UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted] AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Plaintiffs,

v.

ALBERTO GONZALES, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE E. CAPRONI, in her official capacity as General Counsel of the Federal Bureau of Investigation,

Defendants.

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04 Civ. 2614 (VM)

FILED UNDER SEAL

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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Table of Contents

Preliminary Statement

Defendants Alberto Gonzales, Attorney General of the United States; Robert Mueller, Director of the Federal Bureau of Investigation ("FBI"); and Valerie E. Caproni, General Counsel of the FBI[1] (collectively, the "government") respectfully submit this memorandum of law in opposition to the motion for partial summary judgment filed by plaintiffs [redacted], American Civil Liberties Union, and American Civil Liberties Union Foundation, and in support of the government's cross-motion to dismiss the complaint or, in the alternative, for summary judgment, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

Plaintiffs challenge the constitutionality of the non-disclosure provisions of 18 U.S.C. § 2709(c). Those provisions were rewritten following the Court's merits decision in this case and the district court's decision in *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Ct. 2005), to cure any constitutional infirmities. As amended, § 2709(c) bars any wire or electronic communications provider (including its officers, agents, and employees) that is served with a national security letter ("NSL") from disclosing to any person (other than those to whom disclosure is necessary to comply with the NSL or to obtain legal advice or assistance in connection with the NSL) that the FBI has sought or obtained access to information or records pursuant to the NSL. This non-disclosure obligation is triggered only where the Director of the FBI, or a proper designee, certifies that disclosure may result in a "danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C.

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Valerie Caproni, General Counsel of the FBI, should be substituted as defendant in place of Marion E. Bowman, who has retired from the FBI and whose position as Senior Counsel was abolished in an FBI reorganization.

§ 2709(c)(1). The non-disclosure requirement is not permanent; rather, the recipient of the NSL may petition the district court for an order modifying or setting it aside. 18 U.S.C. § 3511(b).

Plaintiffs also challenge the constitutionality of the sealing provisions of the NSL statute, 18 U.S.C. § 3511(d), (e). Pursuant to those sections, the court must close any hearing and papers must be filed under seal to the extent necessary to prevent the unauthorized disclosure of an NSL. *Id.* § 3511(d). In addition, the government is authorized to submit classified information to the court *ex parte* and *in camera*. *Id.* § 3511(e).

Plaintiffs' constitutional challenges are without merit. Plaintiffs' First Amendment challenge to the non-disclosure requirement fails because the limited information that may not be disclosed under section 2709(c)—*i.e.*, information that the recipient of the NSL acquired only by virtue of having been served with an NSL—is subject to less First Amendment protection under established Supreme Court and Second Circuit law. The government has more leeway to regulate the dissemination of such information that is of its own creation, as opposed to information that an individual obtains independently.

Section 2709(c) is fully consistent with the governing First Amendment strictures. The non-disclosure requirement indisputably serves a compelling interest: protecting the integrity and efficacy of the FBI's foreign counterintelligence and counter-terrorism investigations by prohibiting disclosure of the particular investigative inquiries that have been made. In addition, § 2709(c), as amended, provides a number of procedural protections to confine the scope and duration of the non-disclosure requirement. Specifically, the non-disclosure requirement is not triggered unless the Director of the FBI, or his appropriate designee, certifies at the time that the NSL is issued that non-disclosure is necessary to protect against, *inter alia*, harm to the national

security, interference with a criminal, counterterrorism, or counterintelligence investigation, or danger to the life or physical safety of any person. Moreover, the amended statute permits the recipient of the NSL to challenge in district court the need for non-disclosure. Such challenges may be made at the time that the NSL is served and/or at any time in the future. Accordingly, the non-disclosure provision survives First Amendment scrutiny.

Likewise, plaintiffs' claim that the sealing provisions set forth in § 3511 violate the First and Fifth Amendment is without merit. Section 3511(d) simply makes clear (consistent with the Court's actions in this case), that proceedings and filings in connection with a challenge to an NSL statute must be under seal to the extent necessary to prevent a violation of the non-disclosure requirement. This obligation is unremarkable and, as shown by the proceedings in this case, will not materially affect the public record. Similarly, § 3511(e) merely allows the government to submit classified information *ex parte* and *in camera*, a procedure that was already available to the government (and in fact was already employed in this case). Accordingly, plaintiffs' claims should be rejected and their complaint should be dismissed.

Background

A. The Electronic Communications Privacy Act

Mandatory national security letters were first permitted in October 1986, when Congress enacted the Electronic Communications Privacy Act of 1986 ("ECPA"), Pub. L. 99-508, 100 Stat. 1848 (Oct. 21, 1986). Title II of the ECPA enacted chapter 121 of Title 18, 18 U.S.C. §§ 2701–2711, governing access to stored wire and electronic communications and transactional records. ECPA § 201, 100 Stat. at 1860–68; *see also* S. Rep. 99-541 at 3, *reprinted in* 1986 U.S.C.C.A.N. 3557.

The express purpose of ECPA's Title II, which was modeled on the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, was "to protect privacy interests in personal and proprietary information, while protecting the government's legitimate law enforcement needs." S. Rep. 99-541 at 3, *reprinted in* 1986 U.S.C.C.A.N. 3557; *accord id.* at 5 (ECPA "represents a fair balance between the privacy expectations of American citizens and the legitimate needs of law enforcement agencies"), *reprinted in* 1986 U.S.C.C.A.N. 3559; 132 Cong. Rec. 27625, 27633 (Oct. 1, 1986) (ECPA's provisions "are designed to protect legitimate law enforcement needs while minimizing intrusions on the privacy of system users as well as the business needs of electronic communications system providers") (statement of Senator Leahy); *see Organizacion JD Ltda. v. U.S. Dep't of Justice*, 124 F.3d 354, 360 (2d Cir. 1997).

ECPA Title II's provisions carefully distinguish between access to the *contents* of stored communications and access to *records* pertaining to such communications. *Compare* 18 U.S.C. § 2702(a)(1), (2) (prohibiting disclosure of contents of communications), *with* 18 U.S.C. § 2702(a)(3) (prohibiting disclosure of non-content records). In general, the government can require a service provider to disclose the *contents* of stored communications by obtaining a warrant or, upon notice to the customer, through use of a subpoena or court order. 18 U.S.C. § 2703(a), (b). On the other hand, a service provider "shall disclose" to a governmental entity a "record or other information" pertaining to a customer (*not* including the contents of any communication) when the government issues a subpoena, obtains a warrant or court order, secures the consent of the customer, or submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud. 18 U.S.C. § 2703(c).

B. National Security Letters Under 18 U.S.C. § 2709

The NSL provision contested in this case, 18 U.S.C. § 2709, provides a special rule for "access to telephone toll and transactional records" in foreign counterintelligence and counterterrorism investigations.[2] Pursuant to the statute, a wire or electronic communication service provider "shall comply with a request" from the FBI, under subsection (b), for "subscriber information," "toll billing records information," and "electronic communication transactional records." 18 U.S.C. § 2709(a). The statute does *not* authorize the FBI to request the contents of communications. *See* S. Rep. 99-541 at 44 ("It should be noted that [18 U.S.C. § 2709] applies only to transactional records, not to the content of the electronic messages of a customer or subscriber."), *reprinted in* 1986 U.S.C.C.A.N. 3598.

Subsection (b) provides that the Director of the FBI (or a designee, not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office) "may . . . request the name, address, length of service, and local and long distance toll billing records" of a person or entity upon written certification that such information is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities," and "provided that such an investigation of a United States person is not conducted

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[2] Several other statutes, not at issue in this litigation, authorize the FBI (or other government authorities) to issue NSLs for records in connection with foreign counterintelligence and counterterrorism investigations. *See* 12 U.S.C. § 3414(a)(1) (requests from certain government authorities for financial records); 12 U.S.C. § 3414(a)(5) (FBI requests to financial institutions for financial records of customers); 15 U.S.C. § 1681u (FBI requests to consumer reporting agencies for records seeking identification of financial institutions and other identifying information of consumers); 15 U.S.C. § 1681v (government agency requests to consumer reporting agencies for consumer reports and all other information in consumers' files); 50 U.S.C. § 436(b) (investigative agency requests to financial institutions or consumer reporting agencies for financial information and consumer reports needed for authorized law enforcement investigation, counterintelligence inquiry, or security determination).

solely on the basis of activities protected by the first amendment to the Constitution of the United States." 18 U.S.C. § 2709(b)(1), (2).[3]

Subsection (c)—the non-disclosure provision now at issue—prohibits the disclosure of information concerning the FBI's requests for records upon certification by the FBI. Although the statute previously provided for a blanket ban on disclosure "to any person" of the fact that the FBI had sought or obtained access to records by means of an NSL, Congress rewrote the provision in 2006. USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, § 116(a), 120 Stat. 192, 213–14 (2006) (rewriting subsection (c)); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, § 4(b), 120 Stat. 278, 280 (amending paragraph (c)(4)). The new statute prohibits a recipient of an NSL from disclosing its existence when the FBI "certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1). The NSL itself must notify the recipient of the non-disclosure obligation. *Id.* § 2709(c)(2). Under all circumstances, the recipient may disclose the NSL to "those to whom such disclosure is necessary to comply with the request or an

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[3] As described in the government's 2004 brief, the required certification in subsection (b) has been amended several times. As enacted in 1986, subsection (b) required certification that "(1) the information sought is relevant to an authorized foreign counterintelligence investigation"; and "(2) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power" as defined in the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.* 18 U.S.C. § 2709(b) (1988) (as enacted by ECPA § 201(a), 100 Stat. at 1867). Amendments in 1993 (Pub. L. 103-142, § 1, 107 Stat. 1491, 1491 (Nov. 17, 1993)), 1996 (Pub. L. 104-293, Title VI, § 601(a), 110 Stat. 3461, 3469 (Sept. 25, 1996)), and the Patriot Act in 2001 (Pub. L. 107-56, Title V, § 505, 115 Stat. 272, 365 (Oct. 26, 2001)) changed the scope of § 2709(b) to its present form.

attorney to obtain legal advice or legal assistance with respect to the request." *Id.* § 2709(c)(1). The FBI may request the identities of those persons to whom the NSL has been disclosed, but not the identity of any attorney from whom the recipient has sought legal assistance. *Id.* § 2709(c)(4).

C. Judicial Review of National Security Letters

Congress's recent amendments to the NSL scheme also added a provision that expressly permits judicial review of FBI requests for information under § 2709:

> The recipient of a request for records, a report, or other information under section 2709(b) of this title . . . may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.

18 U.S.C. § 3511(a). An NSL recipient may also challenge the non-disclosure obligation in court:

> The recipient of a request for records, a report, or other information under section 2709(b) of this title . . . may petition any court described in subsection (a) for an order modifying or setting aside a nondisclosure requirement imposed in connection with such a request.

Id. § 3511(b)(1).

During the first year after the NSL is issued—and after an FBI official has certified under § 2709(c)(1) that "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person"—the court may modify or quash the non-disclosure requirement if it finds "no reason to believe" that those results may occur. *Id.* § 3511(b)(2). More narrowly, if the Attorney General, Deputy Attorney

General, an Assistant Attorney General, or the FBI Director (*i.e.*, Department of Justice officials senior to those permitted to certify the need for non-disclosure under § 2709(c)) certifies that "disclosure may endanger the national security of the United States or interfere with diplomatic relations," then that certification "shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. § 3511(b)(2).

If the challenge to the non-disclosure requirement is brought more than one year after the NSL was issued, the FBI must, within ninety days, "either terminate the nondisclosure requirement or re-certify that disclosure may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 3511(b)(3). If the FBI re-certifies the need for secrecy, the same standard applies as for a petition filed within one year of the NSL: the district court may modify or set aside the non-disclosure requirement if there is "no reason to believe" the need exists, and if the certification was made by one of the enumerated senior Department of Justice officials on the narrower grounds of national security or threat to diplomatic relations, it is treated as conclusive unless made in bad faith. *Id.* If the court denies a petition to review a non-disclosure requirement filed more than one year after the issuance of NSL, the recipient is precluded from petitioning again for one more year. *Id.*

ARGUMENT

I. Standard of Review

A. Motions to Dismiss and for Summary Judgment

When ruling on a motion to dismiss, the Court must accept as true all facts pleaded in the complaint, and draw all reasonable inferences in the plaintiff's favor. *Gryl v. Shire Pharmaceuticals Group PLC*, 298 F.3d 136, 140 (2d Cir. 2002). Dismissal may be granted where it appears "beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Id.* Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). The Court must construe the facts in the light most favorable to the non-moving party, and draw all reasonable inferences against the movant. *Dallas Aerospace*, 352 F.3d at 780.

B. Deference to Congressional Enactments

Several general principles guide courts in reviewing constitutional challenges to federal statutes. First, a statute duly enacted after consideration by Congress is entitled to deference and a presumption of validity:

> Whenever called upon to judge the constitutionality of an Act of Congress—the gravest and most delicate duty that this Court is called upon to perform—the Court accords great weight to the decisions of Congress. The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. . . . [W]e must have due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.

Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (internal quotation marks and citations omitted); *accord American Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) ("even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court encased in the armor wrought by prior legislative deliberation," and "deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions" (internal quotation marks omitted)). That is particularly appropriate where, as here, Congress specifically considered the statute's constitutionality in amending it in response to adverse court decisions. *See Rostker*, 453 U.S. at 64 ("The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality.").

Second, deference to Congressional enactments is even greater when Congress acts in the area of national security. *Rostker*, 453 U.S. at 64 ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 96–97 (1961) ("[W]hen existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself[,] the legislative judgment as to how that threat may best be met consistent with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods."); *see Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security").

Third, a court must attempt to construe a statute to avoid constitutional doubt. *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 465–66 (1989) ("When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 572 (1973) ("As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.").

II. The NSL Non-Disclosure Requirement Is Consistent with the First Amendment

A. Level of Scrutiny

In its initial decision, the Court held that the NSL non-disclosure provision was both a prior restraint on speech and a content-based speech restriction, and therefore subject to strict scrutiny. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 511–13 (S.D.N.Y. 2004), *vacated*, 449 F.3d 415 (2d Cir. 2006). While, for the reasons previously presented in this litigation, the government continues to believe that strict scrutiny is not the appropriate standard of review, the government is not going to re-brief the issue in light of the Court's prior determination. However, the government respectfully reserves the issue of the appropriate level of scrutiny should there be an appeal in this matter.

Even applying strict scrutiny, the Supreme Court, the Second Circuit, and this Court have recognized the "basic principle" that laws that "prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger less First

Amendment concerns tha[n] laws which prohibit disclosing information a person obtains independently." *Doe*, 334 F.3d at 518. The government's compelling interest in the secrecy of investigatory processes outweighs the much lesser interest an individual has in disclosing information he obtained solely by participation in an investigation. Thus, "courts generally uphold secrecy statutes in connection with official investigations in recognition of two vital considerations: the importance of secrecy and that the secrecy is limited (as here) to facts learned only by virtue of a given person's participation in the proceedings." *Id.* at 516. Stated differently, a " 'limited ban on disclosure' " may survive strict scrutiny in light of the government's interest in secrecy, as long as it does not prevent divulgence of " 'information of which [the speaker] was in possession before' " becoming involved in the government's investigation. *Id.* at 517–18 (quoting *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), and *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 111 (2d Cir. 1994); citing *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (en banc), and *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136 (10th Cir. 2003)).

The theory behind this principle is that, "where an individual learns information to which he ordinarily would have no right of access, the individual takes the information subject to the statutory scheme (confidentiality rules included) which made the information available in the first place." *Doe*, 334 F. Supp. 2d at 518; *see also id.* at 519 ("[t]he First Amendment interest . . . in [the information's] dissemination . . . is necessarily qualified or conditioned by the potential restrictions that are part of the system through which the materials have been obtained") (internal quotation marks omitted). Accordingly, as this Court recognized, "it presumptively does little violence to First Amendment values" when an individual is barred from disclosing only

information that he obtained through participation in a confidential government investigation. *Id.* at 519.

B. The NSL Statute Provides Adequate Procedural Safeguards Under the First Amendment

The NSL statute, as amended, is narrowly tailored to serve a compelling interest. In its 2004 opinion, the Court recognized the government's "compelling" interest "in protecting the integrity and efficacy of international terrorism and counterintelligence investigations":

> A suspected terrorist or foreign intelligence operative who is alerted that the Government is conducting an investigation may destroy evidence, create false leads, alert others, or otherwise take steps to avoid detection. More generally, such disclosures can reveal the Government's intelligence-gathering methods, from which foreign intelligence operatives or terrorists could learn better how to avoid detection.

Doe, 334 F. Supp. 2d at 513–14. However, applying strict scrutiny, the Court concluded that the prior statute was "not sufficiently narrow." *Id.* at 514. In short, the Court characterized the then-existing § 2709(c) as "a blunt agent of secrecy applying in perpetuity to all persons affected in every case," "impos[ing] perpetual secrecy upon an entire category of future cases whose details are unknown and whose particular twists and turns may not justify, for all time and all places, demanding unremitting concealment." *Id.* at 516, 524. "[B]ecause there are undoubtedly circumstances in which the need for secrecy either has expired or simply no longer exists with the same compelling force that once warranted its imposition," the Court held that to be narrowly tailored, and thus constitutional, the statute must allow some judicial process to permit "case-by-case evaluation of the need for secrecy." *Id.* at 524.

On the other hand, the Court noted precedent requiring that in cases of " 'terrorism or other special circumstances,' " " 'heightened deference to the judgments of the political branches

with respect to matters of national security' " is warranted. *Id.* at 523–24 (quoting *Zadvydas*, 533 U.S. at 696; citing *Department of the Navy v. Egan,* 484 U.S. 518, 530 (1988)). Therefore, "the Government should be accorded a due measure of deference when it asserts that secrecy is necessary for national security purposes in a *particular situation* involving *particular persons* at a *particular time*." *Id.* at 524. Accordingly, the Court held that a more narrowly tailored NSL statute could pass constitutional muster: "Congress could require the FBI to make at least *some* determination concerning need before requiring secrecy, and ultimately it could provide a forum and define at least *some* circumstances in which an NSL recipient could ask the FBI or a court for a subsequent determination whether continuing secrecy was still warranted." *Id.* at 521.

Congress has done precisely that in the new § 2709(c) and § 3511. The amended statute permits the FBI to require non-disclosure of NSLs in particular cases where secrecy is necessary, but expressly provides a forum in which the NSL recipient can challenge the FBI's determination, whether at the time the NSL was issued or at a later time. *See* 18 U.S.C. § 3511(b). The statute now requires the FBI to certify the need for secrecy when it issues the NSL, *see id.* § 2709(b), instead of automatically requiring non-disclosure, as the old statute did; requires recertification if the NSL is more than a year old when a challenge is brought (or else termination of the non-disclosure requirement); *see id.* § 3511(b)(3), and in either case permits a court to set aside the non-disclosure requirement if the court finds it unnecessary, *id.* § 3511(b)(1).

Congress has thereby provided for case-by-case review of the government's compelling need for secrecy to protect foreign counterintelligence and counterterrorism investigations, subject to reassessment by the FBI and the courts, balanced against the recipient's interest in

speech and the public's interest in open discussion and debate. The new statute thus is consistent with the Constitution and should be upheld. *See, e.g.*, *Butterworth*, 494 U.S. at 630 (a court's task is to "balance [the] asserted First Amendment rights against [the Government's] interests in preserving the confidentiality of its . . . proceedings"); *id.* at 636 (Scalia, J., concurring) (observing that the state may have "quite good reasons" for prohibiting disclosure of "knowledge [the witness] acquires not 'on his own' but only by virtue of being made a witness" to a grand jury proceeding); *Kamasinski*, 44 F.3d at 111 ("Recognizing the full account of Connecticut's interests in preserving the integrity of its judiciary, we conclude that the limited ban on disclosure of the fact of filing or the fact that testimony was given does not run afoul of First Amendment.") *Hoffmann-Pugh*, 338 F.3d at 1136 (upholding Colorado's grand jury secrecy rule, and stating: "In our judgment, drawing the line at what Ms. Hoffmann-Pugh knew prior to testifying before the grand jury protects her First Amendment right to speak while preserving the state's interest in grand jury secrecy."); *First Amendment Coalition*, 784 F.2d at 479 (same).

C. Plaintiffs' Arguments to the Contrary Are Without Merit

1. Plaintiffs' Reliance on Cases Involving Licensing Schemes Restricting a Wholly Different Category of Speech Is Misplaced

Plaintiffs' argument that the non-disclosure requirement is unconstitutional fails because, *inter alia*, they are applying the wrong test. Likening the NSL statute to a "licensing scheme," plaintiffs contend that the procedural safeguards provided by § 3511 are insufficient for failure to specify a time frame for judicial review and allocate the burden on the government, rather than the recipient, to seek relief in court. *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment, dated September 8, 2006 ("Pls.' Br."), at 15-20. These

arguments are without merit, both because the NSL non-disclosure provision is not a prior-restraint censorship scheme in any sense analogous to those in the cases plaintiffs cite, and because the nature of the government's interest and the threat to free expression are vastly different from the rationale for censorship in those cases.

Plaintiffs rely principally on *Freedman v. Maryland*, 380 U.S. 51 (1965), the high-water mark of the First Amendment's procedural requirements. *See* Pls.' Br. at 16-19. In that case, the Supreme Court considered a state scheme under which no motion picture could be shown without prior approval by a licensing board that the film was "moral and proper" and not "obscene" or "pornographic"—in short, precisely the type of broadly discretionary prior-restraint censorship that the First Amendment was designed to prevent. *Id.* at 52 & n.2 (1965). The Court ruled that for such a system, the state was required to provide certain procedural safeguards:

> "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."

Thomas, 534 U.S. at 321 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion) (citing *Freedman*, 380 U.S. at 58–60)).

Decisions after *Freedman*, however, have held that the level of procedural safeguards required depends on the nature of the "typical First Amendment harm at issue": maximum procedural protection is needed for a scheme "with rather subjective standards . . . where a denial likely mean[s] complete censorship," such as that in *Freedman*, but the need for such rules is "diminish[ed]" when the First Amendment harm is less severe. *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782–83 (2004); *accord Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320,

323 (2002) (While a system consisting of the "core abuse" targeted by the First Amendment—"licensing laws" that vest a government official with "unconfined authority to pass judgment on the content of speech"—requires "extraordinary procedural safeguards," a regulation imposing lesser burdens on speech need not adhere to such stringent procedures to be valid.); *MacDonald v. Safir*, 206 F.3d 183, 195 (2d Cir. 2000) ("broad *Freedman* requirement" "limit[ed]" when government not " 'engaged in direct censorship of particular expressive material' " (quoting *FW/PBS*, 493 U.S. at 229 (plurality opinion))). The flexibility of this standard reflects the fact that while a classic prior-restraint system—in which a censor exercises subjective judgment about the content of speech—" 'presents peculiar dangers to constitutionally protected speech,' " *Thomas*, 534 U.S. at 521 (quoting *Freedman*, 380 U.S. at 57), government regulation less directly concerned with speech is less of a threat, and the prior-restraint analysis is not "a helpful formula":

> The historical referent of "prior restraints" is censorship, see 4 William Blackstone, *Commentaries on the Laws of England* 151–53 (1769) . . . . It is a censor's business to make a judgment about the propriety of the content or message of the proposed expressive activity. Because he is in the business of suppressing such activity (friends of free speech are not drawn to a career in censorship), the danger of abuse is very great, especially when assessed in light of the dismal history of censorship. . . . The heterogeneity of the practices that the "prior restraints" formula covers [citing *Freedman*] is reason to doubt that it can provide much assistance to judges who have to decide a novel case.

Thomas v. Chicago Park District, 227 F.3d 921, 923–24 (7th Cir. 2000) (Posner, J.), *aff'd*, 534 U.S. 316.

Here, § 2709(c) is not the classic form of licensing censorship implicated in *Freedman*, and thus requires none of the stringent and extraordinary procedural protections plaintiffs seek. Instead of requiring potential speakers, seeking to disseminate expression that they themselves

originated, to come to a government official with unfettered discretion to suppress speech, the statute at issue here minimally limits disclosure of information the NSL recipient possesses only by virtue of being part of the government's investigation. The NSL non-disclosure requirement therefore is a far cry from the pure form of prior-restraint censorship addressed in *Freedman* that so greatly concerned the constitutional Framers, and thus does not call for heightened procedural protections.

The Tenth Circuit's decision in *Hoffmann-Pugh* is instructive in this regard. In that case, a grand jury witness in the JonBenet Ramsey murder investigation who wished to write a book about her experiences challenged the constitutionality of Colorado's grand jury secrecy rule. 338 F.3d at 1137. That rule, like § 2709(c), prohibited disclosure of information the witness acquired only through participation in a confidential government investigation, *i.e.*, the proceedings of the grand jury. *Id.* at 1138.

Even though the Colorado rule (like § 3511) placed the burden on the witness to apply to the court overseeing the grand jury for a determination that secrecy is no longer needed, the Tenth Circuit rejected plaintiff's challenge. 338 F.3d at 1140. Applying the Supreme Court's decision in *Butterworth*, and never mentioning *Freedman*, the court held: "In our judgment, drawing the line at what Ms. Hoffmann-Pugh knew prior to testifying before the grand jury protects her First Amendment right to speak while preserving the state's interest in grand jury secrecy." 338 F.3d at 1140. Significantly, the court expressly cited the availability of court review of the continued necessity for non-disclosure in support of its holding that the provision survived First Amendment scrutiny. *Id.* ("This rule provides a mechanism for Hoffmann-Pugh to free herself of the restriction on her disclosure of grand jury testimony at such time as the

investigation is truly closed and the state no longer has a legitimate interest in preserving the secrecy of that testimony.").[4]

Contrary to plaintiffs' suggestion, the cases in which the most stringent procedural safeguards were imposed "all involve special licensing regimes for sexually oriented businesses." *Thomas*, 227 F.3d at 927; *see also Thomas*, 534 U.S. at 322–23 (holding that the permit regulation at issue need not "adhere to the procedural requirements set forth in *Freedman*," based on the lower level of infringement on free expression). This observation is borne out by plaintiffs' brief, which relies almost entirely on cases addressing obscenity and other sexual speech. *See* Pls.' Br. at 16–18 (citing *Freedman*, 380 U.S. 51 (pornographic movies); *Blount v. Rizzi*, 400 U.S. 410 (1971) (obscene mailings); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (on-stage nudity and obscenity); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (obscene books); *City of Littleton*, 541 U.S. 774 (adult bookstore); *FW/PBS*, 493 U.S. 215 (sexually oriented business)). In such cases, the courts have recognized the need for special vigilance against majoritarian suppression of controversial speech. *Thomas*, 227 F.3d at 927–28. However, in this case, the government's interest in safeguarding national security is vastly different from the interest in protecting community mores regarding sex, and the heightened need to protect against censorship of unpopular expression is not present.

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[4] As demonstrated by *Hofmann-Pugh*, plaintiffs' assertion that the non-disclosure provision is unconstitutional "because it places the burden of going to court not on the government but on the NSL recipient, Pls.' Br. at 15, is simply mistaken. *See also Thomas*, 534 U.S. at 322 (no need to place the burden of initiating litigation on the government, or to specify deadlines for judicial review, when a "classic censorship scheme" is not involved).

2. Similar Non-Disclosure Statutes Do Not Require Heightened Procedural Protection

Moreover, as the government described in its earlier brief, numerous provisions throughout the United States Code prohibit disclosure of information related to law enforcement investigations, without special procedural rules or, often, without any express avenue for judicial review at all. While the new 18 U.S.C. § 3511 provides for court challenges to requests for information under 18 U.S.C. § 2709 and similar statutes,[5] other non-disclosure provisions are unaffected, including the three cited by this Court in its 2004 opinion as closest to the NSL statute. *See Doe*, 334 F. Supp. 2d at 514–15. Those statutes—pen registers under 18 U.S.C. § 3123(d) and 50 U.S.C. § 1842(d); wiretaps under 18 U.S.C. § 2511; and subpoenas under 50 U.S.C. § 1861(d)—permit the government to preserve the secrecy of its investigations by prohibiting disclosure by non-government actors, automatically and with no special procedural protections. Other statutes do not mention judicial intervention at all: for instance, 12 U.S.C. § 3420(b), which forbids financial institutions from disclosing to certain persons, "directly or indirectly," the existence of a grand jury subpoena in money laundering investigations,[6] and 31 U.S.C. § 5326, which prohibits disclosure of some Treasury orders.

According to plaintiffs' argument, every time the government seeks a wiretap or pen register it would then be required to initiate a separate lawsuit against the telephone company, a lawsuit that would be governed by strict administrative and judicial time limits—despite the fact that the telephone company never sought to disclose the existence of the wiretap, and in virtually

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[5] 15 U.S.C. §§ 1681u & 1681v, 12 U.S.C. § 3414, and 50 U.S.C. § 436.

[6] 18 U.S.C. § 1510(b) provides that such disclosure is a criminal offense.

all cases will be uninterested in doing so.[7] That requirement would defy common sense, and overwhelm the government and private telephone companies—not to mention the courts—with needless, formalistic litigation that provides no real benefit to free expression. The First Amendment mandates no such result.

The NSL statute, which explicitly permits judicial review, provides more procedural protection than the long-standing wiretap and pen register statutes, in which non-disclosure is automatic "unless or until ordered by the court," the only procedure for judicial review is *ex parte* and does not require the government to justify non-disclosure, and the statute sets forth no standard or time limit for lifting the prohibition on disclosure. The balance struck by the NSL statute, allowing law enforcement officers to proceed with confidential investigations without endless litigation while protecting the free-speech rights of NSL recipients, is appropriate and consistent with the First Amendment.

3. The Non-Disclosure Requirement Does Not Provide Unbridled Discretion to Suppress Speech

Plaintiffs' alternative assertion that, regardless of *Freedman*, § 2709(c) is unconstitutional because it constitutes a classic "licensing scheme that invests unbridled discretion in executive officers," Pls.' Br. at 21, is also mistaken. As the statute makes clear, the FBI does not have discretion to require non-disclosure in the way that a censor has discretion to suppress speech. Under § 2709(c), the prohibited disclosure is always the same—the mere fact that the FBI

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[7] In a true licensing system, such as in *Freedman*, the potential speaker has always, by virtue of seeking a license, indicated its desire to publish the proposed expression. In contrast, there is no reason to believe that most recipients of wiretap orders—or NSLs—wish to disclose that fact to anyone. To require the government to initiate repeated lawsuits against such recipients, to deny them disclosure permission that they do not even want, would be entirely nonsensical.

requested information—and the prohibition is imposed based on an evaluation of the circumstances of the investigation, not of the content of the speech.

As described above, the non-disclosure requirement is triggered only if the Director of the FBI or his appropriate designee certifies that disclosure of the FBI's request "may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1), (c)(2). If the FBI does so, the only information that the recipient may not disclose is information revealing the fact "that the [FBI] has sought or obtained access to information or records" by an NSL. *Id.* § 2709(c)(1).

The evaluation conducted by the FBI thus does not depend on the content of the proscribed disclosure itself.[8] Indeed, the statute does not permit analysis of the content of the expression; it only allows the FBI to assess the effects of the disclosure on national security, an ongoing investigation, diplomatic relations, or public safety. "A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms . . . to *considerations of public safety and the like*." *Thomas*, 534 U.S. at 322–23 (internal

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[8] The Court has ruled that the non-disclosure provision is "content-based," following *Kamasinski*, 44 F.3d at 109, in that it "categorically prohibited" certain persons from disclosing certain topics of information, i.e., that they had received NSLs. *Doe*, 334 F. Supp. 2d at 512. But this is not the same as saying that the regime is a classic prior restraint, wherein a censor reviews the content of speech before its expression and decides, based on that content, whether to permit it. Plaintiffs' suggestion that any content-based regulation must conform to *Freedman*, Pls.' Br. at 18 n.7, misreads the law. In the same footnote, plaintiffs state that *Thomas* held that only two of the three *Freedman* factors applied in that case; in fact, *Thomas* held that *Freedman* was entirely inapplicable, and imposed no special procedural safeguards at all. 534 U.S. at 322 ("*Freedman* is inapposite . . . .").

quotation marks omitted; emphasis added). The NSL non-disclosure requirement, therefore, is not akin to "the kind of prepublication license deemed a denial of liberty since the time of John Milton," but a determination based on "reasonably specific and objective factors"—including, as in *Thomas*, whether there is a danger to people's safety—"[that] do not leave the decision to the whim of the administrator." *Id.* at 323–24 (internal quotation marks omitted).

Plaintiffs' repeated assertion that the criteria for non-disclosure are not sufficiently narrow and defined, *see* Pls. Br. at 20-23, is also unavailing. In evaluating regulations governing the time, place, and manner of expression, the Supreme Court has held that a law that leaves the decision of whether to regulate speech "to the whim of the administrator" runs afoul of the First Amendment. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992). "[O]verly broad discretion" presents the risk that the official will "encourag[e] some views and discourag[e] others through arbitrary application" of the standards, *id.* at 130, 133; an ordinance may not permit officials " 'to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community,' " *Field Day LLC v. County of Suffolk*, 463 F.3d 167, 178 (2d Cir. 2006) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969)). Thus, an administrator must be required to rely on " 'narrowly drawn, reasonable, and definite standards.' " *Id.* at 132–33 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)). The Second Circuit recently reviewed cases in which regulations were found invalid under this test: when a government may deny the right to speak based on, for example, "its judgment [regarding] the public welfare, peace, safety, health, decency, good order, morals or convenience," *Shuttlesworth*, 394 U.S. at 149–50; "the health,

comfort and convenience" of residents, *Nichols v. Village of Pelham Manor*, 974 F. Supp. 243, 250 n.5 (S.D.N.Y. 1997); conditions that are "deemed necessary and reasonable" by the mayor, *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 769 (1988); or whether the official "believes the parade will be disorderly in character or tend to disturb the public peace," *MacDonald*, 206 F.3d at 192, the regulation is impermissible under the First Amendment. *Field Day*, 463 F.3d at 178–79; *see Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).

However, the statute need not "establish with absolute certainty each and every concern or issue . . . that a public official may raise . . . . '[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,' and 'flexible' standards granting 'considerable discretion' to public officials can pass constitutional muster." *Id.* at 179 (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989)). Thus, a permitting scheme that depends on whether "it appears that such gathering [may be held] without hazard to health or safety," or "such other matters as may be appropriate for security of life or health," has been held constitutional: the standard is "much more specific and objective," as it does not "invite a public official to consider the content of speech in making . . . decisions." *Id.* at 173, 179 (internal quotation marks omitted). "The phrases 'health and safety' or 'life and health' simply cannot be reasonably construed to 'give[ ] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.'" *Id.* (quoting *City of Lakewood*, 486 U.S. at 759). Similarly, the Supreme Court has upheld a permitting regulation where the government was to assess the presence of an "unreasonable danger to . . . health and safety." *Thomas*, 534 U.S. at 324.

The NSL statute provides similarly definite standards, sufficient to constrain the FBI from wantonly suppressing speech. Much like the provisions upheld in *Thomas* and *Field Day*, § 2709(c) provides for consideration of "danger to the life or physical safety of any person." The statute also allows the FBI to certify the need for non-disclosure based on three other objective and nondiscretionary factors: "danger to the national security of the United States"; "interference with a criminal, counterterrorism, or counterintelligence investigation"; or "interference with diplomatic relations." 18 U.S.C. § 2709(c)(1). These indisputably reasonable criteria are objective, unlike those in *Forsyth County*, where the local official was empowered to impose whatever fee he found "reasonable," without reference to "any objective factors."[9] 505 U.S. at 133. And they are defined as narrowly as possible—certainly as narrowly as those upheld in *Thomas* and *Field Day*.[10]

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[9] Plaintiffs rely on the occasional statement of the Supreme Court that a permit scheme that "involves appraisal of facts, the exercise of judgment, and the formation of an opinion" is constitutionally suspect. *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). In *Cantwell*, the local official was charged with forming an opinion as to whether a religious solicitation was really religious. *Id.* at 302. In the three other cases where the Court has invoked this formulation in striking down a law, the "facts, . . . judgment, and . . . opinion" were similarly objectionable: in *Forsyth County*, the fee determination based only on a judgment of what was "reasonable," 505 U.S. at 132; in *Southeastern Promotions*, whether the theatrical production was "in the best interest of the community" or "clean and healthful and culturally uplifting," 420 U.S. at 554 & n.7; and in *Staub*, whether the mayor "approve[d] of the applicant or of the [applicant's organization or its] effects upon the general welfare of citizens," 355 U.S. at 322 (internal quotation marks omitted). Plaintiffs' broad reading of the "facts, . . . judgment, and . . . opinion" formulation is entirely divorced from these contexts, and would require the opposite result in *Thomas* and *Field Day*, where officials unquestionably were required to appraise facts, exercise judgment, and form opinions in determining whether a health threat existed.

[10] Plaintiffs object in passing, without authority, to the ability of the FBI to certify that one of the enumerated dangers "*may* result" from disclosure. Pls.' Br. at 22–23; 18 U.S.C. § 2709(c)(1) (emphasis added). A similar formulation was upheld in *Field Day*, where the licensor could consider whether "it appears that" a danger to health and safety existed, or "such

(continued...)

Moreover, the government should be permitted broader discretion in requiring non-disclosure of NSLs, as opposed to restricting speeches, parades, and other traditionally protected forms of expression, given both the narrow restriction on disclosure and the nature of the government's interest at stake. The context of the speech at issue is important in assessing the proper latitude to be given government officials to achieve public goals—for instance, broadcast regulators have greater freedom to restrict expression than other government officials, due to the nature of broadcasting and of the government's interest in regulating it. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the [FCC] decides that such an action would serve 'the public interest, convenience, and necessity.'" (quoting statutes)). In this case, as explained above, the information at issue (the existence of the NSL) was obtained only by virtue of participation in a confidential government investigation; the only restriction on speech is against speech that would disclose the NSL's existence; and the government's compelling interest in law enforcement and national security require deference to the executive branch's determinations. In light of the narrow restriction and the government's interest, the discretion given to the FBI is appropriately cabined under the First Amendment.

4. The Non-Disclosure Provision Does Not Foreclose Courts from Applying a Constitutionally Mandated Standard of Review

Plaintiffs' additional assertion that the non-disclosure provision "fail[s] constitutional scrutiny because it forecloses reviewing courts from applying a standard of review mandated by

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[10] (...continued)
other matters as *may* be appropriate for security of life or health." 463 F.3d at 173.

the First Amendment," Pls.' Br. at 23; *see also* Memorandum of Law of Amicus Curiae the Association of the Bar of the City of New York, dated September 29, 2006 ("City Bar Br."), at 2, 8-10 (same), fails for two reasons. First, plaintiffs' claim is based on their false premise that the non-disclosure provision is subject to "the strictest scrutiny." Pls.' Br. at 23. As shown above, that is not so. Rather, because the information that is subject to non-disclosure is information that the recipient of the NSL learned only by virtue of his or her participation in a confidential investigation, a less stringent application of strict scrutiny is warranted. *Doe*, 334 F. Supp. 2d at 518–19; *accord Butterworth*, 494 U.S. at 636 (Scalia, J., concurring) (same); *Kamasinski*, 44 F.3d at 110–11 (same).[11]

Moreover, the reviewing standard set forth in § 3511(b) essentially is a codification of the standard of review applied by courts to decisions by the government to withhold information in the interest of national security. As this Court has recognized, it is a "well-settled doctrine that courts grant substantial deference to the political branches in national security matters." *Doe*, 334 F. Supp. 2d at 523. That is because "the Executive departments responsible for national defense and foreign policy have unique insights into what adverse effects might occur as a result

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[11] Tellingly, none of the cases that plaintiffs cite in support of their claim that "the strictest scrutiny" applies involved a restriction on disclosure of information that an individual learned only through participation in a confidential investigation. *See* Pls.' Br. at 23. Rather, plaintiffs rely on a variety of obscenity and public forum cases that implicate very different First Amendment concerns. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 677 (2004) ("Like the Court, I would subject the [Child Online Protection] Act to the most exacting scrutiny requiring the Government to show that any restriction of nonobscene expression is 'narrowly drawn' to further a compelling interest.' ") (Breyer, Rehnquist, and O'Connor, dissenting) (internal quotation marks and citation omitted); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (applying "rigorous scrutiny" to Telecommunication Act's "signal bleed" provision, requiring cable operators either to scramble sexually explicit channels in full or to limit programming on such channels to certain hours).

of [disclosure of] a particular classified record." *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983); *accord CIA v. Sims*, 471 U.S. 159, 180 (1985); *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). Conversely, "[o]rdinarily, judges do not have national security expertise. Nor is the institution of the judiciary well-equipped to understand the sensitivity of an isolated piece of information in the context of the entire intelligence apparatus." *Doe*, 334 F. Supp. 2d at 523; *see Center for Nat'l Security Studies*, 331 F.3d at 928 ("It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment [of the harm that will result from disclosure of information]. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security."); *Sims*, 471 U.S. at 179 (emphasizing, in accepting the CIA Director's judgment that disclosure would reveal intelligence sources and methods, that "[t]he decisions of the Director, who must of course be familiar with the 'whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interest and potential risks at stake").

The need for deference is even more acute in cases involving terrorism or foreign counterintelligence investigations. *Zadvydas*, 533 U.S. at 696 (observing that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); *accord Doe*, 334 F. Supp. 2d at 523–24; *Egan*, 484 U.S. at 530 ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). As this Court recognized, "[i]nternational terrorism and counter-intelligence investigations may involve continuously expanding or ever-changing players. Hence, determining whether something is sensitive in such

a fluid and necessarily broad and indeterminate context may not be simple." *Doe.*, 334 F. Supp. 2d at 523; *id.* ("it is sometimes very difficult to determine whether an isolated disclosure implicates national security"); Declaration of David W. Szady dated June 20, 2004 ("Szady Decl.") ¶¶ 9-12, 17-33. Moreover, "bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." *Sims*, 471 U.S. at 178 (internal quotation marks and citation omitted). Thus, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.*; *accord United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989); *Doe*, 334 F. Supp. 2d at 523.

Accordingly, in cases implicating national security, particularly cases involving terrorism or other special circumstances, courts have been loathe to probe or second-guess the considered judgment of the Executive. Rather, as the D.C. Circuit explained in the analogous context of FOIA, "[o]nce satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts need go no further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982); *see also Center for Nat'l Security Studies*, 331 F.3d at 932 ("Inasmuch as the concerns expressed in the Government's declarations seem credible—and inasmuch as the declarations were made by counterterrorism experts with far greater knowledge than this Court—we hold that the disclosure of the names of the detainees could reasonably be expected to interfere with the ongoing investigation."); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (holding that closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism does

not violate the First Amendment, and emphasizing that the court is "quite hesitant to conduct a judicial inquiry into the credibility of th[e government's] security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise");[12] *Edmonds v. FBI*, 272 F. Supp. 2d 35, 46 (D.D.C. 2003) ("in the absence of contradictory evidence, this Circuit has required little more than a showing that the agency's rationale is logical to uphold an agency's classification decision" in cases implicating national security) (internal quotation marks and citation omitted).

The standard of review set forth in § 3511(b) is consistent with this established case law. Section 3511(b)(2) provides that if a petition to modify or set aside the non-disclosure requirement is filed within one year of the request for records, the Court may grant the petition only if it finds that there is "no reason to believe" that disclosure may cause one of the harms enumerated in the statute. 18 U.S.C. § 3511(b)(2). Moreover, if at the time of the petition, the Attorney General or his appropriate designee certifies that disclosure may endanger the national security or interfere with diplomatic relations, such certification "shall be treated as conclusive unless the court finds that the certification was made in bad faith." *Id.*; *see also id.* § 3511(b)(3) (providing the same standard of review for petitions to set aside the non-disclosure requirement filed one year or more after the request for records). This standard of review merely acknowledges the deference due to the Executive in matters of national security, especially in the context of authorized investigations to protect against international terrorism or clandestine

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[12] The Third Circuit's decision in *North Jersey Media Group* dispels plaintiffs' claim that "[t]his exceedingly deferential standard of review is entirely foreign to the First Amendment." Pls.' Br. at 24.

intelligence activities. *See* 18 U.S.C. § 2709(b); *Gardels*, 689 F.2d at 1104; *Center for Nat'l Security Studies*, 331 F.3d at 932; *North Jersey Media Group*, 308 F.3d at 219.[13]

Moreover, plaintiffs and amicus are simply incorrect in arguing that § 3511(b) strips the judiciary of its constitutionally mandated review function. *See* Pls.' Br. at 25; City Bar Br. at 2, 14. Rather, as the D.C. Circuit recently made clear in another national security, terrorism related case:

> In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review, we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the court to second-guess executive judgments made in furtherance of that branch's proper role.

Center for Nat'l Security Studies, 331 F.3d at 932; *accord ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 35 (D.D.C. 2004) ("although deference is not the equivalent to acquiescence, it is the responsibility of the executive, not the courts, to 'weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the agency's intelligence gathering process.'") (quoting *Sims*, 471 U.S. at 180). That said, in instances where there is some showing of bad faith regarding the certification of the need for non-disclosure, nothing in § 3511(b) prevents the district court from requesting additional information from the government, including information that may have to be

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[13] Plaintiffs' assertion that § 3511(b) unconstitutionally places the burden of proof on the NSL recipient, Pls.' Br. at 24, is mistaken. As a threshold matter, the statute places the initial burden on the Director of the FBI, or his appropriate designee, to certify that non-disclosure is necessary to avoid certain specified harms. *See* 18 U.S.C. §§ 2709(c), 3511(b)(2) & (3). Moreover, the statute contemplates that, as a practical matter, the government will have to justify the need for non-disclosure. *See* 18 U.S.C. § 3511(e). In any event, none of the cases plaintiffs cite involves a restriction on disclosure to protect the national security or related harms. *See* Pls.' Br. at 24.

submitted under seal, to ensure that the certification is supported by specific facts or rationales tied to the particular situation at issue. *See generally Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 626 (S.D.N.Y. 1996) ("The Court requested that the Government submit additional affidavits demonstrating that the CIA's justifications for non-disclosure satisfied FOIA's statutory exceptions. Because the Court recognized that such affidavits could be sensitive and contain confidential information, the Government was allowed to submit the affidavits in camera."), *aff'd*, 128 F.3d 788 (2d Cir. 1997); *ACLU v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 34 (D.D.C. 2003) ("In order to resolve these conundrums, the Court requested that DOJ provide these disputed . . . documents for in camera review. Now that defendant has done so, it is clear that its withholdings are proper."); *see also Doe*, 334 F. Supp. 2d at 524 n.256 ("Of course, a court should not embrace these principles to the point of abdicating its constitutional duties."). In fact, § 3511 expressly contemplates the need for such submissions. *See* 18 U.S.C. § 3511(e).

5. The Non-Disclosure Provision Is Not Fatally Overbroad

Plaintiffs speculate that § 2709(c) is "likely to be overbroad both in scope and duration." Pls.' Br. at 26–28.[14] Plaintiffs' overbreadth argument regarding the scope of § 2709(c) appears to rest on the distinction between requiring non-disclosure to the "subject of the NSL" and requiring non-disclosure to everyone. The requirement of the new § 2709(c), that the FBI must certify the

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[14] The government reads plaintiffs' use of the word "overbroad" as contending that the statute is not "narrowly tailored to a compelling government interest," Pls.' Br. at 26, as part of their facial challenge, rather than asserting a claim that the law is "substantially overbroad," i.e., "the statute regulates not only [plaintiffs'] unprotected speech but also a substantial amount of protected speech." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *accord New York v. Ferber*, 458 U.S. 747, 771 & n.26 (1982).

need for secrecy case by case, ensures that in every case where the non-disclosure provision is in effect there is a need for information to remain confidential, and plaintiffs do not attempt to argue otherwise. Instead, plaintiffs surmise that sometimes the FBI will need less secrecy than the statute allows: they claim, without citing any evidence or authority, that only "[i]n very rare cases" will the FBI need to prohibit the NSL recipient from disclosing the existence of the NSL altogether. Thus, plaintiffs call for even further case-by-case review than § 2709(c) already requires.

In no other context, however, is such review mandated by the First Amendment. For instance, in *Butterworth*, the Supreme Court listed a variety of interests that support the "tradition of secrecy surrounding grand jury proceedings" upon which "the proper functioning of our grand jury system depends." 494 U.S. at 629–30. But no case requires a prosecutor to make a case-by-case determination of whether "witnesses would be hesitant to come forward"; "witnesses . . . would be less likely to testify fully and frankly"; "those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment"; or "persons who are accused but exonerated . . . will not be held up to public ridicule." *Id.* at 630. Similarly, in *Kamasinski*, nowhere did the court suggest that the state needed to tailor its confidentiality requirements case by case. 44 F.3d at 110–12. As with those secrecy requirements, the non-disclosure provisions of wiretap, pen register, and similar laws do not require the government to make a case-by-case determination of the exact scope of the required confidentiality. *See* 18 U.S.C. §§ 2511, 3123(d); 50 U.S.C. §§ 1842(d), 1861(d); 12 U.S.C. § 3420(b); 31 U.S.C. § 5326. The non-disclosure required by the face of § 2709(c) is as narrow as can reasonably be expected, and prohibits only

minimal disclosure; any further tailoring would be both unreasonably burdensome and produce no appreciable First Amendment benefits.

Moreover, plaintiffs' position ignores the evidence submitted previously to this Court. As demonstrated in the government's 2004 motion and accompanying exhibits, the need for secrecy in a foreign counterintelligence or counterterrorism investigation goes beyond merely prohibiting the NSL recipient from telling the subject of the NSL about the investigation: the recipient's disclosure to any person could easily lead to the target's being alerted and thus fleeing, avoiding investigation, disrupting the investigation, destroying evidence, or manufacturing false evidence. Szady Decl. ¶¶ 9, 19. Even if the target himself does not learn of the investigation, a terrorist or foreign intelligence organization may, and then warn other operatives. *Id.* ¶¶ 10, 20. If the person whose information is requested is not connected to terrorism, non-disclosure, both to that person and to everyone else, protects the person from public embarrassment or retaliation. *Id.* ¶ 23. Non-disclosure protects against the possibility that terrorist or foreign intelligence organizations will be able to discern government investigative methods by piecing together bits of disparate information, *id.* ¶¶ 11-12, 24–25, 27; preserves the ability of the FBI to develop sources of information, *id.* ¶ 28; and guards against adverse impacts on diplomatic relations, *id.* ¶ 26. These interests in confidentiality are at least as great as those in the grand jury context, and require no more case-by-case tailoring.

As for the duration of the non-disclosure order, plaintiffs argue that the requirement is "likely to be overbroad" because the judicial review statute provides that an NSL recipient who unsuccessfully challenges non-disclosure is barred from doing so again for one year. 18 U.S.C. § 3511(b)(3). As a threshold matter, this argument should be rejected because plaintiffs lack

standing to challenge § 3511(b)(3). It is indisputable that plaintiffs have not been subject to this section because they have not previously brought an unsuccessful challenge to a non-disclosure order. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (no standing where plaintiff has not suffered any actual or threatened injury from the provision at issue).

Moreover, plaintiffs' challenge is not rescued by the First Amendment overbreadth doctrine, which permits a plaintiff, in certain limited situations, to challenge a statute's constitutionality as applied to other parties not before the court even if it is constitutional as applied to the plaintiff. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). This doctrine "only assists plaintiffs who have suffered some injury from application of the contested provision to begin with." *Gilles v. Torgensen*, 71 F.3d 497, 501 (4th Cir. 1995); *accord Secretary of State v. Joseph H. Munson & Co.*, 467 U.S. 947, 958 (1984); *Bordell v. General Electric Co.*, 922 F.2d 1057, 1061 (First Amendment overbreadth doctrine "does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction"). Because plaintiffs have not been injured by the one-year bar contained in § 3511(b)(3), they cannot establish standing under First Amendment overbreadth principles. *See Bordell*, 922 F.2d at 1061 (dismissing constitutional challenge on standing grounds where plaintiff was not injured by the provision at issue); *Gilles*, 71 F.3d at 501 (same).

In any event, this argument should be rejected for the same reasons plaintiffs' argument concerning the scope of non-disclosure fails. In *Butterworth*, the Supreme Court held that the grand jury secrecy obligation imposed on a witness must terminate when the grand jury's term ends, 494 U.S. at 626—a period of up to eighteen months for the Florida jury at issue in that case, *In re Standard Jury Instructions in Criminal Cases (No. 2004-1)*, 911 So. 2d 766, 777 (Fla.

2005), or up to twenty-four months for a federal grand jury, Fed. R. Crim. P. 6(g). In addition, as the Tenth Circuit stated in *Hoffmann-Pugh*, even a permanent non-disclosure requirement could be valid, if limited to information that the witness gained through participation in the grand jury process. 338 F.3d at 1140 (citing 3 Wayne LaFave et al., Criminal Procedure § 8.5(d), at 78 (2d ed. 1999)). Thus, a grand jury witness can be forbidden from disclosing information for much longer than the year that may, at the outside, be required by § 3511; and no case requires case-by-case determinations for the grand jury non-disclosure requirement. Accordingly, the one-year bar to refiling appropriately balances the rights of speech recognized in *Butterworth* with the prevention of repetitive litigation and its consequent burden on the courts and the government. *See* Szady Decl. ¶¶ 29-33 (counterintelligence and counterterrorism investigations are forward looking and long term; the need for non-disclosure continues even after the investigation of the target may be complete).

The NSL statute accommodates the rights of free expression by requiring the need for secrecy to be assessed (by the FBI upon issuing the NSL), and reassessed (by both the agency and the court whenever the NSL's non-disclosure requirement is challenged). In short, it does not allow an "endless" non-disclosure requirement as plaintiffs argue, and strikes a reasonable balance between the need for secrecy and the First Amendment. *See Broadrick*, 413 U.S. at 615 (to prevail in a facial challenge, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

III. Plaintiffs' Constitutional Challenge to § 3511(d)'s Sealing and Classified Information Provisions Is Without Merit

A. Section 3511(d)'s Sealing Provision Is Consistent with the First Amendment

Plaintiffs' assertion that § 3511(d) violates the First Amendment by requiring courts to close any hearing and seal any court filings to the extent necessary to prevent the unauthorized disclosure of an NSL, Pls.' Br. at 31–34, is wholly without merit. Indeed, plaintiffs' arguments defy logic. Section 3511(d) merely requires the court to seal any document and close any hearing to the extent necessary to prevent a violation of the non-disclosure requirement. That makes perfect sense given that, absent the sealing or closure of proceedings, disclosures would be made in direct violation of § 2709(c). Thus, § 3511(d) simply ensures that the non-disclosure requirement is not violated in connection with a challenge to an NSL.[15]

In any event, plaintiffs misstate the First Amendment interests at issue. While plaintiffs are correct that courts have recognized a First Amendment right of access to civil proceedings, including to documents filed in connection with such proceedings, Pls.' Br. at 31, that right does not extend to "disclosure of information compiled during the Government's investigation of terrorist acts," like the investigatory documents at issue here. *Center for Nat'l Security Studies*, 331 F.3d at 933 (noting the crucial distinction between investigatory information and access to information relating to a governmental adjudicative process); *accord United States v. Wolfson*, 55 F.3d 58, 60 (2d Cir. 1995) (First Amendment right of access does not extend to documents

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[15] The amicus' claim that § 3511 requires that the proceeding be conducted in secret and *ex parte* "at the mere request of the government," Brief of Amici Curiae American Library Association, et al., dated September 29, 2006, at 6, is simply wrong. *See* 18 U.S.C. § 3511(d) (requiring closure or sealing "to the extent necessary to prevent an unauthorized disclosure of a request for records").

submitted *in camera* as part of a discovery dispute that were held not to be discoverable); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1259 (W.D. Wa. 2002) (no First Amendment right of access to pleadings filed under seal in a criminal case).

The Supreme Court has made clear that the public's right of access to judicial proceedings "is not all-encompassing, but rather is determined by examining the history and logic of the public's access to the proceeding in question." *Ressam*, 221 F. Supp. 2d at 1257 (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10 (1986)); *accord Wolfson*, 55 F.3d at 60 (same). Thus, before reaching the issue of whether the closure of proceedings and sealing of documents required by § 3511(d) is constitutional, the Court must first "determine whether the right of access attaches to the particular proceedings or documents at issue." *Ressam*, 221 F. Supp. 2d at 1257. Moreover, "[e]ven when the right of access is established, it is a qualified right that can be overcome 'by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Ressam*, 221 F. Supp. 2d at 1257 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)).

The Supreme Court has set forth two questions that must be considered in determining whether there is a public right of access to a particular stage of a proceeding or to a given class of documents: "first, whether there has been a 'tradition of accessibility' to that stage or those documents, and second, whether that traditional public access 'plays a particularly significant role in the actual functioning of the process.'" *Wolfson*, 55 F.3d at 60 (quoting *Press-Enterprise*,

478 U.S. at 10, 11).[16] Neither of these factors is present with respect to the documents and proceedings at issue under § 3511(d).

As an initial matter, there is no "tradition of access" to documents that are submitted under seal or proceedings that are closed to prevent the disclosure of information that by statute may not be disclosed to the public. *See* 18 U.S.C. § 3511(d); *Wolfson*, 55 F.3d at 60–61 (no traditional right of access to documents submitted to the court *in camera* as part of a discovery dispute); *Ressam*, 221 F. Supp. 2d at 1258 (same regarding prosecution's arguments submitted *ex parte, in camera* in support of non-disclosure in Classified Information Procedures Act proceeding). Indeed, "there are no federal court precedents requiring, under the First Amendment, disclosure of information compiled during an Executive Branch investigation, such as the information sought in this case." *Center for Nat'l Security Studies*, 331 F.3d at 935.

Nor would there be any "significant positive role" for the granting of public access to documents that a court has found need not be disclosed. Indeed, the purpose of submitting documents under seal and closing proceedings would be entirely subverted if such a public right of access were found to exist. *Id.* at 935 ("We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose

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[16] The *Press-Enterprise* test has been applied in the context of criminal, not civil, proceedings to determine whether a public right of access exists. It is unclear at best whether this test would apply to a civil proceeding such as this one. *See Center for Nat'l Security Studies*, 331 F.3d at 935 ("neither this Court nor the Supreme Court has ever *indicated* that it would apply the [experience and logic] test to anything other than criminal judicial proceedings") (emphasis in original). Nonetheless, because plaintiffs cannot satisfy this more lenient test for showing a public right of access, the Court need not determine whether a more strict test should apply. *See id.*

information compiled during the exercise of a quintessential executive power—the investigation and prevention of terrorism."); *Wolfson*, 55 F.3d at 60–61; *Ressam*, 221 F. Supp. 2d at 1258.

Finally, even if the Court were to find that there is a public right of access to documents filed under seal and proceedings closed pursuant to § 3511(d), it is clear that this qualified right is easily overcome here based on the government's compelling interest in maintaining the confidentiality of its terrorism and foreign counterintelligence investigations. *See, e.g.*, *Doe*, 334 F. Supp. 2d at 513 (acknowledging that the government's "interest in protecting the integrity and efficacy of international terrorism and counterintelligence investigations is a compelling one"). Moreover, § 3511(d) is narrowly tailored to serve that interest as it only requires sealing of documents and closure of hearings to the extent necessary to prevent an unauthorized disclosure of an NSL in violation of § 2709(c). *See* 18 U.S.C. § 3511(d); *Doe v. Ashcroft*, 317 F. Supp. 2d 488, 491 (S.D.N.Y. 2004) (ruling that limited sealing was necessary in this case to further "(1) the underlying statute's non-disclosure provision and (2) the national security concerns related to the possibility of disclosing sensitive intelligence activities conducted by law enforcement agents").[17] Indeed, the public filings in this case demonstrate the limited nature of

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[17] Plaintiffs' half-hearted suggestion that § 3511(d) should be struck down because it supposedly does not define the "unauthorized disclosure" it seeks to prohibit (and therefore "impermissibly allows the executive branch to dictate whether proceedings must be closed or documents sealed"), Pls.' Br. at 34, should be rejected. The language of the statute makes clear that proceedings must be closed and documents sealed to prevent a violation of the non-disclosure provision. *See* 18 U.S.C. § 3511(d); Pls.' Br. at 35 (acknowledging such a construction). Moreover, even if the language of the statue were unclear, the Court should adopt such a construction to avoid any potential constitutional infirmity. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

the information that must remain under seal pursuant to § 3511(d). *Doe*, 317 F. Supp. 2d at 491 (noting that "the public docket contains a record of relatively few redactions").

B. Section 3511(e)'s Provision for Submission of Classified Information Does Not Violate Due Process

Plaintiffs' constitutional attack on § 3511(e)—which simply permits the government to submit classified information *ex parte* and *in camera*—likewise is without merit. Plaintiffs' argument is mistaken for two fundamental reasons. First, plaintiffs fail to recognize that much of the information concerning the investigation underlying an NSL will be classified, and the government is barred from sharing such information with litigants, like plaintiffs, who lack the requisite security clearance. *See* Exec. Order No. 12958, § 4.2 ("General Restrictions on Access"), 60 Fed. Reg. 19825, 19836 (Apr. 17, 1995); *see also* 18 U.S.C. § 793(d) (imposing criminal penalties on person who, having lawful possession of information relating to national defense, transmits information to person not entitled to receive it); 18 U.S.C. § 798(a) (imposing criminal penalties on person who transmits certain classified information to unauthorized person); *see generally Egan*, 484 U.S. at 527 (stating that Executive Branch has control over access to classified information under constitutional scheme and has "a compelling interest in withholding national security information from unauthorized persons in the course of executive business"). Accordingly, the government is obligated to file such classified material *ex parte*, under seal.

In addition, the law is abundantly clear that *ex parte* submissions of classified or sensitive information in civil cases implicating national security do not violate a plaintiff's due process rights. Indeed, courts have consistently recognized (and exercised) their "inherent authority to

review classified material *ex parte, in camera* as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1299 (2005); *see also, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001).

The reasons for this rule are manifest: "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). Likewise, it is beyond peradventure that "under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has [a] 'compelling interest' in withholding national security information from unauthorized persons." *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (quoting *Egan*, 484 U.S. at 527); *accord Holy Land Found.*, 333 F.3d at 164 (noting "the primacy of the Executive in controlling and exercising responsibility over access to classified information"). As the Supreme Court has recognized, "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam).

"[T]hat strong interest of the government clearly affects the nature . . . of the due process which must be afforded petitioners." *National Council of Resistance of Iran*, 251 F.3d at 207. As the D.C. Circuit explained, disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *Id.* at 208–09. Consequently, in cases in which the government,

informed by classified information, has taken action that adversely affects the property or liberty interests of an individual or entity, "due process require[s] the disclosure of *only* the unclassified portions of the administrative record," *People's Mojahedin Org. of Iran*, 327 F.3d at 1242 (emphasis in original), and the complaint that "due process prevents [governmental action] based upon classified information to which [a party] has not had access is of no avail," *Holy Land Found.*, 333 F.3d at 164.

Thus, contrary to plaintiffs' suggestion, *see* Pls.' Br. at 39–41, a court's consideration of classified or protected information *ex parte* and *in camera* to assess the merits of a challenge to actions taken by the federal government does not violate a plaintiff's constitutional rights.[18] *E.g.*, *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (court could consider affidavits *ex parte* and *in camera* in examining government assertion of right to non-disclosure); *Holy Land Found.*, 333 F.3d at 165 (noting that court of appeals had already rejected the "claim that the use of classified information disclosed only to the court *ex parte* and *in camera* in the designation of a foreign terrorist organization . . . was violative of due process"); *People's Mojahedin Org. of Iran*, 327 F.3d at 1242 (same); *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982) ("it has constantly been held that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an *in camera, ex parte* basis . . . [;] [i]n a field as delicate and sensitive as foreign intelligence gathering, as opposed to domestic, criminal surveillance, there is every

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[18] Plaintiffs' heavy reliance on criminal and immigration cases to support their due process claim, *see* Pls.' Br. at 38, 40–41, is misplaced. The due process concerns in criminal and immigration proceedings, where an individual's liberty is at stake, plainly are different than those presented in a civil proceeding challenging the justification for the issuance of an NSL or the need for non-disclosure. *See, e.g.*, *United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) (emphasizing that heightened due process concerns apply "where liberty is at stake").

reason why the court should proceed *in camera* and without disclosure to determine the legality of a surveillance").[19]

Courts also have uniformly rejected due process challenges to *ex parte* and *in camera* judicial review of applications for approval of surveillance and/or searches authorized by the Foreign Intelligence Surveillance Act ("FISA") to resolve the merits of constitutional challenges by defendants in criminal proceedings. *See, e.g.*, *United States v. Ott*, 827 F.2d 473, 476–77 (9th Cir. 1987) (district court's *ex parte* consideration, pursuant to 50 U.S.C. § 1806(f), of sealed FBI affidavit to determine whether electronic surveillance was legally obtained did not violate due process); *In re Grand Jury Proceedings*, 856 F.2d 685, 686 n.3 (4th Cir. 1988) ("So far, every FISA wiretap review has been *in camera* and *ex parte*."); *Belfield*, 692 F.2d at 148 (same). Even outside the national security context, the law is clear that courts may consider *ex parte* materials submitted by the government to demonstrate the legality of its subpoenas or requests for information. *See In re John Doe, Inc.*, 13 F.3d 633, 635–36 (2d Cir. 1994) (where government moved to compel compliance with grand jury subpoena, district court properly considered government's submission of *ex parte* affidavit from FBI agent justifying basis for subpoena); *In re John Doe Corp.*, 675 F.2d 482, 485–86, 489–91 (2d Cir. 1982) (district court properly considered government's *ex parte* submission, detailing ongoing grand jury investigation, in support of challenged grand jury subpoena); *see also In re Grand Jury Subpoena*, 223 F.3d 213,

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[19] *See also Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) ("[C]onsideration of *in camera* submissions to determine the merits of litigation is allowable only when the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* resolution of the dispute."); *Patterson v. FBI*, 893 F.2d 595, 600 n.9, 604–05 (3d Cir. 1990) (dismissing First and Fourth Amendment claims as moot based on *in camera* declaration and noting that "the D.C. Circuit, as well as other circuits, have allowed the use of *in camera* affidavits in national security cases").

216–17, 219 (3d Cir. 2000) (where target of grand jury investigation challenged subpoena for testimony, district court properly relied on government's *ex parte* affidavit detailing grand jury investigation in order to demonstrate legality of subpoena).[20]

For similar reasons, the Seventh Circuit expressly rejected a constitutional challenge—like the one raised here—to a statute that expressly authorized the government to submit classified information *ex parte*. *Global Relief Found. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting constitutional challenge to statute authorizing district court's *ex parte* consideration of classified evidence in connection with judicial challenges to Executive decision to freeze assets of entity that assists or sponsors terrorism). In *O'Neill*, plaintiff, a charitable corporation, brought suit, *inter alia,* challenging a portion of the USA Patriot Act, 50 U.S.C. § 1702(c), which authorized the *ex parte* use of classified evidence in proceedings to freeze the assets of terrorist organizations. *Id.* at 754. After noting that *ex parte* consideration is "common in criminal cases where, say, the identity of informants otherwise might be revealed, and in litigation under the Freedom of Information Act, the Court rejected plaintiff's argument, reasoning: "The Constitution would indeed be a suicide pact . . . if the only way to curtail

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[20] Plaintiffs' reliance on *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), to establish the supposedly "firmly held main rule" that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions, Pls.' Br. at 36, is misplaced. The D.C. Circuit has made clear that *Abourezk* (suit challenging denial of visas) has no relevance in the context of counterterrorism enforcement actions. *See People's Mojahedin Org. Of Iran*, 327 F.3d at 1242. Likewise, plaintiffs' citation to language from other cases construing due process rights outside the context of national security does not assist their arguments. *See, e.g., Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) (Title VII action); *Ass'n for the Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) (prison inmate civil rights action); *see* Pls.' Br. at 36.

enemies' access to assets were to reveal information that might cost lives. *Id.* As in *O'Neill*, § 3511(e) therefore easily survives constitutional scrutiny.

Plaintiffs' complaint that § 3511(e) "does not require the government to justify the introduction of secret evidence, nor even explain its rationale for secrecy," Pls.' Br. at 41, is unpersuasive. While § 3511(e) authorizes the government to make submissions *ex parte* and *in camera* in connection with challenges to an NSL, nothing in that section requires the Court to accord any particular weight to the government's evidence. Nor does § 3511(e) strip the district court of its inherent authority to determine that a matter submitted need not remain under seal. *See* 18 U.S.C. § 3511(e).

Likewise, plaintiffs' repeated complaint that § 3511(e) does not provide a mechanism for the sharing of classified information submitted *ex parte* with private parties or their counsel, Pls.' Br. at 40, 42, is unavailing. Numerous courts have rejected claims that due process or other concerns require that classified information be provided to private parties or their counsel during litigation against the government. *Weberman*, 668 F.2d at 678 ("The risk presented by participation of counsel . . . outweighs the utility of counsel, or [the] adversary process"); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (district court abused its discretion by ordering release of classified information to plaintiffs' counsel); *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983) (where the claimed exemption is national defense or foreign policy secrecy, it is "not necessary that additional reasons be recited for excluding Pollard's attorney from the *in camera* proceedings"); *Jabara v. Webster*, 691 F.2d 272, 274 (6th Cir. 1982) (rejecting defendant's claim that "the court should not consider the materials in the classified appendix at all unless the materials are made available to him or at least to his counsel subject to protective

order"); *Hayden v. NSA*, 608 F.2d 1381, 1385–86 (D.C. Cir. 1979) ("To the best of our knowledge, this privilege [of reviewing classified information *in camera*] has never been afforded a private attorney in a national security case . . . ."). As the D.C. Circuit recognized: "[O]ur nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *see also People's Mojahedin Org. of Iran*, 327 F.3d at 1242 (holding that "due process require[s] the disclosure of *only* the unclassified portions of the administrative record") (emphasis in original).

Accordingly, because § 3511(e) merely codifies the government's ability to submit classified or sensitive information *ex parte* and *in camera*, it fully comports with plaintiffs' due process rights.

IV. Were the Court to Strike Down § 2709(c) as Unconstitutional, the Court Should Sever That Provision from the Remainder of the Statute

For the reasons set forth above, the non-disclosure requirement of § 2709(c) is not unconstitutional. But even if it were, that conclusion would not support a decision to enjoin enforcement of § 2709 in its entirety. Instead, any constitutional infirmity should be remedied by severing the unconstitutional aspects (if any) of the non-disclosure requirement from the remainder of the statute.

It is a basic principle of constitutional adjudication that "[a] court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines v. Brock*, 480 U.S. 678, 683 (1987); *accord Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *Doe*, 334 F. Supp. 2d at 525.

Accordingly, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley*, 424 U.S. at 108. If it is "unclear which alternative better carries out the intent of Congress," the proper course is "to invalidate the smallest possible portion of the statute." *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 773 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

In its prior opinion in this matter, the Court concluded that "Congress could not have intended §§ 2709(a) and (b), the provisions authorizing the FBI to issue NSLs seeking information from wire and electronic communications service providers, to operate absent the non-disclosure provisions contained in § 2709(c)." *Doe*, 334 F. Supp. 2d at 525. The Court reasoned that because Congress intended § 2709 to operate "as a *secret* means of gathering information from communications service providers," Congress would have regarded an NSL statute without a non-disclosure requirement as worse than no NSL statute at all. *Id.* (emphasis in original). In that regard, the Court observed that the NSL regime "cannot function in accordance with Congress' intent if the fact of an NSL's issuance could be immediately disclosed to a communications subscriber who is the target of a § 2709 NSL." *Id.*

However, while the Court is correct that Congress regarded secrecy as a critical element of the statutory scheme, the Court erred in inferring that Congress therefore would prefer that the FBI have no NSL authority at all, were the non-disclosure requirement excised from the statute. That is because, while, in the absence of a statutory non-disclosure requirement, some communication service providers might wish to reveal the existence of an NSL to their subscribers or the public, nonetheless many other providers likely would be entirely willing to

maintain the confidentiality of an NSL based simply on the FBI's request. By invalidating § 2709 in its entirety, the Court would force the FBI to give up the investigatory value of NSLs even in cases where the statutory non-disclosure requirement may be unnecessary to ensure confidentiality.

Stated another way, if § 2709(c) were invalidated, but the remainder of the statute left undisturbed, the FBI could make judgments about the risk of disclosure in particular cases. The FBI could take account of such factors as the identity of the particular communication service provider, the history of cooperation (or lack of cooperation) between the provider and the FBI in the past, the provider's willingness to make commitments regarding confidentiality, the FBI's assessment of the provider's good faith, and the importance of the particular information being sought. If the FBI were to reach a judgment that the risk of disclosure in a particular case is small and that the need for the information justifies taking that risk, then the FBI would be able to issue an NSL as provided by Congress. This Court's remedy, by contrast, would disable the FBI from using an NSL even when the interests underlying the non-disclosure requirement would not be in jeopardy.

There is no reason to believe that Congress would have desired such a result. Instead, it is far more probable that Congress would have preferred the FBI to have the authority contained in § 2709 and to exercise that authority when, in the agency's expert judgment, the risk of disclosure is sufficiently small. This Court's prior severability holding therefore should not be applied to the amended statute.[21]

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[21] The same rationale regarding severance would apply were the Court to find either § 3511(d) or (e) unconstitutional.

Conclusion

For the foregoing reasons, Plaintiffs' motion for partial summary judgment should be denied, and the government's cross-motion to dismiss the complaint or for summary judgment in its favor should be granted.[22]

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[22]In connection with their motion papers, plaintiffs have also filed a petition to set aside the NSL served on [redacted]. However, the FBI is no longer demanding that [redacted] comply with that NSL. *See* Declaration of Jeffrey Oestericher, dated November 7, 2006, ¶ 3. Accordingly, the issues raised in the petition to set aside the demand for records are now moot. *See DeFunis v. Odegard*, 416 U.S. 312, 316 (1974) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); *see also St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (same); *Fox v. Bd. of Trustees of the State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994) (case is moot where "it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury"), *cert. denied*, 515 U.S. 1169 (1995). To the extent that the Court disagrees that the issues raised in plaintiffs' petition are moot, the government respectfully requests an opportunity to brief those issues.