

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY LETTER

No. C 11-02173 SI

**ORDER GRANTING MOTION TO SET
ASIDE NSL LETTER**

Pursuant to the National Security Letter Statute, 18 U.S.C. § 2709, the FBI issued a National Security Letter (“NSL”) to Petitioner, an electronic communication service provider (“ECSP”), seeking “subscriber information.” By certifying, under section 2709(c)(1), that disclosure of the existence of the NSL may result in “a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person,” the FBI was able to prohibit Petitioner from disclosing the existence of the NSL. Petitioner filed a Petition to Set Aside the National Security Letter and Nondisclosure Requirement, pursuant to 18 U.S.C. §§ 3511(a) and (b).¹

Petitioner challenges the constitutionality – both facially and as applied – of the nondisclosure provision of 18 U.S.C. § 2709(c) and the judicial review provisions of 18 U.S.C. § 3511(b) (collectively “NSL nondisclosure provisions”). Petitioner argues that the nondisclosure provision of the statute is an unconstitutional prior restraint and content-based restriction on speech. More specifically, Petitioner contends that the NSL provisions lack the necessary procedural safeguards required under the First

¹ While the documents submitted in this case were filed under seal, the parties have agreed to unseal partially redacted versions of the parties’ briefing on the Petition to Set Aside and the government’s Motion to Compel Compliance with the Petition. *See* Docket Nos. 28, 38. This Order is not sealed and shall be publicly available.

1 Amendment, because the government does not bear the burden to seek judicial review of the
2 nondisclosure order and the government does not bear the burden of demonstrating that the
3 nondisclosure order is necessary to protect specific, identified interests. Petitioner also argues that the
4 NSL nondisclosure provisions violate the First Amendment because they act as a licensing scheme
5 providing unfettered discretion to the FBI, and that the judicial review provisions violate separation of
6 powers principles because the statute dictates an impermissibly restrictive standard of review for courts
7 adjudicating challenges to nondisclosure orders.

8 In addition, Petitioner attacks the substantive provisions of the NSL statute itself, both separately
9 and in conjunction with the nondisclosure provisions, arguing that the statute is a content-based
10 restriction on speech that fails strict scrutiny.

11 The government opposed the Petition, filed a separate lawsuit seeking a declaration that
12 Petitioner is required to comply with the NSL,² and filed a motion to compel compliance with the NSL
13 in this case.³ In its opposition to the Petition, the government argues that the NSL statute satisfies strict
14 scrutiny and does not impinge on the anonymous speech or associational rights of the subscriber whose
15 information is sought in the NSL. The government also asserts that the nondisclosure provisions are
16 appropriately applied to Petitioner, because the nondisclosure order is not a “classic prior restraint”
17 warranting the most rigorous scrutiny and because it was issued in this case after an adequate
18 certification from the FBI. Finally, the government argues that the standards of judicial review provided
19 for review of NSLs and nondisclosure orders are constitutional. In support of its arguments in
20 opposition to the Petition, as well as in support of its own motion to compel compliance with the NSL,
21 the government relies on a classified declaration from a senior official with the FBI, which the Court
22

23 ² See Civ. No. 11-2667 (Under Seal).

24 ³ With respect to the substantive portions of the NSL as applied to this case, Petitioner argues
25 that the FBI’s certification of necessity for the subscriber information at issue does not demonstrate that
26 an enumerated harm contemplated by the statute would occur absent disclosure, and that the FBI has
27 failed to affirmatively demonstrate that the investigation at issue is not being conducted solely on the
28 basis of activities protected by the First Amendment. Petition at 24. As discussed below, because the
Court finds the NSL nondisclosure provisions constitutionally infirm and concludes that the
nondisclosure provisions cannot be severed from the substantive NSL provisions, the Court does not
reach the issue of whether the FBI has made a sufficient showing to require Petitioner to comply with
the NSL.

1 has reviewed. The government filed a redacted and unclassified version of the FBI official's
2 declaration, which has been provided to Petitioner and its counsel.

3 For the reasons discussed below, the Court finds that the NSL nondisclosure and judicial review
4 provisions suffer from significant constitutional infirmities. Further, those infirmities cannot be avoided
5 by "conforming" the language of the statute to satisfy the Constitution's demands, because the existing
6 statutory language and the legislative history of the statutes block that result. As such, the Court finds
7 section 2709(c) and 3511(b) unconstitutional, but stays the judgment in order for the Ninth Circuit to
8 consider the weighty questions of national security and First Amendment rights presented in this case.
9

10 BACKGROUND

11 1. NSL Statutes at Issue

12 Sections 2709(a) and (b) of Title 18 of the United States Code provide that a wire or electronic
13 communication service provider shall comply with a request⁴ for specified categories of subscriber
14 information if the Director of the FBI or his designee certifies that the records sought are relevant to an
15 authorized investigation to protect against international terrorism or clandestine intelligence activities,
16 provided that such an investigation of a United States person is not conducted solely on the basis of
17 activities protected by the First Amendment to the Constitution of the United States. Section 2709(c)(1)
18 provides that if the Director of the FBI or his designee certifies that "there may result a danger to the
19 national security of the United States, interference with a criminal, counterterrorism, or
20 counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical
21 safety of any person," the recipient of the NSL shall not disclose to anyone (other than to an attorney
22 to obtain legal advice or legal assistance with respect to the request) that the FBI has sought or obtained
23 access to information or records sought in the NSL. Section (c)(2) provides that the FBI shall inform
24 the recipient of the NSL of the nondisclosure requirement.

25 Section 3511 provides for judicial review of NSLs and nondisclosure orders issued under section
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28 ⁴ This request is generally referred to as a "National Security Letter," or "NSL."

1 2709 and other NSL statutes.⁵ Under 3511(a), the recipient of an NSL may petition a district court for
2 an order modifying or setting aside the NSL. The court may modify the NSL, or set it aside, only “if
3 compliance would be unreasonable, oppressive, or otherwise unlawful.” Under 3511(b)(2), an NSL
4 recipient subject to a nondisclosure order may petition a district court to modify or set aside the
5 nondisclosure order. If the NSL was issued within a year of the time a challenge to the nondisclosure
6 order is made, a court may “modify or set aside such a nondisclosure requirement if it finds that there
7 is no reason to believe that disclosure may endanger the national security of the United States, interfere
8 with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic
9 relations, or endanger the life or physical safety of any person.” However, if a specified high ranking
10 government official (*i.e.*, the Attorney General, Deputy or Assistant Attorney Generals, the Director of
11 the Federal Bureau of Investigation, or agency heads) certifies that disclosure “may endanger the
12 national security of the United States or interfere with diplomatic relations, such certification shall be
13 treated as conclusive unless the court finds that the certification was made in bad faith.” 18 U.S.C.
14 3511§ (b)(2).

15 Under 3511(b)(3), if the petition to modify or set aside the nondisclosure order is filed more than
16 one year after the NSL issued, a specified government official, within ninety days of the filing of the
17 petition, shall either terminate the nondisclosure requirement or re-certify that disclosure may result in
18 an enumerated harm. If the government provides that re-certification, the Court may again only alter
19 or modify the NSL if there is “no reason to believe that disclosure may” have the impact the government
20 says it may, and the court must treat the certification as “conclusive unless the court finds that the
21 recertification was made in bad faith.” Finally, if the court denies a petition for an order modifying or
22 setting aside a nondisclosure order, “the recipient shall be precluded for a period of one year from filing
23 another petition to modify or set aside such nondisclosure requirement.”

24 Under 3511(d) and (e) the Court may close hearings to “the extent necessary to prevent an
25 unauthorized disclosure of a request for records,” may seal records regarding any judicial proceedings,
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27 ⁵ See 12 U.S.C. § 3414(a)(5) (financial records); 15 U.S.C. § 1681u (credit history); 15 U.S.C.
28 § 1681v (full credit reports); 50 U.S.C. § 436 (information concerning investigation of improper
disclosure of classified information).

1 and “shall, upon request of the government, review *ex parte* and *in camera* any government submission,
2 or portions thereof, which may include classified information.”
3

4 **2. Prior Cases Testing Constitutionality of the NSL Provisions**

5 This Court is not the first to address the constitutionality of the NSL provisions currently in
6 effect. In *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), affirmed in part and reversed in part
7 and remanded by *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the District Court found that
8 the nondisclosure provision was a prior restraint and a content-based restriction on speech that violated
9 the First Amendment because the government did not bear the burden to seek prompt judicial review
10 of the nondisclosure order. 500 F. Supp. 2d at 406 (relying on *Freedman v. Maryland*, 380 U.S. 51
11 (1965)).⁶ The District Court approved allowing the FBI to determine whether disclosure would
12 jeopardize national security, finding that the FBI’s discretion in certifying a need for nondisclosure of
13 an NSL “is broad but not inappropriately so under the circumstances” of protecting national security.
14 *Id.* at 408-09. However, the District Court determined that section 3511(b)’s restriction on when a court
15 may alter or set aside an NSL – only if there is no reason to believe that disclosure will result in one of
16 the enumerated harms – in combination with the statute’s direction that a court must accept the FBI’s
17 certification of harm as “conclusive unless the court finds that the certification was made in bad faith,”
18 were impermissible attempts to restrict judicial review in violation of separation of powers principles.
19 *Id.* at 411-13. The District Court found that the unconstitutional nondisclosure provisions were not
20 severable from the substantive provisions of the NSL statute, and declined to address whether the
21 unconstitutional judicial review provision – which implicated review of other NSLs, not just NSLs to
22 electronic communication service providers at issue – was severable.

23 The District Court’s decision was affirmed in part, reversed in part and remanded by the Second
24 Circuit Court of Appeals in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). In that opinion,
25 the Second Circuit found that while not a “classic prior restraint” or a “broad” content-based prohibition
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27 ⁶ For an extensive discussion of the history and use of NSLs, as well as the legislative history
28 of the specific NSL provisions challenged by Petitioner, see *Doe v. Gonzales*, 500 F. Supp. 2d 379, 387-
392 (S.D.N.Y. 2007).

1 on speech necessitating the “most rigorous First Amendment scrutiny,” the nondisclosure requirement
2 was sufficiently analogous to them to justify the application of the procedural safeguards announced in
3 *Freedman v. Maryland*, 380 U.S. 51, particularly the third *Freedman* prong requiring the government
4 to initiate judicial review. *Id.* at 881 (“in the absence of Government-initiated judicial review,
5 subsection 3511(b) is not narrowly tailored to conform to *First Amendment* procedural standards.”).
6 However, in order to avoid the constitutional deficiencies, the Court read into the statute a requirement
7 that the government inform each NSL recipient that the recipient could contest the nondisclosure
8 requirements and if contested, the government would initiate judicial review within 30 days, and that
9 review would conclude within 60 days. Under the Second Circuit’s “conforming” of section 2709(c),
10 the *Freedman* concerns were met.

11 The Second Circuit also found the restrictions on the District Court’s review of the adequacy of
12 the FBI’s justification for nondisclosure orders problematic. In order to avoid some of the problems,
13 the Second Circuit accepted three concessions by the government that narrowed the operation of
14 sections 2709(c) and 3511(b) in significant respects. First, the Court accepted the government’s position
15 – offered in litigation – that the section 2709(c) nondisclosure requirement applies *only* if the FBI
16 certifies that an enumerated harm related to an authorized investigation to protect against international
17 terrorism or clandestine intelligence activity may occur. *Id.* 875.⁷ Second, the Court accepted the
18 government’s litigation position that section 3511(b)(2)’s requirement that a court may alter or modify
19 the nondisclosure agreement only if there “is no reason to believe that disclosure may” risk one of the
20 enumerated harms, should be read to mean that a court may alter or modify the nondisclosure agreement
21 unless there is “some reasonable likelihood” that the enumerated harm will occur. Third, the Court
22 accepted the government’s agreement that it would bear the burden of proof to persuade a district court
23 – through evidence submitted *in camera* as necessary – that there is a good reason to believe that
24 disclosure may risk one of the enumerated harms; and that the district court must find that such a good
25 reason exists. *Id.* at 875-76.

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27 ⁷ As written, the statute allows for nondisclosure orders to issue in connection with NSLs where
28 the government certifies that “there may result a danger to the national security of the United States,
interference with a criminal, counterterrorism, or counterintelligence investigation, interference with
diplomatic relations, or danger to the life or physical safety of any person.” 18 U.S.C. § 2709(c).

1 In interpreting section 3511(b) to require the government to show a “good” reason that an
2 enumerated harm related to international terrorism or clandestine intelligence activity may result, and
3 requiring the government to submit proof to the district court to support its certification, the Second
4 Circuit found that a court would have – consistent with its duty independently to assess First
5 Amendment restraints in light of national security concerns – “a basis to assure itself (based on *in*
6 *camera* presentations where appropriate) that the link between the disclosure and risk of harm is
7 substantial.” *Id.* at 881. After implying these limitations – based on the government’s litigation
8 concessions – the Second Circuit found that most of the significant constitutional deficiencies found by
9 the district court could be avoided. However, the Second Circuit affirmed the holding that section
10 3511(b)(2) and (b)(3)’s provision that government certifications must be treated as “conclusive” is not
11 “meaningful judicial review” as required by the First Amendment. *Id.* at 882. In conclusion, the Second
12 Circuit severed the conclusive presumption provision of section 3511(b), but left intact the remainder
13 of section 3511(b) and the entirety of section 2709, with the added imposed limitations and “with
14 government-initiated review as required.” *Id.* at 885.⁸

15 In the pleadings in the present case, the government did not state whether it was complying with
16 the narrowing constructions and the procedural requirements imposed on the NSL nondisclosure
17 provisions by the Second Circuit. However, at the hearing before this Court, the government asserted
18 that it was following the mandates imposed by the Second Circuit in the *John Doe, Inc. v. Mukasey*
19 decision for *all* NSLs being issued, since it would be impracticable to attempt to comply with that
20 decision only in the Second Circuit.

21 At the hearing, this Court also asked Petitioner whether in its view the challenged NSL
22 nondisclosure provisions would survive constitutional scrutiny if the requirements imposed by the
23 Second Circuit were adopted by Congressional amendment. Petitioner agreed that the nondisclosure
24 provisions if so amended would be constitutional, but argued that the NSL provisions cannot be saved
25 by judicial reconstruction but only through Congressional amendment.

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27 ⁸ Because the government did not concede or voluntarily offer to be the party to initiate court
28 review of challenged nondisclosure order, the Court enjoined the government from enforcing the
nondisclosure requirements in absence of government-initiated judicial review. *Id.*

DISCUSSION

1. Jurisdiction Over the Constitutional Challenge

The government argues first that this Court does not have jurisdiction to consider Petitioner's constitutional challenges to the NSL nondisclosure provisions. Under section 3511(a)'s judicial review provision, courts can "modify or set aside" NSLs if compliance would be "unreasonable, oppressive, or otherwise unlawful." Under section 3511(b), a court can "modify or set aside" nondisclosure orders if "if it finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." As the scope of judicial review expressly provided is limited to those two issues, the government contends this Court cannot review the constitutionality of the NSL provisions in this action brought pursuant to section 3511. Govt. Oppo. at 6-7. The Court disagrees. As part of determining whether to modify or set aside an NSL – which Petitioner seeks to do in this case – the Court can review the constitutional attack on the statute, because the statute's constitutionality implicates whether an NSL served on a wire or electronic communications provider, including this one, is unreasonable or unlawful. *Cf. AFGE Local 1 v. Stone*, 502 F.3d 1027, 1039 (9th Cir. 2007) (where statutory scheme did "not clearly state an intention on the part of Congress to preclude judicial review of constitutional claims," those claims should be adjudicated). In any event, the government does not dispute that, even without the judicial review provisions in section 3511(a) and (b), the court can exercise its fundamental obligation to determine the constitutionality of the NSL nondisclosure provisions under the Declaratory Relief Act, 28 U.S.C. § 2201. *Cf. Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004), vacated and remanded by *Doe I v. Gonzales*, 449 F.3d 415 (2d Cir. 2006)(finding Section 2709's nondisclosure provision – prior to enactment of judicial review provisions in Section 3511 – unconstitutional in part because former Section 2709 "effectively bars or substantially deters any judicial challenge to the propriety of an NSL request.").

2. Level of Scrutiny

Petitioner contends that the nondisclosure order amounts to both a classic prior restraint on

1 speech and a content-based restriction on speech, and urges that accordingly exacting levels of scrutiny
2 be used in evaluating the restriction.

3 Petitioner argues that the nondisclosure order is a classic prior restraint on speech, noting that
4 it prohibits recipients of an NSL from speaking not just about the NSL's contents and target, but even
5 about the existence or receipt of the NSL. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550
6 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding
7 certain communications when issued in advance of the time that such communications are to occur.'" (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984))). Petitioner argues that,
8 as a "classic" prior restraint, the statute can only be saved if disclosure of the information from NSLs
9 will "surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York*
10 *Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White,
11 J. concurring).

12 Petitioner also contends that the NSL nondisclosure order is a content-based restriction on
13 speech, because it targets a specific category of speech – speech regarding the NSL. As a content-based
14 restriction, the nondisclosure provision is "presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382
15 (1992), and can only be sustained if it is "narrowly tailored to promote a compelling Government
16 interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must
17 use that alternative." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (citation
18 omitted).

19 The Court finds that given the text and function of the NSL statute, Petitioner's proposed
20 standards are too exacting. Rather, this Court agrees with the analysis of the Second Circuit in *John*
21 *Doe, Inc. v. Mukasey*, and finds that while section 2709(c) may not be a "classic prior restraint" or a
22 "typical" content-based restriction on speech, the nondisclosure provision clearly restrains speech of
23 a particular content – significantly, speech about government conduct. *John Doe, Inc. v. Mukasey*, 549
24 F.3d 861, 876, 878 (2d Cir. 2008). Under section 2709(c), the FBI has been given the unilateral power
25 to determine, on a case-by-case basis, whether to allow NSL recipients to speak about the NSLs. As
26 a result, the recipients are prevented from speaking about their receipt of NSLs and from disclosing, as
27 part of the public debate on the appropriate use of NSLs or other intelligence devices, their own
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1 experiences. In these circumstances, the Court finds that while section 2709(c) does not need to satisfy
2 the extraordinarily rigorous *Pentagon Papers* test, section 2709(c) must still meet the heightened
3 justifications for sustaining prior-restraints announced in *Freedman v. Maryland* and must be narrowly
4 tailored to serve a compelling governmental interest. *See John Doe, Inc. v. Mukasey*, 549 F.3d at 878-
5 881 (applying third *Freedman* procedural safeguard); *see also id.* at 878 (noting government conceded
6 strict scrutiny applied in that case).

7 The Court is not persuaded by the government's attempt to avoid application of the *Freedman*
8 procedural safeguards by analogizing to cases which have upheld restrictions on disclosures of
9 information by individuals involved in civil litigation, grand jury proceedings and judicial misconduct
10 investigations. The concerns that justified restrictions on a civil litigant's *pre-trial* right to disseminate
11 confidential business information obtained in discovery – a restriction that was upheld by the Supreme
12 Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) – are manifestly not the same as the
13 concerns raised in this case. Here, the concern is the government's unilateral ability to prevent
14 individuals from speaking out about the government's use of NSLs, a subject that has engendered
15 extensive public and academic debate.⁹

16 The government's reliance on cases upholding restrictions on witnesses in grand jury or judicial
17 misconduct proceedings from disclosing information regarding those proceedings is similarly misplaced.
18 With respect to grand jury proceedings, the Court notes that the basic presumption in federal court is
19 that grand jury witnesses are not bound by secrecy with respect to the content of their testimony. *See,*
20 *e.g., In re Grand Jury*, 490 F.3d 978, 985 (D.C. Cir. 2007) ("The witnesses themselves are not under
21 an obligation of secrecy."). While courts have upheld state law restrictions on grand jury witnesses'
22 disclosure of information learned only through participation in grand jury proceedings, those restrictions
23 were either limited in duration or allowed for broad judicial review. *See, e.g., Hoffmann-Pugh v.*
24 *Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) (agreeing state court grand jury witness could be
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26 ⁹ *See, e.g.,* Statement of Glenn Fine, Inspector General, U.S. Department of Justice before the
27 Senate Judiciary Committee concerning Reauthorizing the USA Patriot Act (September 23, 2009)
28 <www.justice.gov/oig/testimony/t0909.pdf>; 72 Geo. Wash. L. Rev., August 2004, *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & The USA Patriot Act*; Editorial, *Breaking a Promise on Surveillance*, N.Y. Times, July 29, 2010, at 22.

1 precluded from disclosing information learned through giving testimony, but noting state law provides
2 a mechanism for judicial determination of whether secrecy still required); *cf. Butterworth v. Smith*, 494
3 U.S. 624, 632 (1990) (interests in grand jury secrecy do not “warrant a permanent ban on the disclosure
4 by a witness of his own testimony once a grand jury has been discharged.”).

5 Importantly, as the Second Circuit recognized, the interests of secrecy inherent in grand jury
6 proceedings arise from the nature of the proceedings themselves, including “enhancing the willingness
7 of witnesses to come forward, promoting truthful testimony, lessening the risk of flight or attempts to
8 influence grand jurors by those about to be indicted, and avoiding public ridicule of those whom the
9 grand jury declines to indict.” *John Doe, Inc. v. Mukasey*, 549 F.3d at 876. In the context of NSLs,
10 however, the nondisclosure requirements are imposed at the demand of the Executive Branch “under
11 circumstances where the secrecy might or might not be warranted.” *Id.* at 877. Similarly, the secrecy
12 concerns which inhere in the nature of judicial misconduct proceedings, as well as the temporal
13 limitations on a witness’s disclosure regarding those proceedings, distinguish those proceedings from
14 section 2709(c). *Id.*¹⁰

16 **3. Procedural Safeguards**

17 Having concluded that the procedural safeguards mandated by *Freedman* should apply to section
18 2709(c), the question becomes whether those standards are satisfied by section 2709(c). *Freedman*
19 requires that ““(1) any restraint prior to judicial review can be imposed only for a specified brief period
20 during which the status quo must be maintained; (2) expeditious judicial review of that decision must

21 ¹⁰ The cases relied on by the government, where restrictions on speech were not considered
22 prior restraints because speakers were not restrained in advance but instead subjected to potential
23 criminal penalties after the speech occurred, are also inapposite. *See, e.g., Cooper v. Dillon*, 403 F.3d
24 1208, 1215 (11th Cir. 2005); *see also CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (distinguishing
25 between “a threat of criminal or civil sanctions after publication” which “chills speech” and a prior
26 restraint which “freezes” speech) (citation omitted); *Landmark Communications v. Va.*, 435 U.S. 829,
27 838 (1978) (appellant did not dispute that statute imposing criminal sanctions for disclosure of
28 confidential proceedings of judicial misconduct was not “a prior restraint or attempt by the State to
censor the news media.”). Here, the recipients of NSLs are not merely warned that disclosing the NSL
could result in criminal sanctions, but ordered in the NSLs themselves not to disclose its existence or
its contents. *See* Section 2709(c)(1) (“no wire or electronic communications service provider . . . shall
disclose to any person . . . that the Federal Bureau of Investigation has sought or obtained access to
information or records under this section.”); Section 2709(c)(2) (“request” shall notify the recipient of
the “nondisclosure requirement”).

1 be available; and (3) the censor must bear the burden of going to court to suppress the speech and must
2 bear the burden of proof once in court.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (quoting
3 *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (O’Connor, J., joined by Stevens, and Kennedy, JJ.)).

4 The government argues that even if the *Freedman* factors apply to section 2709(c), the manner
5 in which Petitioner’s NSL and court challenge have, in fact, been handled by the FBI satisfy those
6 factors. The government is attempting to foreclose Petitioner’s facial attack on the NSL provisions by
7 arguing that this Court must defer to the government’s “authoritative constructions” of the NSL statute,
8 including its implementation in this case. *See, e.g.*, Govt Oppo. at 20, n.10. The Court, however, has
9 not been presented with any *evidence* of an “authoritative construction.” There is no evidence that the
10 Department of Justice has implemented regulations to impose the constructions and safeguards
11 mandated by the Second Circuit in the *John Doe v. Mukasey* decision. There is no evidence that either
12 the DOJ or the FBI has adopted a formal “policy” adhering to those constructions and safeguards. The
13 most the government says in its briefs is that consistent with “usual FBI practice,” the NSL at issue
14 informed Petitioner that if Petitioner objected to the NSL, the FBI would seek judicial review within 30
15 days. At oral argument, government counsel stated that it continued to comply with *Freedman*’s
16 procedural requirements. But, a statement in a brief of “usual practice” and a commitment to continue
17 that practice made in court are not sufficient to demonstrate the existence of – and thereby mandate
18 court deference to – an agency’s “authoritative construction” of a licensing scheme, much less a content-
19 based scheme like the one at issue. *Cf. Ward v. Rock against Racism*, 491 U.S. 781, 795-796 (1989)
20 (finding that “[a]dministrative interpretation and implementation of a regulation are, of course, highly
21 relevant to our analysis” of a facial challenge to a content-neutral time, place and manner regulation
22 impacting speech).¹¹ The risks of unwarranted suppression of speech inherent in content-based speech
23 restrictions cannot be adequately ameliorated by governmental promises to comply with *Freedman*’s
24 requirements.

25 Similarly, even if the FBI is in fact complying with both the procedural and substantive
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27 ¹¹ That the government likewise initiated judicial review in another case, after an NSL recipient
28 requested the government seek judicial review of the NSL nondisclosure requirement, does not change
this conclusion. *See* Case No 12-0007 (AJT/IDD) (E.D. Va. April 24, 2012) (partially unsealed order).

1 requirements imposed by the Second Circuit for all NSLs issued, the fact that the statute is facially
2 deficient – in not mandating the procedural and substantive protections discussed below – presents too
3 great a risk of potential infringement of First Amendment rights to allow the FBI to side-step
4 constitutional review by relying on its voluntary, nationwide compliance with the Second Circuit’s
5 limitations. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 174 (2000) (“A
6 defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a
7 case.”).

8 Another significant factor weighs in favor of this Court resolving the facial challenge: despite
9 evidence demonstrating that tens of thousands of NSLs are issued each year – and by the government’s
10 own estimate, 97% of them may come with a nondisclosure order – only a handful of challenges to the
11 NSL provisions have been brought. *Compare* DOJ Office of Inspector General “A Review of the
12 Federal Bureau of Investigation’s Use of National Security Letters,” March 2007 at 120
13 <www.usdoj.gov/oig/special/s0703b/final.pdf> (noting that in 2005, more than 47,000 NSL requests
14 were issued) *with Doe v. Gonzales*, 500 F. Supp. 2d 379, 405 (S.D.N.Y. 2007) (finding as of 2007 that
15 only two challenges have been made in federal court since the original enactment of the NSL statute).¹²

16 All of these factors weigh in favor of this Court reviewing Petitioner’s facial challenge. Simply
17 because the government chose to meet the *Freedman* safeguards in issuing and seeking to compel the
18 NSL at issue here, does not foreclose Petitioner’s ability to challenge the constitutionality of the
19 statute’s provisions.

20
21 **A. Government Must Initiate Judicial Review and Bear Burden of Proof**

22 There is no dispute that the NSL provisions do not require the government to initiate judicial
23 review of NSL nondisclosure orders. The Second Circuit found that this deficiency rendered the NSL
24 provisions unconstitutional, but suggested that *if* the government were to inform recipients that they

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26 ¹² The Court recognizes that a more recent challenge to a nondisclosure order was brought in
27 2012. However, in that case, while the NSL recipient requested the government to obtain judicial
28 review of the nondisclosure requirement, the NSL recipient did not appear in Court or otherwise
participate in the Eastern District of Virginia proceedings. *See* partially unsealed April 24, 2012 Order
in Case No 12-0007 (AJT/IDD) (E.D. Va. April 24, 2012).

1 could object to the nondisclosure order, and that if they objected, the government would seek judicial
2 review, then the constitutional problem could be avoided. *John Doe, Inc. v. Mukasey*, 549 F.3d at 879.
3 The Second Circuit noted that there are three ways the government could satisfy this requirement: (1)
4 by interpreting its authority in section 3511(c) to move to compel compliance with an NSL to also
5 encompass a petition for judicial review of the nondisclosure order; (2) by identifying another way to
6 invoke the equitable power of a district court to prevent disclosure of the NSL; or (3) by seeking explicit
7 Congressional authorization. *Id.* at 884.

8 There is no evidence in this record as to which option, if any, the government has decided to
9 follow, although the government did file a complaint for declaratory and injunctive relief in support of
10 the NSL and nondisclosure order here, after receiving notice that Petitioner intended to contest both the
11 NSL and the nondisclosure order. *See* Case No. 11-02173, Docket No. 1 filed June 3, 2011 (Under
12 Seal).

13 With respect to the burden of proof, there is no requirement in the statute that the government
14 bear any specific burden of proof, in terms of the showing necessary to justify the nondisclosure order.
15 To the contrary, section 3511(b) provides that a court may modify or set aside a nondisclosure
16 requirement only if the court finds there is “no reason to believe” that disclosure “may” endanger
17 national security, interfere with an investigation or diplomatic relations, or endanger any person. The
18 Second Circuit addressed this issue by construing 3511(b)(2) and (b)(3) to place on the government the
19 burden to show that a “good reason” exists to expect disclosure of receipt of an NSL will risk an
20 enumerated harm. The Second Circuit suggested that the government could satisfy this burden by
21 providing evidence to the court – submitted *ex parte* and *in camera* if necessary – showing why
22 disclosure in a particular case could result in an enumerated harm. *John Doe, Inc. v. Mukasey*, 549 F.3d
23 at 883. Here, the government did not address the burden of proof requirement of the third *Freedman*
24 prong or explain its position, other than noting that in *this* case it submitted a classified declaration in
25 support of its opposition to the Petition and in support of its motion to compel compliance with the NSL.
26

27 **B. Short Period of Time Prior to Judicial Review**

28 Under *Freedman*’s first prong, any restraint prior to judicial review can be imposed only for a

1 specified brief period. The NSL provisions do not provide any limit to the period of time the
2 nondisclosure order can be in place prior to judicial review. The Second Circuit addressed this problem
3 by finding that *if* the government were to notify NSL recipients that if they objected to the nondisclosure
4 order within 10 days, the government would seek judicial review of the nondisclosure restriction within
5 30 days, then this *Freedman* factor would be satisfied. This Court agrees that if the statute, or a
6 regulation implementing the NSL provisions, imposed the time limitations suggested by the Second
7 Circuit, that would be sufficient. But that is not the record before the Court.¹³

8
9 **4. Narrowly Tailored to Serve a Compelling Governmental Interest**

10 In addition to satisfying the *Freedman* procedural safeguards, as content-based restrictions on
11 speech, the NSL nondisclosure provisions must be narrowly tailored to serve a compelling governmental
12 interest.

13 It is undisputed that our national security interests are compelling. *See, e.g., Haig v. Agee*, 453
14 U.S. 280, 307 (1981) (“no governmental interest is more compelling than the security of the Nation.”).
15 The question is whether the NSL nondisclosure provisions are sufficiently narrowly tailored to serve
16 that compelling interest without unduly burdening speech.

17 The Court finds that the NSL nondisclosure provisions are not narrowly tailored on their face,
18 since they apply, without distinction, to both the content of the NSLs and to the very fact of having
19 received one. The government has a strong argument¹⁴ that allowing the government to prohibit
20 recipients of NSLs from disclosing the specific information sought in NSLs to either the targets or the
21 public is generally necessary to serve national security in ongoing investigations. However, the
22 government has *not* shown that it is generally necessary to prohibit recipients from disclosing the mere
23 fact of their receipt of NSLs. The statute does not distinguish – or allow the FBI to distinguish –
24 between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The

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26 ¹³ Petitioner does not challenge section 2709(c) under the second *Freedman* factor, that
27 “expeditious judicial review” must be available.

28 ¹⁴ The argument is supported by the information provided in the declaration of a high ranking
FBI official, submitted to the Court *ex parte* and to the Petitioner in a redacted form.

1 statute contains a blanket prohibition: when the FBI provides the required certification, recipients cannot
2 publicly disclose the receipt of an NSL. A review of the FBI's use of NSLs discloses that the FBI issued
3 nondisclosure orders for 97% of the NSLs it had issued. *See* Statement of Glenn Fine, Inspector
4 General, U.S. Department of Justice before the Senate Judiciary Committee concerning Reauthorizing
5 the USA Patriot Act (September 23, 2009) at 6 <www.justice.gov/oig/testimony/t0909.pdf>. This
6 pervasive use of nondisclosure orders, coupled with the government's failure to demonstrate that a
7 blanket prohibition on recipients' ability to disclose the mere fact of receipt of an NSL is necessary to
8 serve the compelling need of national security, creates too large a danger that speech is being
9 unnecessarily restricted. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("[T]he line between
10 speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or
11 punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for more
12 sensitive tools. . . .") (internal citations omitted).

13 To be sure, the First Amendment concerns at issue do not require that every recipient of an NSL
14 must be allowed to disclose the fact of their receipt of an NSL. It is not hard to surmise situations where
15 recipients would appropriately be precluded from disclosing their receipt of an NSL. For example if
16 an ECSP has only a handful of subscribers, disclosure could compromise a national security
17 investigation. The problem, however, is that the statute does nothing to account for the fact that when
18 no such national security concerns exist, thousands of recipients of NSLs are nonetheless prohibited
19 from speaking out about the mere fact of their receipt of an NSL, rendering the statute impermissibly
20 overbroad and not narrowly tailored. This is especially problematic in light of the active, continuing
21 public debate over NSLs, which has spawned a series of Congressional hearings, academic commentary,
22 and press coverage. *See* fn. 9 *supra*. Indeed, at oral argument, Petitioner was adamant about its desire
23 to speak publicly about the fact that it received the NSL at issue to further inform the ongoing public
24 debate.

25 In addition to the breadth of the non-disclosure provision, the Court is concerned about its
26 duration. Nothing in the statute requires or even allows the government to rescind the non-disclosure
27 order once the impetus for it has passed. Instead, the review provisions require *the recipient* to file a
28 petition asking the Court to modify or set aside the nondisclosure order. 18 U.S.C. § 3511(b). The

1 issuance of a nondisclosure order is, in essence, a permanent ban on speech absent the rare recipient who
2 has the resources and motivation to hire counsel and affirmatively seek review by a district court. Also
3 problematic is the fact that if a recipient seeks review, and the court declines to modify or set aside the
4 nondisclosure order, a recipient is precluded from filing another petition to modify or set aside for a
5 year, even if the need for nondisclosure would cease within that year. 18 U.S.C. § 3511(b)(3). By their
6 structure, therefore, the review provisions are overbroad because they ensure that nondisclosure
7 continues longer than necessary to serve the national security interests at stake. *See also Doe v.*
8 *Gonzales*, 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007), affirmed in part and reversed in part by *John Doe,*
9 *Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (“Once disclosure no longer poses a threat to national
10 security, there is no basis for further restricting NSL recipients from communicating their knowledge
11 of the government’s activities. International terrorism investigations might generally last longer than
12 run-of-the-mill domestic criminal investigations, but they do not last forever.”).

13
14 **5. Prescribing the Standards of Judicial Review**

15 As noted above, section 3511(b) allows for judicial review, but the scope of that review is
16 narrow. In particular, the statute provides that a district court may only modify or set aside the
17 nondisclosure requirement if the court finds “there is no reason to believe” that disclosure “may” result
18 in an enumerated harm. If the FBI certifies that such a harm “may” occur, the district court must accept
19 that certification as “conclusive.” Petitioner asserts that these limits on judicial review violate
20 separation of powers principles and violate Petitioner’s due process rights to an unbiased decisionmaker.

21 The Second Circuit addressed the first two issues by interpreting “no reason to believe,” as
22 requiring the government to provide a “good reason,” and the “may occur” to mean the government
23 must show “some reasonable likelihood” of harm. *John Doe, Inc. v. Mukasey*, 549 F.3d at 875-76. The
24 Second Circuit noted that in making that showing, the government would be required to “at least
25 indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based
26 on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is
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1 substantial.” *Id.* at 881.¹⁵ Turning to the third issue, the “conclusive” treatment of the FBI’s
2 certification, the Second Circuit found the mandated deference unconstitutional because it would
3 preclude meaningful judicial review. *Id.* at 882-83 (“The fiat of a governmental official, though senior
4 in rank and doubtless honorable in the execution of official duties, cannot displace the judicial
5 obligation to enforce constitutional requirements.”).

6 The Court finds that, as written, the statute impermissibly attempts to circumscribe a court’s
7 ability to review the necessity of nondisclosure orders. As noted above, while not a “classic” prior
8 restraint or content-based speech restriction, the NSL nondisclosure provisions significantly infringe
9 on speech regarding controversial government powers. As such, the Court can only sustain
10 nondisclosure based on a searching standard of review, a standard incompatible with the deference
11 mandated by Sections 3511(b) and (c). As written, the statute expressly limits a court’s powers to
12 modify or set aside a nondisclosure order to situations where there is “no reason to believe” that
13 disclosure “may” lead to an enumerated harm; and if a specified official has certified that such a harm
14 “may” occur, that determination is “conclusive.” The statute’s intent – to circumscribe a court’s ability
15 to modify or set aside nondisclosure NSLs unless the essentially insurmountable standard “no reason
16 to believe” that a harm “may” result is satisfied – is incompatible with the court’s duty to searchingly
17 test restrictions on speech. *See, e.g., John Doe, Inc. v. Mukasey*, 549 F.3d at 883 (“The fiat of a
18 governmental official, though senior in rank and doubtless honorable in the execution of official duties,
19 cannot displace the judicial obligation to enforce constitutional requirements. ‘Under no circumstances
20 should the Judiciary become the handmaiden of the Executive.’ *United States v. Smith*, 899 F.2d 564,
21 569 (6th Cir. 1990).”).

22 The government argues that in light of the national security context in which NSLs are issued,
23 a highly deferential standard of review is not only appropriate but necessary. The Court does not
24 disagree. Courts necessarily give significant deference to the government’s national security
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26 ¹⁵ In this case, the government did not address, either in its briefs or in oral argument, whether
27 it intends to adhere to the substantive limitations adopted by the Second Circuit in all future judicial
28 proceedings reviewing the imposition of NSL nondisclosure orders. As noted, in this case the FBI
submitted a declaration *in camera* presenting an official explanation of the need for nondisclosure in
order to justify the order here.

1 determinations.¹⁶ However, that deference must be based on a reasoned explanation from an official
2 that directly supports the assertion of national security interests. As the Second Circuit recognized, the
3 statute might be less objectionable if the statute allowed the Court to determine whether there was a
4 “good reason” to believe an enumerated harm might occur if disclosure were allowed, and that “good
5 reason” required the government to demonstrate “some reasonable likelihood” that an enumerated harm
6 may occur if disclosure of the NSL were allowed. *John Doe, Inc. v. Mukasey*, 549 F.3d at 874-75.
7 However, the language relied on by the Second Circuit is *not* in the statute and, in this Court’s view,
8 expressly contradicts the level of deference Congress imposed under Section 3511(b) and (c). The Court
9 also agrees with the Second Circuit that the statute’s direction that courts treat the government’s
10 certification as “conclusive” is likewise unconstitutional. Treating the government’s certification as
11 “conclusive” diminishes the exacting scrutiny courts must apply to speech restraints down to “no
12 scrutiny” at all. *Id.* at 882-83.

13 In support of its argument that the “conclusive” deference mandated by Section 3511(b) is
14 permissible, the government also relies on cases arising under the Federal Freedom of Information Act
15 and cases upholding restrictions on former government employees’ abilities to disseminate classified
16 or sensitive information. Those cases, however, are distinguishable. They are not prior restraint cases
17 and address only the high level of deference courts generally give to executive branch determinations
18 as to whether the government must release its own classified or national security information. *See, e.g.,*
19 *Ctr. for Nat’l Sec. Studies v. United States DOJ*, 331 F.3d 918 (D.C. Cir. 2003) (deferring to government
20 position on release of records under FOIA); *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983)
21 (upholding government decision to prevent ex-CIA employee from publishing classified information);
22 *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1096 at n.9 (9th Cir. 2010) (in seeking
23 access to government records, “the balance of interests will more often tilt in favor of the Executive
24 when disclosure is the primary end in and of itself. FOIA therefore predictably entails greater deference
25 to the national classification system than does the state secrets doctrine.”). These cases do not address
26

27 ¹⁶ *See, e.g., Al Haramain Islamic Found., Inc. v. United States Dep’t of the Treasury*, 686 F.3d
28 965, 980 (9th Cir. 2012) (“We owe unique deference to the executive branch’s determination that we
face ‘an unusual and extraordinary threat to the national security’ of the United States.”).

1 the situation faced by Petitioner – the prevention of the disclosure of the fact that Petitioner received
2 an NSL letter and the information sought therein.

3
4 **6. Procedures for *In Camera* Review**

5 Finally, Petitioner challenges section 3511(e) to the extent that it forces a court “upon request
6 of the government” to review government submissions *ex parte* and *in camera*. Petitioner asserts that
7 the decision whether to review materials *ex parte* and *in camera* should rest with the courts, and that *ex*
8 *parte* and *in camera* proceedings lack fundamental fairness. The Court recognizes Petitioner’s concerns,
9 but does not find section 3511(e) unconstitutional. Despite the language of the statute, which attempts
10 to mandate that a court review materials *ex parte* and *in camera* at the demand of the government, courts
11 have an inherent ability to determine on their own whether there is a need to review materials *ex parte*
12 and *in camera* and if so, the steps to be taken to minimize any unfairness. *See Doe v. Gonzales*, 500 F.
13 Supp. 2d 379, 423 (S.D.N.Y. 2007) (the “Court’s authority to assess what process is due on a
14 case-by-case basis is undisturbed by the language of § 3511(e)”; *see also Ass’n for Reduction of*
15 *Violence v. Hall*, 734 F.2d 63, 68 (1st Cir. 1984) (ordering redaction or summary of privileged materials
16 if necessary); *Naji v. Nelson*, 113 F.R.D. 548, 553 (N.D. Ill. 1986) (requiring government to disclose
17 non-classified portions of withheld documents). Moreover, in the context of intelligence gathering
18 activities and national security, the use of *ex parte* and *in camera* submissions to review classified
19 information may be the only way for a court to carry out its duty, as noted above, to conduct a searching
20 review of the government’s evidence offered in support of an NSL request or nondisclosure order.

21 Petitioner relies on the Ninth Circuit’s decision in *American-Arab Anti-Discrimination Comm.*
22 *v. Reno*, 70 F.3d 1045 (9th Cir. 1995), which held that use of undisclosed national security information
23 in summary adjustment-of-status legalization proceedings violated due process. However, in a
24 subsequent decision, the Ninth Circuit questioned the continued validity of that holding. *See Al*
25 *Haramain Islamic Found., Inc. v. United States Dep’t of the Treasury*, 660 F.3d 1019 (9th Cir. 2011),
26 reprinted as amended at *Al Haramain Islamic Found., Inc. v. United States Dep’t of the Treasury*, 686
27 F.3d 965, 981-82 (9th Cir. 2012). The Court clarified that the holding in *American-Arab Anti-*
28 *Discrimination Commission* was based on the content of the classified information, specifically the fact

1 that the government had argued that the aliens threatened national security, but the classified
2 information contained nothing about the aliens themselves. In *Al Haramain*, the Ninth Circuit held
3 that “the use of classified information in the fight against terrorism,” qualified as a sufficiently
4 extraordinary circumstance to overcome any presumption against the use of classified information in
5 deportation proceedings. *Id.*, at 982.¹⁷ This Court finds that the use of classified information, submitted
6 *in camera* for the Court’s review of the necessity of a nondisclosure order or an NSL, is not
7 unconstitutional but is instead a necessary mechanism for the Court to conduct the searching review of
8 the government’s national security justification required by the First Amendment.

9
10 **7. Remedy**

11 Having concluded that the NSL provisions suffer from significant constitutional infirmities, the
12 Court must determine the appropriate remedy. As an initial matter, the Court finds that it is not within
13 its power to “conform” the NSL nondisclosure provisions, as did the Second Circuit. The statutory
14 provisions at issue – as written, adopted and amended by Congress in the face of a constitutional
15 challenge – are not susceptible to narrowing or conforming constructions to save their
16 constitutionality.¹⁸ The Second Circuit relied primarily on *United States v. Thirty-Seven (37)*
17 *Photographs*, 402 U.S. 363 (1971) and *United States v. Booker*, 543 U.S. 220 (2005), but the narrow
18 defects in the statutes under review in those cases bear little resemblance to the multiple constitutional
19 inadequacies identified by the Court in the NSL nondisclosure provisions.

20 In *Thirty-Seven (37) Photographs*, the Supreme Court reviewed a statute authorizing customs
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22 ¹⁷ The Ninth Circuit in *Al Haramain Islamic Found.* also found that to the extent practicable,
23 the government should provide an unclassified summary of the information withheld to counsel or allow
24 access to the classified information to defense counsel who have secured an appropriate level of security
clearance, in order to minimize any due process concerns. *Id.* at 983. Here, the government provided
an unclassified, redacted version of the classified declaration to Petitioner’s counsel.

25 ¹⁸ As noted above, after the prior version of the NSL statute, including the nondisclosure
26 provision in 18 U.S.C. § 2709, was found unconstitutional by two district courts in the Second Circuit,
27 Congress amended the provision and added the judicial review provisions in 18 U.S.C. § 3511. *See Doe*
28 *v. Ashcroft (Doe I)*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); *Doe v. Gonzales (Doe CT)*, 386 F. Supp. 2d
66 (D. Conn. 2005); see also *Doe I v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) (remanding *Doe I* for
reconsideration in light of amendments to NSL nondisclosure provisions and dismissing *Doe CT* as
moot in light of government’s withdrawal of nondisclosure order).

1 agents to seize obscene materials. While the statute met most of the requirements of *Freeman*, its sole
2 omission was the “failure to specify exact time limits within which resort to the courts must be had and
3 judicial proceedings be completed.” *Id.* at 371. In construing the statute to require judicial review to
4 be commenced within fourteen days and completed within sixty days, the Court relied on extensive
5 congressional history recognizing that “prompt” judicial review of seizures must be provided. *Id.* at
6 371-72. Here, however, there are *multiple* constitutional problems with the statute; indeed, despite the
7 Second Circuit’s attempt to conform the statute, the problems still resulted in the Second Circuit striking
8 down the conclusive review provisions as unconstitutional. *Compare United States v. Thirty-Seven (37)*
9 *Photographs*, 402 U.S. 363 at 369 (noting the “cardinal principle” of construing a statute to avoid its
10 unconstitutionality does not govern cases where statutes “could not be construed so as to avoid all
11 constitutional difficulties”); *with John Doe, Inc. v. Mukasey*, 549 F.3d at 884 (striking down
12 “conclusive presumption” clauses of subsections 3511(b)(2) and (b)(3), while conforming remainder
13 of statute). Moreover, there is no evidence before the Court that Congress was still concerned about
14 constitutional deficiencies after it had taken steps to address some of the constitutional infirmities found
15 by district courts in the Second Circuit. Rather, it appears that, in amending and reenacting the statute
16 as it did, Congress was concerned with giving the government the broadest powers possible to issue
17 NSL nondisclosure orders and preclude searching judicial review of the same.

18 In *Booker*, the Supreme Court struck down the judicial review provisions of the Sentencing
19 Reform Act, which provided for *de novo* review of sentencing departures, and instead inferred
20 “appropriate review standards from related statutory language, the structure of the statute, and the
21 ‘sound administration of justice.’” 543 U.S. at 260-61. Here, however, the sorts of multiple inferences
22 required to save the provisions at issue are not only contrary to evidence of Congressional intent, but
23 also contrary to the statutory language and structure of the statutory provisions actually enacted by
24 Congress.

25 The government does not directly address the Second Circuit’s approach, other than approving
26 the Second Circuit’s result in a footnote. *See Govt. Oppo.* at 20-21 & fn.10. Instead, the government
27 asserts that this Court should rely on the “canon of constitutional avoidance.” *See Govt. Oppo.* at 20,
28 n. 10 (relying on *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (canon of constitutional avoidance

1 applies if a reasonable interpretation of statute can avoid constitutional infirmities)). Here, however,
2 the Court cannot ignore express language in the statute in order to come up with “reasonable
3 interpretations” that would be constitutional.

4 The government also relies on a line of cases where courts accepted limiting constructions
5 offered by the government to avoid striking down content-neutral time, place and manner restrictions
6 on speech. See Govt. Oppo at 20-21, n. 10 (citing *Cox v. New Hampshire*, 312 U.S. 569, 575 (1941),
7 *Stokes v. Madison*, 930 F.2d 1163, 1170 (7th Cir. 1991)). Again, those cases are inapposite to the
8 situation here, where Congress has drafted a very specific statute aimed at preventing speech on a
9 particular subject, and redrafted amendments to it to address identified constitutional deficiencies. In
10 light of the language actually and intentionally used by Congress in amending the statute after it was
11 initially struck down as unconstitutional by two different district courts in the Second Circuit, this Court
12 finds there is no “reasonable construction” that can avoid the constitutional infirmities that have been
13 identified.

14 The Court also finds that the unconstitutional nondisclosure provisions are not severable. There
15 is ample evidence, in the manner in which the statutes were adopted and subsequently amended after
16 their constitutionality was first rejected in *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) and
17 *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005), that Congress fully understood the issues at hand
18 and the importance of the nondisclosure provisions. Moreover, it is hard to imagine how the substantive
19 NSL provisions – which are important for national security purposes – could function if no recipient
20 were required to abide by the nondisclosure provisions which have been issued in approximately 97%
21 of the NSLs issued.

22

23 **8. Petitioner’s Challenge to the Statute As Applied**

24 In light of the Court’s conclusion that the NSL provisions suffer from significant constitutional
25 defects which cannot be remedied in this forum, and the conclusion that the Court cannot sever the
26 unconstitutional nondisclosure provisions from the substantive NSL provisions, the Court need not reach
27 Petitioner’s as-applied challenge to both the nondisclosure provision and the substantive request for
28 information.

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CONCLUSION

For the reasons discussed above, the Court concludes that the nondisclosure provision of 18 U.S.C. § 2709(c) violates the First Amendment and 18 U.S.C. § 3511(b) (2) and (b)(3) violate the First Amendment and separation of powers principles. The Government is therefore enjoined from issuing NSLs under § 2709 or from enforcing the nondisclosure provision in this or any other case. However, given the significant constitutional and national security issues at stake, enforcement of the Court's judgment will be stayed pending appeal, or if no appeal is filed, for 90 days.

IT IS SO ORDERED.

Dated: March 14, 2013



SUSAN ILLSTON
United States District Judge