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14 [REDACTED]

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17

18 IN RE MATTER OF NATIONAL
19 SECURITY LETTER ISSUED TO
20 [REDACTED]

No. _____

PETITION OF PLAINTIFF [REDACTED]

[REDACTED] TO SET ASIDE
NATIONAL SECURITY LETTER
AND NONDISCLOSURE
REQUIREMENT IMPOSED IN
CONNECTION THEREWITH;
MEMORANDUM OF POINTS AND
AUTHORITIES

DOCUMENT SUBMITTED UNDER
SEAL

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28 Case No. _____ PETITION TO SET ASIDE NATIONAL SECURITY LETTER
AND NONDISCLOSURE REQUIREMENT

702975909v1

PETITION

Petitioner [REDACTED] or

“Petitioner”) has received a National Security Letter (“NSL”) issued by the Federal Bureau of Investigation (“FBI”) demanding certain [REDACTED] records in the Petitioner’s possession pursuant to 18 U.S.C. § 2709, and prohibiting Petitioner from disclosing the existence of the demand to its [REDACTED] or the public pursuant to sections 2709(c)(1) and (c)(2).

Petitioner hereby petitions the Court under 18 U.S.C. §§ 3511(a) and (b) for an order setting aside both the NSL and the nondisclosure requirement imposed in connection with the NSL on the following legal grounds, as explained further in the accompanying Memorandum of Points and Authorities, which is incorporated herein by this reference:

1. The nondisclosure provisions of the NSL statute constitute unconstitutional prior restraints in at least three ways:

(a) The statute fails the *Pentagon Papers* test for national security prior restraints, which requires that disclosure of information will “surely result in direct, immediate and irreparable harm to our nation or its people.”

(b) The statute fails the procedural requirements for prior restraints first articulated in *Freedman v. Maryland* by allowing restraints in the absence of court approval and by failing to limit the time of the restraints.

(c) The nondisclosure provision of the statute fails the requirement of “narrow, objective and definite standards” cabining executive discretion as required by cases such as *Shuttlesworth v. City of Birmingham*.

2. The nondisclosure provisions of the NSL statute violate separation of powers by preventing reviewing courts from applying the appropriate level of review mandated by the First Amendment and by binding a court to treat an FBI certification of harm as “conclusive.”

3. The statute as a whole, both substantively and in its non-disclosure provision, is a content-based restriction on speech that fails strict scrutiny in at least three ways:

1 (a) The substantive standards for issuing NSLs fail strict scrutiny both as to
2 [redacted] itself and as to its [redacted] because it is not narrowly tailored.

3 (b) The non-disclosure provision fails strict scrutiny because it is not narrowly
4 tailored and because it authorizes overly long prior restraints.

5 (c) The judicial review provision of the statute fails strict scrutiny because it
6 limits judicial review and excludes [redacted] from meaningful participation in judicial review,
7 unconstitutionally seeking to insulate the NSL from legitimate judicial challenge in violation of
8 *Legal Services Corp. v. Velasquez*.

9 4. The NSL statute violates the anonymous speech and associational rights of
10 Americans by requiring identification of [redacted] without meeting the
11 First Amendment tests. on its face violates the associational rights of Americans.

12 5. Even if the statute survives constitutional scrutiny, the government must meet its
13 heavy burden to demonstrate, rather than simply assert, that its request is relevant to an
14 authorized investigation of the type listed, that disclosure would risk an enumerated harm and
15 that the investigation is not solely based on activities protected by the First Amendment.

16 DATED: May 2, 2011

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