligation. *Id.* § 2709(c)(2). Violation of the nondisclosure requirement is a criminal offense *if* the recipient discloses the information "knowingly and with the intent to obstruct an investigation or judicial proceeding." *Id.* § 1510.

II. Factual Background

As part of an ongoing, authorized national security investigation, the FBI issued an NSL dated [redacted] and served on [redacted] to Respondent, requesting information concerning non-content information related to the investigation. *See* Classified Good Decl. at ¶ 17. In particular, the NSL requested the names, addresses, length of service and electronic communications transactional records for the account in question pursuant to 18 U.S.C. § 2709. *Id.*

The NSL was issued by [redacted] an FBI official who is authorized to issue NSLs under 18 U.S.C. § 2709.[3] *See* Classified Good Decl. ¶ 18. [redacted] also certified pursuant to § 2709(b) that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *See id.*

The NSL informed Respondent of the prohibition against disclosing the contents of the NSL, certifying, in accordance with § 2709(c), that such disclosure could result in an enumerated harm that is related to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *See id.* The letter notified Respondent that in accordance with 18 U.S.C. § 3511(a) and (b), Respondent had a right to challenge the letter if compliance would be unreasonable, oppressive, or otherwise illegal. *See* Unclassified Good Decl. ¶ 10; 18 U.S.C. § 3511(a). The letter also advised that Respondent had 10 days to notify the FBI as to whether it desired to challenge the nondisclosure provision. *See* Unclassified Good Decl. ¶ 24. Respondent did not object to providing the information requested in the NSL, and in fact provided the information and, to the FBI's knowledge, has not disclosed the contents of the NSL. *See* Unclassified Good Decl. ¶ 24; Petition ¶ 29.

[redacted]

On March 24, 2015, the FBI received a letter via facsimile from Respondent, dated March 23, 2015. *See* Exhibit 1. According to its letter, Respondent now seeks "to set aside the non-disclosure provisions of the NSL." *Id.* Respondent's letter further asked for responses regarding several matters, including whether the government: 1) would "agree that . . . the non-disclosure provision is no longer needed," and 2) will initiate the judicial proceeding for enforcement of the non-disclosure provision in this instance, where [redacted] *Id.* In response to Respondent's letter, the FBI's Office of General Counsel and the FBI's litigation counsel at the Department of Justice indicated to Respondent that the justifications for the nondisclosure provisions in the NSL issued to Respondent continue to be valid, *see* Classified Good Decl. ¶ 24, and that, although [redacted] the government would nonetheless agree to take on the burden of initiating an enforcement proceeding. *See* Unclassified Good Decl. ¶ 25.

ARGUMENT

I. Standard Of Review

The Attorney General brings his petition for judicial review and enforcement of the NSL under 18 U.S.C. § 3511. Under that statute, Congress has provided that, when the recipient of an NSL "fail[s] to comply with [the] request for records, a report, or other information," the Attorney General "may invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request." 18 U.S.C. § 3511(c). And the "request" that the Attorney General may seek to enforce in a court includes that "notif[ication]" (and imposition) "of the nondisclosure requirement." *Id.* § 2709(c)(2).[4] A disclosure of information about the NSL such as respondent wishes to make is thus a

[4] Section 3511(c) is symmetrical to § 3511(b), which authorizes NSL recipients to seek judicial

"fail[ure] to comply with [the] request" and, under § 3511, this Court "may issue an order," punishable as contempt, "requiring the [respondent] to comply with the request," including its nondisclosure requirement. *Id.*[5]

II. The National Security Letter Issued To Respondent And Its Nondisclosure Requirement Comply With The Underlying Statute, 18 U.S.C. § 2709(c).

The NSL statute, 18 U.S.C. § 2709(c), provides that:

> If the Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person, no wire or electronic communications service provider, or officer, employee, or agent thereof, shall disclose to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

Id. § 2709(c)(1). The statute further provides that, when nondisclosure is required, the NSL "shall notify the person or entity to whom the request is directed of the nondisclosure requirement[.]" *Id.* § 2709(c)(2).

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review of a nondisclosure requirement. Under § 3511(b), a district court "may modify or set aside" the nondisclosure requirement if the court finds "no reason to believe" that disclosure "may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* § 3511(b)(2), (b)(3).

[5] Even in the absence of this express, statutory authorization to invoke the aid of this Court, the government would have standing to bring suit to vindicate its sovereign interests by preventing the disclosure of sensitive national security or law enforcement information. *See, e.g., Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201-07 (1967) (noting the long line of cases recognizing that the United States may sue to protect its sovereign or statutory interests); *In re Debs*, 158 U.S. 564, 586 (1895) (the United States possesses a non-statutory cause of action to vindicate federal interests in the federal courts); *United States v. Marchetti*, 466 F.2d 1309, 1313 & n.3 (4th Cir. 1972) (following *Debs* to hold that the government had non-statutory standing to bring suit to enjoin a threatened disclosure of classified information).

As set forth below, the NSL nondisclosure obligation here is imposed in compliance with all of these requirements.

A. As A Provider Of An "Electronic Communication Service," Respondent Is Subject To 18 U.S.C. § 2709(c) And The NSL Nondisclosure Obligation

The NSL statute, 18 U.S.C. § 2709, authorizes the FBI to obtain information via NSL from, and to impose a nondisclosure requirement on, a "wire or electronic communication service provider." *Id.* § 2709(a). As the provider of an online service that allows users to [redacted] Respondent is such an electronic communication service provider.[6]

Section 2709 is contained in Title II of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2701 *et seq.* ECPA defines "electronic communication service" ("ECS") as any service that "provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. §§ 2510(15), 2711(1). "The language chosen by Congress" to define an electronic communication service thus "captures any service that stands as a 'conduit' for the transmission of wire or electronic communications from one user to another." *See Council on American-Islamic Relations Action Network, Inc. v. Gaubatz ("CAIR")*, 793 F. Supp. 2d 311, 334 (D.D.C. 2011) (*quoting Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 902 (9th Cir. 2008), *cert. denied in relevant part*, 130 S. Ct. 1011 (2009), *and reversed in part on other grounds*, 130 S. Ct. 2619 (2010)). ECS providers in 1986 included, in addition to telephone companies, others such as "[e]lectronic 'bulletin board[ ]'" operators and electronic mail companies. *See* S. REP. NO. 99-541 at 8-9 (1986), as reprinted in 1986 U.S.C.C.A.N. 3562-63. Respondent provides its users [redacted]

[6] In its correspondence objecting to the nondisclosure requirement (Exhibit 1), Respondent has not disputed that it is an electronic communication service provider.

[redacted] It is therefore an electronic communications service provider within the meaning of the ECPA. *See, e.g., In re Zynga Privacy Litigation*, 750 F.3d 1098, 1103 (9th Cir. 2014) (an ECSP enables the "transfer of electronic messages, such as email, between computer users); *Freedman v. America Online, Inc.*, 325 F. Supp. 2d 638, 643 & n.4 (E.D. Va. 2004) (Internet service provider America Online was electronic communication service provider); *Inventory Locator Service v. Partsbase*, 2005 WL 2179185, *24 (W.D. Tenn. September 6, 2005) (holding a password-protected website containing an electronic bulletin board and a web-based forum where parties could communicate was an ECS).

B. An Authorized FBI Official Certified The Need For Nondisclosure Of The NSL To Respondent.

The NSL nondisclosure obligation on respondent here satisfies the requirement that the need for nondisclosure be certified by an appropriate, senior FBI official. Under the NSL statute, 18 U.S.C. § 2709(c)(1), the nondisclosure obligation is imposed on an NSL recipient electronic communication service provider such as respondent when "the Director of the Federal Bureau of Investigation, or his designee [redacted] certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." Here, [redacted] made the required certification in the NSL itself, using the statutory language. *See* Classified Good Decl. at ¶18; *id.* ¶¶ 26-30 (explaining further the need for continued nondisclosure of the NSL by respondent). [redacted] is designated as [redacted] authorized to certify the need for nondisclosure of an NSL under 18 U.S.C. § 2709(c). *See* Classified

Good Decl. ¶ 18.

C. The NSL Notified Respondent Of The Nondisclosure Requirement.

As required by statute, the NSL itself also informed respondent that the statutory nondisclosure obligation was being imposed under 18 U.S.C. § 2709(c). *See* Unclassified Good Decl. at ¶¶ 17-18.

The NSL to respondent was therefore issued in full compliance with all statutory requirements, and the nondisclosure requirement should therefore be enforced under the NSL statute. *See In re National Security Letter*, No. 12-mc-0007, Dkt. No. 17-3 (AJT/IDD) (E.D. Va. April 24, 2012, as partially unsealed July 23, 2012) (finding "the NSL . . . was properly issued in accordance with law, including 18 U.S.C. § 2709").

III. The Certification Of Need For Nondisclosure In The National Security Letter Served On Respondent Is Justified, And The Nondisclosure Obligation Is Narrowly Tailored To Serve A Compelling Government Interest.

As (A)AD Good explains in his Declaration, the NSL nondisclosure requirement is applied to respondent here in order to shield an authorized investigation to protect against international terrorism or clandestine intelligence activities, and, thereby, protect against a danger to the national security of the United States and/or interference with the investigation. *See* Classified Good Decl. ¶¶ 24-36; Unclassified Good Decl. at ¶ 15. That governmental interest is a manifestly compelling one. *See, e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation.").

Congress repeatedly has recognized the need for secrecy when conducting counterintelligence and counter-terrorism investigations, and so each of the several statutes allowing issuance of NSLs

includes a nondisclosure provision similar to 18 U.S.C. § 2709(c).[7] As Congress has explained, "the FBI could not effectively monitor and counter the clandestine activities of hostile espionage agents and terrorists if they had to be notified that the FBI sought their . . . records for counterintelligence investigations," and the "effective conduct of FBI counterintelligence activities requires such non-disclosure." H. REP. NO. 99-690(I) at 15, 18, *reprinted in* 1986 U.S.C.C.A.N. 5341, 5345 (regarding enactment of 12 U.S.C. § 3414(a)(5)). Congress also has imposed similar nondisclosure requirements in connection with the use of other investigative techniques apart from NSLs in national security investigations.[8]

The NSL here is carefully tailored to advance the public interest, support the FBI's investigation of a target, and protect national security without unnecessarily restricting expression. By its terms, the nondisclosure requirement of the NSL narrowly applies only to prevent the respondent's disclosure of the fact that the government "has sought or obtained access to information or records" under 18 U.S.C. § 2709. The NSL does not purport to prohibit respondent from disclosing any other information, and places no restriction on respondent's ability to engage in general public discussions regarding matters of public concern. As discussed in the Classified Good Declaration, the complete application of the

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

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

nondisclosure requirement is necessary to prevent the national security harms described therein; that is, there is no information about the NSL that can be disclosed without a reasonably likely harm to national security, including the fact that Respondent has received an NSL or the approximate date on which it received the NSL. *See* Classified Good Decl. at ¶ 30. The nondisclosure requirement is therefore tailored as narrowly as possible to serve the compelling interests described above.

IV. The NSL Is Otherwise Valid And Enforceable.

As set forth above, the NSL issued to respondent satisfied all the applicable statutory criteria. It is, moreover, valid under law, and should be enforced by the Court. *Accord* 18 U.S.C. § 3511(a) (when an NSL recipient challenges the NSL, a court may modify or set it aside only if it is "unreasonable, oppressive, or otherwise unlawful").

The NSL nondisclosure requirement imposes a necessary restriction on what respondent may disclose. As explained below, the nondisclosure requirement, both facially and as applied to respondent here, is proper. It complies with the First Amendment, is not a classic prior restraint, and survives any properly-applied scrutiny because it is narrowly tailored to serve the paramount governmental and public interest in national security.

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

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

the investigation that it has learned through its own involvement.

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

The Supreme Court relied on this distinction again in *Butterworth v. Smith*, 494 U.S. 624 (1990), in which the Court held that Florida could not constitutionally prohibit a grand jury witness from disclosing the substance of his testimony after the term of the grand jury had ended. In so holding, the Court distinguished *Rhinehart* on the ground that "[h]ere . . . we deal only with [the witness's] right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury." *Id.* at 632; *id.* at 636 (Scalia, J., concurring) ("[q]uite a different question is presented . . . by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness.").[9]

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[9] Lower courts likewise have upheld similar nondisclosure requirements based on this principle. *See Hoffman-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) ("a [constitutional] line should be drawn between information the witness possessed prior to becoming a witness and information the

Section 2709(c) is analogous to the grand jury and other investigatory nondisclosure provisions discussed above. Indeed, 18 U.S.C. § 2709 is intended explicitly to mirror grand jury subpoena powers in many key respects. *See* H. REP. NO. 107-236(I) at 61-62 (Congress sought to "harmonize" § 2709 "with existing criminal law where an Assistant United States Attorney may issue a grand jury subpoena for all such records in a criminal case."). In *Doe v. Ashcroft*, a case considering the facial constitutionality of 18 U.S.C. § 2709(c), the court concluded that "[t]he principle that *Rhinehart* and its progeny represent is directly applicable" to § 2709 because "[a]n NSL recipient or other person covered by the statute learns that an NSL has been issued only by virtue of his particular role in the underlying investigation." 334 F. Supp. 2d 471, 519 (S.D.N.Y. 2004), *vacated on other grounds*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006); *see also id.* at 518 (the "laws which prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger less First Amendment concerns tha[n] laws which prohibit disclosing information a person obtains independently."). And in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), a subsequent appeal in that litigation discussed further below, the Second Circuit held that "[t]he nondisclosure requirement of subsection 2709(c) is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny." 549 F.3d at 877.[10]

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witness obtained through her actual participation in the grand jury process"; upholding statute prohibiting disclosure of, *inter alia*, information sought by prosecution in grand jury); *In Re Subpoena to Testify*, 864 F.2d 1559, 1562 (11th Cir. 1989) (similar); *First Am. Coalition v. Judicial Review Bd.*, 784 F.2d 467, 479 (3d Cir. 1986) (*en banc*) (state may prohibit witnesses and other persons "from disclosing proceedings taking place before" a judicial misconduct investigation board); *Small v. Ramsey*, 280 F.R.D. 264, 284 (N.D.W.Va. 2012) ("an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny").

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

Indeed, the nondisclosure requirement is not a typical prior restraint. In any event, because the nondisclosure requirement is accompanied by procedural protections that meet or exceed those courts have imposed when considering prior restraints, it passes constitutional muster.

B. The Nondisclosure Requirement Of The NSL Served On Respondent Is Not A Classic Prior Restraint Subject To Heightened First Amendment Scrutiny.

As the Second Circuit held in upholding the NSL statute against a First Amendment challenge, the nondisclosure obligation imposed on respondent here "is not a typical prior restraint or a typical content-based restriction[.]" such as a licensing scheme for speech in which the plaintiff's right to speak is conditioned on prior approval from the government. *See Doe v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008). *Compare id. with City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); *see also City of Lakewood*, 486 U.S. at 764 (distinguishing between statute imposing prohibition on speech and one conditioning speech on obtaining a license or permit). Because the NSL restricts limited information obtained only by participation in a confidential investigation, it does not "raise the same specter of censorship" as other restrictions, *Rhinehart*, 467 U.S. at 32, and does not "warrant[] the most rigorous First Amendment scrutiny." *Mukasey*, 549 F.3d at 877.

Here, the NSL categorically prohibits respondent from disclosing that it has received the NSL.

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

This is akin to the statute challenged in *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978), which prohibited the disclosure of information about the proceedings of a judicial investigative body and imposed criminal penalties for violation. *See id.* at 830. Such a nondisclosure provision "does not constitute a prior restraint or attempt by the State to censor the news media." *Id.* at 838. Similarly, in *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), the Eleventh Circuit held that a state law prohibiting disclosure of non-public information obtained through participation in a law enforcement investigation "cannot be characterized as a prior restraint on speech because the threat of criminal sanctions imposed after publication is precisely the kind of restriction that the [Supreme] Court has deemed insufficient to constitute a prior restraint." *Id.* at 1215-16. In short, a categorical prohibition on disclosures enforceable by a penalty after the fact is not a prior restraint. Were that not so, countless state and federal statutes, including every anti-espionage statute that prohibits the disclosure of classified information, would be a prior restraint. *See, e.g.*, 18 U.S.C. §§ 793-794, 798.[11]

Nor is the NSL nondisclosure requirement a classic prior restraint in the form of a court injunction against certain speech or speakers. *See Alexander*, 509 U.S. at 550. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court set forth the strongest statement of First Amendment protection against court-enjoined speech, but the factors that distinguish the NSL nondisclosure requirement from a typical judicial prior restraint of the form considered in *Freedman* underscore why *Freedman* does not apply here. As discussed *supra*, and as the Supreme Court has recognized, court

[11] Whenever the executive branch classifies any item of information under Executive Order 13292, it thereby prohibits the disclosure of the information by the information's recipients. *See* 18 U.S.C. § 793 (providing criminal penalties for improper disclosure of classified information). The classification of information itself, like a categorical prohibition of disclosure with threat of subsequent punishment, "does not "constitute[] a prior restraint in the traditional sense." *See McGehee* v. *Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983); *cf. U.S. v. Morrison*, 844 F.2d 1057, 1068 (4th Cir. 1988) (rejecting First Amendment challenge to application of 18 U.S.C. § 793 because prosecution of government employee for disclosing classified information "certainly is no prior restraint case").

orders prohibiting information acquired only by virtue of involvement in an official investigation do not raise the same concerns as other injunctions on speech. *Rhinehart*, 467 U.S. at 32.

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

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

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

The statute there undertook to censor private films whose contents were created independently of the government itself. The NSL and 18 U.S.C. § 2709(c), in contrast, place no restriction on the disclosure of independently obtained information, but are confined to sensitive information that the NSL recipient learns only by his involvement in the government's own investigation.

Another critical difference is that the nature of the "typical First Amendment harm" associated with a law imposing censorship on motion pictures is far greater than the First Amendment risks associated with a law prohibiting the disclosure of confidential information about a national security investigation. *See City of Littleton* v. *Z.J. Gifts D-4*, 541 U.S. 774, 782-83 (2004). In *Freedman*, the licensing scheme at issue was not confined to obscene speech, but extended to films that "tend to debase or corrupt morals," an open-ended category that reaches protected speech. 380 U.S. at 52 n.2. *See, e.g.*, *Kingsley Intern. Pictures Corp.* v. *SUNY Regents*, 360 U.S. 684, 688-89 (1959). In contrast, like the secrecy agreement in *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), the NSL nondisclosure requirement is aimed at protecting highly sensitive national security investigations, and respondent remains free to disseminate information obtained outside the investigation. Moreover, the reach of the nondisclosure obligation is limited to a narrow category of information that is not characteristically political. The object of the nondisclosure provision is not to censor private speech, but to ensure that the secrecy of the government's own activities is not compromised when those activities must be made known to private persons in order to obtain their assistance. *Cf. Marchetti*, 466 F.2d at 1315 ("The Government . . . has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.").

Thus, if this is a prior restraint at all, it is "not the kind of classic prior restraint that requires

exacting First Amendment scrutiny." *Rhinehart*, 467 U.S. at 33; *Mukasey*, 549 F.3d at 877 (NSL nondisclosure requirement does not "warrant[] the most rigorous First Amendment scrutiny."). And as noted *supra*, the FBI's determination that disclosure of information concerning the NSL to respondent may cause one or more of the harms identified in § 2709(c) is similar to a determination that government information should be classified on national security grounds -- a classification process that, itself, is not a prior restraint for First Amendment purposes. *See, e.g.*, *McGehee*, 718 F.2d at 1147; *Marchetti*, 466 F.2d at 1317.

C. Even If Viewed As A Prior Restraint, The NSL Nondisclosure Requirement Is Valid.

Even if viewed as a prior restraint, the NSL nondisclosure requirement crafted by Congress in 18 U.S.C. § 2709(c) and applied here after an individualized determination of need is appropriate. As discussed further below, it has been upheld for similar application by the Second Circuit. *Mukasey*, 549 F.3d 861. Moreover, to the extent the NSL nondisclosure requirement can be considered a prior restraint, the U.S. Court of Appeals for the Fourth Circuit has previously upheld restrictions of this type.

1. The NSL Nondisclosure Requirement Here Satisfies The Standard Set Out By The Second Circuit Court of Appeals In *Doe v. Mukasey* As Well As the Standard Set Out By The Supreme Court In *Freedman*.

In the only final court decision to consider the current version of 18 U.S.C. § 2709 to date, and the only federal Court of Appeals opinion on the subject, the Second Circuit upheld the nondisclosure statute. As noted, in *Mukasey*, the Second Circuit held that "[t]he nondisclosure requirement of subsection 2709(c) is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny," such that it would always require judicial review prior to, or immediately following, imposition. 549 F.3d at 877. Rather, applying *Freedman*, the Second Circuit held that the Government only has a duty to initiate judicial proceedings to enforce an NSL

nondisclosure requirement when there is a prompt assertion by the NSL recipient that it wishes to make a prohibited disclosure. *Mukasey*, 549 F.3d at 879. The court therefore held, in accordance with *Freedman*, that the First Amendment would be satisfied by a "reciprocal notice" arrangement, under which the Government would notify the NSL recipient of the nondisclosure requirement and would give the recipient 10 days, or some comparable period, to notify the Government that it contests the requirement. *Id.* If the recipient gave such notice within that brief period, the Government would have "a limited time, perhaps 30 days," to initiate a judicial proceeding to maintain the nondisclosure requirement. *Id.* But if the recipient does not give notice within 10 days, the nondisclosure requirement would remain in effect without the need for any further action on the part of the Government. *Id.* The court noted that the Government itself expected very few recipients to wish to make disclosures regarding NSLs, which would mean that the Government would rarely find itself called on to initiate judicial proceedings to maintain the nondisclosure requirement. *Id.*[12]

As noted above, in response to *Mukasey*, the FBI revised its NSL procedures to accommodate the reciprocal notice and judicial review scheme suggested by the Second Circuit. *See* Unclassified Good Decl. at ¶ 17. The FBI informs recipients of the reciprocal notice procedure in the text of the

[12] Reasoning that the Government might be able to implement this proposed "reciprocal notice" scheme without the need for further legislation, the *Mukasey* court declined to invalidate either § 2709(c) or § 3511(b) on its face, and invalidated both provisions "only to the extent that they fail to provide for Government-initiated judicial review." The *Mukasey* court allowed the Government to "respond to this partial invalidation ruling by using the suggested reciprocal notice procedure," 549 F.3d at 884-85, and "limit[ed]" the injunction against the statute imposed by the district court "to enjoining FBI officials from enforcing the nondisclosure requirement of section 2709(c) in the absence of Government-initiated judicial review." 549 F.3d at 885. The *Mukasey* court also considered the constitutional adequacy of the standards for judicial review in Section 3511(b) and held that those standards were deficient in only one respect – the requirement that the district court treat the FBI's determinations regarding national security and diplomatic relations as "conclusive" in the absence of bad faith. 549 F.3d at 882-83. The court concluded this requirement was severable from the remainder of the NSL statute. 549 F.3d at 885.

FBI's standard NSL, and the NSL to Respondent included that language. *Id.* at ¶ 18. And, as in this case, the FBI has assumed the burden of initiating judicial review within approximately thirty days of receiving an objection. To the extent the NSL nondisclosure requirement can be viewed as a prior restraint, its post-*Mukasey* implementation, including its application to Respondent, passes constitutional muster.[13]

Indeed, the NSL served on respondent here even complies with the strict protections afforded by *Freedman* for a classic prior restraint. *Freedman* requires that in the case of a classic prior restraint: "'(1) any [administrative] restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'" *Thomas*, 534 U.S. at 321 (construing *Freedman*, 380 U.S. at 58-60; additional citations omitted).

As noted, the FBI informed respondent that it would seek judicial review to enforce the NSL nondisclosure requirement, if at all, within approximately 30 days after respondent lodged its objection with the government, and the FBI initiated this proceeding in accordance with that commitment. *See*

[13] The enforcement of NSL nondisclosure requirements by the United States District Court for the Northern District of California in a case currently on appeal supports the constitutionality of the nondisclosure requirement as applied to Respondent. That Court disagreed with the Second Circuit's conclusion in *Mukasey* and held the NSL statute facially unconstitutional in an NSL challenge brought by a mobile telephone service provider. *In re National Security Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013) (ruling that the Second Circuit's narrowing construction of the NSL statute was inconsistent with the legislative history and the text of the statute); *see In re NSL*, No. 13-16732 (9th Cir. 2013) (appeal briefed and pending before the Ninth Circuit Court of Appeals). During the pendency of the appeal, however, the same judge in the Northern District of California has reviewed further as-applied challenges to NSLs, including a challenge brought by the *In re NSL*, petitioner, and concluded that the Government had complied with the statutory and constitutional requirements as-applied to the petitioners by implementing the *Mukasey* reciprocal-notice procedure. The Court, therefore, ordered enforcement of the NSLs at issue in these subsequent proceedings.

Factual Background, *supra*; Unclassified Good Decl. at ¶ 25. That was the "specified brief period" of *Freedman*, and so the NSL at issue here satisfies the first *Freedman* prong, even though the NSL itself committed the government to seek prompt judicial review only pursuant to an objection made within ten days of the service of the NSL. *See* Factual Background, *supra*. The second *Freedman* requirement is that expeditious review in fact be available. *See Thomas*, 534 U.S. at 321. The Court has ordered prompt briefing of this matter, satisfying the second *Freedman* requirement. *Id.* Finally, in the NSL served on Respondent, FBI informed respondent how the government would comply with the third *Freedman* prong – that it would "bear the burden of going to court" to enforce the nondisclosure requirement if necessary. *See Thomas*, 534 U.S. at 321.

2. The NSL Nondisclosure Requirement Is Consistent With A Prior Restraint On Publication Of National Security Information Upheld as Constitutional By the Fourth Circuit.

In *Marchetti*, the United States sought to enjoin a former Central Intelligence Agency employee from publishing a proposed book that included classified information in violation of his secrecy agreement and secrecy oath. The United States District Court for the Eastern District of Virginia granted an injunction, and the Court of Appeals affirmed. The Fourth Circuit, considering the injunction against the former employee to be a prior restraint and following *Freedman*, upheld the injunction. *See Marchetti*, 466 F.2d at 1317. The Court of Appeals held that "the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure" by current and former employees of classified information obtained in their employment. *Id.* at 1316-17. The Court continued:

> One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course.

Id. (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). Thus, the Court concluded that, given the nature and sensitivity of the national security information at issue and the gravity of the harm that could be expected to flow from disclosure, while prompt judicial review should be available, the full scope of *Freedman* procedures did not apply and the government was not required to seek judicial review itself. *Id.*

Likewise, Congress determined here that, upon an individualized determination by a senior FBI official that nondisclosure is required to prevent serious harm to, *inter alia*, national security, imposition of the nondisclosure obligation is warranted. Moreover, *Marchetti* is not distinguishable on the ground that it involved enforcement of a secrecy agreement, not a statute. The Fourth Circuit made it clear that it was adjudicating Marchetti's First Amendment rights, not ignoring those rights on the basis of any contractual undertaking. *Marchetti*, 466 F.2d at 1317 (the employee's secrecy "agreement is enforceable only because it is not a violation of," not in spite of, his First Amendment rights).

Accordingly, even if the NSL nondisclosure requirement is viewed as a prior restraint, it is nonetheless valid.

CONCLUSION

The NSL nondisclosure requirement applied to respondent here is justified under the facts set forth by (A)AD Good in his classified declaration. Moreover, it meets or exceeds any applicable statutory or constitutional procedures. For all of the foregoing reasons, the Court should therefore grant the Attorney General's Petition, declare the nondisclosure requirement valid, and enjoin respondent to comply.

Dated: May 8, 2015

Respectfully submitted,

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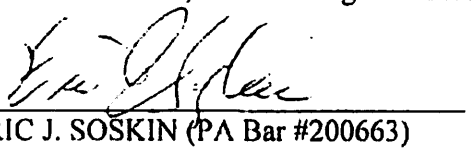

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-cv-001180 FILED UNDER SEAL PURSUANT TO 18 U.S.C. § 3511(d)

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-cv-001180 [redacted] PURSUANT TO 18 U.S.C. § 3511(d)

REPLY IN SUPPORT OF PETITION FOR JUDICIAL REVIEW AND ENFORCEMENT OF A NATIONAL SECURITY LETTER PURSUANT TO 18 U.S.C. § 3511

INTRODUCTION

Petitioner, the Attorney General of the United States, explained in her opening brief that the National Security Letter ("NSL") served on Respondent complies with applicable law and passes constitutional muster. *See* Mem. of Law in Support of Petition for Judicial Review and Enforcement of [an NSL] Pursuant to 18 U.S.C. § 3511 (May 8, 2015) at 2-5 ("Pet's Br."). The Court should, accordingly, enforce the lawful requirement that Respondent maintain the confidentiality of that NSL.

Respondent's arguments in opposition are meritless. Respondent contends that the statutory authority providing for imposition of nondisclosure requirements in NSLs is facially unconstitutional because it is overbroad and provides for inadequate judicial review, and argues that disclosure of the NSL "cannot risk" the harms enumerated in Petitioner's brief. *See* Respondent's Opposition to Petition to Enforce Nondisclosure Provision, *filed under seal* (June 8, 2015) ("Opp. Br."). But Respondent ignores the June 2, 2015 enactment of the USA FREEDOM Act of 2015 ("USA FREEDOM Act" or "Act"), *see* Pub. L. No. 114-23, which revised the statutory framework governing judicial review for NSLs and added a requirement that the Government periodically review the NSL nondisclosure

requirements and lift them where they are no longer necessary to, *inter alia*, protect national security.[1] Respondent's further suggestion that the passage of time or generalized disclosures made in other contexts necessarily obviates the harms of disclosure is unpersuasive: a senior, authorized FBI official has explained real harms likely to occur if *this* NSL is disclosed *now*.[2] *See* Classified Declaration of Donald Good, Acting Assistant Director ("(A)AD") of the Cyber Division of the Federal Bureau of Investigation ("FBI") at ¶¶ 18, 26-30, previously submitted to the Court *ex parte* and *in camera* ("Classified Good Decl."). The FBI's expert judgment is due deference, and is not undermined by

[1] As explained in the Government's opening brief, in this instance, as with all NSLs issued since 2009, the Government has already followed procedures that mirror those adopted by the Act.

[2] Respondent also objects to the filing of the Petition under seal. *See* Opp. Br. n.2. 18 U.S.C. § 3511(d) specifically authorizes judicial review of NSLs to be conducted under seal, however, and for the reasons explained in the Good Declaration, maintaining this litigation and the identity of Respondent under seal are critical to avoiding the national security harms identified therein. The Government will work to prepare redacted versions of the filings in this matter that protect information that would cause the very harms which the NSL statute, itself, seeks to avoid, and will move the Court to partially unseal filings consistent with those necessary redactions as soon as practicable. Respondent's suggestion that "it is entitled to know more" because it has retained counsel with a "clearance" is not well-founded. The Court should not direct the Government to provide Respondent or its counsel with information for which disclosure risks national security harms. The Executive Branch exercises control over the information, and its decisions regarding such information (including how best to protect the information from inadvertent disclosure) are entitled to the utmost deference. *Cf. Holy Land Found. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (recognizing that disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect"); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656 at * 9 (Fed. Cir. Apr. 19, 1993) (finding that, under separation of powers principles, "the access decisions of the Executive may not be countermanded by either coordinate Branch"). It is essential to recognize that every additional disclosure of national security information increases the risk to national security, irrespective of the trustworthiness of any particular individual: "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised." *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (quoting *Alfred A. Knopf v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975). Indeed, the Supreme Court has acknowledged that even disclosures to a court in camera and ex parte could pose such risks. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 10 (1953) ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

Respondent's speculation. For these reasons, the Court should reject Respondent's request that it be permitted "to inform the target of the NSL" and to make other disclosures, as well as its claims that the NSL framework is unconstitutional.[3]

ADDITIONAL STATUTORY BACKGROUND

In its opening brief, the Government provided an overview of the then-applicable statutory framework governing the NSL served on Respondent. Subsequent to the Government's filing, Congress passed, and the President signed into law, the USA FREEDOM Act of 2015, Pub. L. No. 114-23 (June 2, 2015). In relevant part, the USA FREEDOM Act updates the NSL statutory framework to: 1) include the procedure, previously followed voluntarily by the FBI for all NSLs – including in the NSL challenged here – for Government-initiated judicial review upon objection by a recipient of the NSL; 2) revise the standards of judicial review to be applied to challenges to NSL nondisclosure requirements; and 3) require the Attorney General to establish "termination procedures" that will implement ongoing, periodic review of NSL nondisclosure requirements to ensure that they terminate when no longer necessary to protect against an ongoing harm. *See id.* at §§ 502, 503.[4]

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[3] Respondent's rhetoric about challenging the "underlying information request," Opp. Br. at 4, is of no relevance to these proceedings. As Petitioner explained in its opening brief, and Respondent does not contest, Respondent did not object to the information request in the NSL and, in fact, provided the requested information to the FBI [redacted] *See* Unclassified Declaration of Donald Good, *filed under seal* (May 8, 2015) at ¶ 24 ("Unclassified Good Decl.").

[4] The USA FREEDOM Act's changes to the procedures that are required in serving an NSL and initiating judicial review, see §3511(b)(1); §3511(d), do not apply in this case because the NSL was served and litigation was initiated under the prior version of the statute. However, the amended procedures governing judicial review, see §3511(b)(2)-(3), do apply because this litigation is ongoing and must comply with the new standards. *See Bigelow v. Virginia*, 421 U.S. 809, 817-18 (1975); *Landgraf v. USI Film Products*, 511 U.S. 244, 275, 280 (1994).

The first two requirements parallel the narrowed construction the Second Circuit gave the prior NSL statute to ensure its constitutionality, procedures that were adopted thereafter by the FBI, including in this instance. *See* Pet's Br. at 21-23; *Mukasey v. Doe*, 549 F.3d 861, 883-84 (2d Cir. 2008). The third requirement [redacted] FBI to begin conducting periodic reviews of nondisclosure requirements to ensure that they remain necessary. [redacted]

[redacted]

The USA FREEDOM Act's judicial review procedure for NSL nondisclosure requirements allows the government to assume the burden of seeking judicial review at any time, as it has done here. *See* Pub. L. 114-23 § 502(g). When the recipient of an NSL "wishes to have a court review a nondisclosure requirement imposed in connection with the request or order," the recipient has two choices. *Id.* The recipient either may "notify the Government," or itself may "file a petition for judicial review" in federal district court, in the district where the recipient does business or resides. *Id.* In the event that the recipient chooses to notify the Government, the Government then bears the burden of initiating review, and must "apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order," doing so "[n]ot later than 30 days" after receiving the request.[5] *Id.* "[D]uring the pendency of proceedings," the nondisclosure requirement remains in effect and the district court is requested to "rule expeditiously" on the Government's application. *Id.* In addition, the Act requires that every NSL must include notice of the availability of this judicial review procedure. *See* Pub. L. 114-23 § 503(a).

[5] Venue for a government-initiated judicial review proceeding lies in the district in which the recipient of the NSL does business, or in "any judicial district within which" the underlying investigation "is being conducted." Pub. L. 114-23 § 502(g). As explained in the Declaration of Acting Assistant Director Good, that requirement is met here. *See* Classified Good Decl. ¶ 14.

Whether the Government initiates judicial review or responds to a recipient's petition, the USA FREEDOM Act specifies that – for NSLs issued by the FBI – a senior DOJ or FBI official (no lower than an Assistant Attorney General or Special Agent in Charge of an FBI field office) provide:

> a certification . . . containing a statement of specific facts indicating that the absence of a prohibition of disclosure . . . may result in:
> '(A) a danger to the national security of the United States;
> '(B) interference with a criminal, counterterrorism, or counterintelligence investigation;
> '(C) interference with diplomatic relations; or
> '(D) danger to the life or physical safety of any person.'

Pub. L. 114-23 § 502(g). If the district court conducting judicial review concludes that "there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in" one of the specified harms, it should issue a nondisclosure order, or extend an existing order. *Id.*

As to the new termination procedures, the USA FREEDOM Act requires that such procedures be adopted "not later than 180 days after the date of enactment" of the Act, which will occur in late 2015. Pub. L. 114-23 § 502(f). The Attorney General is instructed to create procedures that will be required for any NSL nondisclosure provision. These procedures will include:

> (A) the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist;
> (B) the termination of such a nondisclosure requirement if the facts no longer support nondisclosure; and
> (C) appropriate notice to the recipient of the national security letter, or officer, employee, or agent thereof, subject to the nondisclosure requirement, and the applicable court as appropriate, that the nondisclosure requirement has been terminated.

Id. The USA FREEDOM Act thus not only "allows" but "requires" the Government "to rescind the non-disclosure order once the impetus for it has passed." In this case, the result of such a review is embodied in the declarations of Acting Assistant Director Good, which explain why continued,

complete nondisclosure of the NSL to Respondent is necessary to protect against the harms enumerated in § 2709.

ARGUMENT

I. The Court Should Not Reach Respondent's Purported Facial Challenge to the NSL Statutes, but Should Find the NSL Nondisclosure Requirement on Respondent is Lawful.

Much of Respondent's opposition is dedicated to a facial challenge to the nondisclosure and judicial review provisions of the prior NSL statute. Specifically, Respondent alleges that the nondisclosure requirement constitutes an unconstitutional prior restraint and is unconstitutionally overbroad, and that the statutory judicial review provisions impermissibly limit a court's evaluation of the propriety of NSL nondisclosure requirements. As explained in Petitioner's opening brief and reinforced below, however, the Government has properly imposed a nondisclosure requirement in this instance, and because "[a]s applied challenges are the basic building blocks of constitutional adjudication," the Court should not entertain a facial challenge to a statute that has been constitutionally applied to the challenger. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007); *Parker v. Levy*, 417 U.S. 733, 759 (1974) ("a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

Respondent's overbreadth challenge should likewise be rejected as an inappropriate effort to convert Respondent's objection to enforcement of the NSL at issue here into an "unnecessar[y] . . . wholesale attack upon . . . federal laws." *Renne v. Geary*, 501 U.S. 312, 324 (1991) (it is not "generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied"). Although courts may entertain an overbreadth challenge in the First Amendment context, such a challenge is only appropriate where a "substantial number" of a law's

applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (quoting *Broadrick*, 413 U.S. at 615). But courts should not apply the "'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash St. Grange*, 552 U.S. at 450 (citing *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988)). It is not sufficient for a challenger merely to hypothesize scenarios in which the NSL statute might conceivably be applied unconstitutionally. *See, e.g.*, *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984); *Parker v. Levy*, 417 U.S. 733, 760 (1974). Rather, Respondent "must demonstrate from the text of [the applicable statute] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally," *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988), and Respondent has not done so here.[6]

As an initial matter, Respondent's facial challenges, including overbreadth, must be considered in light of the current version of the NSL as revised through the USA FREEDOM ACT to avoid

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[6] Respondent also suggests it is entitled to bring a facial challenge because "no set of circumstances exists under which the law would be valid." Opp. Br. at 11 (quoting *Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor and City Council of Baltimore*, 721 F.3d 264, 282 (4th Cir. 2013). As explained below, however, the NSL statute is constitutional as applied to Respondent, so a facial challenge is not appropriate here under the "no set of circumstances" exception. *Cf. In re Matter of NSLs*, Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce, No. 13cv1165-SI (N.D. Cal. August 12, 2013) (enforcing 2 NSLs), *appeal docketed*, No. 13-16732 (9th Cir. argued Oct. 14, 2014); *In re Matter of NSLs*, Order Denying Petition to Set Aside, Denying Motion to Stay, and Granting Cross-Petition to Enforce, No. 13mc80089-SI (N.D. Cal. August 12, 2013) (enforcing 2 NSLs), *appeal docketed*, No. 13-16731 (9th Cir. argued Oct. 14, 2014); *In re NSLs*, Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce, No. 13mc80063-SI (N.D. Cal. May 28, 2013) (Amended Order for Public Release enforcing 17 NSLs); *In re NSLs*, Order, No. 13mc80063-SI (N.D. Cal. May 23, 2013) (enforcing 2 NSLs); In re National Security Letter, No. 12-mc-0007, Dkt. No. 17-3 (AJT/IDD) (E.D. Va. April 24, 2012, as partially unsealed July 23, 2012).

justiciability problems. *See Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006).[7] To the extent Respondent's overbreadth arguments can be ascertained from its brief, Respondent appears to rely on the opinion of a federal district court finding the statute to be overbroad because it authorizes nondisclosure orders of "unlimited duration" and those orders reach "to the very fact of having received" an NSL. *See* Opp. Br. at 18 (citing *In re NSL*, 930 F. Supp. 2d 1064, 1075-76 (N.D. Cal. 2013)).[8] Adoption of the USA FREEDOM Act, however, addresses the duration of NSL nondisclosure orders through its provision for termination procedures to review whether the harms of disclosure remain over time after an NSL is served. Pub. L. 114-23 § 502(f). And, in light of (A)AD Good's explanation of why disclosure of the *fact* of Respondent's receipt of an NSL is likely to cause national security harms, Respondent's assertions that such disclosure is harmless and that the prospect of nondisclosure requirements of unlimited duration renders the NSL statute overbroad are therefore unpersuasive. *See* Classified Good Decl. at ¶¶ 29, 31-33; *infra* Part II A. Indeed, Acting Assistant Director Good's determination that disclosure would be harmful here is entitled to deference. *E.g.,*

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[7] Even as to the prior version of the statute, however, Respondent failed to meet the standards for an overbreadth challenge to be heard. It is well-established that overbreadth should not be "invoked when a limiting construction has been or could be placed on the challenged statute," *Broadrick*, 413 U.S. at 613 (citations omitted), and here, the FBI's usage of NSLs since 2009 has been pursuant to the limiting construction suggested by *Mukasey.* Pet's Br. at 20-23; *Mukasey*, 549 F.3d 861. In addition, Respondent failed to demonstrate that the prior statute was overbroad in a "substantial number" of applications. *Ferber* at 770. Respondent acknowledged that, in thousands of cases where appropriate, the Government issues NSLs *without* nondisclosure orders. Opp. Br. at 3 (citing *In re NSL*, 930 F. Supp. 2d 1064, 1074 (N.D. Cal. 2013)). And the fact that few of the NSL nondisclosure requirements imposed under the prior statute were brought to courts for judicial review, Opp. Br. at 3-4, far from suggesting the statute is unconstitutional, instead demonstrates that, as the *Mukasey* court discussed, most recipients did not manifest an interest in challenging the nondisclosure requirements. *See* 549 F.3d at 879.

[8] Further, by codifying judicial review procedures and a requirement that NSL recipients subject to a nondisclosure order be notified of those procedures, the USA FREEDOM Act revisions undercut any suggestion that there are others on whose behalf a constitutional challenge needs to be heard in this instance. *See Vincent*, 466 U.S. 800-01.

Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive" in national security affairs).

For these reasons, the Court should neither "anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Wash. State Grange*, 552 U.S. at 450-51 (internal quotations omitted), and therefore should not entertain a facial or overbreadth challenge. Rather, this Court should consider the question before it: whether the NSL to Respondent is lawful and whether the nondisclosure requirement should continue in effect.

II. The NSL Nondisclosure Requirement, as Applied to Petitioner, is Lawful.

A. Disclosure Of the NSL To The Target of the FBI's Investigation Would Reasonably Be Expected to Harm National Security, As Would Respondent's Other Requested Disclosures.

Respondent contends that the Government's assertion of national security harms in support of the Petition is implausible because the number of users registered to Respondent's services and the passage of more than [redacted] since Respondent's compliance with the NSL ensures that disclosure "cannot risk any of the harms enumerated" in the statute. Op. Br. at 23-24. Respondent's argument is misguided. As the Classified Good Declaration explains, disclosure *at this time* is reasonably expected to cause harm to national security. ¶¶ 23-34. First, Respondent seeks to inform the investigative *target* of the investigation itself. *See* Opp. Br. 1 & n.1. The risk of harm to national security from a disclosure directly to the target is very great, as (A)AG Good explained. *See* Classified Good Decl. at ¶¶ 24-26. Further, this harm would exist even if Respondent made a more limited disclosure, because such disclosure would link Respondent to a particular NSL served at a particular point in time in a particular

geographic area of the United States, and this may be sufficient for the target to change tactics and stop using Respondent's services altogether. *See* Classified Good Decl. ¶ 29.

Nor is it the case that the size of Respondent's registered user base mitigates the possibility of national security harm. *See* Opp. Br. at 10-11 & 23-24. Respondent's argument rests on a mistaken assumption that *all users* are equally likely to be the targets of NSLs. They are not. Accordingly, the relevant pool is not Respondent's base of innocent, registered users, but the set of active users knowingly engaged in unlawful activities likely to subject them to FBI surveillance in a particular geography at a particular time, and within this relatively narrow group, disclosure that Respondent received an NSL within a particular time could be combined with other pieces of information to the detriment of national security. *See* Classified Good Decl. at ¶ 6; *Cf. Bowers v. Dep't of Justice*, 930 F.2d 350 (4th Cir. 1991) (Individual pieces of "information may often be dull, repetitious and even tedious, but when [] considered with other bits and pieces of information, the total may present a picture that is detrimental to the national security of the United States."). Moreover, this harm multiplies if the identities of providers in NSL enforcement proceedings are routinely revealed. On an aggregate basis, *see Healy v. Beer Institute Inc.*, 491 U.S. 324, 336 (1989); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985), such disclosures would divulge substantial, discrete information concerning the volume and frequency of NSLs issued and the geographic venues of enforcement proceedings, and tie particular providers to particular NSLs issued at particular points in time. This window into the universe of NSLs issued by the FBI would provide a wealth of detailed information to our adversaries, contrary to the structure and intent of the statutory scheme, and would help to facilitate detection and evasion of our intelligence and counter-terrorism efforts.[9]

[9] For this reason, Respondent's contention that the nondisclosure requirement at issue here is

Respondent's claim that the need for secrecy is undercut by the publication of aggregate statistics by electronic communications providers identifying how many NSLs they have received, in bands of 1,000, is in error. As an initial matter, as Plaintiff acknowledges, for those providers receiving fewer than 1000 NSLs, the lowest reporting band provides that the provider may acknowledge receiving "between 0-999 NSLs." Opp. Br. at 9; *see* Pub. L. 114-29 at § 604 (setting forth permissible reporting bands). Contrary to Respondent's argument that a "disclosure itself" confirms "that a provider has received (at least) one NSL," such a report *does not* necessarily reveal that the provider has received an NSL at all: Respondent's claim that any provider that had not "received (at least) one NSL . . . would unambiguously disclose that it received no NSLs" is nothing more than unsupported speculation. *See id.* at § 604; Opp. Br. at 25. [redacted]

[redacted]

insufficiently tailored to the national security harm, and would thereby fail strict scrutiny, necessarily fails. *See* Opp. Br. at 19-20. Likewise, because (A)AD Good has assessed the national security risk at the present time, continued nondisclosure is likely to be consistent with the termination procedures to be adopted under the USA FREEDOM Act, once such procedures are implemented.

B. The Requirement That This NSL Not Be Disclosed Is Not an Unlawful Prior Restraint.

1. The Government May Properly Limit Dissemination Of Information Learned Only Through Involvement In A Government Investigation.

The First Amendment does not forbid limits on the disclosure of information learned by participating in confidential government matters. Courts have repeatedly recognized that the Government's need for secrecy in confidential matters provides a firm constitutional footing for restrictions on the disclosure of information learned through participation in such confidential proceedings, particularly those involving government information. Thus, in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), the Supreme Court upheld the constitutionality of a judicial order that prohibited parties to a civil suit from disclosing sensitive information obtained through pretrial discovery. In rejecting a First Amendment challenge to the order, the Court noted that the parties "gained the information they wish to disseminate only by virtue of the trial court's discovery processes," which themselves were made available as a matter of legislative grace, not constitutional right. 467 U.S. at 32. Likewise, in *Butterworth v. Smith*, 494 U.S. 624 (1990), the Court distinguished information a grand jury witness learned through "participation in the proceedings of the grand jury" from the information he possessed previously, thereby suggesting that the "right to divulge information" in such circumstances would not extend to the former. *Id.* at 632; *see id.* at 636 (Scalia, J., concurring) ("[q]uite a different question is presented . . . by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness.").[10]

[10] Lower courts likewise have upheld similar nondisclosure requirements based on this principle. *See Hoffman-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) ("a [constitutional] line should be drawn between information the witness possessed prior to becoming a witness and information the witness obtained through her actual participation in the grand jury process"; upholding statute prohibiting disclosure of, *inter alia*, information sought by prosecution in grand jury); *In Re Subpoena to Testify*, 864 F.2d 1559, 1562 (11th Cir. 1989) (similar); *First Am. Coalition v. Judicial Review Bd.*, 784

Respondent's efforts to distinguish these precedents are unpersuasive. First, Respondent asserts that NSLs are not comparable to grand jury testimony because they forbid disclosure of "the fact of [a] subpoena or testimony," and constraints on grand jury testimony extend only to the contents of such testimony. Opp. Br. at 3 (citing *Butterworth v. Smith*, 494 U.S. 624, 636-37 (Scalia, J., concurring) (1990).[11] Respondent's view appears to be based on a misreading of the concurrence in *Butterworth*, in which Justice Scalia distinguished "information contained within the witness' testimony" that was acquired by the witness on his or her own, from "the fact that the witness conveyed that information to the grand jury." This passage in *Butterworth* simply does not address "the fact of [a] subpoena or testimony," and its logic, as explained in Petitioner's opening brief, favors secrecy for the fact of a subpoena: *receipt of* the subpoena itself, as with the conveyance of information *to the grand jury*, are equally facts learned by a witness "only by virtue of being made a witness." *Butterworth*, 494 U.S. at 636-37 (Scalia, J., concurring). Similarly, Respondent's claim that nondisclosure requirements related to classified information and confidential discovery material are different because the secrecy requirements are entered into "voluntarily," Opp. Br. at 4, 16 (citing cases), is inconsistent with the rationale of those cases and has already been rejected by the Fourth Circuit. *See United States v. Marchetti*, 466 F.2d 1309, 1316-17 (4th Cir. 1972) (upholding nondisclosure requirements with respect to classified materials, despite noting that a voluntary agreement is not a surrender of First Amendment rights), *cert. denied*, 409 U.S. 1063 (1972). There is no valid basis to treat NSL nondisclosure

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F.2d 467, 479 (3d Cir. 1986) (*en banc*) (state may prohibit witnesses and other persons "from disclosing proceedings taking place before" a judicial misconduct investigation board); *Small v. Ramsey*, 280 F.R.D. 264, 284 (N.D.W.Va. 2012) ("an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny").

[11] Respondent's brief overlooks that this citation to *Butterworth* is to the opinion of a concurring Justice and not to the majority opinion.

requirements differently from classified information nondisclosure requirements.

Respondent's possession of information here is analogous to information learned through participation in a grand jury proceeding, and for that reason, Congress deliberately fashioned 18 U.S.C. § 2709 after grand-jury proceedings. *See* H. REP. NO. 107-236(I) at 61-62 (Congress sought to "harmonize" § 2709 "with existing criminal law where an Assistant United States Attorney may issue a grand jury subpoena for all such records in a criminal case."). In *Doe v. Ashcroft*, the original district court proceeding underlying the *Mukasey* decision, the court concluded that "[t]he principle that *Rhinehart* and its progeny represent is directly applicable" to § 2709 because "[a]n NSL recipient or other person covered by the statute learns that an NSL has been issued only by virtue of his particular role in the underlying investigation." *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 519 (S.D.N.Y. 2004), *vacated on other grounds*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006); *see also id.* at 518 (the "laws which prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger less First Amendment concerns tha[n] laws which prohibit disclosing information a person obtains independently.").[12] Thus, the Government may properly limit

[12] In *Mukasey*, the Second Circuit did not fully accept the analogy between the NSL nondisclosure requirement and those in proceedings in which "interests in secrecy arise from the nature of the proceeding," such as grand juries, because "the nondisclosure requirement of subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." 549 F.3d at 877. But for all the often-obvious reasons discussed above why national security investigations require secrecy, those interests likewise inhere "from the nature of the proceeding" in this context. *Id.* Thus, by requiring that the FBI make a case-by-case determination before applying the nondisclosure requirement, the NSL statutory procedures provide greater protection than what is constitutionally required. In *Butterworth*, for example, the Supreme Court did not require a prosecutor to make a case-by-case determination of whether "witnesses would be hesitant to come forward" or "less likely to testify fully and frankly" absent Federal Rule of Criminal Procedure 6(e), nor whether "those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment." 494 U.S. at 630. Nor do the nondisclosure provisions of wiretap, pen register, and similar laws require the government to make a case-by-case determination of the scope of required confidentiality. *See* 18

Respondent's dissemination of information that is in Respondent's possession only because the FBI served Respondent with an NSL as part of its investigation of the target.

2. The NSL Nondisclosure Requirement Is Not An Unconstitutional Prior Restraint.

Respondent asserts that the nondisclosure requirement applied by the NSL here should be treated as a prior restraint on speech subject to heightened First Amendment scrutiny. *See* Opp. Br. at 12-15. As explained in Petitioner's opening brief, however, the NSL nondisclosure requirement is *not* a "classic prior restraint." *See* Pet's Br. at 16-20. In *Mukasey*, the Second Circuit recognized as much in upholding the NSL statute against a First Amendment challenge, finding that the NSL nondisclosure requirement imposed on a recipient "is not a typical prior restraint or a typical content-based restriction," in which a person's right to speak is conditioned on prior approval from the government. *See Doe v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008). *Compare id. with City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). Rather, because the NSL functions as a categorical prohibition on disclosures of information learned only by participation in a confidential investigation, the threat of criminal sanctions imposed after disclosure does not "raise the same specter of censorship" as other restrictions, *Rhinehart*, 467 U.S. at 32, and does not "warrant[] the most rigorous First Amendment scrutiny." *Mukasey*, 549 F.3d at 877. *See also Landmark Comm. v. Virginia*, 435 U.S. 829 (1978); *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005).[13]

U.S.C. §§ 2511, 3123(d); 50 U.S.C. §§ 1842(d), 1861(d); 12 U.S.C. § 3420(b); 31 U.S.C. § 5326.

[13] Respondent's attempt to distinguish *Landmark Comm.* and *Cooper* as cases that "involved a sanction subsequent to restraint," Opp. Br. at 13-14, is unavailing. As did the statutes in these cases, the NSL non-disclosure provision indeed bars disclosure only as a subsequent punishment, rather than a prior restraint. *See* 18 U.S.C. § 1510(e) (imposing criminal penalties if a disclosure forbidden by an NSL provision is made "knowingly and with the intent to obstruct an investigation or judicial proceeding"). The NSL statute therefore operates in the same manner as, for example, 18 U.S.C. § 798,

Importantly, the nondisclosure restriction here does not raise the significant concerns about discretionary censorship that classic prior restraints do. In part, this is the case because the nondisclosure provision is categorical, and not made on the basis of a discretionary determination about the merits of commonly-expressive speech. *Compare Freedman*, 380 U.S. at 735 (requiring advance licensing for film distribution based on criteria such as "moral and proper" and "debas[ing] or corrupting"); *City of Littleton* v. *Z.J. Gifts D-4*, 541 U.S. 774, 782-83 (2004). As the Fourth Circuit has explained, not all prior restraints "must provide *Freedman's* procedural safeguards" because a licensing standard that is based on "considerations of public safety and the like" is "diametrically" different from one that permits censorship. *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 431-32 (4th Cir. 2007). Second, because the information at issue here was not created independently of the government itself, the object of the restriction is not to target expressive speech or conduct, but to protect the government's own interests in secrecy.[14] *Cf. Marchetti*, 466 F.2d at 1315 ("The Government

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prohibiting the disclosure of classified information, which is "precisely the kind of restriction that the [Supreme] Court has deemed insufficient to constitute a prior restraint." *Cooper*, 408 F.3d at 1215-16; *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 591-92 (1976) (Brennan, J., concurring in judgment) (explaining that in *New York Times v. United States* ("*Pentagon Papers*"), 403 U.S. 713 (1974), "a majority of the Court believed that the release of the documents . . . might even be prosecuted after publication").

[14] Contrary to Respondent's claim, the details included in, and existence of, the NSL at issue here are not "core 'political' speech," such as, *e.g.*, "[t]he circulation of an initiative petition [containing] the expression of a desire for political change and a discussion of the merits of the proposed change," *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988), "speech to protest racial discrimination," *NAACP v. Claiborne Hardware*, 458 U.S. 886, 915 (1982), a "candidate's political views," *Libertarian Party v. Judd*, 718 F.3d 308, 315 (4th Cir. 2013), or even "flags of a political sort." *Am. Legion Post 7 of Durham v. City of Durham*, 239 F.3d 601, 607 (4th Cir. 2001). Respondent remains free to discuss "the extent to which the government can conduct investigations into United States citizens . . . , the means by which the government can compel" responses to NSLs, and NSL nondisclosure requirements in general without reference to the details of this particular NSL or its target. As explained in Petitioner's opening brief, the NSL nondisclosure requirement here is carefully drawn to limit Respondent's speech only regarding the facts of this NSL, for which secrecy is essential to national security. *See* Pet's Br. at 10-

. . . has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.").[15]

In addition, as *Freedman* and *Mukasey* make clear, even if the NSL nondisclosure requirement here is evaluated as a prior restraint, the requirement is constitutional. In *Freedman*, the Supreme Court adopted "procedural safeguards" that would "obviate the dangers" of a prior restraint by minimizing the burdens of administrative and judicial review. 380 U.S. at 58; *see also Mukasey*, 529 F.3d 877. Under *Freedman* "any [administrative] restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained." *Covenant Media*, 493 F.3d at 431 (quoting *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion)). Here, upon receiving the objection to continued application of the nondisclosure requirement from Respondent, the Government sought judicial review within approximately thirty days – and thus, Respondent "is . . . not challenging the NSL on this ground." Opp. Br. at 6 & n.6 (recognizing the Government's adoption of the requirement as set out in *Mukasey*, 549 F.3d at 879). Second, *Freedman* identified a need for "expeditious judicial review" of the nondisclosure determination. *Covenant Media*, 493 F.2d 431; *see Freedman*, 380 U.S. 60. Here, the parties agreed to, and the Court adopted, an expeditious schedule for briefing and presentation of this issue to the Court. Third, *Freedman* required that the Government "bear the burden of going to court to suppress the speech and [] bear the burden of proof once in court.'" *Thomas* v. *Chicago Park District*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS,* 493 U.S. at 227); *Freedman*, 380 U.S. at 58-60. Accordingly, the Government initiated this proceeding and submitted to

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13; Classified Good Decl.

[15] As Petitioner explained in its opening brief, the NSL nondisclosure requirements are therefore similar to the classification of information under Executive Order 13292, which "does not constitute a prior restraint in the traditional sense." *See* 18 U.S.C. § 793 (providing criminal penalties for improper disclosure of classified information); *McGehee* v. *Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983).

the Court the Good Declaration (in both classified and unclassified form), thereby assuming the burden of proof to demonstrate that the continued need for secrecy in this case is well-founded – which it is. *See* Part I, *supra*; Classified Good Decl. at ¶¶ 18, 26-30.

The Fourth Circuit's conclusions in *Marchetti* likewise confirm that, even if tested as a prior restraint, the NSL nondisclosure requirement is properly imposed on Respondent here. In *Marchetti* – In *Marchetti* – which treated as a prior restraint an injunction against a former CIA employee against disclosing classified information – the Court of Appeals held that the "system of prior restraint" was justified, based largely on "the Government's need for secrecy in this area." *See Marchetti*, 466 F.2d at 1317. Importantly, the Government's need for secrecy is not contingent on the identity of the person holding the information, but rather, the fact that it is the Government's information and that "the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary" that ordinary criminal sanctions are insufficient to prevent disclosure. *Id.* at 1317. Here, where Respondent seeks to inform the target of the investigation of the investigation itself, *see* Opp. Br. 1 & n.1, the risk of harm is extraordinarily great, as explained in the Good Declaration. *See* Classified Good Decl. at ¶¶ 9, 23-27. Congress and the Executive Branch have both determined to rely on the individualized determination by a senior FBI official regarding such national security harms, and so this Court, as did the Court of Appeals in *Marchetti*, should conclude that the NSL is "not a violation of" Respondent's First Amendment rights. *Id.* at 1317. For these reasons, the nondisclosure requirement passes constitutional muster as applied to Respondent.

III. The NSL Statute's Judicial Review Procedures, as Amended by the USA FREEDOM Act, Are Constitutional.

As explained above, a facial challenge is not appropriate here because the NSL nondisclosure requirement has been constitutionally applied to Respondent and Respondent has failed to demonstrate that the statute is overbroad. *See supra* Part I. Even if the Court is inclined to consider Respondent's challenge, however, the judicial review procedures Respondent challenges in the NSL statute (as that statute has been amended by the USA FREEDOM Act) are consistent with the Constitution.

Respondent objects to two components of the judicial review procedure for NSLs. First, Respondent asserts that the fact that the statute is satisfied whenever the FBI director says that specified harms "may" occur renders the statute unconstitutional because such uncertainty leaves the statute less than "narrowly tailored." Opp. Br. at 19. But certainty is impossible in making predictions necessary to preserve national security and other compelling Government interests, and courts are not in any better position than law-enforcement, intelligence, and other national security personnel to exercise the expert judgment required to make those predictions. *Cf. Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980); *accord Mukasey*, 549 F.3d 875. Moreover, the same uncertainty lies in every other instance where courts have affirmed secrecy requirements: the harms feared from disclosure of classified information, grand jury proceedings, and judicial misconduct investigations are all possible, not certain: they "may" occur. *See* Pet's Br. at 14-15 (citing, *e.g.*, *Butterworth*, 494 U.S. 624; *First Am. Coalition v. Judicial Review Bd.*, 784 F.2d 467, 479 (3d Cir. 1986)).[16] Reviewing courts may assess whether the proffered national security harms are persuasive in their predictive power, and determine whether to enforce NSL

[16] The recognition that the harms feared from disclosure in these other contexts may adequately support a prior restraint puts to rest Respondent's contention that the statute is constitutionally infirm because "the enumerated harms . . . cover more than national security harms." Opp. Br. at 19.

nondisclosure provisions accordingly.

Respondent also contends that the prior version of 18 U.S.C. § 3511(b)(3) violated the constitutional separation of powers of *Freedman* by making certain certifications "conclusive" unless made in bad faith, thereby "circumscrib[ing]" judicial review. Opp. Br. at 5, 7, 20-22 (quoting *In re NSL*, 930 F. Supp. 2d at 1077). With adoption of the USA FREEDOM Act, Congress has replaced the challenged provision with a discretionary determination by the Court that "there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period" would cause the enumerated harm to national security.[17] As the Court of Appeals held in *Mukasey* in adopting a similar reading of the prior statute, a statutory standard that provides district courts with the opportunity to "discharge their review responsibility" in this way is constitutional. 549 F.3d 882.[18]

Finally, Respondent's objection to having judicial review conducted in an under seal proceeding is misplaced. *See* Opp. Br. n.2. 18 U.S.C. § 3511(d) specifically authorizes judicial review of NSLs to be conducted under seal, and for the reasons explained in the Good Declaration, maintaining this litigation and the identity of Respondent under seal are critical to avoiding the national security harms identified therein. *See generally* Classified Good Decl. The Government will work to prepare redacted versions of the filings in this matter that protect information that would cause the very harms that the

[17] Under the new version of 18 U.S.C. § 3511(b), no distinction is made in the statute between judicial review of an objection made immediately upon receipt of an NSL, and an objection made later. *See* USA FREEDOM Act § 502(g)(1).

[redacted]

NSL statute itself seeks to avoid, and will move the Court to partially unseal filings consistent with those necessary redactions as soon as practicable.[19]

CONCLUSION

The NSL nondisclosure requirement applied to Respondent here is justified under the facts set forth by (A)AD Good in his classified declaration and satisfies or exceeds the applicable statutory and constitutional standards. The Court should therefore grant the Attorney General's Petition, declare the nondisclosure requirement valid, and enjoin respondent to comply.

Dated: June 22, 2015

Respectfully submitted,

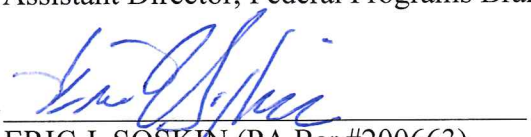
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROD J. ROSENSTEIN

[19] Respondent's suggestion that "it is entitled to know more" about the classified matters discussed in (A)AD Good's Declaration because it has retained counsel with a "clearance" is not well-founded. The Court should not direct the Government to provide Respondent or his counsel with information for which disclosure risks national security harms. The Executive Branch exercises control over the information, and its decisions regarding such information (including how best to protect the information from inadvertent disclosure) are entitled to the utmost deference. *Cf. Holy Land Found. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (recognizing that disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect"); *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656 at * 9 (Fed. Cir. Apr. 19, 1993) (finding that, under separation of powers principles, "the access decisions of the Executive may not be countermanded by either coordinate Branch"). It is essential to recognize that every additional disclosure of national security information increases the risk to national security, irrespective of the trustworthiness of any particular individual: "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised." *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (quoting *Alfred A. Knopf v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975)). Indeed, the Supreme Court has acknowledged that even disclosures to a court *in camera* and *ex parte* could pose such risks. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 10 (1953) ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

United States Attorney

JACQUELINE COLEMAN SNEAD
Assistant Director, Federal Programs Branch



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORETTA E. LYNCH, Attorney General v. UNDER SEAL	Case No. 15-cv-001180 **FILED UNDER SEAL** PURSUANT TO 18 U.S.C. § 3511(d)

~~[PROPOSED]~~ ORDER

Upon consideration of the Petitioner's Unopposed Motion for Partial Unsealing, it is hereby ORDERED that:

1) Petitioner's Motion is Granted;
2) This case shall be placed on the public docket as a matter containing material that is under seal, which shall include the identity of Respondent and Respondent's counsel;
3) This case shall be captioned on the public docket as *Loretta E. Lynch, Attorney General v. Under Seal*;
4) Respondent's counsel shall be identified on the public docket as "Under Seal";
5) The redacted versions of the documents filed with Petitioner's Motion shall be placed on the public docket, along with Petitioner's Motion and this Order;
6) All other documents currently under seal in this case shall remain sealed.

IT IS SO ORDERED.

Dec. 14, 2015
(Date)

James K. Bredar
JAMES K. BREDAR
United States District Judge