07-4943-cv

IN THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN DOE INC., JOHN DOE, AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

v.

MICHAEL B. MUKASEY, in his official capacity as Attorney General of the United States, ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation, and VALERIE E. CAPRONI, in her official capacity as General Counsel to the Federal Bureau of Investigation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the Plaintiffs-Appellees certifies 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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PRELIMINARY STATEMENT

In this action, plaintiffs [redacted], American Civil Liberties Union ("ACLU"), and American Civil Liberties Union Foundation ("ACLUF") challenge the constitutionality

of certain subsections of 18 U.S.C. §§ 2709 and 3511 (collectively, the "NSL statute"). The challenged subsections permit the Federal Bureau of Investigation ("FBI") to impose a broad and effectively permanent non-disclosure obligation on any person or entity served with a national security letter ("NSL"). *See* 18 U.S.C. §§ 2709(c) & 3511(b) (collectively, the "gag provisions"). Plaintiff [redacted] was served with an NSL in February 2004 and plaintiffs have now been subject to a gag order for more than four years. The government continues to enforce the gag order even though the FBI abandoned its demand for records over a year ago.

On cross-motions for summary judgment, the District Court for the Southern District of New York (Marrero, J.) declared that 18 U.S.C. §§ 2709(c) and 3511(b) are unconstitutional under the First Amendment and the principle of separation of powers; enjoined defendants from issuing gag orders under those provisions; and enjoined defendants from issuing national security letters under 18 U.S.C. § 2709. Plaintiffs respectfully urge this Court to affirm the district court's judgment.

STATEMENT OF FACTS

The April 2004 Complaint and Related Proceedings

The NSL statute was originally enacted in 1986 as part of the Electronic Communications Privacy Act ("ECPA"). *See* Pub. L. No. 99-

508, Title II, § 201(a), 100 Stat. 1848 (Oct. 21, 1986) (codified as amended at 18 U.S.C. § 2510, *et seq.*). The statute has since been amended several times. In its current form, the statute authorizes the FBI to issue NSLs ordering "electronic communication service provider[s]" to disclose "subscriber information," "toll billing records information," and "electronic communication transactional records" upon a certification that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. §§ 2709(a) & (b)(1). An "electronic communication service" is "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15).

This action arises out of an NSL served on plaintiff [redacted], through [redacted], its then-President and [redacted], in February 2004. [redacted], [redacted] an [redacted] Internet access and consulting business located and incorporated in [redacted]. A-426-427. On or about February 2, 2004, FBI agent [redacted] telephoned [redacted] to inform him that the FBI would be serving an NSL on [redacted] A-428. Agent [redacted] personally delivered the NSL (the "February 2004 NSL") to [redacted] on or about February 4, 2004. A-426, 428. The letter was on FBI letterhead and signed by Marion E. Bowman, Senior

Counsel, National Security Affairs, Office of the General Counsel. A-428. The letter stated that [redacted] is "hereby directed to provide the [FBI] the names, addresses, lengths of service and electronic communication transactional records, [redacted]" A-428-429, 440.

The letter included a certification that "the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." A-440. It also advised [redacted] "that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions." A-440. The letter further stated, "You are requested to provide records responsive to this request personally to a representative of the [redacted] Field Office of the FBI. Any questions you have regarding this request should be directed only to the [redacted] Field Office. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation." A-440.

Appended to the February 2004 NSL was a page entitled "ATTACHMENT" that stated, [redacted]" A-442. The page then listed, among other things, [redacted]" A-442.

Plaintiffs initiated this lawsuit on April 6, 2004, and filed an amended complaint on May 13, 2004. In a Motion for Summary Judgment filed on May 17, 2004, plaintiffs argued that the NSL statute, as amended by the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("Patriot Act"), violated the First and Fourth Amendments by authorizing the FBI unilaterally to compel the disclosure of sensitive records, including records relating to constitutionally protected expressive and associational activity. Plaintiffs also argued that the NSL statute's gag provision, then

codified in 18 U.S.C. § 2709(c), violated the First Amendment by categorically and permanently barring NSL recipients from disclosing that the FBI had sought or obtained information from them.

While the case was in the district court, the government repeatedly invoked the gag provision to prevent plaintiffs from disclosing information about the February 2004 NSL and about the litigation. A-220-232, 430-437, 463-468. For several weeks, plaintiffs were prevented even from disclosing the existence of the suit. A-221-222. Plaintiffs were required – as they still are – to submit their papers to the government for review and redaction before making them available to the public. A-221-222.

The district court granted plaintiffs' Motion for Summary Judgment on September 28, 2004. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471, 506 (S.D.N.Y. 2004). The Court found that the NSL statute violated the Fourth Amendment because, as implemented by the FBI, it "essentially force[d] the reasonable NSL recipient[s] to immediately comply" with FBI demands for information, denying NSL recipients any opportunity to challenge FBI demands before complying with them. *Id.* at 494. The Court also found that the statute violated the First Amendment by empowering the FBI unilaterally to compel the disclosure of records of protected associational and expressive activity. *Id.* at 506.

Turning to the statute's gag provision, the court first found that the gag provision constituted a prior restraint and content-based restriction on speech. *Id.* Applying strict scrutiny, the court faulted the provision for imposing "a *permanent* bar on disclosure in every case, making no distinction among competing relative public policy values over time, and containing no provision for lifting that bar when the circumstances that justify it may no longer warrant categorical secrecy." *Id.* at 519. The court wrote:

> The Government does not deny that there are plausible situations in which little or no reason may remain for continuing the secrecy of the fact that an NSL was issued. . . . Section 2709(c) does not countenance the possibility that the FBI could permit modification of the NSL's non-disclosure order even in those . . . situations no longer implicating legitimate national security interests and presenting factual or legal issues that any court could reasonably adjudicate. Bluntly stated, the statute simply does not allow for that balancing of competing public interests to be made by an independent tribunal at any point.

Id. at 520. The Court concluded that the provision could not survive strict scrutiny, and, finding that the gag provision could not be severed, it invalidated the entire statute. *Id.* at 525-26.[1]

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[1] The government states that the district court faulted the statute for failing to provide for "an initial administrative determination that nondisclosure was necessary." Gov't Br. 27. In fact, as the quoted passage makes clear, the district court faulted the statute for its failure to provide for

The government appealed the district court's decision and this Court heard oral argument in November 2005. Before this Court could issue a decision, however, Congress enacted the USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006) ("PIRA"), and the USA PATRIOT Act Additional Reauthorizing Amendments Act, Pub. L. No. 109-178, 120 Stat. 278 (Mar. 9, 2006) ("ARAA"), which amended the challenged law.

The 2006 Amendments to the Challenged Law

Until the PIRA and ARAA amendments the NSL statute did not afford NSL recipients any means of challenging the FBI's demands for records before complying with them. Moreover, the statute included a gag provision that permanently barred NSL recipients from disclosing "that the [FBI] has sought or obtained information or records under [the statute]." 18 U.S.C. § 2709(c) (2004). The gag provision, which applied with respect to every NSL issued, permanently foreclosed NSL recipients from notifying surveillance targets that their privacy had been compromised (even if the targets were innocent third parties rather than suspects), from speaking out publicly about the FBI's investigation (even after the investigation had ended), from contesting the FBI's demand for records in court (even if the

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an "independent," i.e., *judicial*, determination that nondisclosure was necessary.

demand was plainly unlawful), and even from consulting an attorney about the possibility of contesting the FBI's demand.

Following the district court's September 2004 decision and another district court's decision in *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005) (hereinafter, "*Library Connection*"), Congress amended the statute in several respects. First, it amended the statute to permit those served with NSLs to "petition for an order modifying or setting aside the request." 18 U.S.C. § 3511(a). If the recipient of an NSL files such a petition, the reviewing court may modify or set aside the NSL "if compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* Under the amended statute, the FBI may affirmatively seek judicial enforcement of an NSL by "invok[ing] 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 [served with the NSL] resides, carries on business, or may be found." *Id.* § 3511(c). If a court issues an order requiring compliance with an NSL, non-compliance may be punished by the court as contempt. *Id.*[2]

Congress also replaced the gag provision with a series of provisions that allow the FBI unilaterally to issue gag orders on a case-by-case basis

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[2] These provisions, relating to the FBI's authority to order electronic communications service providers to turn over information about their subscribers, are not at issue in this appeal.

and strictly confine the ability of NSL recipients to challenge such orders in court. As amended, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a gag order on any person or entity served with an NSL. *See* 18 U.S.C. § 2709(c). To impose such an order, the Director or his designee must "certify" that, absent the non-disclosure obligation, "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 2709(c)(1). If the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from "disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained access to information or records under [the NSL statute]." *Id.* Gag orders imposed under the NSL statute are imposed by the FBI unilaterally, without prior judicial review. While the statute requires a "certification" that the gag is necessary, the certification is not examined by anyone outside the executive branch. No judge considers, before the gag order is imposed, whether secrecy is necessary or whether the gag order is narrowly tailored.

The gag provisions permit the recipient of an NSL to petition a court "for an order modifying or setting aside a nondisclosure requirement." *Id.* § 3511(b)(1). However, in the case of a petition filed "within one year of the request for records," the reviewing court may modify or set aside the nondisclosure requirement only 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." *Id.* § 3511(b)(2) (emphasis added). Moreover, if a designated senior government official "certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations," the certification must be "treated as *conclusive* unless the court finds that the certification was made in bad faith." *Id.* (emphasis added).

In the case of a petition filed under § 3511(b)(1) "one year or more after the request for records," the FBI Director or his designee must either terminate the non-disclosure obligation within 90 days or recertify that disclosure may result in one of the enumerated harms. *Id.* § 3511(b)(3). If the FBI recertifies that disclosure may be harmful, however, the reviewing court is required to apply the same extraordinarily deferential standard it is

required to apply to petitions filed within one year. *Id.* If the recertification is made by a designated senior official, the certification must be "treated as *conclusive* unless the court finds that the recertification was made in bad faith." *Id.* (emphasis added).[3]

The 2006 Complaint and the 2007 Decision from Which the Government Appeals

After Congress amended the NSL statute, this Court remanded the case to the district court "to receive amended pleadings, request new briefs, conduct oral argument, and, in due course, furnish its view on the constitutionality" of the amended NSL statute. *Doe v. Gonzales*, 449 F.3d 415, 419 (2d Cir. 2006). Plaintiffs filed a Second Amended Complaint on

[3] The PIRA and ARAA amended the NSL statute and associated laws in a number of other ways. Of these amendments, perhaps the most significant provides that those who violate gag orders issued under the NSL statute may now be subject to criminal penalties. *See* 18 U.S.C. § 1510(e) ("Whoever, having been notified of the applicable disclosure prohibitions or confidentiality requirements of [the NSL statute] . . . knowingly and with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or requirements applicable by law to such person shall be imprisoned for not more than five years, fined under this title, or both.").

The PIRA and ARAA also added provisions relating to closure and *ex parte* review. Under one provision, courts that review challenges to NSLs and gag orders are required to "close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records" and to keep filings under seal "to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records." *Id.* § 3511(d). Under a second provision, reviewing courts are required, "upon request of the government," to "review ex parte and in camera any government submission or portions thereof, which may include classified information." *Id.* § 3511(e).

July 28, 2006, and soon thereafter the parties cross-moved for summary judgment.[4]

After the parties' motions were fully briefed, but before the district court had ruled on them, the Justice Department's Office of Inspector General ("OIG") issued a public report about the FBI's use of NSLs. The OIG reported that the FBI had issued more than 47,000 NSLs in 2005 compared with approximately 8,500 NSLs in the calendar year before Congress enacted the Patriot Act; that between 2003 and 2005 the FBI had substantially underreported to Congress the number of NSLs it issued; that in some cases the had FBI issued NSLs even where no underlying investigation had been approved; that some NSL recipients had provided the FBI with information to which it was not entitled, including voicemails, emails, and images; and that the FBI had issued more than 700 so-called "exigent letters," which were authorized neither by the NSL statute nor by any other law. SPA-21-25. Reiterating their argument that the extraordinary

[4] Together with their motion for summary judgment, plaintiffs filed a Petition to Set Aside Demand for Records. However, the court did not adjudicate the Petition because the government withdrew the underlying NSL (but not the gag order) in November 2006. SPA-12 n.3; A-482; Gov't Br. 12. The government has not offered any explanation for its decision to withdraw the NSL before the court could adjudicate its lawfulness. Nor has it offered any explanation for its decision to stand by the gag order even though the underlying investigation is at least four years old and may well have ended, A-426, and even though the FBI abandoned the February 2004 NSL more than a year ago, A-482.

secrecy surrounding the FBI's use of NSLs invites abuse, plaintiffs filed a copy of the OIG's report with the district court. SPA-21 n.12.[5]

On September 6, 2007, the district court granted plaintiffs' motion in relevant part, agreeing with plaintiffs that while the PIRA and ARAA had remedied some of the NSL statute's deficiencies, the statute's gag provisions remained unconstitutional. First, the court found that the gag provisions invest executive branch officials with broad discretion to censor speech but fail to provide procedural safeguards required by the First Amendment. SPA-43-51. In particular, the court found that the gag provisions, in violation of *Freedman v. Maryland*, 380 U.S. 51 (1965), place the burden of initiating judicial review not on the government (the censor) but on the NSL recipient (the would-be speaker). *Id.* at 51.[6]

Second, the court found that section 3511(b) violates the First Amendment and the principle of separation of powers by foreclosing reviewing courts from assessing individual gag orders under strict scrutiny –

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[5] In recent testimony to Congress, FBI Director Mueller indicated that many of the problems identified in the OIG's report persisted at least into 2006. *Oversight of the Federal Bureau of Investigation: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 2nd Sess. (March 5, 2008) (testimony of FBI Director Robert Mueller).

[6] The court rejected plaintiffs' argument that the gag provisions also violate the First Amendment because they invest executive officers with unbridled discretion to suppress speech in violation of *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). SPA-62-69. Plaintiffs believe that this aspect of the district court's decision was erroneous.

the standard that the Constitution requires them to apply. SPA-49-50. The court noted that gag orders issued under the NSL statute are content-based restrictions on speech and that the courts ordinarily assess such content-based restrictions by asking whether they are narrowly tailored to a compelling government interest. SPA-35-43. The NSL statute, however, requires reviewing courts to defer to the FBI's certification that secrecy is necessary and in some contexts requires them to treat the FBI's certification as conclusive. SPA-89-96

Finally, the court found that the gag provisions violate the First Amendment by permitting the FBI to issue gag orders that are not narrowly tailored in scope or duration. The court noted that gag orders issued under the NSL statute close off a broad spectrum of speech – even though, in any particular case, only a very narrow spectrum of speech may be sensitive. It also noted that although "it is hard to conceive of any circumstances that would justify a permanent bar on disclosure," gag orders issued under the statute may remain in place indefinitely, SPA-100, and that the statute "contains no requirement that the government act affirmatively and promptly to terminate the nondisclosure order" if the need for secrecy dissipates, SPA-

102. The court concluded that the gag provisions violate the First Amendment for these reasons as well.[7]

Having found that the NSL statute's gag provisions were unconstitutional, the Court considered whether the provisions were severable from the remainder of the statute. The court reasoned that secrecy was integral to the statutory scheme and that Congress would not have wanted the NSL statute to operate without the non-disclosure provisions. It therefore found the gag provisions non-severable and it invalidated section 2709 in its entirety. SPA-108-110. The court stayed its ruling, however, pending the adjudication of the government's appeal. SPA-110-111.

SUMMARY OF ARGUMENT

According to the Justice Department's own Inspector General, the FBI issued almost 150,000 NSLs between 2003 and 2005. SPA-21. The public knows virtually nothing about who those letters were served on, what information the letters sought, or why. This is largely because the statute at issue here, even after recent amendments by Congress, gives the FBI virtually unchecked authority to silence NSL recipients.

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[7] The court rejected plaintiffs' challenge to the provisions relating to closure and *ex parte* review, *see* note 3, *supra*, finding that the provisions could be construed narrowly to avoid constitutional concerns. SPA-102-103. Because the court construed the provisions narrowly, plaintiffs do not appeal this aspect of the district court's decision.

The district court was correct to find that the amended NSL statute is unconstitutional. The statute violates the First Amendment and the principle of separation of powers because it forecloses courts from assessing individual gag orders under strict scrutiny, the constitutionally mandated standard of review. In fact, the statute requires courts to give extraordinary deference to the executive's assessments of whether secrecy is necessary, and in some contexts it requires courts to regard these assessments as conclusive. The statute also violates the First Amendment because it permits the issuance of gag orders that are not narrowly tailored to a compelling government interest. As the district court found, gag orders issued under the statute are likely to be overbroad both in scope and duration. Finally, the statute violates the First Amendment because it operates as a licensing scheme – conditioning the right to speak on the approval of executive officers – but fails to provide procedural safeguards to ensure that the censorial power is not abused. As the district court found, the statute impermissibly places the burden of initiating judicial review on the would-be speaker rather than the government.

Plaintiffs respectfully urge this Court to affirm the judgment below. The government may have a compelling interest in prohibiting some NSL recipients from disclosing a narrow spectrum of information for a limited

period of time. The statute at issue here, however, invests the FBI with sweeping censorial authority, turns judicial review into an empty formalism, and fails to provide procedural safeguards that the Constitution requires. The district court was correct to find the statute unconstitutional.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE NSL STATUTE'S GAG PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY FORECLOSE REVIEWING COURTS FROM APPLYING STRICT SCRUTINY TO INDIVIDUAL GAG ORDERS.

A. Because individual gag orders issued under the NSL statute are prior restraints and content-based restrictions on speech, the First Amendment requires that they be subject to strict scrutiny.

As the district court correctly recognized, SPA-37-38, gag orders issued under section 2709(c) are prior restraints, because they do not merely impose a penalty for a general category of speech but rather stifle speech before it occurs. *See, e.g.*, *Alexander v. United States*, 509 U.S. 544, 550 (1993); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001); *In re G. & A. Books, Inc.*, 770 F.2d 288, 296 (2d Cir. 1985) ("governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated"). The Supreme Court has said that "even a short-lived 'gag' order in a case of widespread concern to

the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect." *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983). Prior restraints "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

Gag orders issued under section 2709(c) are, in addition to being prior restraints, content-based restrictions on speech, because they restrict speech according to its substantive message. SPA-38-40. Because they are content-based restrictions on speech, gag orders issued under section 2709(c) are subject to strict scrutiny; they are unconstitutional unless narrowly tailored to a compelling government interest. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Library Connection*, 386 F. Supp. 2d at 75.

It is particularly necessary that gag orders issued under section 2709(c) be subject to strict scrutiny because such gag orders suppress truthful speech about government activity. The *Library Connection* case involved a challenge to a gag order issued under an earlier version of the NSL statute, but its discussion of NSL gag orders is equally accurate now:

> The statute has the practical effect of silencing those who have the most intimate knowledge of the statute's effect and a strong

> interest in advocating against the federal government's broad investigative powers pursuant to § 2709: those who are actually subjected to the governmental authority by imposition of the non-disclosure provision. The government may intend the non-disclosure provision to serve some purpose other than the suppression of speech. Nevertheless, it has the practical impact of silencing individuals with a constitutionally protected interest in speech and whose voices are particularly important to an ongoing, national debate about the intrusion of governmental authority into individual lives.

Library Connection, 386 F. Supp. 2d at 75. The speech suppressed by gag orders issued under section 2709(c) is speech at the heart of the First Amendment's concern. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2001); *United States v. Aguilar*, 515 U.S. 593, 605 (1995); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("[w]hatever 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" (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by

lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system").

The government contends that gag orders issued under section 2709(c) suppress only a "narrow category" of information, Gov't Br. 33, but to understand the far-reaching effect of such gag orders one need look no further than this case. Because of the gag order to which he has been subject for more than four years, plaintiff [redacted] has been prevented from publishing information about the government's use of NSLs. A-434-35. He has been prevented from disclosing that the government ordered him to turn over constitutionally protected information about one of his clients. A-427, 429, 431, 436. He has been prevented from participating in the national debate about the Patriot Act. A-435-37. The gag order has had a similar effect on plaintiff ACLU. During the Patriot Act reauthorization debate, for example, the gag order precluded ACLU staff from fully responding to the administration's oft-repeated claim that the Patriot Act had not led to any "abuses." A-469-470. The gag order precluded ACLU staff from responding to this claim by describing the FBI's dubious use of the NSL statute in this case. A-468-470.

The gag order has also inappropriately limited the public's access to information about this litigation. In reliance on section 2709(c), the

government has heavily redacted many of the filings in this case and has insisted on reviewing every filing before it is made public. In one instance, it redacted from one of plaintiffs' briefs the contention that the gag order was "an irresponsible invocation of national security to justify unnecessary secrecy." A-227-228. In another instance, the government redacted, from a declaration filed by [redacted], the statement that "the public should be able to monitor how the government is using [its Patriot Act] powers so that it can police against possible abuses." A-228. In still another instance, the government redacted a sentence in which [redacted] expressed concern that the subject of the February 2004 NSL was impermissibly targeted because of his political speech. A-228. At one point the government relied on section 2709(c) to insist that plaintiffs redact, from a letter to be filed on the public docket, the following language taken directly from a Supreme Court opinion:

> The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

A-227 (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 317 (1972) (hereinafter, "*Keith*")).[8]

Plaintiffs' experience with the gag provisions is not unique. In the *Library Connection* case, the government used its censorial authority in similar ways. During the debate about reauthorization of the Patriot Act, the government relied on section 2709(c) to prevent Library Connection from disclosing even the fact that it had received an NSL. A-416-417. Notably, the government maintained this position even after Library Connection's identity had been publicly disclosed in news articles. A-232-325. Government spokespeople had previously stated publicly that the Patriot Act had not been used to compel the production of library records, and by preventing Library Connection from disclosing its identity the government ensured that its spokespeople's statements could stand unqualified and unchallenged. A-420-421.

The district court was correct to find that gag orders issued under the NSL statute must be evaluated under strict scrutiny.

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[8] The government argues that gag orders are not content-based because they are not aimed at suppressing particular viewpoints. Gov't Br. 55. The government glosses over the way that the gag order has operated in the instant case. In any event, the Supreme Court has emphasized that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980).

B. Strict scrutiny is not made inapplicable simply because the suppressed information relates to a confidential government investigation.

The government argues that gag orders issued under section 2709(c) should be subject to something less than strict scrutiny because such gag orders "only restrict[] information obtained through participation in a confidential government proceeding." Gov't Br. 17. But the fact that information was learned from a confidential government proceeding does *not* make strict scrutiny inapplicable. This Court applied strict scrutiny in *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 111-12 (2d Cir. 1994), though that case involved information learned from participation in a confidential judicial investigation. The Eleventh Circuit applied strict scrutiny in *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), though that case involved information learned from participation in a confidential law enforcement investigation. The First Circuit applied strict scrutiny in *In re Grand Jury Proceedings*, 814 F.2d 61, 69 (1st Cir. 1987) (hereinafter, "*Fernandez Diamante*"), though that case involved information learned from participation in a grand jury investigation. The district court in *Library Connection* properly applied strict scrutiny to a gag order issued under the pre-amendment section 2709(c), though that provision, like the amended

provisions challenged here, suppressed speech relating to a confidential FBI investigation. *Library Connection*, 386 F. Supp. 2d at 73-74.

Nor does the fact that information was learned from a confidential government proceeding mean that strict scrutiny will necessarily be *satisfied* with respect to any specific gag order – particularly where, as here, the challenged statute suppresses speech about government activity. In *Cooper*, for example, the Eleventh Circuit considered a Florida statute that prohibited citizens from disclosing information learned through participation in internal law enforcement investigations. 403 F.3d at 1208. Although the statute suppressed only information obtained through participation in confidential government investigations, *id.* at 1216, the Eleventh Circuit, applying strict scrutiny, found the statute unconstitutional, *id.* at 1218-19. The Court noted: "our system of representative democracy depends upon an informed citizenry which can hold government officials accountable and can seek redress for grievances." *Id.* at 1219. "[B]y proscribing speech critical of government officials, [the Florida statute] purports to regulate speech which lies near the core of the First Amendment." *Id.* (internal quotation marks omitted).

Of course, even under a strict scrutiny standard, the FBI may be able to justify a temporary gag order in some cases. In the context of challenges

to individual gag orders, however, strict scrutiny will not be satisfied simply by virtue of the fact that the information at issue was obtained through participation in a confidential government proceeding. In applying strict scrutiny, the courts have looked to a more complex combination of factors, including, for example,

(1) The nature of the government proceeding, *see, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (holding that "unique character of the discovery process" allows courts special latitude to fashion protective orders covering information obtained through discovery); *Butterworth v. Smith*, 494 U.S. 624, 629 (1990) (noting that secrecy surrounding grand jury proceedings evolved from grand jury's role in "safeguard[ing] citizens against an overreaching Crown"); *Cooper*, 403 F.3d at 1217 (distinguishing executive investigations from grand jury investigations);

(2) The prospective speaker's role in the government proceeding, *see, e.g.*, *Aguilar*, 515 U.S. at 606 ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public"); *First Amendment Coal. v. Judicial Inquiry and Review Bd.*, 784 F.2d 467, 478 (3d Cir. 1986) ("The situation [here] is also unlike *Seattle Times* in that plaintiffs did not seek to avail themselves of the Board's processes"); SPA-54 ("An NSL recipient . . . does not voluntarily assume a duty of confidentiality; that duty is unilaterally imposed on him by the FBI"); *Library Connection*, 386 F. Supp. 2d at 75;

(3) The nature of the information suppressed, *see, e.g.*, *Landmark Communications, Inc.*, 435 U.S. at 839 (noting that publication of information in question had served an "interest[] in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect"); *Kamasinski*, 44 F.3d at 110 ("[p]enalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of the First Amendment . . . and . . . such a prohibition would be unconstitutional"); *Library*

Connection, 386 F. Supp. 2d at 81 (noting that the pre-amendment NSL statute "create[d] a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public"); and

(4) The likelihood that disclosure will result in harm, *see, e.g.*, *Butterworth*, 494 U.S. at 632 (noting that disclosure is unlikely to result in harm where underlying investigation has ended); *Doe v. Gonzales*, 449 F.3d at 422 (Cardamone, J., concurring) (same); *id.* at 422-23 (noting the futility of banning the disclosure of information that had already been reported by the media).[9]

The government urges this Court to adopt a myopic theory that would make the First Amendment inquiry turn *solely* on the fact that information was obtained through participation in a confidential government proceeding. There is no support for this theory, either in the case law or common sense. Plaintiffs do not suggest that the FBI will never be able to demonstrate a compelling interest in preventing an NSL recipient from disclosing information. But the fact that the NSL recipient learned the information through participation in the FBI's investigation does not mean that strict scrutiny is inapplicable, and it does not mean that strict scrutiny will be

[9] Notably, many of these considerations weigh against the lawfulness of the gag order that continues to silence plaintiffs. First, [redacted] did not affirmatively seek the information that it is now prohibited from disclosing – the information was foisted upon it by the FBI. Second, as discussed above, the speech prohibited by the gag order relates to government activity and possible government misconduct. Third, the gag order relates to an NSL that the FBI no longer seeks to enforce, A-482, and to an investigation that is at least four years old and may well have ended, A-426.

satisfied. The First Amendment requires that reviewing courts be permitted to apply strict scrutiny on a case-by-case basis, taking into account all relevant factors. As discussed below, however, it is precisely that kind of searching and nuanced case-by-case inquiry that the NSL statute expressly forecloses.

C. The NSL statute's gag provisions violate the First Amendment because they foreclose reviewing courts from subjecting individual gag orders to strict scrutiny.

As the district court found, SPA-87-96, the NSL statute is unconstitutional because it forecloses reviewing courts from applying a standard of review mandated by the First Amendment. Rather than require (or permit) reviewing courts to apply strict scrutiny in assessing individual gag orders, the amended statute rejects strict scrutiny – and indeed any form of heightened scrutiny – in favor of a standard that is even less protective than "rational basis" review. Specifically, the statute permits reviewing courts to set aside gag orders only where "there is *no reason to believe* that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. §§ 3511(b)(2), (b)(3) (emphasis added). This exceedingly deferential standard of review is entirely foreign to the First

Amendment. The First Amendment does not permit the imposition of a content-based restriction on speech simply because there is some reason, however remote or speculative, to believe the restriction will mitigate a hypothetical harm. *See, e.g.*, *Blount v. Rizzi*, 400 U.S. 410, 420 (1971) (rejecting legislative attempt to substitute "probable cause" standard for traditional First Amendment scrutiny). The First Amendment permits gag orders only if they are narrowly tailored to a compelling interest.

The review contemplated by the NSL statute is problematic for an additional reason: the statute places the burden of showing that an individual gag order does *not* meet strict scrutiny on the NSL recipient – the prospective speaker. The Constitution, however, requires that the burden of satisfying strict scrutiny be carried by the government. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality" (internal quotation marks omitted)). In *Speiser v. Randall*, 357 U.S. 513 (1958), the Supreme Court considered the constitutionality of a state law that permitted veterans the benefit of a property tax exemption if they certified that they did not advocate the overthrow of the government by force. The Court observed that the statute required veterans to demonstrate their entitlement to the

exemption and thereby unconstitutionally relieved the government of the obligation of justifying a burden on speech. *Id.* at 522 ("Not only does the initial burden of bringing forth proof of nonadvocacy rest on the taxpayer[s], but throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption."). The Court therefore found the statute unconstitutional. The Court wrote, "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding – inherent in all litigation – will create the danger that legitimate utterance will be penalized." *Id.* at 526. "[A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Id.* (internal quotation marks omitted).

The judicial review contemplated by the NSL statute is inadequate in every instance. In some contexts, however, the contemplated judicial review is not simply inadequate but entirely illusory. The amended statute instructs that, where any of a set of specified government officials certifies that lifting a gag "may" endanger national security or interfere with diplomatic relations, the reviewing court must take such a certification as conclusive

absent bad faith. *See* 18 U.S.C. §§ 3511(b)(2), (b)(3). The statute thus unconstitutionally reduces reviewing courts to nothing more than rubber stamps for executive decisionmaking. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995) (noting with disfavor the government's "perplexing" reading of a statute where that "reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct"); *Keith*, 407 U.S. at 317 ("[T]hose charged with . . . investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks . . . . [U]nreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."); *United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990) ("Under no circumstances should the Judiciary become the handmaiden of the Executive. The independence of the Judiciary must be jealously guarded at all times against efforts . . . to erode its authority.").

The government contends, as it did in the court below, that the NSL statute simply codifies the deference that courts routinely extend to the executive's national security decisions. Gov't Br. 42-49. The district court

properly rejected this argument. SPA-87-96. While courts do accord some degree of deference to the special expertise of the executive branch in matters of national security, *see, e.g.*, *Library Connection*, 386 F. Supp. 2d at 76, what the amended NSL statute contemplates is not judicial deference but judicial irrelevance. This is true even in cases in which the FBI does not certify that disclosure could harm national security or diplomatic relations, because the "no reason to believe" standard leaves the reviewing court with only the narrowest authority. Where the FBI does offer such a certification,

[redacted]

sensitive information, the judiciary's tasks include the protection of individual rights."). In the context presented here, this means that any judicial deference to the executive's national security decisions should be afforded on a case-by-case basis and within the confines of the "strict scrutiny" framework. *See, e.g.*, *Library Connection*, 386 F. Supp. 2d at 73-74.

Courts have routinely applied strict scrutiny – actual strict scrutiny, not the stunted version of it the government envisions here – in national security cases. *See, e.g.*, *N.Y. Times Co.*, 403 U.S. at 714 (per curiam) (finding that the government failed to meet its "heavy burden" under the First Amendment to justify restraining publication of the Pentagon Papers); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002). In fact, courts have emphatically rejected the contention that traditional First Amendment standards are relaxed in the national security context. In *In re Washington Post Co.*, for example, the government argued that the First Amendment right of access to judicial documents should not be protected by strict scrutiny "where national security interests are at stake." 807 F.2d 383, 391 (4th Cir. 1986). In rejecting this argument, the Court wrote:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking

> responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

Id. at 391-92. The Court remanded the case to the district court for application of the traditional First Amendment standards.

Virtually all of the cases that the government cites in support of its argument involved not the First Amendment but the Freedom of Information Act ("FOIA"). Gov't Br. 28-32. The contexts are not analogous. As the district court noted, "[p]laintiffs' desire here is to exercise their First Amendment rights, which distinguishes this case from those in which an individual seeks disclosure of information . . . pursuant to FOIA. Here, [plaintiffs] seek to vindicate a constitutionally guaranteed right; they do not seek to vindicate a right created, and limited, by statute." SPA-88 (internal quotation marks omitted); *see also McGehee*, 718 F.2d at 1147 ("The difference between seeking to obtain information and seeking to disclose information already obtained raises [the plaintiffs'] constitutional interests in

this case above the constitutional interests held by a FOIA claimant."); *Library Connection*, 386 F. Supp. 2d at 78.[11]

It is worth noting, in any case, that the review contemplated by section 3511(b) is actually *less* searching than the review provided for under FOIA. In the FOIA context, courts "accord substantial weight" to the executive's national security judgments, but judicial review is *de novo* and the burden of establishing an exemption – that is, the burden of showing that information should remain secret – is the government's. *Ray v. Turner*, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978). Even in the FOIA context, courts do not rubber stamp the executive's national security decisions, as they are required to do under the NSL statute. To the contrary, courts conduct their review "without relinquishing their independent responsibility" to ensure that the executive's decision is lawful. *Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987); *Assoc. Press v. Dep't of Defense*, 462 F. Supp. 2d 573, 576 (S.D.N.Y. 2006); *see also Ray*, 587 F.2d at 1194 (noting that the FOIA drafters "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security

[11] To the extent the government cites non-FOIA cases, those cases stand for the proposition that the executive branch should be accorded a degree of deference within the framework of the relevant constitutional standard. *See, e.g.*, *Detroit Free Press*, 303 F.3d at 705-07. They do not support the contention that the relevant constitutional standard differs depending on whether or not the case implicates issues of national security.

determinations with common sense, and without jeopardy to national security").[12]

The government's argument that the NSL statute "provide[s] greater procedural protections tha[n] those applicable to many other federal statutes restricting disclosure of information about law enforcement investigations," Gov't Br. 52, is also incorrect. As the district court observed in its 2004 decision, most subpoena statutes do not contemplate non-disclosure orders at all. *Doe*, 334 F. Supp. 2d at 485 ("Unlike the NSL statutes, most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases."). Those subpoena statutes that *do* allow for non-disclosure orders generally require that such orders be issued in the first instance by an Article III judge. *Id.* (citing statutes). Even in the federal grand jury context – a context in which secrecy has a unique historical pedigree, *see Butterworth*, 494 U.S. at 629; *United States v. Williams*, 504 U.S. 36, 47 (1992) – nondisclosure orders are not imposed on subpoena recipients except upon a case-by-case showing of

[12] The government's reliance on *McGehee*, *United States v. Snepp*, 897 F.2d 138 (4th Cir. 1990), and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), is misplaced. Gov't Br. 37-38. Those cases involved government employees who had voluntarily signed non-disclosure agreements. *See, e.g.*, *McGehee*, 718 F.2d at 1141 ("[T]he State has interests as an employer in regulating the speech of employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.") (internal quotation marks omitted).

necessity to a court, *see, e.g.*, *United States v. Sells Eng'g, Inc.*, 463 U.S 418, 425 (1983); *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (1996); *Fernandez Diamante*, 814 F.2d at 70.[13] The statutes that the government characterizes as similar to the one at issue here are in fact different in at least two key respects: first, none of them preclude reviewing courts from applying strict scrutiny in as-applied challenges to gag orders; and second, all of them "apply in contexts in which a court authorizes the investigative method in the first place." SPA-27 (quoting *Doe*, 334 F. Supp. 2d at 515). Whether these differences are sufficient to render these statutes constitutional is arguable, but the differences are certainly sufficient to distinguish them from the statute at issue here.

As the district court noted, "a court reviewing the need for nondisclosure of an NSL must be free to make a determination on a case-by-case basis, and it must be free to do so applying the strict standards required by First Amendment jurisprudence as construed and applied by the courts, rather than the excessively deferential and inflexible rule Congress enacted in § 3511 at the behest of the Executive." SPA-94. The effect of the NSL

[13] Some courts have held that the grand jury secrecy rule, Fed. R. Crim. P. 6, categorically *forecloses* the imposition of a non-disclosure obligation on grand jury witnesses. *See, e.g.*, *United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir. 1976), *abrogated on other grounds*, *Unites States v. Daily*, 921 F.2d 994 (10th Cir. 1990).

statute's extraordinarily deferential standard of review is that courts called on to evaluate gag orders are foreclosed from applying the searching, individualized inquiry that the First Amendment demands.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE NSL STATUTE'S GAG PROVISIONS VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS BECAUSE THEY FORECLOSE REVIEWING COURTS FROM APPLYING A CONSTITUTIONALLY MANDATED STANDARD OF REVIEW.

The district court properly found that the gag provisions violate not only the First Amendment but the principle of separation of powers as well. SPA-68. Under our constitutional system, Congress does not have the power to override legislatively a standard of review required by the Constitution. "[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). In this constitutional scheme, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress cannot "require[] the federal courts to exercise '[t]he judicial Power of the United States,' U.S. Const., Art III, § I, in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995).

As discussed above, the Supreme Court has said that prior restraints – and content-based restrictions on speech – warrant strict scrutiny. The Supreme Court having interpreted the First Amendment in this way, it is not open to Congress to dictate a different standard. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court considered the constitutionality of the Religious Freedom Restoration Act of 1993, which required courts to apply strict scrutiny to challenges brought under the free exercise clause to neutral, generally applicable laws. In an earlier case, the Supreme Court had held that neutral, generally applicable laws could be applied to religious practices even when not supported by a compelling governmental interest. *See Employment Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In *City of Boerne*, the Court wrote:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch . . . . When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id. at 535-36. The Supreme Court found the Act unconstitutional. *Id.* at 536.

The Supreme Court addressed a similar issue in *Dickerson v. United States*, 530 U.S. 428 (2000), which involved the constitutionality of Congress's attempt to legislatively override *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court had held that a suspect's statement made during custodial interrogation could not be admitted into evidence in a criminal trial unless the suspect had been warned, in advance of his statement, that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had a right to the presence of an attorney, and that if he could not afford an attorney one would be appointed for him. *Id.* at 479. The statute at issue in *Dickerson* permitted statements made during custodial interrogation to be admitted as evidence as long as the statements were "voluntary." *Dickerson*, 530 U.S. at 432. The Court found the statute unconstitutional. Writing for a unanimous Court, then-Chief Justice Rehnquist wrote, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." *Id.* at 437.

Congress does not have the authority to defy or repeal a judicial decision construing the Constitution. Yet, as the district court found, this is

precisely what Congress has attempted to do here. SPA-77 ("Congress has in effect prescribed to the judiciary the standard of review a court must apply in assessing the validity of a government restriction on First Amendment rights . . . ."); SPA-75 (finding that the NSL statute "breaches the proper constitutional limits drawn for our government by the concepts of separation and balance of power").[14]

III. THE DISTRICT COURT CORRECTLY HELD THAT THE NSL STATUTE'S GAG PROVISIONS VIOLATE THE FIRST AMENDMENT BY ALLOWING THE ISSUANCE OF GAG ORDERS THAT ARE NOT NARROWLY TAILORED.

As the district court found, SPA-96-102, the amended NSL statute also violates the First Amendment by authorizing the issuance of gag orders that are not narrowly tailored to a compelling governmental interest. Gag

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[14] The government appears to acknowledge that if the NSL statute violates the First Amendment, it violates the principle of separation of powers as well. Gov't Br. 50. But while the government is correct that plaintiffs' First Amendment and separation of powers claims overlap to some extent, plaintiffs' separation of powers claim is not "superfluous." *Id.* If this Court rejects the district court's conclusion that gag orders must be subject to strict scrutiny, the Court could find nonetheless that the NSL statute violates the principle of separation of powers by requiring reviewing courts to defer to (or treat as conclusive) the executive's determinations that secrecy is necessary. *Cf. Mistretta v. United States*, 488 U.S. 361, 381 (1989) ("we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch"). In other words, the question of what standard of review should apply can be separated from the question whether Congress can permissibly require the courts to defer to the executive's determination that the standard is satisfied.

orders issued under the amended statute are likely to be overbroad both in scope and duration. They are likely to be overbroad in scope because every gag provision issued under the statute forecloses the NSL recipient – or any officer, employee, or agent of the NSL recipient – from "disclos[ing] to any person . . . that the [FBI] has sought or obtained access to information or records" under the statute. 18 U.S.C. § 2709(c). Such sweeping secrecy is unlikely to be necessary in every case in which some degree of secrecy is required. In some cases, the FBI may have a compelling interest in prohibiting the NSL recipient, for a limited period of time, from notifying the subject of the NSL that her privacy has been compromised. In very rare cases, the FBI may have a compelling interest in prohibiting the NSL recipient, for a limited period of time, from disclosing even the fact that it was served with an NSL. But the amended gag provision is a blunt instrument: in each case that the FBI invokes the provision, the scope of the gag order is exactly the same. As the district court wrote:

> [A]n NSL recipient cannot communicate to anyone indefinitely that it received an NSL, the identity of the target, the type of information that was requested and/or provided, general statistical information such as the number of NSLs it received in the previous month or year, its opinion as to whether a particular NSL was properly issued in accordance with the applicable criteria, or perhaps even its opinion about the use of NSLs generally (e.g., whether NSLs are being used legitimately, whether their use may be stifling speech, whether the government may be abusing its power under the statute,

> etc.). Clearly, these various potential statements range widely both in their possible threat to national security and in their value to the national debate about the government's activities.

SPA-98.

Gag orders issued under the amended statute are likely to be overbroad in duration for two reasons. First, the statute provides that, if the recipient of an NSL unsuccessfully challenges a gag order one year or more after the issuance of the NSL, the recipient "[is] precluded for a period of one year" from filing another challenge. 18 U.S.C. § 3511(b)(3). This provision effectively renders some gag orders immune from judicial review regardless of the government's interest in keeping those orders in place. Where an NSL recipient is unsuccessful in challenging a gag order twelve months after the service of the NSL but the government's interest in secrecy dissipates a month later – perhaps because the investigation has closed, or because the government itself has disclosed the information that it previously sought to keep secret – the recipient will, for the next eleven months, be subject to a gag order that is unsupported by any legitimate government interest, let alone an interest that is "compelling" for the purposes of the First Amendment. Thus, some gag orders will inevitably endure much longer than the Constitution permits. *See Doe*, 449 F.3d at 422 (Cardamone, J., concurring). It is clear that "less restrictive alternatives

would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *see also Speiser*, 357 U.S. at 525 ("[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . .").

Second, gag orders are likely to be overbroad in duration because, as discussed above, the judicial review contemplated by the statute is virtually meaningless. That the statute places the burden on the NSL recipient to challenge a restraint on speech means that few challenges will be filed in the first place. The statute's substantive standards – the "no reason to believe" standard and the required deference to FBI certifications – means that, of the few challenges that are actually filed, virtually all are certain to fail. The result is that, except in truly extraordinary cases, gag orders issued under the statute are likely to be permanent. SPA-97 (noting that the gag provisions "continue[] to authorize nondisclosure orders that permanently restrict an NSL recipient from engaging in any discussion related to its receipt of the NSL"). The First Amendment does not countenance this result. As Judge Cardamone wrote when the instant case came before this Court in 2005,

> The government's urging that an endless investigation leads logically to an endless ban on speech flies in the face of human

> knowledge and common sense: witnesses disappear, plans change or are completed, cases are closed, investigations terminate. Further, a ban on speech and a shroud of secrecy in perpetuity are antithetical to democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens. Unending secrecy of actions taken by government officials may also serve as a cover for possible official misconduct and/or incompetence.

Doe, 449 F.3d at 422 (Cardamone, J., concurring); *see also Butterworth*, 494 U.S. at 632 ("When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape – that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other."); *Kamasinski*, 44 F.3d at 112 (noting that "the ban on disclosure is constitutional only so long as the [Judicial Review Council] acts in its investigatory capacity. Once the JRC has determined whether or not there is probable cause that judicial misconduct has occurred, even Connecticut's most compelling interests cannot justify a ban on the public disclosure of allegations of judicial misconduct.").[15]

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[15] The government states that "[r]equiring Congress to subject the nondisclosure requirement to automatic termination after the passage of a particular period of time . . . would . . . jeopardize the vital national security interests that section 2709(c) is designed to protect." Gov't Br. 57. But plaintiffs do not suggest – and more importantly, the First Amendment does not require – that nondisclosure orders should expire automatically after a particular period of time even if there is a continued need for secrecy. The First Amendment does require, however, that any nondisclosure order be

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE NSL STATUTE'S GAG PROVISIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY FAIL TO PROVIDE CONSTITUTIONALLY MANDATED PROCEDURAL SAFEGUARDS.

The district court properly found that the NSL statute is unconstitutional for a third reason: because its gag provisions comprise an unconstitutional licensing scheme. SPA-46-47, 51-53. As the court found, the statute invests the FBI with the discretion to determine, on a case-by-case basis, whether a gag order should be issued with respect to any given NSL; it conditions an NSL recipient's right to speak on the approval of executive officers. SPA-40 (noting that the statute allows the FBI "to pick and choose which NSL recipients are prohibited from discussing the receipt of an NSL"); SPA-47 ("the FBI, based on its own case-by-case assessment, now has broad discretion to grant some NSL recipients permission to disclose certain information pertaining to their receipt of an NSL and to deny others that freedom"); *see also MacDonald v. Safir*, 206 F.3d 183, 194 (2d Cir. 2000) ("if rules condition the exercise of expressive activity on official permission . . . they . . . constitute a prior restraint on speech" (internal quotation marks omitted)); *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999); Erwin Chemerinsky, Constitutional Law Principles and Policies

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tailored to an actual need for secrecy and that, once that need has expired, the nondisclosure order must expire as well.

§ 11.2.3.4 (2d ed. 2002) (characterizing licensing schemes as "the classic type of prior restraint").[16] As the district court noted, SPA-44-45, a licensing scheme is constitutional only if it provides procedural safeguards to minimize the risk that protected speech will be suppressed. The NSL statute fails to provide these safeguards.

The Supreme Court's seminal case in this area is *Freedman*, 380 U.S. 51, which involved the constitutionality of a Maryland statute that made it unlawful to exhibit any motion picture without first obtaining the approval of a state licensing board. In considering the validity of the licensing scheme, the Court observed that, "[u]nlike a prosecution . . . a censorship proceeding puts the initial burden on the exhibitor or distributor" – that is, on the prospective speaker. *Id.* at 57. One danger of such schemes, the Court noted, is that they are likely to suppress more speech than is constitutionally acceptable. The Court wrote, "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression." *Id.* at 57-58.

[16] Indeed, the amended statute's gag provisions comprise a licensing scheme even under the narrow definition that the government itself advanced earlier in this litigation. *See Doe*, 334 F. Supp. 2d at 512 ("The Government . . . maintains that § 2709(c) does not operate as a prior restraint because it does not create a licensing system by which the Government can pick and choose among speakers to restrain.").

Moreover, "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Id.* at 58.

In view of such dangers, the Court held that a licensing scheme "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* The Court set forth three safeguards in particular: First, any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained. *Id.* at 58-59. Second, expeditious judicial review of that decision must be available. *Id.* Third, the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Id.* The Court found that the Maryland censorship scheme afforded none of these safeguards. Under the Maryland statute, "once the censor [had] disapprove[d] [a] film," – that is, once the censor had suppressed speech – the prospective speaker was required to "assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression." *Id.* at 59-60. Exhibition of the film was prohibited pending judicial review, "however protracted." *Id.* at 60. Moreover, the statute "provide[d] no assurance of prompt judicial determination." *Id.* The Court invalidated the statute on its face.

As the district court noted, SPA-48, the courts have applied the *Freedman* analysis in a variety of contexts. In *Blount*, 400 U.S. 410, the Supreme Court applied the *Freedman* analysis to a federal statute under which the Postmaster General, following administrative hearings, could halt use of the mails for commerce in allegedly obscene materials. The Court found the statute unconstitutional because it did not guarantee prompt judicial review and because it placed the burden of instituting judicial proceedings on the citizen rather than the government. *Id.* at 418, 420 (faulting statute because "the section does not satisfy the requirement that the [government] assume the burden of seeking a judicial determination"). Similarly, in *Southeastern Promotions*, 420 U.S. 546, the Supreme Court applied the *Freedman* analysis to an informal process under which the board of directors of a municipal theatre considered applications for use of its theatre facility. The Court found the procedures unconstitutional because they "did not provide a procedure for prompt judicial review"; because "it was [the] petitioner, not the board, that bore the burden of obtaining judicial review"; and because, "[d]uring the time prior to judicial determination," the petitioner was foreclosed from using the municipal theatre facilities. *Id.* at 561-62. Noting the special danger presented by prior restraints, the Court wrote: "Insistence on rigorous procedural safeguards under these

circumstances is 'but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Id.* at 561 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)).

It is now well settled that any licensing scheme "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights – rights which we value most highly and which are essential to the workings of a free society." *Speiser*, 357 U.S. at 521. In particular, because "a scheme conditioning expression on a licensing body's prior approval of content presents peculiar dangers to constitutionally protected speech," such a scheme must afford the "procedural safeguards" described by the Court in *Freedman. Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002); *see also City of Littleton v. Z.J. Gifts*, 541 U.S. 774, 779-80 (2004); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (finding that licensing scheme that governed the solicitation of charitable contributions by professional fundraisers was unconstitutional because of failure to specify a deadline by which the state would have to commence judicial proceedings); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971) (finding that statute authorizing federal customs agents to seize obscene

material at the border must be construed to require government to commence forfeiture proceedings within 14 days and to require completion of judicial proceedings within an additional 60 days); *Bantam Books*, 372 U.S. at 70 (noting that Court had tolerated licensing schemes "only where [they] operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint"); *MacDonald*, 206 F.3d at 183; *Beal*, 184 F.3d at 117.

The district court properly found that the NSL statute should be evaluated under *Freedman* and its progeny:

> Comparing the licensing scheme embodied in § 2709(c) with that at issue in *Freedman*, many shared characteristics are apparent. Both statutes give an agency of the executive branch broad discretion to restrict a particular category of speech, on a case-by-case basis, based solely on its content. The decision to limit speech is made by the government agent prior to any judicial determination as to whether the restriction is constitutional. Although the context of the public exhibition of motion pictures differs substantially from the asserted national security interests entailed in the disclosure of an NSL, both situations present a serious risk of unconstitutionally restricting speech. Importantly, both licensing schemes involve the inherent danger that the government agency might be "less responsive than a court ... to the constitutionally protected interests in free expression," *Freedman*, 380 U.S. at 57-58, 85 S.Ct. 734, as well as the substantial likelihood that the censored party – in this case the ECSP – will not have an adequate incentive to challenge the nondisclosure order in court. As in *Freedman*, "[b]ecause the censor's business is to censor," 380 U.S. at 57, 85 S.Ct. 734, the ultimate concern is that, in the absence of adequate procedural safeguards, the licensing determination "may in practice be final," *id.* at 58, 85 S.Ct. 734,

> resulting in a broad de facto power to censor constitutionally protected speech.

SPA-50.[17]

The government argues that the NSL statute's gag provisions do not constitute a licensing scheme at all, pointing (once again) to the fact that the information suppressed by the statute is information obtained through participation in a confidential government investigation. As plaintiffs have discussed above, *see* Section I, *supra*, the government is wrong to assert that the First Amendment question turns entirely on the fact that information derives from a government investigation. Moreover, the government misunderstands the purpose of *Freedman*'s procedural protections. The point is that *any* statute that invests executive officers with the power to suppress speech must include procedural safeguards to ensure that the executive's power is not abused – and, in particular, must place the burden of initiating judicial review, and of showing that any restraint on speech comports with the First Amendment, on the government rather than the

[17] While plaintiffs believe that the FBI has *already* used the statute as a means of suppressing speech critical of the government, plaintiffs note that the statute would be unconstitutional even if it had not been used in this way. As this Court has observed, "it is the *risk* of an abuse of discretion that has motivated the [Supreme] Court's decisions in this area . . . and a risk of abuse exists whenever a decisionmaker can effectively discriminate against certain viewpoints." *Beal*, 184 F.3d at 126 n.6; *see also Forsyth*, 505 U.S. at 133 n.10.

citizen. In the obscenity context, procedural safeguards are necessary to ensure that any restraint is limited to obscenity – speech that is unprotected by the First Amendment. In the NSL context, procedural safeguards are necessary to ensure that any restraint is narrowly tailored to a compelling government interest. In both contexts, *Freedman*'s procedural safeguards are necessary because "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." 380 U.S. at 58.

As the district court found, the NSL statute fails to provide the safeguards required by *Freedman*. The statute fails to require the FBI to initiate judicial proceedings at all, let alone within a specified, brief period of time, as *Freedman* requires. Instead, the statute places the burden of initiating judicial proceedings on the prospective speaker. As a result, a gag order issued under the NSL statute is presumptively permanent, and it is subject to judicial review, if at all, only when the NSL recipient affirmatively chooses to contest it. Of course, not all NSL recipients will have the motivation or resources to commence judicial proceedings against the government. *Cf. Freedman*, 380 U.S. at 59 ("[w]ithout these safeguards, it may prove too burdensome to seek review of the censor's determination"). Consequently, it is likely that the overwhelming majority of gag orders

issued under the statute will never be subjected to judicial review at all. This would be a concern of constitutional dimension in any context, but in this context it is a special concern because the speech suppressed by the statute relates to the conduct of the government. *Beal*, 184 F.3d at 124 (stating the "constitutional limitation on excessive official discretion exists because a regulation susceptible to arbitrary application 'has the potential for becoming a means of suppressing a particular point of view'" (quoting *Forsyth*, 505 U.S. at 130-31)).

The government contends that the district court was incorrect to find that all three of *Freedman's* safeguards are necessary in the NSL context. It argues that the third safeguard – that the government bear the burden of initiating judicial review – is unnecessary here because gag orders issued under section 2709(c) are "limited to an extremely narrow category of information that is not characteristically political." Gov't Br. 39. The government once again misunderstands the nature and scope of the speech suppressed by the gag orders. The cases that the government relies on involved time, place, and manner regulations that required executive officers to make decisions that were content-neutral and "ministerial" in nature. *See Thomas*, 534 U.S. at 322; *FW/PBS, Inc.*, 493 U.S. at 606-07. These cases are inapposite. Gag orders issued under the NSL statute are content-based

restraints on speech, and the determinations made by the FBI (e.g., that disclosure would jeopardize national security) cannot fairly be characterized as merely "ministerial" in nature. As the district court found, there is no merit to the government's argument that some of the *Freedman* safeguards are unnecessary. SPA-47-51.

The district court was correct to find that the NSL statute constitutes an unconstitutional licensing scheme.[18]

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[18] The district court rejected plaintiffs' argument that the NSL statute is unconstitutional for the additional reason that it invests executive officers with unbridled discretion to suppress speech in violation of *Shuttlesworth*, 394 U.S. at 149-50. SPA-62-69. Plaintiffs believe that this aspect of the district court's decision was erroneous. To comport with the First Amendment, any licensing scheme must confine the discretion of the censor with "narrow, objective, and definite standards." *Id.* at 150; *see also Forsyth*, 505 U.S. at 131 ("[I]f [a] permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion . . . by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." (internal quotations omitted)).

The NSL statute does not cabin the FBI's discretion with narrow, objective, and definite standards. Under the statute, the FBI may suppress speech whenever, in its view, there otherwise may result a danger to national security, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person. 18 U.S.C. § 2709(c)(1). That language is subjective, extraordinarily sweeping, and plainly requires executive officers to appraise facts, exercise judgment, and form opinions. *Cf. Forsyth*, 505 U.S. at 131. The term "national security," in particular, is elastic, manipulable, and deeply contested, *see, e.g.*, *Keith*, 407 U.S. at 314; *Bernstein v. Dep't of Justice*, 176 F.3d 1132, 1139 (9th Cir. 1999), *vacated for rehearing en banc*, 192 F.3d 1308 (9th Cir. 1999), *remanded without*

V. THE DISTRICT COURT CORRECTLY HELD THAT THE NSL STATUTE'S GAG PROVISIONS ARE NOT SEVERABLE FROM THE REMAINDER OF THE STATUTE.

As the Supreme Court has said, "the touchstone for any decision about remedy is legislative intent." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006) (internal quotation marks omitted); *see also Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part). In considering a question of severability, the question to be asked is whether "the legislature [would] have preferred what is left of its statute to no statute at all." *Ayotte*, 546 U.S 330. After asking this question, SPA-108, the district court held that the NSL statute's gag provisions are not severable, and it invalidated the NSL statute in its entirety. The district court was correct to do so.

First, invalidating only the gag provisions would transform the statute into a statute fundamentally different from the one that Congress actually enacted. As the district court recognized, SPA-108, secrecy is an essential aspect of the NSL statute. Moreover, without the gag provisions, the statute is to a large extent duplicative of other compulsory process statutes. *See, e.g.*, Fed. R. Crim. P. 17 (providing that grand jury subpoena may order recipient to disclose "any books, papers, documents, data, or other objects

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decision after government promulgated new regulations, No. 97-16686 (9th Cir. Jan. 31, 2000) & No. 97-16686 (9th Cir. Apr. 11, 2000).

the subpoena designates"). The district court was correct to conclude that Congress would not have enacted the NSL statute without the gag provisions.

Second, invalidating only the gag provisions would transform the NSL statute from a censorship law that operates with *insufficient* judicial oversight into a censorship law that operates with *no* judicial oversight. The government itself makes this clear. If this Court strikes down only the gag provisions, the government says, the FBI will continue to censor NSL recipients; it will do so, however, not by issuing gag orders with "the force of a statutory command behind [them]," but by issuing informal "request[s]" for secrecy. Gov't Br. 60. There is reason to be skeptical that non-disclosure "requests" issued without the *ex ante* or *ex post* supervision of a court would be understood by NSL recipients as requests rather than demands. *Cf. Bantam Books*, 372 U.S. at 66-67; *Fernandez-Diamante*, 814 F.2d at 61 (stating, of a non-disclosure "request" issued by a prosecutor, that "we fail to see how a reasonable, law-abiding person who received such a letter would think anything other than that he was being told that he was legally obligated not to engage in that course of action"); *Doe*, 334 F. Supp. 2d at 504-05. More fundamentally, there is no evidence that Congress intended to invest the FBI with the authority to impose gag orders – or gag

"requests" – without any supervision by a court. To the contrary, the main purpose of the 2006 amendments was to subject FBI gag orders to some degree of judicial supervision.

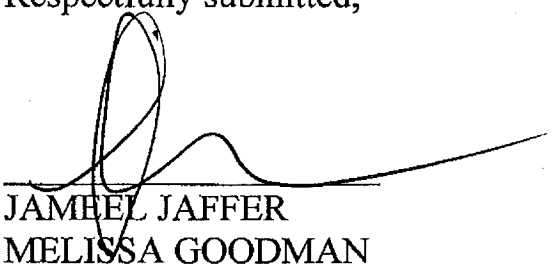
Having found that the gag provisions were unconstitutional, the district court was correct to invalidate the NSL statute in its entirety.[19]

[19] There is no merit to the government's contention that "[a]bsent class certification, injunctive relief should be limited to the parties before the court." Gov't Br. 61. A district court enjoys "a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct." *Forchner Group, Inc., v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997); *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) (a narrowly tailored injunction does not preclude the power of the federal courts to "enjoin [a party] from committing acts elsewhere"). Nationwide injunctive relief is appropriate and necessary here because the statute has been held invalid not just as applied to plaintiffs but on its face. *See Sable Communications of Cal., Inc. v. FCC*, 692 F. Supp. 1208 (C.D. Cal. 1988), *affirmed*, 492 U.S. 115 (1989).

CONCLUSION

For the reasons stated above, plaintiffs respectfully urge the Court to affirm the judgment below.

Respectfully submitted,



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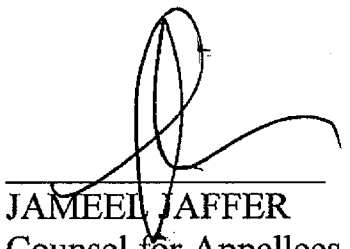

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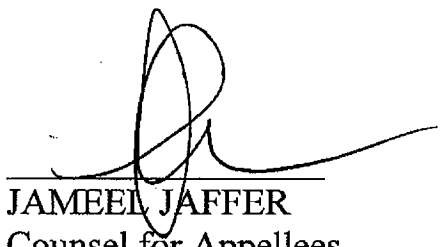

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