NOS. 16-16067, 16-16081, 16-16082, 16-16190

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL SECURITY LETTER, UNDER SEAL, Petitioner-Appellant (Nos. 16-16067; 16-16081)/ Cross-Appellee (No. 16-16190), v. LORETTA E. LYNCH, Attorney General, Respondent-Appellee (Nos. 16-16067; 16-16081)/ Cross-Appellant (No. 16-16190).	In re: NATIONAL SECURITY LETTER, UNDER SEAL, Petitioner-Appellant (No. 16-16082), v. LORETTA E. LYNCH, Attorney General, Respondent-Appellee (No. 16-16082).

On Appeal From the United States District Court
For the Northern District of California
Case Nos. 11-cv-02173-SI; 13-mc-80089-SI; 13-cv-01165-SI
The Honorable Susan Illston, United States Senior District Judge, Presiding

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Ninth Circuit Rules of Appellate Procedure, Appellant and Cross-Appellee CREDO makes the following disclosure: Working Assets, Inc. is the parent company of Appellant and Cross-Appellee Working Assets Funding Service, Inc./Credo Mobile, Inc.

Appellant CloudFlare makes the following disclosure: CloudFlare states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

These consolidated appeals arise under the Constitution and 18 U.S.C. §§ 2709 and 3511. The district court had jurisdiction under 18 U.S.C. § 3511 and 28 U.S.C. § 1331. It entered judgment on April 21, 2016 on Appellants' renewed petitions under 18 U.S.C. § 3511 to set aside National Security Letters ("NSLs") they received, denying the petitions in Nos. 16-16067 and 16-16082 and denying in part the petition in No. 16-16081. Appellants filed timely notices of appeal on June 7, 2016, within the 60 days allowed by Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW[1]

1. Whether the NSL statute, 18 U.S.C. §§ 2709 and 3511, violates the First Amendment because it authorizes the issuance of prior restraints that are not necessary to further a governmental interest of the highest magnitude. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

2. Whether the NSL statute, which allows the FBI to gag an NSL recipient without any judicial oversight or intervention, violates the First Amendment because it lacks the procedural protections for prior restraints required by *Freedman v. Maryland*, 380 U.S. 51 (1965).

3. Whether the NSL statute's nondisclosure provision violates the First Amendment because it is a content-based restriction that is not narrowly tailored and does not meet strict scrutiny.

STANDARD OF REVIEW

This Court's review of a district court's legal conclusions are reviewed de novo. *Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 840 (9th Cir. 2005). Factual findings are reviewed for clear error. *Lemons v. Bradbury*, 538 F.3d 1098, 1102 (9th Cir. 2008).

[1] Pursuant to Circuit Rule 28-2.7, an addendum containing pertinent constitutional provisions, statutes, and regulations appears at the end of this brief.

INTRODUCTION AND STATEMENT OF THE CASE

The National Security Letter ("NSL") statute is unconstitutional because it allows the FBI to unilaterally prohibit Americans from speaking on matters of significant public interest, and to prevent them from doing so indefinitely. The statute therefore authorizes classic prior restraints, but without either the substantive or procedural protections required to uphold such highly disfavored restrictions on speech. And even if NSL gag orders were not considered prior restraints, the statute also fails to satisfy the strict scrutiny accorded to content-based restrictions on speech. Recent amendments to the law did not fix either of these constitutional defects, and the NSL gags are invalid both as a facial matter and as applied here.

Appellant NSL recipients CREDO and CloudFlare are providers of electronic communication services and have already been fully gagged under NSLs for more than five years and three years, respectively. The gags have significantly limited Appellants' exercise of First Amendment rights, including:

Preventing Appellants from truthfully informing Congress about how the FBI is using NSLs. An NSL gag prevented the in-house counsel to Appellant CloudFlare from correcting the Chief Counsel to the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security and Investigations when she asserted, wrongly, that CloudFlare could never receive an NSL and that

CloudFlare was therefore spreading "misinformation" by stating otherwise in its lobbying efforts to change the law. ER 129. Similarly, an NSL gag prevented CREDO, through its then-Vice President and Political Director, from telling Congress and the public about CREDO's experiences as an NSL recipient and explaining why those experiences informed its belief that the FBI-supported amendments to the NSL statute proposed in 2014 (and later enacted) would be insufficient to remedy problems with the FBI's use of NSLs. ER 44-45.

Publishing truthful and accurate transparency reports. The NSL gags also prevented both Appellants from publishing truthful "transparency reports" describing the type and number of legal process, including NSLs, that the government uses to seek information about their customers. ER 47, 157. Like other leading companies in the technology and communications industries, as well as the Office of the Director of National Intelligence itself, Appellants seek to publish truthful and not misleading transparency reports to build trust in their companies. Appellants also seek to use these transparency reports to engage in public discussions about increasing demands for customer data from both U.S. and foreign governments.

These gags have therefore already had a direct impact on law and policy by preventing informed and critical voices from being heard. The executive's ability to manipulate public and congressional discourse in this way is especially troubling

given that, at the time, Congress was debating amending the NSL statute, and the executive was itself actively engaged in lobbying Congress about changes to the statute. As a result, Congress enacted a law based on an incomplete, inaccurate, and one-sided public record, with Appellants (and presumably other NSL recipients) unable to provide information to Congress or the public.

Although the district court correctly recognized that NSL gags are both prior restraints and content-based restrictions, it erred by failing to apply settled First Amendment law. Instead, the court deemed Appellants "non-customary" speakers, who, it found, are not entitled to full First Amendment rights. Even assuming that this category exists in the law, which it does not, the record indicates that Appellants do not deserve to be in it. The decision to provide NSL recipients with a lesser set of protections under the First Amendment was incorrect and should be reversed. When the correct standards are applied, the statute must be found unconstitutional.

A. The National Security Letter Statutory Framework.

The NSL statute invoked here, 18 U.S.C. §§ 2709 and 3511, grants the FBI extraordinary powers to demand on its own—in secret and without any prior judicial oversight—customer records from electronic communication service providers as part of international terrorism and counterintelligence investigations,

and then gag those recipients.[2]

The NSL statute grants the FBI two primary powers: (1) to compel a wire or electronic communication service provider to produce certain customer information based on the FBI's own certification that the information is relevant to "an authorized investigation to protect against international terrorism or clandestine intelligence activities," § 2709(b); and (2) to impose an indefinite nondisclosure requirement or "gag" on NSL recipients, preventing them from publicly disclosing anything about the NSL, even the mere fact that they have received one, again based only on a self-certification by an FBI official, § 2709(c).

Between 2003 and 2015, the FBI issued almost 500,000 NSLs, including 16,348 in 2014 and 12,870 in 2015.[3] In nearly all of these NSLs—97% by one

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[2] Five statutory provisions authorize the FBI to issue NSLs to a range of recipients to obtain a variety of types of user information *See* 18 U.S.C. § 2709 (wire or electronic communication providers), 12 U.S.C. § 3414 (financial institutions), 15 U.S.C. §§ 1681u, v (consumer credit agencies), and 50 U.S.C. § 3162 (financial institutions, consumer credit agencies, travel agencies).

[3] According to reports by the DOJ, White House, and Office of the Director of National Intelligence ("ODNI"), the FBI issued approximately 474,656 NSLs between 2003 and 2015. DOJ, Office of the Inspector General ("OIG"), *A Review of the Federal Bureau of Investigation's Use of National Security Letters*: *Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009* at 65 (2014), *available at* https://oig.justice.gov/reports/2014/s1408.pdf ("2014 OIG Report") (chart showing NSLs issued 2003-2011); *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) ("President's Review Group") (number of NSLs issued in 2012), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; 2013: ODNI Transparency Report (June 26, 2014),

estimate—the government unilaterally imposed a gag order.[4] *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013) ("*In re NSL I*").

The NSL statute allows the FBI to exercise its authority without any court involvement. Indeed, of all similar investigatory tools relied upon by the FBI, the NSL statutes alone create a process whereby the executive can issue both demands for customer information and gag orders without any prior judicial involvement or ever giving the ultimate targets of an investigation the ability to contest the underlying information request themselves.

At present, the statute requires oversight by a court only in two limited circumstances, both of which require the NSL recipient—*not* the government—to

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https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2013 (NSLs issued in 2013); ODNI Transparency Report (Apr. 22, 2015), https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2014 (NSLs issued in 2014); ODNI Transparency Report (May 2, 2016): https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2015 (NSLs issued in 2015).

[4] In a series reports issued between 2007 and 2014, the DOJ OIG documented the agency's systematic and extensive misuse of NSLs. The OIG concluded that, left to itself to ensure that legal limits were respected, "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." DOJ, OIG, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* 124 (2007, rereleased with some previously redacted information unredacted 2016), *available at* https://oig.justice.gov/reports/2016/o1601b.pdf ("2007 OIG Report"); *see also* 2014 OIG Report 187. Responding to these reports and congressional testimony, the President's Review Group in 2013 recommended several limitations on the FBI's NSL authority to better protect the privacy and civil liberties of Americans, including a requirement for judicial approval prior to the issuance of an NSL, absent "genuine emergency." President's Review Group at 26, 92-93, 122-23, 128.

invoke judicial review: (1) A recipient may petition a district court for review "if compliance would be unreasonable, oppressive, or otherwise unlawful," 18 U.S.C. § 3511(a); or, (2) in the alternative, "if a recipient . . . wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government," § 3511 (b)(1)(A).[5] If the recipient affirmatively chooses to invoke this "reciprocal notice" procedure, the government is directed to file a petition to enforce the NSL gag within 30 days. § 3511(b)(1)(B). The statute, however, does not require that the gag automatically dissolve if the government fails to do so.

And even if the recipient initiates judicial review in either of these ways, the statute limits the court's discretion. The statute mandates that a court reviewing an NSL nondisclosure requirement "shall issue" an order enforcing the FBI's unilateral gag if the court finds "reason to believe" one of four statutory harms "may result" without the gag. § 3511(b)(3).[6] And although the court must "rule expeditiously," no time limit is specified. § 3511(b)(1)(C).

Once the FBI issues an NSL gag, it can bar recipients from speaking about

[5] The latter option codifies a less rigorous variation of the "reciprocal notice procedure" suggested by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861, 879 (2d Cir. 2008).

[6] The government must support its certification with a "statement of specific facts" indicating that without a gag, an enumerated harm "may result." § 3511(b)(2).

the NSL entirely, even about bare fact that they have received it.[7] A licensing scheme recently codified by Congress allows recipients of various forms of national security requests to report limited information to the public in wide "bands," rather than stating the actual number of requests received. USA FREEDOM Act of 2015, Pub. L. 114-23, § 604, 129 Stat. 268 (2015) ("USA FREEDOM Act"), codified at 50 U.S.C. § 1874. But providers like Appellants who receive fewer than 500 NSLs in a six month period, for example, may report only that they received between 0-499 NSLs, leaving open the possibility that they have received none. 50 U.S.C. § 1874(a)(2)(A). Under that reporting "band," only providers who receive more than 500 NSLs in a six month period may definitively report that they have received *any at all*.[8]

NSL gags are also of indefinite and potentially unlimited duration. The USA FREEDOM Act directed the Attorney General to adopt unspecified procedures to

[7] The gag bars recipients from discussing anything about the NSL with anyone except those to whom "disclosure is necessary to comply with the request," attorneys for the purpose of legal advice, and anyone else as specifically permitted by the FBI. § 2709(c)(2)(A). These individuals are also subject to the gag, and the FBI can require NSL recipients to identify them. § 2709(c)(2)(D) (exception for attorneys).

[8] For example, Google, one of the largest service providers in the world, was only able to confirm receipt of any NSLs—more than 500—in four semi-annual periods out of seven years of transparency reports. In every other period, it reported the range "0-499." Google, *Transparency Report – National Security Letters*, https://www.google.com/transparencyreport/userdatarequests/US/#NSLs (last visited Sep. 16, 2016).

perform an internal review "at appropriate intervals" to determine whether gags issued under the revised statute are still supported. Pub. L. 114-23, § 502(f). Pursuant to procedures adopted on November 24, 2015, the FBI reviews NSL gags on (at most) two occasions: the third anniversary of the investigation that led to the NSL's issuance, and the closing of the investigation.[9]

If the FBI determines that its earlier decision to impose the gag order is still supported, the gag remains, and the FBI then has no further obligations to review the gag. It may remain in place indefinitely, even long after the investigation that prompted the NSL is closed. If the FBI determines the gag is no longer supported, it must notify the recipient that it may disclose the NSL

Notably, under these procedures, the FBI itself, not a court, reviews the gag orders.

B. Procedural History.

In early 2011, Appellant CREDO, a provider of long distance and mobile phone services, received an NSL from the FBI directing it to provide subscriber information about one of its customers (hereinafter the "11-2173 NSL" from the district court case number). ER 60-62. The 11-2173 NSL prohibited CREDO from disclosing any information about the NSL or its petition to its affected customer, to

[9] FBI, *Termination Procedures for National Security Letter Nondisclosure Requirement* (Nov. 24, 2015), *available at* https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf/view.

most of its employees and staff, to the press, to members of the public, and to members of Congress. ER 57. On May 2, 2011, CREDO filed a petition asking the district court to set aside the 11-2173 NSL, arguing that the statute was unconstitutional on its face and as applied. ER 64-65.

On March 14, 2013, the district court granted the petition to set aside the 11-2173 NSL and declared the statute facially unconstitutional. *In re NSL I*, 930 F. Supp. 2d at 1074-75. The government appealed to this Court. *See* Ninth Circuit No. 13-15957.

More NSLs followed. In early 2013, Appellant CREDO received two additional NSLs from the FBI (collectively, the "13-80089 NSLs"). ER 98, 102-109. Appellant CloudFlare, a provider of cloud-based Internet services to help secure and accelerate websites, also received two NSLs (collectively the "13-1165 NSLs"). ER 160-163. The 13-80089 and 13-1165 NSLs similarly included gag orders preventing Appellants from disclosing the fact of receipt or otherwise discussing the demands publicly.

Shortly after the *In re NSL I* decision, Appellants each filed new petitions, asking the same district court to set aside the 13-80089 and 13-1165 NSLs on the same grounds. Proceeding with caution, the district court abstained from applying its prior *In re NSL I* ruling and instead denied Appellants' petitions and granted the government's cross-petitions to enforce the NSLs. Both companies appealed to this

Court. *See* Ninth Circuit Nos. 13-16731; 13-16732.

After appeals Nos. 13-15957, 13-16731 and 13-16732 were briefed and argued, Congress amended the NSL statute as part of the USA FREEDOM Act. This Court vacated and remanded to the district court. On remand, Appellants filed renewed petitions to set aside the NSLs they received and renewed their challenge to the constitutionality of the NSL statute's nondisclosure and judicial review provisions. ER 51, 82, 136.

The district court denied all three renewed petitions insofar as they challenged the constitutionality of the amended NSL statute. *In re Nat'l Sec. Letter*, Nos. 11-2173, 13-80089, 13-1165, slip op. at 32 (N.D. Cal. Mar. 29, 2016) ("*In re NSL II*"), ER 1-33. Both companies appealed. *See* Nos. 16-16067, 16-16081, 16-16082.

However, the district court also held that the NSL gags issued by the FBI to Appellant CREDO in conjunction with the 13-80089 NSLs should not be enforced, and the government cross-appealed. *See* No. 16-16190.

SUMMARY OF THE ARGUMENT

The gag order provision of the NSL statute violates the First Amendment for two independent reasons.

First, the statute lacks the substantive and procedural requirements necessary to uphold a prior restraint because it allows the government to unilaterally impose indefinite gags on recipients and, in the rare instance that a court reviews the gag, requires the court to approve it upon a showing of the mere possibility of harm. The district court justified upholding the NSL statute only by inventing a new category of prior restraints involving "non-customary" speakers as a basis for reducing the First Amendment protections against prior restraints.

Second, the statute is a content-based restriction that fails strict scrutiny because it allows the FBI to impose indefinite, overinclusive gags that bar recipients from discussing government conduct without any consideration of less restrictive means of protecting national security.

This Court should reject the district court's improper departure from established First Amendment law and hold that the NSL statute is unconstitutional.

ARGUMENT

I. THE NSL STATUTE VIOLATES THE FIRST AMENDMENT BECAUSE IT DOES NOT MEET CONSTITUTIONAL STANDARDS FOR PRIOR RESTRAINTS.

NSL gags have barred both Appellants from participating in public debate about the NSL statute, including at the very time Congress was considering amendments to the statute. These are textbook prior restraints—as every court that examined the gag orders authorized by the NSL statute, including the district court here, has found. *In re NSL II*, slip op. at 19; *In re NSL I*, 930 F. Supp. 2d at 1071; *Mukasey*, 549 F.3d at 876.

"The 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." *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quotations and citation omitted, emphasis original). Section 2709(c) does exactly that: it allows the FBI, at its sole discretion, to forbid in advance NSL recipients from disclosing anything about their interaction with the government, even the mere fact that they have received an NSL. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976) (finding a temporary gag order for purposes of empanelling a jury to be a prior restraint).

Because it forbids speech entirely, a prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. Unlike a

time-place-and-manner restriction that channels speech but does not prohibit it, or libel or true threat laws that punish speech only after it has occurred, a prior restraint prevents the speaker from speaking.

For that reason, prior restraints are subject to the highest level of substantive scrutiny under the First Amendment, and are also subject to special procedural rules requiring the government to obtain speedy judicial review of any prior restraint it imposes—standards not met here.

A. THE DISTRICT COURT'S OPINION IMPROPERLY REWRITES FIRST AMENDMENT LAW TO CREATE A NEW CATEGORY OF "NON-CUSTOMARY" SPEAKERS WHO ARE AFFORDED LESS PROTECTION FROM PRIOR RESTRAINTS.

Although the district court recognized that NSL gag orders are prior restraints, it failed to subject them to settled prior restraint scrutiny. Its refusal to do so was based on the mistaken conclusion that NSL gag orders are not "typical" prior restraints because NSL recipients supposedly are not "customary" speakers who engage in traditional forms of expression. *In re NSL II*, slip op. at 20 (quoting *Mukasey*, 549 F.3d at 876).

Yet no such category exists in First Amendment law, and this Court should not create one. It would, for instance, elevate film exhibitors, which the district court called "customary speakers," above speakers like Appellants intending to inform Congress, their customers, and the public on matters of serious public interest. And it would have the perverse effect of providing less protection for

speech about government activity depending on the identity of the speaker.

Even if such a two-tiered system existed, the district court was wrong to place Appellants in the inferior tier. Appellants sought to engage in speech, both to Congress and to the American people, but were gagged from doing so. That is as "customary" as it comes.

1. The First Amendment and prior restraint doctrine do not distinguish between "customary" and "non-customary" speakers.

Following the Second Circuit's erroneous lead, the district court held that "[a]lthough the nondisclosure requirement is in some sense a prior restraint, . . . it is not a typical example of such a restriction for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies." *In re NSL II*, slip op. at 20 (quoting *Mukasey*, 549 F.3d at 876).

This Court should reject that tortured view of the First Amendment. The Supreme Court has never so much as hinted that distributors of movies, for example, get greater protection against prior restraints than "non-customary" speakers. Indeed it has generally afforded the full panoply of First Amendment protections to even non-customary *forms* of expression. *See Hurley v. Irish-Am. Gay, Lesbian Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (First Amendment protection includes expression not conveying a "particularized

message" and not taking a conventional form).

While neither the district court nor the Second Circuit explained the criteria or doctrinal basis for this new, reduced category of "non-customary" speakers, the First Amendment does not require that speakers be regularly engaged in speech in public fora, or the exhibition or publication of artistic or literary works, in order to receive full protection against prior restraints. For example, in *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978), this Court held that a post-verdict gag order on jurors barring them from discussing the case *with anyone* was an impermissible prior restraint subject to full First Amendment scrutiny:

> The government in order to sustain the order must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest, the restraint must be narrowly drawn and no reasonable alternatives, having a lesser impact on First Amendment freedoms, must be available.

Id. (citations omitted). The Court did not parse out the parts of the gag order that applied to speech to the press from the parts that applied to speech to anyone else in nonpublic situations.[10]

Similarly, in *Milwaukee Police Ass'n v. Jones,* 192 F.3d 742, 749 (7th Cir.

[10] In *Sherman*, the motion challenging the gag order was brought by news media entities that wanted to speak to the jurors. 581 F.2d at 1360. But who challenges the gag order should make no difference in the prior restraint analysis, especially with respect to a facial challenge. Were another rule to apply, this Court would be compelled to apply a different analysis were this effort to lift the NSL gags brought by a news media entity that wanted to speak with Appellants rather than by the Appellants themselves.

1999), the Seventh Circuit applied the governmental employee prior restraint doctrine. In that case, a departmental directive deemed all complaints about a fellow department member to be confidential and forbade the complainant from discussing the fact of the complaint with anyone, including the labor union. The court held the directive was a prior restraint even though the directive included personal, private conversations by government employees with co-workers.

Finally, to the extent the character of the speech at issue matters to a prior restraint analysis, the fact that an NSL gag order is intended to suppress speech regarding governmental operations *confirms* the need for full constitutional scrutiny. It certainly does not diminish it.

The Supreme Court has repeatedly affirmed that speech "on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. State of Alabama*, 384 U.S. 214, 218 (1966). Granting such speech *less* protection against prior restraint because NSL recipients do not match the district court's vision of "customary speakers," like publishers or movie exhibitors, interferes with the "essence of self-government."

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

2. The NSLs prevent Appellants from engaging in the political process and speaking about important matters of public policy.

Even if the district court's distinction between prior restraints imposed on customary and non-customary speakers were tenable, Appellants are plainly customary speakers here.

Because of the importance of customer trust to its business, Appellant CloudFlare has long been involved in public policy discussion about the role of government in accessing information it holds about its customers. ER 157-58. CloudFlare has made a policy of notifying customers whenever it is legally required to turn over their data to a third party and only refrains from doing so when ordered to withhold notice by a court of competent jurisdiction. ER 157. CloudFlare reports to the public, in as much detail as possible, the requests for customer information it has received. *Id.*

CloudFlare has also played a prominent role in the public and legislative debate over NSLs. *Id*.

But as discussed above, the gag orders had the direct effect of preventing CloudFlare from informing a legislative official responsible for the NSL statute that she seriously misapprehended the scope of that statute. In March 2014, CloudFlare's in-house legal counsel Kenneth Carter met with Caroline Lynch,

Chief Counsel of the House Judiciary Committee's Subcommittee on Crime, Terrorism, Homeland Security, and Investigations to discuss issues related to the Internet, transparency, and due process. ER 128. Mr. Carter stressed the importance of his company's role in verifying that any government request for customer data met both statutory and constitutional standards, and that in CloudFlare's view, any NSL nondisclosure requirement would fail on both counts. *Id.*

In response, Ms. Lynch asserted, incorrectly, that Mr. Carter was engaging in needless worrying, speculation, and misinformation, *because it would be impossible for CloudFlare to be the recipient of an NSL*. *Id*. Of course, as counsel for a recipient of an NSL, Mr. Carter knew that Ms. Lynch's view of the reach of the NSL statute was plainly at odds with the FBI's actual practice, but he was barred from correcting her. *Id.*

Similarly, the gag order against Appellant CREDO also resulted in Congress hearing only one side of the debate—the government's side supporting the reciprocal notice provision—and not from actual recipients with experience with reciprocal notice.

Appellant CREDO has a long-standing history of political activism and attracts customers, in part, based on its public practice of donating 1% of its customers' monthly long distance and mobile charges to various progressive

nonprofit groups. ER 97. CREDO also facilitates the direct political speech of its customers and online members through an activism network, resulting in millions of letters and calls to decision-makers, and submission of millions of signatures as part of various petitions, U.S. government agency public comment submissions, and communications to decision-makers on important issues. *Id*.

CREDO has a strong interest in protecting the communications privacy of its customers and ensuring that all legal standards are met. It is a longtime participant in the political debate surrounding government access to Americans' data. ER 43.

CREDO's then-Vice President and Political Director, Becky Bond, the executive who oversaw CREDO's political speech and activism network, represented CREDO in the political debate leading up to the passage of the USA FREEDOM Act. ER 43. In her declaration, Ms. Bond described how CREDO wished to publicly describe its experience as a recipient of NSLs, especially to illustrate the failings of the reciprocal notice process, which was put forth by the government as a fix to the previous version of the statute. ER 44. Because of this experience, CREDO was specially positioned to discuss its experience with reciprocal notice, especially the lengthy amount of time a final resolution actually takes under that process (over three years at the time of the debate over the USA FREEDOM Act and now over five years). *Id.*

The nondisclosure requirements the FBI imposed on CREDO and Ms. Bond, however, specifically gagged her from doing so. The order also gagged CREDO from arguing to members of Congress, congressional staff, and members of the public that in CREDO's actual experience, the USA FREEDOM Act's codification of reciprocal notice procedure does not protect against what it believes is an unconstitutional exercise of FBI power. *Id.*

Each Appellant sought to engage with legislators and policymakers on the reform of the NSL statute from the informed position uniquely held by an NSL recipient. And each was prevented from doing so by the FBI's unilateral gag authorized by that very statute. Thus, Appellants' declarations not only demonstrate that Appellants are "customary speakers" and the specific individual harms caused by the NSL gags, they give lie to the notion that the passage of the USA FREEDOM Act was the result of political compromise and the ordinary democratic process.

Moreover, each Appellant desired to speak in public fora and distribute literature; each wanted to publish the fact of its receipt of an NSL in a transparency report.[11] Government surveillance is a topic of strong public interest, and Appellants are among the dozens of companies that wish to speak about their

[11] CloudFlare, *Transparency*, https://www.cloudflare.com/transparency (last visited Sep. 16, 2016); CREDO Mobile, *Transparency Report*, http://www.credomobile.com/transparency (last visited Sep. 16, 2016).

interactions with the government regarding national security requests for customer data. In the last several years, transparency reports discussing the nature and volume of government surveillance requests have become a standard practice for technology and communications providers—and indeed, for the government itself.[12] Prominent companies such as Apple, AT&T, Facebook, Google, Microsoft, Twitter, Verizon and Yahoo, among many others, have published transparency reports.[13] And other companies in addition to Appellants have pushed for the right to disclose more information about these requests. *See* Second Am. Compl., *Twitter v. Lynch*, No. 14-cv-4480 (N.D. Cal. May 24, 2016) (Twitter seeking to publish transparency report including number of NSLs received); Am. Compl., *Microsoft v. DOJ*, No. 16-cv-538 (W.D. Wash. June 17, 2016) (Microsoft seeking

[12] The ODNI has published transparency reports on its intelligence activities starting with the year 2013. *See* ODNI, *Increasing Transparency, Earning Trust*, https://icontherecord.tumblr.com/transparency (last visited Sep. 16, 2016).

[13] Apple, *Privacy – Reports*, https://www.apple.com/privacy/transparency-reports (last visited Sep. 16, 2016); AT&T, *Transparency Report*, http://about.att.com/content/csr/home/frequently-requested-info/governance/transparencyreport.html (last visited Sep. 16, 2016); Facebook, *Government Requests Report*, https://govtrequests.facebook.com (last visited Sep. 16, 2016); Google, *Transparency Report*, https://www.google.com/transparencyreport/userdatarequests (last visited Sep. 16, 2016); Microsoft, *Transparency Hub*, https://www.microsoft.com/about/csr/transparencyhub (last visited Sep. 16, 2016); Twitter, *Transparency Report*, https://transparency.twitter.com (last visited Sep. 16, 2016); Verizon, *Transparency Report*, https://www.verizon.com/about/portal/transparency-report (last visited Sep. 16, 2016); Yahoo, *Transparency Report*, https://transparency.yahoo.com (last visited Sep. 16, 2016).

judgment that gag orders issued under 18 U.S.C. § 2705 barring notice to customers are unconstitutional).

B. THE NSL STATUTE FAILS TO SATISFY THE SUBSTANTIVE REQUIREMENTS FOR PRIOR RESTRAINTS.

1. The NSL statute fails to require a showing that the gag is necessary to further an interest of the highest magnitude.

A prior restraint is invalid unless it survives the most exacting scrutiny. "Any prior restraint on expression comes to [a court] with a heavy presumption against its constitutional validity" and "carries a heavy burden of showing justification." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). The First Amendment's "special protection" against prior restraints is premised on the understanding that unlike the "threat of criminal or civil sanctions after publication," which "chills" speech, prior restraints "freeze" it for their entire duration. *Nebraska Press*, 427 U.S. at 556, 559. As a result, prior restraints are justified only in unusual and extreme circumstances, when no other remedy will suffice. *Id.* at 559.

To pass constitutional muster, prior restraints must be *necessary* to further a governmental interest of the highest magnitude. *See id.* at 562-63 (finding that a criminal defendant's right to a fair trial was a sufficiently important governmental interest). The prior restraint will be *necessary* only if:

(1) The harm to the governmental interest is highly likely to occur, *see id.* at

563, 565, 567 (approving of the trial court's finding of a clear and present danger of impairment of the defendant's fair trial rights, but cautioning against uncertainty); *see also New York Times v. U.S.*, 403 U.S. 713, 730 (1971) (Stewart, J. concurring) (requiring absence of prior restraint to "surely result" in feared harm); *Levine v. U.S. Dist. Ct.,* 764 F.2d 590, 595 (9th Cir. 1985) (activity restrained must pose "either a clear and present danger or a serious and imminent threat to a protected competing interest");

(2) The harm will be irreparable, *New York Times*, 403 U.S. at 730;

(3) No alternative exists for preventing the harm, *see Nebraska Press*, 427 U.S. at 563-65; *Levine*, 764 F.2d at 595; and

(4) The prior restraint will actually prevent the harm. *See Nebraska Press* 427 U.S. at 565-66 ("We must also assess the probable efficacy of prior restraint on publication[.]").

The NSL statute fails to meet this exacting test because it does not require the government to prove that the gag order is "necessary." *Nebraska Press*, 427 U.S. at 562; *see also In re NSL II*, slip op. at 29.

Rather than requiring a near certainty that harm will result if a gag is not imposed, the statute requires only that the government show there is "reason to

believe" a specified harm "may" occur." 18 U.S.C. § 3511(b)(3).[14] This standard is far below the constitutional threshold. Indeed, the statute prevents a court from requiring more certainty because it states that courts "shall" issue the gag order if the "may" standard is met. *Id.*

Nor does the statute require the government to prove the irreparable nature of the potential harm that might be caused by Appellants' disclosure of the mere fact that they have received an NSL.

Lastly, a gag of unlimited duration, as the statute allows and has been imposed in these cases, is highly unlikely to be the only alternative for preventing the harm to national security; one alternative is a time-limited gag that ends when the necessity ends. *See also* Section II, *infra.*

Although Appellants are not privy to the specific facts presented to the district court in the government's classified *in camera* certifications in support of the gags, the government was not required to demonstrate that the gags are necessary, so it is unlikely that they meet the constitutional standard. *See also* ER

[14] The USA FREEDOM Act reworded the standard of judicial review in § 3511(b) in purely cosmetic fashion, replacing the previous provision that allowed a district court to *set aside* a gag if "there is no reason to believe" an enumerated harm might result. *See* 18 U.S.C. § 3511(b) (2014). In amending the statute, Congress rejected the Second Circuit's requirement in *Mukasey* that the government affirmatively show a "good reason" for the gag. 549 F.3d at 883; *see also In re NSL I*, 930 F. Supp. 2d at 1075. As before, the amended §§ 2709 and 3511 only require that the government certifies—and a reviewing court credits—that an enumerated harm "may result" absent a gag, not that the gag is "necessary" to preventing this harm. 18 U.S.C. §§ 2709 (c)(1)(B); 3511(b)(3).

39-40; 80-81; 134-35 (unclassified government declarations stating that "there is reason to believe" disclosure of the 11-2173, 13-80089, and 13-1165 NSLs "may" result in harm).

2. Even in the context of national security, prior restraints are subject to full First Amendment scrutiny.

In addition to its erroneous "non-customary speaker" holding, the district court further erred when it refused to apply the binding *Nebraska Press* prior restraint standard because it believed "the national security context in which NSLs are authorized imposes on courts a significant obligation to defer to judgments of Executive Branch officials." *In re NSL II*, slip op. at 20 (quoting *Mukasey*, 549 F.3d at 871).

The Supreme Court rejected such excessive deference for prior restraints arising in the national security context in the "Pentagon Papers" case, *New York Times Co. v. United States,* 403 U.S. 713 (1971). There, the Court, *per curiam*, found that the United States' request for an injunction preventing the *New York Times* and *Washington Post* from publishing the contents of a classified study of U.S. policy towards Vietnam was an impermissible prior restraint. The government had not overcome the "heavy presumption" against the constitutionality of a prior restraint on speech and failed to carry its "heavy burden of showing justification for the imposition of such a restraint." *Id.* at 714 (internal quotations and citations

omitted). Justice Stewart, joined by Justice White, faulted the government for not demonstrating that disclosure of the information will "surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J. joined by White, J., concurring).

At the very least, *New York Times* requires that the government justify a prior restraint on substantive grounds even when it seeks to protect claimed national security interests of the highest order; national security is not an exception to prior restraint rules. *See New York Times*, 403 U.S. at 718 (Black, J. joined by Douglas, J., concurring); *id.* at 723 (Douglas, J. joined by Black, J., concurring); *id* at 726 (Brennan, J., concurring); *id.* at 742 (Marshall, J., concurring); *id.* at 731 (White, J. joined by Stewart, J., concurring).

C. THE NSL STATUTE IS UNCONSTITUTIONAL BECAUSE IT ALLOWS GAGS OF INDEFINITE DURATION WITHOUT THE PROCEDURAL PROTECTIONS MANDATED BY THE FIRST AMENDMENT.

The NSL statute also fails to meet the procedural safeguards for prior restraints set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), which places strict limits on the duration and manner of prior restraints unilaterally imposed by executive officials. The NSL statute authorizes the FBI to impose gags of indefinite and potentially unlimited duration, with no requirement that the government initiate judicial proceedings to review the gags. This defect was not remedied by the USA FREEDOM Act.

In *Freedman*, the Supreme Court held that any administrative scheme requiring governmental permission before one can speak must have built into it three core procedural protections ensuring prompt and searching judicial review: (1) Any restraint imposed prior to judicial review must be limited to "a specified brief period"; (2) After review is initiated, the period of restraint before final judicial determination must be limited to "the shortest fixed period compatible with sound judicial resolution"; and (3) The burden of going to court to suppress speech and the burden of proof in court must be placed on the government. *Freedman*, 380 U.S. at 58-59. Thus, a statute authorizing prior restraints must incorporate these procedures. *Id.; see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park Dist*., 534 U.S. 316, 321 (2002).[15]

1. The NSL statute violates *Freedman* because it neither assures that the government bear the burden of judicial review nor limits pre-review gags to "a specified brief period."

The NSL statute fails to meet *Freedman* because it permits the FBI to impose an administrative gag of indefinite duration, with no requirement that the government ever seek court approval, unless the recipient first takes action. This is inconsistent with the *Freedman* Court's admonitions that the government must

[15] *Freedman* fully applies here. Unlike *FW/PBS* and *Thomas*, which involved content-neutral licensing determinations, NSL gag orders involve the government "passing judgment on the content" of protected speech, which is the central concern of *Freedman*. *FW/PBS*, 493 U.S. at 229; *Thomas*, 534 U.S. at 322.

bear the burden of going to court to suppress speech, and that a potential speaker must be "assured" by the statute that a censor *"will,* within a *specified brief period*, either issue a license or go to court to restrain" the speech at issue. *Id.* at 58-59 (emphasis added). The combination of these limitations is important because without it, the government can use the unlimited duration of the gag to effectively avoid judicial review of the overwhelming majority of NSLs simply by placing the onus of challenging the status quo on the recipient.

The "reciprocal notice procedure" added to § 3511(b) by the USA FREEDOM Act is not a constitutionally adequate substitute for these requirements. The statute still requires the recipient to act first to initiate judicial review, either by filing a petition in court under § 3511 (a), or by notifying the government of its desire for judicial review under § 3511 (b)(1)(A). Once the government has unilaterally issued an NSL gag, the gag remains in place *unless and until* the recipient takes action.

This is the very same backward burden that the Supreme Court found impermissible in *Freedman*. 380 U.S. at 57-58. One of the Supreme Court's explicit goals in imposing the *Freedman* requirements was to counteract the self-censorship that occurs when would-be speakers are unwilling or unable to challenge a governmental official's decision to censor speech. *Id.* at 59.

Similarly, reciprocal notice does not ensure that pre-review gags are limited

to a "specified brief period." Rather, the NSL statute continues to authorize gags of indefinite duration *unless* the recipient takes action by initiating judicial review or by notifying the government of its desire for judicial review. 18 U.S.C. § 3511 (b)(1)(A). Moreover, even when the recipient invokes the notice provision, the statute gives the government 30 days to initiate review, and the gag does not automatically dissolve if the government fails to do so. 18 U.S.C. § 3511 (b)(1)(B).

The district court simply declined to apply this provision of *Freedman* because of its erroneous view, discussed above, that prior restraint law did not apply in full. *See* Section I.B, *supra*. This ignores the categorical First Amendment rule, set forth by the Supreme Court in *Freedman*, that *all* prior restraints must either dissolve automatically or be subject to judicial review.

2. The revised NSL statute fails to assure a prompt final judicial decision.

The gag scheme, even after the USA FREEDOM Act, still fails *Freedman*'s requirement that the scheme in question "must . . . assure a prompt final judicial decision." *Freedman,* 380 U.S. at 59. This requirement reflects the Supreme Court's concern that "unduly onerous" procedural requirements that drive up the time, cost, and uncertainty of judicial review of speech licensing schemes discourage the exercise of First Amendment rights. *Id.* at 58.

A lengthy and protracted process of judicial determination, which leaves the

gag in place in the interim and potentially comes after the value of speaking about the issues gagged has diminished, "would lend an effect of finality to the censor's determination" that the gag is valid. *Id.* As the Supreme Court has recognized in a variety of contexts, the deprivation of First Amendment rights, for even a limited period of time, causes a significant constitutional injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In its most recent revision of the NSL statute, Congress failed to require that a court reviewing a gag order issue a "prompt final judicial decision." It certainly could have, but instead, the amended § 3511 now simply says that the court must "rule expeditiously." 18 U.S.C. § 3511 (b)(1)(C). Congress declined to include a specified time frame for this review, disregarding the Second Circuit's suggestion in *Mukasey* of "a *prescribed* time, perhaps 60 days." 549 F.3d at 879 (emphasis added). Although the Supreme Court has not specified precisely how quickly a final judicial decision must come, it did conclude that it had to be faster than the four months for an initial judicial review and six months for appellate review as had occurred in *Freedman* itself. 380 U.S. at 55, 61.

Indeed, the very harm that the *Freedman* Court was concerned about—that without finite limits, any judicial lifting would come after the value of speaking about the issues gagged had diminished—has come to pass in this case. 380 U.S. at 58. The entire span of congressional deliberation about the USA FREEDOM Act

and the legislative process around NSLs, including the gags, occurred during the lengthy period—five and a half years and three and half years respectively—that the Appellants have been gagged. During that entire time, Appellants were unable to correct senior congressional staff's misapprehension of the scope of that statute, or inform Congress and the public of the effect of NSLs on them and their customers.

3. The NSL statute violates the *Freedman* requirements because it does not sufficiently place the burden of proof on the government.

Finally, even if the matter is actually brought to court, by requiring the reviewing court to affirm a gag order if the court finds "reason to believe" one of four statutory harms "may result" without the gag, the NSL statute impermissibly weakens the burden of proof the government bears and undermines *Freedman*'s requirement of independent judicial review.[16] 380 U.S. at 58-59.

Even outside the prior restraint context, the Supreme Court has held that

[16] In amending the statute, Congress failed to even incorporate the Second Circuit's construction in *Mukasey* that the government affirmatively show a "good reason." 549 F.3d at 883; *see also In re NSL I*, 930 F. Supp. 2d at 1075. The district court below determined that the scant legislative history regarding the USA FREEDOM Act demonstrated that Congress was aware of the Second Circuit's interpretation and implicitly ratified it. *In re NSL II*, slip op. at 28. The district court was half right. In amending the statute, Congress drew only selectively from the *Mukasey* decision—including aspects of the reciprocal notice procedure suggested by the Second Circuit—but it conspicuously failed to include the word "good" in the "reason to believe" standard.

"[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns v. Virginia,* 435 U.S. 829, 843 (1978). This imposed deference by the reviewing court also threatens separation of powers and "impermissibly threatens the institutional integrity of the Judicial Branch." *Mistretta v. U.S.*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 851 (1986)).

II. THE NSL GAG PROVISION ALSO VIOLATES THE FIRST AMENDMENT BECAUSE IT IS A CONTENT-BASED RESTRICTION ON SPEECH THAT FAILS STRICT SCRUTINY.

Even apart from violating the substantive and procedural requirements for prior restraints, the NSL statute is also unconstitutional for the independent reason that it is a content-based restriction on speech that fails strict scrutiny. The district court conceded that, even as amended by the USA FREEDOM Act, the statute still aims to suppress speech of a specific content—speech about the NSL—and does so precisely because it fears the communicative impact of that speech. *In re NSL II*, slip op. at 20; *see also Texas v. Johnson*, 491 U.S. 397, 411-12 (1989).

Strict scrutiny applies to the NSL statute because its gags are content-based restrictions on speech. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict

scrutiny." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Indeed, every court that has examined the gag provision has applied strict scrutiny. *See In re NSL II*, slip op. at 29; *Mukasey*, 549 F.3d at 878; *Merrill v. Lynch*, 151 F. Supp. 3d 342, 347 n.5 (S.D.N.Y. 2015).

Strict scrutiny applies even if the gag orders are not prior restraints. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. This narrow tailoring requires that the restriction on speech directly advance the governmental interest, that it be neither overinclusive nor underinclusive, and that there be no less speech-restrictive alternatives to advancing the governmental interest. *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997).

The NSL statute fails strict scrutiny because it is not narrowly tailored.

1. The gag provision is overinclusive because it authorizes blanket gag orders on recipients, including the bare fact that they have received an NSL.

The nondisclosure provision is overinclusive because it impermissibly permits 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 NSL I*, 930 F. Supp. 2d at 1075. As

the district court previously explained:

> [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.

This blanket prohibition is unchanged following Congress' amendments to the statute in the USA FREEDOM Act, which allow a reviewing court to "issue a nondisclosure order that includes conditions appropriate to the circumstances," 18 U.S.C. § 3511(b)(1)(C), and give the FBI authority to license additional disclosures, 18 U.S.C. § 2709 (c)(2)(D).[17]

The amended statute remains overinclusive on its face for several reasons.

First, neither provision stops the government from issuing overinclusive gag orders in the first instance—for example, from gagging recipients who may have millions of customers from disclosing even the mere fact that they have received an NSL. That the public would know that one of those millions of customers is the subject of an investigation will not impede the government's national security

[17] The district court relied on these provisions in changing its analysis to find that the gag order was no longer overinclusive. *In re NSL II*, slip op. at 30 (citing 18 U.S.C. §§ 3511(b)(1)(C) and 2709(c)(2)(D)). As explained below, this analysis is incorrect.

interests. As discussed above, the statute only requires a mere possibility of harm. Thus the gag orders will apply even to disclosures that also may *not* be harmful.

Second, the provisions giving the FBI authority to permit additional disclosures are not narrowly tailored, because they do not *require* the FBI to engage in any consideration of a narrower gag. The new provisions merely allow the FBI to expand *who* within the recipient's organization may learn about the NSL or to individually license certain disclosures to preselected third parties. Far from remedying the problem of overinclusive gags, these provisions grant the FBI total discretion and do not require it to craft an order to allow recipients to disclose the fact of receipt or other steps short of fully disclosing the NSL. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 149-50 (1969) (requiring any governmental action that restrains speech be governed by "narrow, objective, and definite" standards).

Third, the provisions allowing a court to modify an NSL apply *only* under the limited circumstances when a recipient actively challenges the nondisclosure order accompanying the NSL. The content-based restriction on speech occurs when the FBI issues the gag; the court's subsequent ability to modify that order does not ameliorate the initial overinclusive restriction on speech.

Nor does § 604 of the USA FREEDOM Act, which allows certain recipients to report that they may have received NSLs in broad aggregated bands, remedy the

gag order's overinclusiveness. To the contrary, this provision demonstrates the arbitrary and overinclusive nature of the bands. As explained above, even under § 604's limited license for government-approved speech, Appellants here cannot even speak to acknowledge receipt of the NSLs at issue in the case. Section 604 requires that recipients who receive fewer than the specified number of NSLs, such as 500 in a semi-annual period, must still include "0" in the lowest reporting band. *See* 50 U.S.C. § 1874.

These recipients, including Appellants, are effectively prevented from making complete and honest transparency reports, forced instead to falsely assert that they *might* have received none. By contrast, the few recipients who receive a large number of NSLs are not so gagged; they can use a band that does not include zero. Thus, the statute includes a blanket, arbitrary determination that once a provider receives a certain number of NSLs, it no longer risks harming national security by disclosing that it has received at least one NSL, whereas providers that receive fewer NSLs are automatically prohibited from doing so, regardless of any other factor such as how many customers they have. That is not narrow tailoring.

2. The gag provision is both overinclusive and not the least restrictive means because it authorizes and permits indefinite prior restraints.

The statute also fails strict scrutiny because it sanctions overly long—indeed indefinite—gags on recipients, which are not the least restrictive means of

achieving the government's national security interests. *See In re NSL I*, 930 F. Supp. 2d at 1076. Even if a court decides that the prior restraint is justified in a particular case at the time of review, the statute does not require the court to tailor the duration of the prior restraint to the circumstances. As the district court previously stated, "[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.* at 1076-77; *see also Doe v. Gonzales,* 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007). "Nothing in the statute requires . . . the government to rescind the non-disclosure order once the impetus for it has passed." *In re NSL I*, 930 F. Supp. 2d at 1076.

The USA FREEDOM Act did not remedy this defect. In amending the NSL statute, Congress directed the Attorney General to adopt procedures to review "at appropriate intervals" to determine whether gags issued under the revised statute are still supported. Pub. L. 114-23, § 502(f). However, the statute does not require that these administrative procedures ensure that gags persist no "longer than necessary," as strict scrutiny requires. *In re NSL I*, 930 F. Supp. 2d at 1076.

Nor do the Attorney General's review procedures promulgated pursuant to § 502(f) suffice to render NSL gags narrowly tailored. These procedures permit a maximum of two reviews of an outstanding NSL gag order: first, three years after the initiation of the investigation that generated the NSL, and second, when the

underlying investigation closes. But, as the D.C. District Court recently observed, these procedures leave "several large loopholes":

> First, there is no further review beyond these two, meaning that where a nondisclosure provision is justified at the close of an investigation, it could remain in place *indefinitely* thereafter. . . Second, these procedures by their own terms apply only to "investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures" . . .; as a result a large swath of NSL nondisclosure provisions [that predate the procedures] may never be reviewed and could remain *unlimited in duration*. . . Third, for long-running investigations, there could be an extended period of time—*indefinite* for unsolved cases—between the third-year anniversary and the close date.

In re Nat'l Sec. Letters, No. 16-518, slip op. at 4 (D.D.C. July 25, 2016) ("*In re NSLs D.D.C.*") (internal citations omitted) (brackets in original; emphasis added).

Similarly, in a decision issued before the Attorney General guidelines were finalized, the District of Maryland found it "problematic" that the statute allowed for gag orders of "indefinite duration." *Lynch v. Under Seal*, No 15-1180, slip op. at 4 (D. Md. Sept. 17, 2015).

As these courts' repeated invocation of the words "indefinite" and "unlimited" indicates, neither the revised statute nor the Attorney General procedures fulfill the constitutional requirement that NSL gag orders be the least restrictive means and thus last no longer than necessary.

That the statute is not narrowly tailored is further proved by the fact that these courts differed so widely on the remedy. Both the Maryland and D.C. district courts ultimately required recurring review of the specific NSLs at issue at more frequent intervals than the Attorney General Procedures allow for—triennially and twice a year, respectively. *See In re NSLs D.D.C.*, slip op. at 5-6. But individual district courts should not be forced to rewrite the statute in each case they review an overbroad NSL gag order and on multiple occasions. The First Amendment requires that the statute be narrowly tailored in the first instance.

CONCLUSION

For the reasons stated above, the district court's judgment upholding the NSL statute and denying Appellants' petitions to set aside the NSLs in appeals 16-16067, 16-16081 and 16-16802 should be reversed and the cases remanded for further proceedings. The district court's judgment enjoining the government from enforcing the NSL gag in cross-appeal 16-16190 should be affirmed.

Dated: September 19, 2016

Respectfully submitted,

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Dated: September 19, 2016

/s/ Andrew Crocker
Andrew Crocker

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STATEMENT OF RELATED CASES

Nos. 16-16067, 16-16081, and 16-16082 have been consolidated by order of this Court and are being briefed in conjunction with cross appeal no. 16-16190. Appellants are not aware of other related cases pending before this Court.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 19, 2016.

Dated: September 19, 2016

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE
SEALED DOCUMENTS
INTERIM CIRCUIT RULE 27-13

Case Number: 16-16067, 16-16081, 16-16082, 16-16190

Case Title: In re: National Security Letter, UNDER SEAL v. Loretta E. Lynch, Attorney General

Note: Documents to be filed under seal are to be submitted electronically. As the parties will not have online access to those documents once they are submitted, the CM/ECF electronic notice of filing will not act to cause service of those documents under FRAP 25(c)(2) and Ninth Circuit Rule 25-5(f). Interim Circuit Rule 27-13(c) therefore requires an alternative method of serving the motion or notice to seal and the materials to be sealed.

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DESCRIPTION OF DOCUMENTS:

Appellants' Under Seal Opening Brief
Appellants' Under Seal Excerpts of Record Vol 1 of 2, Pages ER 001 to ER 033
Appellants' Under Seal Excerpts of Record Vol 2 of 2, Pages ER 034 to ER 183

Signature: /s/ Andrew Crocker

(use "s/" format with typed name)

Date: 09/19/2016

STATUTORY AND CONSTITUTIONAL ADDENDUM

U.S. Constitution, amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. § 2709

§ 2709. Counterintelligence access to telephone toll and transactional records

(a) Duty to provide.--A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification.--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, may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request--

> **(1)** request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided 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; and
>
> **(2)** request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely

upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Prohibition of certain disclosure.--

(1) Prohibition.--

(A) In general.--If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(B) Certification.--The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in--

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception.--

(A) In general.--A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to--

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(B) Application.--A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

(C) Notice.--Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients.--At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review.—

(1) In general.--A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

(2) Notice.--A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).

(e) Dissemination by bureau.--The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(f) Requirement that certain congressional bodies be informed.--On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

(g) Libraries.--A library (as that term is defined in section 213(1) of the Library Services and Technology Act (20 U.S.C. 9122(1)), the services of which include access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication in print or digitally by patrons for their use, review, examination, or circulation, is not a wire or electronic communication service provider for purposes of this section, unless the library is providing the services defined in section 2510(15) ("electronic communication service") of this title.

18 U.S.C. § 3511

§ 3511. Judicial review of requests for information

(a) The recipient of a request for records, a report, or other information under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947 may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.

(b) Nondisclosure.--

(1) In general.—

(A) Notice.--If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the

Government or file a petition for judicial review in any court described in subsection (a).

(B) Application.--Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(C) Consideration.--A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) should rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(2) Application contents.--An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a 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, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection 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.

(3) Standard.--A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period 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.

(c) In the case of a failure to comply with a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947, 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 court may issue an order requiring the person or entity to comply with the request. Any failure to obey the order of the court may be punished by the court as contempt thereof. Any process under this section may be served in any judicial district in which the person or entity may be found.

(d) In all proceedings under this section, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947. Petitions, filings, records, orders, and subpoenas must also 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) of this title, section 626(a) or (b) or 627(a) of the Fair Credit

Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947.

(e) In all proceedings under this section, the court shall, upon request of the government, review ex parte and in camera any government submission or portions thereof, which may include classified information.

50 U.S.C. § 1874

§ 1874. Public reporting by persons subject to orders

(a) Reporting

A person subject to a nondisclosure requirement accompanying an order or directive under this chapter or a national security letter may, with respect to such order, directive, or national security letter, publicly report the following information using one of the following structures:

> **(1)** A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of--
>
> > **(A)** the number of national security letters received, reported in bands of 1000 starting with 0-999;
> >
> > **(B)** the number of customer selectors targeted by national security letters, reported in bands of 1000 starting with 0-999;
> >
> > **(C)** the number of orders or directives received, combined, under this chapter for contents, reported in bands of 1000 starting with 0-999;
> >
> > **(D)** the number of customer selectors targeted under orders or directives received, combined, under this chapter for contents[1] reported in bands of 1000 starting with 0-999;
> >
> > **(E)** the number of orders received under this chapter for noncontents, reported in bands of 1000 starting with 0-999; and

(F) the number of customer selectors targeted under orders under this chapter for noncontents, reported in bands of 1000 starting with 0-999, pursuant to--

(i) subchapter III;

(ii) subchapter IV with respect to applications described in section 1861(b)(2)(B) of this title; and

(iii) subchapter IV with respect to applications described in section 1861(b)(2)(C) of this title.

(2) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply into separate categories of--

(A) the number of national security letters received, reported in bands of 500 starting with 0-499;

(B) the number of customer selectors targeted by national security letters, reported in bands of 500 starting with 0-499;

(C) the number of orders or directives received, combined, under this chapter for contents, reported in bands of 500 starting with 0-499;

(D) the number of customer selectors targeted under orders or directives received, combined, under this chapter for contents, reported in bands of 500 starting with 0-499;

(E) the number of orders received under this chapter for noncontents, reported in bands of 500 starting with 0-499; and

(F) the number of customer selectors targeted under orders received under this chapter for noncontents, reported in bands of 500 starting with 0-499.

(3) A semiannual report that aggregates the number of orders, directives, or national security letters with which the person was required to comply in the[2] into separate categories of--

(A) the total number of all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 250 starting with 0-249; and

(B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 250 starting with 0-249.

(4) An annual report that aggregates the number of orders, directives, and national security letters the person was required to comply with into separate categories of--

(A) the total number of all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 100 starting with 0-99; and

(B) the total number of customer selectors targeted under all national security process received, including all national security letters, and orders or directives under this chapter, combined, reported in bands of 100 starting with 0-99.

(b) Period of time covered by reports

(1) A report described in paragraph (1) or (2) of subsection (a) shall include only information--

(A) relating to national security letters for the previous 180 days; and

(B) relating to authorities under this chapter for the 180-day period of time ending on the date that is not less than 180 days prior to the date of the publication of such report, except that with respect to a platform, product, or service for which a person did not previously receive an order or directive (not including an enhancement to or iteration of an existing publicly available platform, product, or service) such report shall not include any information relating to such new order or

directive until 540 days after the date on which such new order or directive is received.

(2) A report described in paragraph (3) of subsection (a) shall include only information relating to the previous 180 days.

(3) A report described in paragraph (4) of subsection (a) shall include only information for the 1-year period of time ending on the date that is not less than 1 year prior to the date of the publication of such report.

(c) Other forms of agreed to publication

Nothing in this section prohibits the Government and any person from jointly agreeing to the publication of information referred to in this subsection in a time, form, or manner other than as described in this section.

(d) Definitions

In this section:

(1) Contents

The term "contents" has the meaning given that term under section 2510 of Title 18.

(2) National security letter

The term "national security letter" has the meaning given that term under section 1873 of this title.

USA FREEDOM Act of 2015, Pub. L. 114-23, § 502(f), 129 Stat. 268 (2015).

TITLE V—NATIONAL SECURITY LETTER REFORM
SEC. 501. PROHIBITION ON BULK COLLECTION.
(f) TERMINATION PROCEDURES .—
(1) IN GENERAL .—Not later than 180 days after the date of enactment of this Act, the Attorney General shall adopt procedures with respect to nondisclosure requirements issued pursuant to section 2709 of title 18, United States Code, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy

Act (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), as amended by this Act, to require—

(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.

(2) REPORTING .—Upon adopting the procedures required under paragraph (1), the Attorney General shall submit the procedures to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

FBI, Termination Procedures for National Security Letter Nondisclosure Requirement (Nov. 24, 2015)

I. References

a. Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422.
b. Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x.
c. Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2701-2712.
d. Domestic Investigations and Operations Guide, Federal Bureau of Investigation, 2015.
e. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015).

II. Introduction

The FBI is statutorily authorized to issue NSLs only in connection with investigations to protect against international terrorism or clandestine intelligence activities and to obtain one of only four types of basic records: (i) telephone subscriber information, toll records, and other non-content electronic communication transactional records, *see* 18 U.S.C. § 2709; (ii) consumer-

identifying information possessed by consumer reporting agencies (names, addresses, places of employment, and institutions at which a consumer has maintained an account), *see* 15 U.S.C. § 1681u; (iii) full credit reports, *see* 15 U.S.C. § 1681v; and (iv) financial records, *see* 12 U.S.C. § 3414. An NSL may issue for these records only if the information being sought is relevant to an investigation to protect against international terrorism or clandestine intelligence activities, except that NSLs may not be used to obtain a full credit report in counterintelligence investigations unless there is an international terrorism nexus.

The FBI may impose a nondisclosure requirement on the recipient of an NSL only after certification by the head of an authorized investigative agency, or an appropriate designee, that one of the statutory standards for nondisclosure is satisfied; that is, where there is good reason to believe 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. *See, e.g.,* 18 U.S.C. § 2709(c). The nondisclosure requirement prohibits the recipient of an NSL from disclosing information protected by the nondisclosure requirement to anyone other than: (i) those persons to whom disclosure is necessary in order to comply with the request; (ii) an attorney in order to obtain legal advice or assistance regarding the request; or (iii) other persons as permitted by the head of the authorized investigative agency, or a designee, described in the respective statute.

An NSL may issue, and a nondisclosure requirement may be imposed, only after rigorous review and approval at a high level. With respect to the NSL itself, an agent must justify in writing why the NSL is needed, i.e., the agent must provide a detailed explanation of the predication for the investigation as well as the relevance of the information sought. That written explanation, as well as the proposed NSL itself and any associated nondisclosure requirement, must be reviewed and approved by the Supervisory Special Agent, Chief or Associate Division Counsel, Assistant Special Agent in Charge, and Special Agent in Charge, or the equivalent-level officials at FBI Headquarters (FBIHQ).

The procedures set forth below (the "NSL Procedures") govern the review of the nondisclosure requirement in NSLs and termination of the requirement when the facts no longer support nondisclosure. These NSL Procedures also ensure that such reviews are initiated at established points in the life cycle of an investigation, and that such reviews and determinations are documented in the FISA Management System (FISAMS) and the FBI's central recordkeeping system, and any successor systems.

These NSL Procedures recognize and incorporate by reference existing limits mandated by statute on the imposition of the nondisclosure requirement in NSLs. The agent or analyst, Supervisory Special Agent, Chief or Associate Division Counsel, Assistant Special Agent in Charge, and Special Agent in Charge must assess whether the facts no longer support the nondisclosure requirement included in an NSL. If the facts no longer support the nondisclosure requirement, the FBI will provide notice to the recipient of the NSL, or officer, employee, or agent thereof, as well as to any applicable court, as appropriate, when the nondisclosure requirement has been terminated.

III. Review Procedures

A. Timeframe for Review

Under these NSL Procedures, the nondisclosure requirement of an NSL shall terminate upon the closing of any investigation in which an NSL containing a nondisclosure provision was issued except where the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied. The FBI also will review all NSL nondisclosure determinations on the three-year anniversary of the initiation of the full investigation and terminate nondisclosure at that time, unless the FBI determines that one of the statutory standards for nondisclosure is satisfied.[18] When, after the effective date of these procedures, an

[18] Among other things, the USA FREEDOM Act requires the FBI to "review at appropriate intervals" the nondisclosure requirement of an NSL to assess whether facts supporting nondisclosure continue to exist. In the legislative history accompanying the Act, Congress indicated that:

> [t]hese procedures are based upon nondisclosure reforms proposed by President Obama in January 2014. In remarks accompanying the issuance of PPD-28, President Obama directed the Attorney General 'to amend how we use National Security Letters so that [their] secrecy will not be indefinite, and will terminate within a fixed time unless the government demonstrates a real need for further secrecy.' In January 2015, as part of its Signals Intelligence Reform 2015 Anniversary Report, the Director of National Intelligence announced that: In response to the President's new direction, the FBI will

investigation closes and/or reaches the three-year anniversary of the initiation of the full investigation, the agent assigned to the investigation will receive notification, automatically generated by FBI's case management system, indicating that a review is required of the continued need for nondisclosure for all NSLs issued in the case that included a nondisclosure requirement. Thus, for cases that close after the three-year anniversary of the full investigation, the NSLs that continue to have nondisclosure requirements will be reviewed on two separate occasions; cases that close before the three-year anniversary of the full investigation will be reviewed on one occasion. Moreover, NSL nondisclosure requirements will be reviewed only if they are associated with investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures.

B. Review Requirements

The assessment of the need for continued nondisclosure of an NSL is an individualized one; that is, each NSL issued in an investigation will need to be individually reviewed to determine if the facts no longer support nondisclosure under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., where there is good reason to believe 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. *See, e.g.,* 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

> now presumptively terminate National Security Letter nondisclosure orders at the earlier of 3 years after the opening of a fully predicated investigation or the investigation's close. Continued nondisclosure orders beyond this period are permitted only if a Special Agent in Charge or a Deputy Assistant Director determines that the statutory standards for nondisclosure continue to be satisfied and that the case agent has justified, in writing, why continued nondisclosure is appropriate.

H. Rep. No. 114-109 (2015) at 24-25.

Every determination to continue or terminate the nondisclosure requirement will be subject to the same review and approval process that NSLs containing a nondisclosure requirement are subject to at the time of their issuance. Thus, (i) the case agent will review the NSL, the original written justification for nondisclosure, and any investigative developments to determine whether nondisclosure should continue; (ii) the case agent will document the reason for continuing or terminating the nondisclosure requirement; (iii) the case agent's immediate supervisor will review and approve the case agent's written justification for continuing or terminating nondisclosure; (iv) an attorney—either the Chief Division Counsel or Associate Division Counsel in the relevant field office or an attorney with the National Security Law Branch at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; (v) higher-level supervisors—either the Assistant Special Agent in Charge in the field or the Unit Chief or Section Chief at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; and (vi) a Special Agent in Charge or a Deputy Assistant Director at FBIHQ will review and make the final determination regarding the case agent's written justification for continuing or terminating nondisclosure. In addition, those NSLs for which the nondisclosure requirement is being terminated will undergo an additional review at FBIHQ for consistency across field offices and programs. This review process must be completed within 30 days from the date of the review notice given by the FBI's case management system.

C. Notification of Termination

Upon a decision that nondisclosure of an NSL is no longer necessary, written notice will be given to the recipient of the NSL, or officer, employee, or agent thereof, as well as to any applicable court, as appropriate, that the nondisclosure requirement has been terminated and the information contained in the NSL may be disclosed. Any continuing restrictions on disclosure will be noted in the written notice. If such a termination notice is to be provided to a court, the FBI field office or FBIHQ Division that issued the NSL, in conjunction with FBI's Office of General Counsel, shall coordinate with the Department of Justice to ensure that notice concerning termination of the NSL nondisclosure requirement is provided to the court and any other appropriate parties.

D. Use of FBI Recordkeeping Systems

FBI will use its FISAMS system, or any successor system, to facilitate and document the review process described above. Once the decision to continue or terminate a nondisclosure requirement has been approved under the above review process, FISAMS will generate an electronic communication ("EC") that documents the justification and determination that will be serialized into the FBI's central recordkeeping system, unless otherwise exempted from being serialized. The FBI will also use FISAMS and its central recordkeeping system, and any successor systems, to facilitate the creation and transmittal of termination notices to NSL recipients and any court, as appropriate.

Audits to ensure compliance with these procedures will be included during the annual NSL reviews conducted by FBI's Inspection Division, as well as during periodic National Security Reviews conducted by the Department of Justice at each of FBI's 56 field offices.

E. Administrative Matters

This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The NSL Procedures will be effective 90 days from the date of the Attorney General's approval.