UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN DOE, INC.; JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. ERIC HOLDER, Jr., in his official capacity as Attorney General of the United States; ROBERT MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE CAPRONI, in her official capacity as Senior Counsel to the Federal Bureau of Investigation, Defendants.	**MEMORANDUM IN OPPOSITION TO CONTINUATION OF THE NSL GAG ORDER** 04 Civ. 2614 (VM) ~~SEALED~~ REDACTED

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INTRODUCTION

For more than five years, the Federal Bureau of Investigation ("FBI") has prohibited plaintiffs from speaking out – to the press, the public, and Congress – about the FBI's use of a controversial surveillance tool. Specifically, it has prohibited plaintiffs from speaking out about a national security letter ("NSL") that was served on plaintiff Doe Inc. in 2004. The government now asks this Court to extend indefinitely the gag order that has already restricted plaintiffs' speech for five years. The government has not, however, carried the burden that the First Amendment imposes in this context. Accordingly, this Court should lift the gag order in its entirety.

As the Second Circuit ruled, the gag order can survive constitutional scrutiny only if the government meets stringent standards. The Second Circuit specifically rejected the notion that the government may justify its ongoing censorship with conclusory invocations of national security or law enforcement interests. Instead, the government must persuade this Court that disclosure of the NSL issued in early 2004 is substantially likely to cause harm to national security. The government's burden is two-pronged: it must demonstrate not only the substantiality of the asserted harm, but also a real causal link between disclosure and the consummation of that harm.

The government has failed to meet its burden. Its unclassified filings in support of the gag order make clear that there is no plausible linkage between disclosure of the NSL and harm to national security or an authorized investigation. According to the government, the potential harm is that disclosure will "tip off" the target of the NSL about the government's interest. But this possibility cannot support continuation of the gag [redacted]

[redacted] The disclosure of the fact that Doe five

years ago received a demand for certain records the FBI never obtained could not plausibly provide the decisive clue that would allow the target to thwart the government. Such a tenuous justification cannot validate the continuation of an indefinite restraint on plaintiffs' core speech rights.

PROCEDURAL HISTORY

The Second Circuit described the procedural history of this case in its 2008 ruling. *See John Doe, Inc. v. Mukasey*, 549 F.3d 861, 864-871 (2d Cir. 2008) (hereinafter "*Doe IV*"). Below, plaintiffs address developments since that decision.

The 2008 Second Circuit Opinion

On December 15, 2008, the Second Circuit ruled that the amended NSL gag provisions contained serious constitutional flaws. *Id.* at 877-78.

Accordingly, the Court issued several important limiting constructions of the NSL statute's gag provisions. It construed 18 U.S.C. § 2709(c)(1) to permit the FBI to impose a nondisclosure requirement only when senior FBI officials certify that disclosure may result in an enumerated harm that is related to "an authorized investigation to protect against international terrorism or clandestine intelligence activities." *Id.* at 875. It also limited 18 U.S.C. §§ 3511(b)(2) and (b)(3) in two important ways. First, it construed those provisions to place on the government the burden to show that a *good* reason exists to expect that disclosure of receipt of an NSL will risk an enumerated harm; second, it construed them to mean that the government satisfies its burden only if it makes an adequate demonstration as to why disclosure in a particular case is likely to result in an enumerated harm. *Id.* at 875-76.

The court also held that certain provisions were too constitutionally infirm for ameliorative construction. It ruled that §§ 2709(c) and 3511(b) are unconstitutional to the extent

that they impose a nondisclosure requirement without placing on the government the burden of initiating judicial review of that requirement, and that §§ 3511(b)(2) and (b)(3) are unconstitutional to the extent that, upon such review, a governmental official's certification that disclosure may result in harm is treated as conclusive. *Id.* at 878-83.

As discussed further below, the court set forth the specific standard under which a court must assess the constitutionality of NSL gag orders. The Second Circuit remanded to this Court to determine whether the government can "sustain its burden of proof and satisfy the constitutional standards [the Second Circuit has] outlined for maintaining the disclosure requirement." *Id.* at 885.

<u>The Government's Proffer on Remand</u>

On May 27, 2009, this Court entered an order requiring the government to file "papers in support of the continuing need for nondisclosure of the National Security Letter" by June 17, and requiring plaintiffs to file a response by July 1. On June 17, however, the government did not file any document to which plaintiffs could actually respond. Instead, it filed with the Court (i) a certification asserting without explanation that disclosure of even the mere fact that Doe received an NSL could result in a laundry list of harms; (ii) an *ex parte* affidavit by an unspecified affiant; and (iii) a letter from the government's counsel stating without explanation that the *ex parte* affidavit satisfied the government's constitutional burden.

Plaintiffs moved for an order compelling disclosure of the government's *ex parte* filing under a protective order or, alternatively, disclosure of a redacted version of the government's filing and an unclassified summary of the classified evidence it relied on. On August 5, 2009, this Court ordered the government to disclose to plaintiffs an unclassified summary and a redacted version of its classified declaration. *Doe v. Holder*, --- F. Supp. 2d ----, 2009 WL

2432320 (S.D.N.Y. Aug. 5, 2009). The same day, the government disclosed a heavily redacted version of the declaration it had filed on June 17th, as well as an unclassified summary of that declaration. The unclassified summary stated:

> The classified declaration is sworn to under penalty of perjury by a Federal Bureau of Investigation ("FBI") Supervisory Special Agent. The declaration was executed on June 16, 2009, is twelve pages long, and consists of sixty-three single spaced paragraphs. The declaration explains why disclosure of the National Security Letter ("NSL") served upon plaintiff Doe may result in a danger to the national security of the United States and interfere with an authorized investigation.
>
> More specifically, the declaration discusses the following topics: the background of the declarant; the underlying investigation pursuant to which the NSL was served; the contents of the challenged NSL; and the need for continued non-disclosure of the NSL. In particular, the declaration explains why disclosure of the NSL could tip off the target of the investigation and other individuals who are under investigation.

See Unclassified Summary of Classified FBI Declaration (Aug. 5, 2009). The redacted version of the classified declaration conveys very little discernible information.

ARGUMENT

I. THE NSL GAG ORDER CONTINUES TO IMPOSE ON PLAINTIFFS A SIGNIFICANT FIRST AMENDMENT HARM.

Plaintiffs have been subject to an NSL gag order for more than five years. Third Declaration of John Doe ¶¶ 2-3 (hereinafter "Third Doe Decl."); Third Declaration of Ann Beeson (hereinafter "Third Beeson Decl.") ¶¶ 2-5 [Dckt 136]; Second Declaration of Anthony Romero (hereinafter "Second Romero Decl.") ¶¶ 22 [Dckt. 136]. The government now seeks to prolong this serious burden on plaintiffs' First Amendment rights indefinitely.

The FBI, in reliance on the NSL gag order, continues to prohibit plaintiffs from disclosing, among other things, Doe's identity; the mere fact that Doe received an NSL; the identity of the target of the NSL; [redacted]

the specific kinds of information the FBI sought through the NSL; the categories of information the FBI generally demands through an NSL; *See* Third Beeson Decl. ¶¶ 31-40.

As a result of the NSL gag order, Doe has already suffered serious First Amendment harm. For more than five years, Doe has been prohibited from disclosing the fact that he is the Doe plaintiff in this lawsuit, and informing his former clients that he initiated this lawsuit in order to protect their privacy rights. Third Doe Decl. ¶ 4. He has been prevented from publishing information about the government's use of NSLs. *Id.* He has been prevented from disclosing that the government ordered him to turn over constitutionally-protected information about one of his clients and that he fears his client was targeted because of political speech. *Id.* He is also unable to coordinate with or organize similarly situated service providers to advocate collectively for NSL reform. *Id.* ¶ 4. In addition to constraining Doe's engagement with the public sphere, the gag also subjects him to severe restrictions in his communications with his friends and family. *Id.* Doe will continue to suffer these First Amendment harms if the government succeeds in extending the gag order.

Most disturbingly, Doe has been prevented from participating in the national debate about the Patriot Act. Doe was silenced during the 2006 Patriot Act reauthorization debate in Congress. *Id.* If the government is permitted to extend this gag order, Doe will be prevented from participating in future debates. Congress is still actively engaged with the question of NSL reform. At least one bill to amend the NSL statute is currently pending in the House. Declaration of Melissa Goodman (hereinafter "Goodman Decl.") ¶ 12. Moreover, three Patriot Act provisions are set to expire on December 31, 2009. *Id.* ¶ 13. Although the NSL provisions are not among those expiring, it is very likely that Congress will consider changes to the NSL

statute when it debates whether to reauthorize the other Patriot Act powers. *Id.* Indeed, just two weeks ago, Senators Feingold and Durbin announced that they are advocating for NSL reforms as "part of the reauthorization of expiring provisions that the Senate will consider later this year." *Id.* Doe, however, is excluded from expressing his views on the subject, even though those views are informed by his experience as an NSL recipient with first-hand knowledge of the government's actual use of NSLs, and its use and abuse of the NSL gag power. Third Doe Decl. ¶ 4.

The gag order has also substantially hindered the ACLU's exercise of its First Amendment rights. 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." 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. In April 2008, Jameel Jaffer, one of the lawyers who represents plaintiffs in this case, was invited to testify about the need for NSL reform before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties. Although he was specifically invited to discuss the ACLU's concerns about the scope of both the NSL record demand power and the NSL gag power, the NSL gag order in this case prevented Mr. Jaffer from sharing relevant information during the course of his testimony. Goodman Decl. ¶ 14.

The ACLU continues to advocate for reform of the NSL statutes. Because of the gag order, however, the ACLU is prevented from providing relevant information to members of Congress that would inform their expected debate about NSL reforms later this year. *Id.* The ACLU is prevented from sharing critical information with the press and the public. *Id.* ¶ 15. Despite the fact that the ACLU has unique insight into the FBI's *actual* use (and abuse) of its

NSL powers, the ACLU is prohibited from including relevant information in its public education and advocacy materials. *Id.* Indeed, because of the gag order, ACLU counsel in this case have been hamstrung in their ability to share important information – including concrete evidence of the FBI's abuse of its NSL powers – with ACLU lobbyists in Washington that would aid their legislative and executive branch advocacy efforts. *Id.* ¶ 9.

II. THE GOVERNMENT HAS FAILED TO JUSTIFY CONTINUATION OF THE GAG ORDER.

Considered against the background of these serious and ongoing constitutional deprivations, the government shoulders a weighty burden in justifying continued enforcement of this five-year-old gag order. It has not carried that burden.

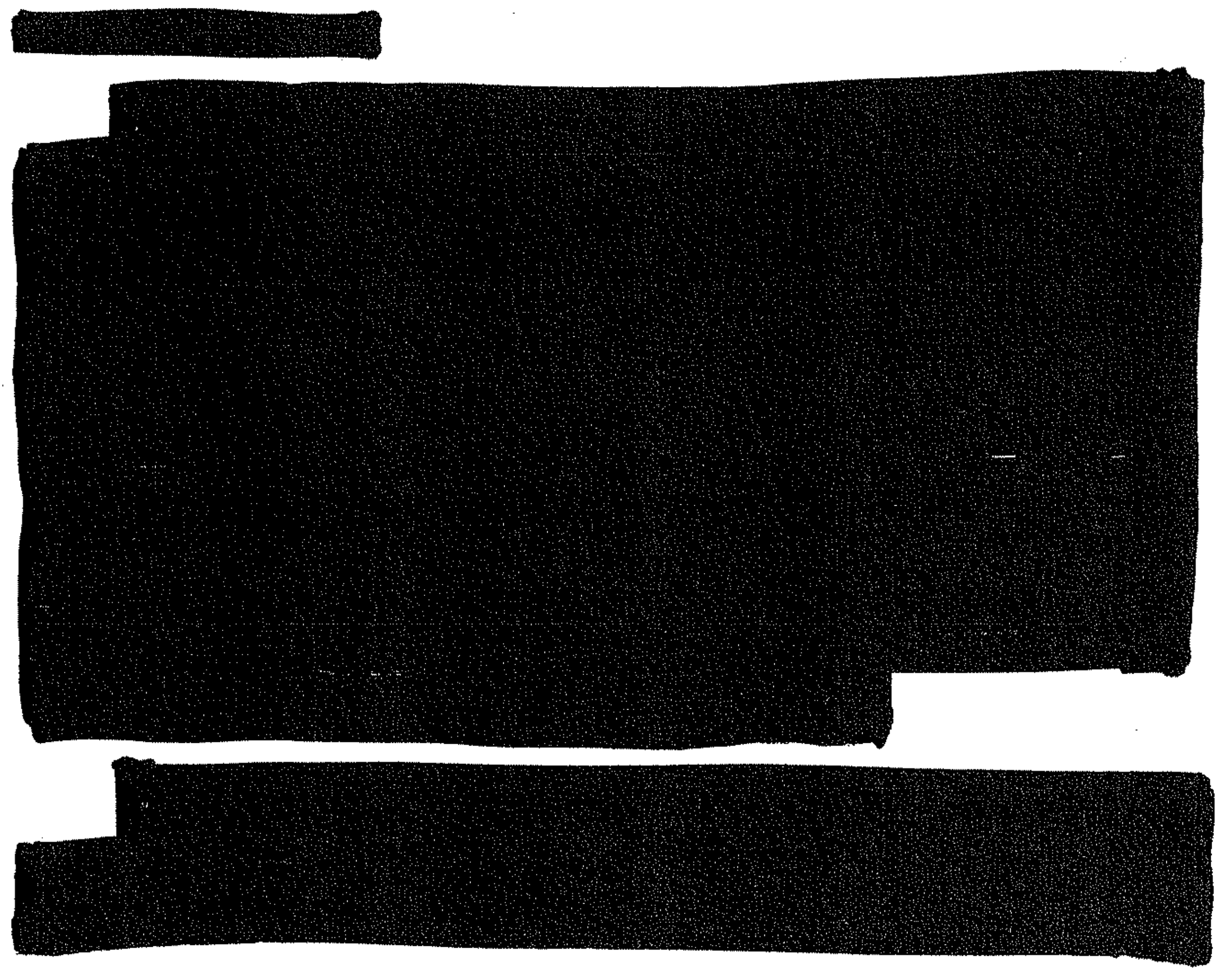
As this Court and the Second Circuit have found, the gag order is a content-based prior restraint of speech. *Doe IV*, 549 F.3d at 877-78; *Doe v. Gonzales*, 500 F. Supp. 2d 379, 397 (S.D.N.Y. 2007) (hereinafter "*Doe III*"). The censored speech, as this Court knows, is relevant to intended criticism of governmental activity and is therefore entitled to the most stringent protection. *See Doe IV,* 549 F.3d at 878 (stating that plaintiffs have "been restrained from publicly expressing a category of information. . . and that information is relevant to intended criticism of a governmental activity"); *see also Gentile v. State Bar of Nevada*, 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."); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) ("information relating to alleged governmental misconduct" is "speech which has traditionally been recognized as lying at the core of the First Amendment"); *Piesco v. City of New York Dep't of Pers.*, 933 F.2d 1149, 1157 (2d Cir. 1991) ("[s]peech critical of the government is precisely the kind of speech the first amendment was designed to protect" from state interference); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

The gag order can be maintained only if it satisfies strict scrutiny. *See, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) ("a content-based speech restriction . . . can stand only if it satisfies strict scrutiny"); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). The Second Circuit has delineated how the strict scrutiny standard should be applied in this context.[1] To justify the gag order, a senior FBI official must certify that "disclosure may result in an enumerated harm that is related to an authorized investigation to protect against international terrorism or clandestine intelligence activities." *Doe IV*, 549 F.3d at 875 (internal quotation marks omitted). On judicial review, the government bears the burden of "persuad[ing] [the] district court that there is a good reason to believe that disclosure may risk one of the enumerated harms." *Id.* The gag order is invalid unless the court "find[s] that such a good reason exists." *Id.* In this context, the "good reason" standard requires the government to show a "reasonable likelihood" that, but for the gag order, the enumerated harm will occur, *id.* and it must show "that the link between disclosure and risk of harm is *substantial*." *Id.* at 881 (emphasis added). In its decision, the Second Circuit underscored that a reviewing court "cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood [of harm] exists." *Id.* "The fiat of governmental official, though senior in rank and doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements." *Id.* at 882-83.

[1] The Second Circuit did not definitively rule on whether strict scrutiny applies in the context of an NSL gag order, although it did apply the traditional strict scrutiny analysis to §§ 2709(c) and 3511. *Doe IV*, 549 F.3d at 878. The Second Circuit made clear, however, that "[u]nder either traditional strict scrutiny or a less exacting application of that standard, some demonstration from the Executive Branch of the need for secrecy is required in order to conform the nondisclosure requirement to First Amendment standards." *Id.* at 882.

A. The Government Has Failed to Justify Any Further Extension of the Gag Order.

The government has not justified any further extension of the gag order. Based on the unclassified summary of the FBI's classified declaration, it is clear that the government cannot demonstrate "that the link between disclosure and risk of harm is substantial." *Id.* at 881. Taking the Unclassified Summary on its own terms, any asserted harms occur insofar as "disclosure of the NSL could tip off the target of the investigation and other individuals who are under investigation." But the government cannot establish the crucial link between disclosing the NSL and "tipping off" the target or anyone else:



It is untenable for the government to maintain that insulating the target from knowledge of the NSL justifies the continuation of the longstanding gag on plaintiffs' speech.

The tenuousness of the link between disclosure and an enumerated harm is especially glaring given the limited information that would be disclosed if the gag were lifted. To justify the gag, the government must demonstrate that merely disclosing the details of a records request issued five years ago carries a "reasonable likelihood" of inducing an enumerated harm. *Doe IV*, 549 F.3d at 882. It is hard to imagine how the government attributes such power to the limited factual information at issue. Lifting the gag would reveal only that, more than five years ago, the FBI considered the target relevant to an investigation, and unsuccessfully sought information about through SP. It would reveal nothing about the scope or content of the FBI's years-old investigation. Nor would it reveal to the target specific evidence the FBI possesses about because the FBI never actually obtained any records in response to its now-withdrawn demand.[2]

[2] In November 2006, the government withdrew the underlying NSL. *See Doe IV*, 549 F.3d at 869. The government did not, however, withdraw the NSL gag order. The government did not offer

The link between disclosure and an enumerated harm is all the more tenuous given the amount of time that has elapsed since the FBI issued the NSL to Doe. Even in the limited circumstances when a prior restraint is permissible, courts have recognized that its justification diminishes over time. *See Doe v. Gonzales*, 449 F.3d 415, 422 (2d Cir. 2006) (hereinafter "*Doe II*) (Cardamone, J., concurring) ("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."); *Doe III*, 500 F. Supp. 2d at 421 ("[i]t is hard to conceive of any circumstances that would justify a permanent bar on disclosure."). To meet its burden, the government must establish the highly improbable proposition that the limited subject matter contained in the NSL, coupled with the significant lapse of time since its issuance, have not rendered obsolete any asserted benefits of the gag order.

B. <u>The Government Has Failed to Justify Continuation of the Gag Order to the Extent it Prevents Doe from Merely Identifying Himself as an NSL Recipient</u>.

Even if this Court finds that the gag order should not be lifted entirely, it should terminate the gag order insofar as it prevents Doe from discussing the mere fact that he has received an NSL. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (when considering a challenge to a content-based speech restriction, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives"). [redacted] disclosure of the mere fact that Doe Inc. received an NSL would provide the target with limited information at best. [redacted]

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any explanation for its decision to withdraw the NSL. Nor did it offer any explanation for its decision to stand by the gag order even though it had abandoned its demand for records and even though the underlying investigation was, at the time, at least two and a half years old.

The chances are therefore extremely slim that disclosure of the mere fact of Doe Inc.'s identity would provide the target with a decisive clue that is the subject of the government's investigation. Learning that Doe Inc. received an NSL could add only the most marginal information about the government's investigation.

The government has failed to show a "reasonable likelihood" that, but for the gag order, the enumerated harm will occur, and that "the link between disclosure and risk of harm is substantial." Accordingly, it has not satisfied the test prescribed by the Second Circuit for conforming the ongoing gag to the First Amendment.

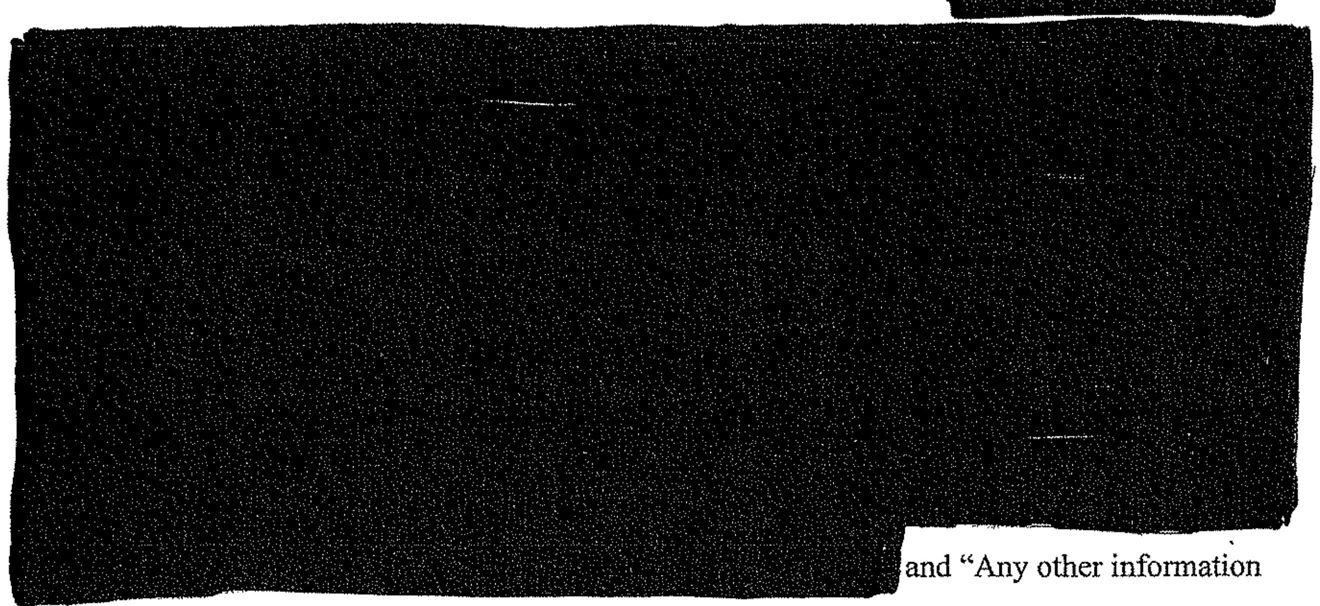
C. The Government Has Failed to Justify Continuation of the Gag Order to the Extent it Prevents Plaintiffs From Disclosing Information Contained in the NSL Attachment.

Even assuming that the government may constitutionally prohibit Doe from disclosing the five-year-old NSL record demand that the FBI has long since abandoned, and even assuming that the government may constitutionally prohibit Doe from disclosing the mere fact that Doe received an NSL, the government cannot constitutionally continue to suppress the Attachment that accompanied the NSL.

The question of what kinds of personal information the FBI has obtained (or tried to obtain) through NSLs is a matter of public concern, but one that has been shrouded in ambiguity and excessive secrecy. *See Doe III*, 500 F. Supp. 2d at 395. The statute authorizes the FBI to issue NSLs ordering ISPs to disclose "subscriber information," "toll billing records information," and "electronic communication transactional records." 18 U.S.C. § 2709(a). Specifically, the FBI is authorized to demand "the name, address, length of service, and local and long distance

toll billing records of a person or entity." 18 U.S.C. § 2709(b)(1). The statue does not define the term "electronic communication transactional record." To plaintiffs' knowledge, the FBI has never publicly disclosed its own interpretation of the term.

The NSL served on Doe provides unique insight on this issue. The now-withdrawn NSL served on Doe directed him to provide the "names, addresses, lengths of service and electronic communication transactional records" for a particular email address, and commanded that Doe provide "existing transaction/activity logs and all e-mail header information." Goodman Decl., Exh. A at 1. An "Attachment" to the NSL, stated: "In preparing your response to this request, you should determine whether your company maintains the following types of **information which may be considered by you to be an electronic communication transactional record** in accordance with Title 18, United States Code, Section 2709." *Id.* at 3.



and "Any other information which you consider to be an electronic communication transactional record." *Id.*

The Attachment is concrete evidence of the specific categories of information the FBI has sought through NSLs. The Attachment reveals that the FBI has interpreted the term "electronic communication transactional record" extremely broadly and it refutes the FBI's repeated claim

that NSLs are minimally intrusive: [redacted]

[redacted]

[redacted] and left it to the ISP's discretion whether to disclose even more personal records. Because of this NSL gag order, however, Doe's attorneys have been prohibited from disclosing any information contained in the Attachment. Indeed, to plaintiffs' knowledge, of the hundreds of thousands of NSLs issued since 2003, not one NSL Attachment has been publicly revealed in its entirety.[3] As a result, the public (and Congress) lacks a full and concrete understanding of what kinds of records, precisely, the FBI can obtain, or has tried to obtain, with an NSL. Disclosure of the Attachment is necessary to inform public debate on the appropriate scope of the NSL authority.

More importantly, the Attachment provides unique and concrete evidence of the FBI's abuse of the NSL power. Specifically, it reveals that the FBI sought some information through this NSL that it was not entitled to obtain under the statute. In January 2009, the Department of Justice publicly released a previously secret Office of Legal Counsel (OLC) Memorandum dated November 5, 2008, concerning the scope of the FBI's statutory NSL power. *See* Office of Legal Counsel, *Requests for Information Under the Electronic Communications Privacy Act, Memorandum Opinion for the General Counsel Federal Bureau of Investigation* (Nov. 5, 2008) ("OLC Memo").[4] The FBI had sought the OLC's opinion as to whether the four types of

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[3] In April 2008, the FBI withdrew an NSL issued to the Internet Archive, a digital library, as a result of the settlement of a lawsuit brought by the ACLU and the Electronic Frontier Foundation. Goodman Decl. ¶ 18. In withdrawing the letter, the FBI also lifted the gag order that prohibited the Archive and its attorneys from disclosing the existence of the NSL and permitted the public disclosure of, among other things, a redacted version of the NSL and its Attachment. *Id.* at ¶ 10 & Exh. D. Although the Archive NSL Attachment is less redacted than the Attachment in this case, the list describing the specific types of records sought remains sealed. *Id* at ¶¶ 19-20.

[4] The memo is attached as Exhibit C to the Declaration of Melissa Goodman.

information listed in the NSL statute – name, address, length of service, and toll billing records – was "exhaustive or merely illustrative of" the information that the FBI may demand from a service provider. OLC Memo at 2. The OLC definitively concluded that the list "is exhaustive" and "sets the limits of what the FBI may" demand through an NSL. *Id.*[5]

Most relevant here, the OLC also concluded that the term "electronic communication transactional records" was similarly limited in scope. The OLC explained that Congress' addition of the term to the statute was simply meant to give the FBI "the necessary authority" to issue NSLs "with respect to electronic communication services other than ordinary telephone services." OLC Memo at 3 n.3 (citing legislative history). Thus, the OLC concluded that, "[w]hile clarifying that NSLs can extend to other types of services . . . the language reaches *only those categories of information parallel to subscriber information and toll billing records for ordinary telephone service.*" *Id.* (emphasis added). Thus, "[t]he universe of records subject to an NSL is still restricted to the types listed in the statute." *Id.* at 4.

The Attachment at issue here makes clear that the FBI tried to use an NSL to obtain information beyond the electronic equivalent of name, address, length of service, and toll billing information. The Attachment is proof that, prior to the issuance of the 2008 OLC Memo, the FBI interpreted its statutory power expansively and that, as a result, it may have obtained a very large number of records and information from ISPs that it was never entitled to in the first place. In short, the Attachment is unique evidence of abuse of the NSL authority. The continued suppression of the Attachment has prevented the ACLU from fully explaining the significance of the November 2008 OLC Memo to the public, Congress, and the executive branch. Goodman

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[5] OLC also specifically rejected the FBI's argument that the term "subscriber information" encompassed information "similar to the types" specified in the NSL statute, such as "a subscriber's date of birth or social security number." OLC Memo at 3. Even this information was beyond the bounds of the statute.

Decl. ¶ 9. In fact, the continued suppression of the Attachment has made it impossible for the ACLU attorneys in this case to fully explain even to ACLU lobbyists why they believed the OLC Memo was important. *Id.* ¶ 10. More disturbingly, the ACLU would like to convey to Congress and to the executive branch its deep concern that, prior to the issuance of this OLC memo, the FBI collected types of information and records to which it was never entitled under the statute and its concern that this information has never been purged from FBI files and databases. As a result of the gag order, however, the ACLU cannot disclose the concrete evidence that give rise to its concern.[6]

Thus, the continued suppression of the Attachment is unconstitutionally preventing plaintiffs from engaging in speech critical of government activity. More troubling, it is preventing plaintiffs from disclosing their first-hand knowledge of abuse of the NSL power. *Cf. Doe II,* 449 F.3d at 422 (Cardamone, J., concurring) (warning that "[u]nending secrecy of actions taken by government officials may also serve as a cover for possible official misconduct and/or incompetence"); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 81 (D.Conn. 2005) (expressing concern that NSL gag orders result in "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 that "the very people who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the public and with the legislators who empower the executive branch with the tools used to investigate matters of national security.").

The government has no legitimate interest in continuing to suppress the general categories of information it sought to obtain through this NSL. There is no good reason to

[6] The OLC Memo specifically declined to address "whether the FBI must purge its files of any additional information given to it by communications providers." OLC Memo at 4 n.5

believe that the public disclosure of this information could endanger national security. The Attachment is not a classified document. Potential terrorists and criminals are already on notice that the FBI can demand an array of records from ISPs through an NSL. Disclosing a list of the general types of records the FBI unlawfully tried to obtain through an NSL in 2004 will not harm the nation's security.

Nor is there any good reason to believe that the public disclosure of this information would interfere with an investigation. It is already public knowledge that this NSL sought information about a particular (but undisclosed) email address. *See Doe IV*, 549 F.3d at 865. The Attachment reveals nothing more than the general types of information the FBI tried to obtain about that address over five years ago. Disclosure of this information would not inform anyone about the FBI's investigation at all, let alone in a manner that would interfere with it. Nor could disclosure reveal what kinds of evidence the FBI obtained during its investigation because the FBI *never obtained* the records. Nor would disclosure of the Attachment even reveal anything about the FBI's current investigatory practices; as the November 2008 OLC Memo makes clear, many of the types of records listed in the Attachment are not types of records the FBI is authorized to obtain.

In fact, the FBI itself has already permitted the public disclosure of some of the information in the body of the NSL and the NSL Attachment that it seeks to continue suppressing here. For example, the FBI continues to prohibit disclosure of the words "existing transaction/activity logs and all e-mail header information" in the body of the NSL. *See* Goodman Decl., Exh. B at 1. In the public version of the Internet Archive NSL, however, those words are not redacted. *Id.* at Exh. D at 1. The public version of the Internet Archive NSL also leaves unredacted portions of the Attachment identical to those redacted here; specifically, the

title of the document, the opening instruction, the part of the list that states "[a]ny other information which you consider to be an electronic communication transactional record," and the closing paragraph. *Id.* at Exh. B at 3.

Because there is no good reason to believe that the disclosure of this information substantially risks endangering national security or interfering with an investigation, its continued suppression violates the First Amendment.

CONCLUSION

For the reasons stated above, plaintiffs respectfully ask that this Court terminate the gag order that has restricted their speech for more than five years.

Respectfully submitted,

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