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 MARION E. BOWMAN, in his official capacity as Senior Counsel to the Federal Bureau of Investigation, Defendants.	**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT** 04 Civ. 2614 (VM) **FILED UNDER SEAL**

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

JAMEEL JAFFER (JJ-4653)
ANN BEESON (AB-2082)
MELISSA GOODMAN (MG-7844)
National Legal Department
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

Dec. 15, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In November 2005, the *Washington Post* reported that the Federal Bureau of Investigation (FBI) now issues more than 30,000 national security letters (NSLs) every year.[1] The American public knows virtually nothing about who those letters were served on, what information the letters sought, or why. This is because the statute at issue here, even after recent amendments by Congress, gives the FBI the unchecked authority to issue gag orders compelling NSL recipients to silence. Any gag order issued under the statute is presumptively permanent, and it is subject to judicial review, if at all, only when the NSL recipient affirmatively chooses to challenge it. Moreover, the NSL statute ensures that any such challenge is likely to be futile. Except in the most extraordinary circumstances, the reviewing court is required to rubber stamp the FBI's judgment that secrecy is necessary.

The amended NSL statute is inconsistent with the First Amendment and the principle of separation of powers. Congress does not have the authority to tell courts how to adjudicate First Amendment claims, and it certainly does not have the authority to require courts to apply a standard of review that contemplates a near-servile deference to the executive. Moreover, the First Amendment does not permit executive officers to be invested with the unfettered discretion to decide which NSL recipients should be permitted to speak and which should be compelled to

[1] Barton Gellman, *The FBI's Secret Scrutiny*, Wash. Post, Nov. 6, 2005. According to the Justice Department, in calendar year 2005 the FBI issued 9,254 NSLs relating to 3,501 different U.S. persons. *See* Letter from Assistant Attorney General William E. Moschella to Hon. J. Dennis Hastert, April 28, 2006, available at http://www.fas.org/irp/agency/doj/fisa/2005rept.html. However, the Justice Department's statistics do not include NSLs that sought only "subscriber information," and they do not include NSLs that sought information about non-U.S. persons. *Id.*

keep silent. The First Amendment requires that such discretion be cabined by specific procedural safeguards, none of which the challenged statute provides.[2]

For these reasons and the reasons discussed below, this Court should invalidate the NSL statute's gag provisions on their face.

ARGUMENT

I. THE NSL STATUTE'S GAG PROVISIONS VIOLATE THE FIRST AMENDMENT AND THE PRINCIPLE OF SEPARATION OF POWERS.

A. The NSL statute's gag provisions violate the First Amendment and the principle of separation of powers because they foreclose courts from applying a constitutionally mandated standard of review.

The government concedes, at least for the purpose of the instant motion, that the NSL statute's gag provisions are subject to strict scrutiny. Gov't Br. 11. Having made this concession, however, the government proceeds to rebrief the issue it has conceded, arguing, for example, that the gag provisions should be subject to "less First Amendment scrutiny" because of the nature of the speech that the provisions suppress. Gov't Br. 11-12; *id. at* Gov't Br. 27 (contending that "a less stringent application of strict scrutiny is warranted . . . ."). There is no merit to this argument. As this Court has already found, gag orders issued under the NSL statute constitute prior restraints and content-based restrictions on speech. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 511-12 (S.D.N.Y. 2004) ("*Doe*"); *see also Doe v. Gonzales,* 386 F. Supp. 2d 66, 75 (D. Conn. 2005) ("*Library Connection*").[3] Moreover, as plaintiffs have explained, the speech suppressed by the gag provisions is at the core of the First Amendment's concern. Pl. Br. 13-14.

---

[2] In addition, the NSL statute's secrecy provisions violate the First and Fifth Amendments to the extent that they divest the judiciary of the authority to determine, after consideration of the parties' and the public's constitutional interests, whether evidence should be sealed or withheld from the NSL recipient and whether hearings should be closed.

[3] This Court ruled on the pre-amendment gag provision, but the new gag provisions have the same essential character. Pl. Br. 10-15.

This is apparent from the language of the provisions – language that singles out speech about government activity – and it is underscored by the manner in which the provisions have operated, and continue to operate, in the instant case. Pl. Br. 13-15, 20.

The amended gag provisions are unconstitutional because they do not permit reviewing courts to apply the strict scrutiny that the First Amendment mandates. Pl. Br. 23-25. Instead, they require courts to accord the FBI's determinations near-total deference. In general, reviewing courts must affirm gag orders except where there is "no reason to believe" that one of four specified harms will result. 18 U.S.C. § 3511(b)(2)-(3). Where the FBI certifies that disclosure could jeopardize national security or diplomatic relations, reviewing courts are required to treat the certification as "conclusive" except where there is evidence of bad faith. *Id.* Those standards do not resemble the strict scrutiny that the First Amendment requires, and for this reason the statute is unconstitutional on its face.[4]

The government proposes that the standard of review set forth in the statute "merely acknowledges the deference due to the Executive in matters of national security." Gov't Br. 30; *id* at Gov't Br. 27. But while courts do accord some degree of deference to the special expertise of the executive branch in matters of national security, *see, e.g., Doe*, 334 F. Supp. 2d at 524; *Library Connection*, 386 F. Supp. 2d at 76, what the amended NSL statute contemplates is not judicial deference but a judicial rubber stamp. This is true even in cases in which the FBI does *not* certify that disclosure could harm national security or diplomatic relations, because the "no reason to believe" standard leaves the reviewing court with only the narrowest authority. Where

[4] As plaintiffs explained in their opening brief, the NSL statute also violates the principle of separation of powers, for similar reasons. Pl. Br. 28-30 (citing, *inter alia, Dickerson v. United States*, 530 U.S. 428 (2000); *Boerne v. Flores*, 521 U.S. 507 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995). Plaintiffs do not revisit this argument here because defendants have entirely ignored it in their brief.

the FBI *does* offer such a certification, as it has done in this case, *see* Declaration of Jeffrey Oestericher ("Oestericher Decl."), Ex. A (Certification of FBI Director Robert S. Mueller III), the reviewing court's role is purely cosmetic.

The First Amendment does not contemplate that the judiciary may be enlisted as a fig leaf for the executive branch, even in cases involving national security. *See, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (stating that the Constitution "envisions a role for all three branches when individual liberties are at stake"). Courts have routinely applied strict scrutiny – *actual* strict scrutiny, not the stunted version of it the government envisions here – in national security cases. *See, e.g., New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (per curiam) (finding that the government failed to meet its "heavy burden" under the First Amendment to justify restraining publication of the Pentagon Papers); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002) (recognizing that the Supreme Court "applied no deferential review to the Government's actions when faced with a national security threat" in the Pentagon Papers litigation). In fact, courts have emphatically rejected the contention that traditional First Amendment standards are relaxed in the national security context. In *In re Washington Post Co.*, for example, the government argued that the First Amendment right of access to judicial documents should not be protected by strict scrutiny "where national security interests are at stake." 807 F.2d 383, 391 (4th Cir. 1987). In rejecting this argument, the Court wrote:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to 'national security'may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for

> secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

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

In fact, the government's brief suggests a surprising lack of familiarity with the relationship between the judiciary and executive where constitutional rights are at stake. As the D.C. Circuit has written, "while the [executive's] tasks include the protection of national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the protection of individual rights." *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983). Virtually all of the cases that the government cites in support of its misguided argument come not from the First Amendment context but from the context of the Freedom of Information Act ("FOIA"). Gov't Br. 28-32. The contexts are not "analogous." Gov't Br. 29. As Judge Hall observed in *Library Connection*, NSL recipients who challenge gag orders "seek to vindicate a constitutionally guaranteed right; they do not seek to vindicate a right created, and limited, by statute." 386 F. Supp. 2d at 78. "The difference between seeking to obtain information and seeking to disclose information already obtained raises the plaintiffs' constitutional interests in this case above the constitutional interests held by a FOIA claimant." *McGehee*, 718 F.2d at 1147.[5]

The government's "mosaic" argument, *see* Gov't Br. 29, is unavailing for similar reasons. The mosaic argument has been accepted in the FOIA context, but in that context the government invokes the "mosaic" argument as a shield – as a means of withholding information. Here, by

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

contrast, it invokes the argument as a sword – as a means of compelling private citizens not to speak. The mosaic argument has never been accepted as a rationale for suppressing speech that would otherwise be permitted by the First Amendment. *Detroit Free Press*, 303 F.3d at 709-10; *Library Connection*, 386 F. Supp. 2d at 77-78 (discussing inapplicability of mosaic argument in First Amendment context). Even if the mosaic argument *were* relevant here, it would justify (at most) a degree of deference in the context of "a *particular situation* involving *particular persons* at a *particular time*." *Doe*, 334 F. Supp. 2d at 524. It would not justify a total abandonment of the strict scrutiny framework, which is what the government is attempting to defend.

It is worth noting, in any case, that the review contemplated by the NSL statute is actually *less* searching than the review provided for under FOIA. In the FOIA context, courts "accord substantial weight" to the executive's national security judgments, but judicial review is *de novo* and the burden of establishing an exemption – that is, the burden of showing that information should remain secret – is the government's. *Ray v. Turner*, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978). Even in the FOIA context, courts do not rubber stamp the executive's national security decisions, as they are required to do under the NSL statute. To the contrary, courts conduct their review "without relinquishing their independent responsibility" to ensure that the executive's decision is lawful. *Goldberg v. Dep't of State*, 818 F.2d 71, 76-77 (D.C. Cir. 1987); *Associated Press v. Dep't of Defense*, --- F.Supp.2d ----, 2006 WL 3404806 at *2 (S.D.N.Y. 2006); *see also Ray*, 587 F.2d at 1194 (noting that the FOIA drafters "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security").

The effect of the NSL statute's extraordinarily deferential standard of review is that courts are foreclosed from applying the searching, individualized inquiry that the First

Amendment demands.[6] In the end, the government's defense of the NSL statute's extraordinarily deferential standard of review rests almost entirely on the fact that the information suppressed by the statute is information learned through participation in a confidential government proceeding. Gov't Br. 11-12. But the fact that information was learned from a confidential government proceeding does not make strict scrutiny inapplicable. The Second Circuit applied strict scrutiny in *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 111 (2d. Cir. 1994), though that case involved information learned from participation in a confidential judicial review investigation. The Eleventh Circuit applied strict scrutiny in *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), though that case involved information learned from participation in a confidential law enforcement investigation. And this Court properly applied strict scrutiny to the pre-amendment gag provision, though that provision, like the amended provisions challenged here, suppressed speech relating to a confidential FBI investigation. *Doe*, 334 F. Supp. 2d at 511-12 (applying strict scrutiny to pre-amendment gag provision); *Library Connection*, 386 F. Supp. 2d at 73-74 (same).

Nor does the fact that information was learned from a confidential government proceeding mean that strict scrutiny will necessarily be satisfied in any individual case –

---

[6] The government contends that the statute requires case-by-case consideration by the FBI, Gov't Br. 32-33, but this is not the same thing as case-by-case consideration by a court, which is what the Constitution requires, *see, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (rejecting publication ban in part because it imposed "categorical prohibitions" upon media access); *Capital Cities Media Inc. v. Toole*, 463 U.S. 1303, 1307 (1983) ("In an extraordinary case such a restriction might be justified, but the justifications must be adduced on a case-by-case basis . . . and less restrictive alternative must be adopted if feasible."). The government's contention that "no case" requires the government to justify gag orders on a case-by-case basis is wrong. Gov't Br. 36. As plaintiffs have pointed out repeatedly in this litigation (and the government has never disputed), the courts have held that grand jury witnesses cannot be subjected to gag orders except upon a case-by-case determination of necessity. *See, e.g., United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996); *In re Grand Jury Proceedings*, 814 F. 2d 61, 70 (1st Cir. 1987) ("*Fernandez Diamante*").

particularly where, as here, the challenged statute suppresses speech about government activity. In *Cooper,* for example, the Eleventh Circuit considered a Florida statute that prohibited citizens from disclosing information learned through participation in internal law enforcement investigations. 403 F.3d at 1208. Although the statute suppressed *only* information obtained through participation in confidential government investigations, *id.* at 1216, the Eleventh Circuit, applying strict scrutiny, found the statute unconstitutional, *id.* at 1218-19. The Court noted: "our system of representative democracy depends upon an informed citizenry which can hold government accountable and can seek redress for grievances." *Id.* at 1219. "[B]y proscribing speech critical of government officials, [the Florida statute] purports to regulate speech which lies near the core of the First Amendment." *Id.* (internal quotation marks omitted).

Plaintiffs acknowledge that, even under a strict scrutiny standard, the FBI may be able to justify a temporary gag order in some cases. Even in the context of challenges to individual gag orders, however, strict scrutiny will not be satisfied simply by virtue of the fact that the information at issue was obtained through participation in a confidential government proceeding. In applying strict scrutiny, the courts have looked to a more complex combination of factors, including, for example, (1) the nature of the government proceeding, *see, e.g.*, *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32 (1984) (holding that "unique character of the discovery process" allows courts special latitude to fashion protective orders covering information obtained through discovery); *Butterworth v. Smith*, 494 U.S. 624, 629 (1990) (noting that secrecy surrounding grand jury proceedings evolved from grand jury's role in "safeguard[ing] citizens against an overreaching Crown"); *Cooper,* 403 U.S. at 1217 (distinguishing executive investigations from grand jury investigations); (2) the prospective speaker's *role* in the government proceeding, *see, e.g., First Amendment Coalition v. Judicial Inquiry and Review Bd.*, 784 F.2d 467, 478 (3d Cir.

1986) ("The situation [here] is also unlike *Seattle Times* in that plaintiffs did not seek to avail themselves of the Board's processes"); (3) the nature of the information suppressed, *see, e.g., Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 839 (1978) (noting that publication of information in question had served an "interest[] in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect"); *Kamasinski*, 44 F.3d 106 ("[p]enalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of the First Amendment . . . and . . . such a prohibition would be unconstitutional"); *Library Connection*, 386 F. Supp. 2d at 81 (noting that the pre-amendment NSL statute "create[d] a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public"); and (4) the likelihood that disclosure will result in harm, *see, e.g., Butterworth*, 494 U.S. at 632 (noting that disclosure is unlikely to result in harm where underlying investigation has ended); *Doe v. Gonzales*, 449 F.3d 415, 422 (2d Cir. 2006) ("*Doe II*") (noting that the argument that "an endless investigation leads logically to an endless ban on speech flies in the face of human knowledge and common sense: witnesses disappear, plans change or are completed, cases are closed, investigations terminate") (Cardamone, J., concurring); *id.* at 422-23 (noting the futility of banning the disclosure of information that had already been reported by the media).[7]

[7] Plaintiffs note that many of these considerations weigh against the lawfulness of the gag order that continues to silence Doe. First, Doe did not affirmatively seek the information that [redacted] is now prohibited from disclosing – the information was foisted upon [redacted] by the FBI. Second, the speech prohibited by the gag order relates to government activity and possible government misconduct. Pl Br. 13, 19; SUF § VII (Second [redacted] Decl. ¶ 14). Third, the gag order relates to an NSL that the FBI no longer seeks to enforce, *see* Oestericher Decl. ¶ 3, and to an investigation that is almost [redacted] old, SUF § I (Second [redacted] Decl ¶ 2), that the government has not even made clear is still ongoing.

The government urges this Court to adopt a myopic theory that would make the First Amendment inquiry turn *solely* on the fact that information was obtained through participation in a confidential government proceeding. There is no support for this theory, either in the case law or common sense. Plaintiffs do not suggest that the FBI will *never* be able to demonstrate a compelling interest in preventing an NSL recipient from disclosing information. But the fact that the NSL recipient learned the information through participation in the FBI's investigation does not mean that strict scrutiny is inapplicable, and it does not mean that the strict scrutiny test will be satisfied. The First Amendment requires that reviewing courts be permitted to apply strict scrutiny on a case-by-case basis, taking into account all relevant factors. It is precisely that kind of searching and nuanced case-by-case inquiry that the NSL statute expressly prohibits.

B. The gag provisions violate the First Amendment because they fail to provide constitutionally mandated procedural safeguards.

The government states that the NSL statute provides "adequate procedural safeguards under the First Amendment," arguing that the amended statute "expressly provides a forum in which the NSL recipient can challenge" a gag order issued by the FBI and "permits the court to set aside the non-disclosure requirement if the court finds it unnecessary." Gov't Br. 13-14. That characterization of the statute is misleading, for the reasons discussed above. While the statute allows for challenges to gag orders issued by the FBI, the statute also ensures that such challenges will be futile.[8]

The statute is unconstitutional for additional reasons. As plaintiffs discussed in their opening brief, the gag provisions comprise a paradigmatic licensing scheme. Pl. Br. 15-20; *see*

[8] Indeed, though the government contends that the amended statute has remedied the constitutional deficiencies earlier identified by this Court, the amended statute actually places NSL recipients' on a *weaker* footing. Under the pre-amendment statute, as-applied challenges to gag orders were evaluated under strict scrutiny. *Library Connection*, 386 F. Supp. 2d at 73-74. Under the amended statute, such challenges are subject to only the most deferential review.

also City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 759 (1988) (characterizing licensing scheme as a statute that "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers"). A statute of this kind can be constitutional only if (i) any restraint prior to judicial review is imposed "only for a specified brief period"; (ii) expeditious judicial review of that restraint is available; and (iii) "the censor [bears] the burden of going to court to suppress the speech and [bears] the burden of proof once in court." *MacDonald v. Safir*, 206 F.3d 183, 194 (2d Cir. 2000). The NSL statute satisfies neither the first nor the third of these requirements. The statute does not limit FBI-imposed gag orders to a "specified brief period" – or, indeed, to any particular period at all. Nor does it require the government to initiate judicial proceedings or bear the burden of proof once in court. Instead, gag orders issued under the statute are presumptively permanent, and they are subject to judicial review, if at all, only when NSL recipients affirmatively choose to bring suit. Pl. Br. 19.

The government argues that the NSL statute's gag provisions do not constitute a licensing scheme at all, pointing (once again) to the fact that the information suppressed by the statute is information obtained through participation in a confidential government investigation.[9] The government suggests that this information is entitled to lesser protection under the First Amendment. Gov't Br. 17-18. But the licensing scheme cases that plaintiffs cited in their opening brief were cases involving obscenity, a category of speech that is not protected by the

[9] Plaintiffs reiterate that in an earlier phase of this litigation, the government argued that the pre-amended statute would have been a licensing scheme but for the fact that it did not give the FBI the discretion to decide which NSL recipients should be subject to a gag order. Pl. Br. 11 n. 5; *see also Library Connection*, 386 F. Supp. 2d at 74 ("Defendants correctly point out that a prior restraint typically involves either a court order or a licensing scheme which vests discretion in an agency."). It is difficult to reconcile the government's current position with the position it has taken previously.

First Amendment at all. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 53 (1965) (statute allowing Maryland State Board of Censors to disapprove, among other things "such [films] as are obscene"); *Blount v. Rizzi*, 400 U.S. 410, 412 (1971) (statute allowing Postmaster General to halt use of the mails for commerce in "allegedly obscene materials"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 366-67 (1971) (statute allowing customs agents to seize obscene materials at the border). The courts required procedural safeguards in those cases not because the speech *targeted* by the challenged statutes was protected by the First Amendment – in many cases it was not – but because of the danger that executive branch officials, invested with the unchecked authority to suppress speech, would suppress speech that *was* constitutionally protected. *See, e.g., Freedman*, 380 U.S. at 57-58 (noting that "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression."); *Beal v. Stern*, 184 F.3d 117, 126 n.6 (2d Cir. 1999) ("it is the *risk* of an abuse of discretion that has motivated the Court's decisions in this area").[10]

Procedural safeguards are necessary here for the same reason. The concern is not that the FBI will suppress speech that the First Amendment permits it to suppress; the concern is that the FBI, invested with the authority to suppress speech, will suppress information that NSL recipients have a constitutional right to disclose. *Freedman's* procedural safeguards are necessary because "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression." 380 U.S. at 58.

---

[10] The government relies on *Hoffman-Pugh v. Keenan*, but that case did not involve a licensing scheme at all, because it did not invest executive officers with the discretion to determine which speakers should be silenced. 338 F.3d 1136, 1138 (10th Cir. 2003).

The government's suggestion that the principles underlying the licensing scheme cases are limited to contexts involving sexual speech does not warrant an extended response. Gov't Br. at 19. As an initial matter, the courts have applied the *Freedman* framework in diverse contexts, not just in contexts involving sexual speech. *See, e.g., Riley v. Nat'l Federation of the Blind of North Carolina*, 487 U.S. 781, 802 (1988) (statute regulating solicitation of funds for charitable purposes); *MacDonald*, 206 F.3d 183 (statute regulating issuance of parade permits). More importantly, there is no serious argument that the speech at issue here – core political speech about the exercise of government power – is entitled to anything less than the First Amendment's full protection. *See* Pl. Br. 24-25; *infra*, 26-27; *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self government); *Stromberg v. People of the State of California*, 283 U.S. 359, 369 (1931) ("[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"). Ironically, the government has argued in other cases that sexual speech is entitled to less protection precisely because it is *not* political speech.[11]

---

[11] *See, e.g.,* Steven H. Shriffin and Jesse H. Choper, The First Amendment: Cases-Comments-Questions 103 (3d Ed. 2001) ("The government [in *Roth v. United States*] tendered an illustrative hierarchy of nineteen speech categories with political, religious, economic, and scientific speech at the top; entertainment, music, and humor in the middle; and libel, obscenity, profanity, and commercial pornography at the bottom"); *Roth v. United States,* 354 U.S. 476, 487-488 (1957) (rejecting government's argument that non-obscene sexual speech entitled to lesser First Amendment protection).

The government's argument that "similar non-disclosure statutes do not require heightened procedural protection," Gov't Br. 20, is also incorrect. As this Court has observed, most subpoena statutes do not contemplate non-disclosure orders at all. *Doe*, 334 F. Supp. 2d at 485 ("Unlike the NSL statutes, most administrative subpoena laws either contain no provision requiring secrecy, or allow for only limited secrecy in special cases."). Those subpoena statutes that *do* allow for non-disclosure orders generally require that such orders be issued in the first instance by an Article III judge. *Id.* (citing statutes). Even in the federal grand jury context – a context in which secrecy has a unique historical pedigree, *see Butterworth,* 494 U.S. at 629; *United States v. Williams*, 504 U.S. 36, 47 (1992), nondisclosure orders are not issued except upon a case-by-case showing of necessity to a court. *See, e.g., United States v. Sells Eng'g, Inc.*, 463 U.S. at 425 ; *In re Grand Jury Subpoena*, 103 F.3d at 239; *Fernandez Diamante*, 814 F.2d at 70. The three statutes that the government characterizes as "similar" to the one at issue here are in fact different in at least one key respect: "they apply in contexts in which a court authorizes the investigative method in the first place." *Doe*, 334 F. Supp. 2d at 515. Whether this is sufficient to render these statutes constitutional is questionable, but it is certainly sufficient to distinguish them from the statute at issue here.[12]

Citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), the government argues that procedural protections are less necessary where a regulation is not "directly concerned with speech." Gov't Br. 17. The Supreme Court's decision in *Thomas*, however, was expressly predicated on the fact that the regulation challenged in that case was content-*neutral*. *Id.* at 322

[12] The other two statutes to which the government points pertain only to subpoenas served on financial institutions. Such institutions are heavily regulated and are subject to requirements that would not be lawful in other contexts, as the courts have noted. *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 252 (1947); *Meriden Trust and Safe Deposit Co. v. FDIC*, 62 F.3d 449, 455 (2d Cir. 1995); *Am. Commerce Nat'l Bank v. United States*, 38 Fed. Cl. 271, 275 (Fed. Cl. 1997).

("*Freedman* is inapposite here because the licensing scheme at issue here is not subject-matter censorship but *content-neutral* time, place, and manner regulation of the use of a public forum" (emphasis added)); *id.* (characterizing challenged regulation as "a *content-neutral* permit scheme regulating speech in a public forum" (emphasis added)). Regulations that are content-*based*, however, are subject to all of *Freedman's* requirements, as both the Supreme Court and Second Circuit have recently reaffirmed. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990) (all three *Freedman* factors apply where executive officers "engage[] in direct censorship of particular expressive material"); *MacDonald*, 206 F.3d at 195 (all three *Freedman* factors apply where executive officers "exercise discretion by passing judgment on the content of any protected speech" (internal quotation marks omitted)). This Court has already found that the pre-amendment gag provision was content-based. *Doe*, 334 F. Supp. 2d at 512-13. The amended provisions are content-based for the same reasons.[13]

The government contends that a regulation may be content-based but still not involve a situation "wherein a censor reviews the content of speech before its expression and decides, based on that content, whether to permit it." Gov't Br. 22 n. 8. The distinction is elusive, to say the least. In any case, to say that the NSL statute does not require executive officers to review content is to disregard the way the statute has operated in this very litigation. Because of the gag

[13] The NSL statute's gag provisions would constitute an unconstitutional licensing scheme even if the statute were content-neutral, because even content-neutral licensing schemes must comply with the first two of *Freedman's* three factors. *Beal*, 184 F.3d at 128. As noted above, the NSL statute does not comply with *Freedman's* first factor because it does not limit gag orders issued by the FBI to a specified, brief period. To the contrary, gag orders issued under the NSL statute are presumptively permanent, and the statute's extraordinarily deferential standard of review ensures that many such gag orders will in fact *be* permanent, even if they are subject at some point to judicial review. As this Court has already held, permanent gag orders are unconstitutional. *Doe*, 334 F. Supp. 2d at 520; *see also Doe II*, 449 F.3d at 422 ("a ban on speech and a shroud of secrecy in perpetuity are antithetical to democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens") (Cardamone, J., concurring.).

provision, plaintiffs had to ask the government's permission before disclosing even the existence of this lawsuit. SUF § IV (Third Beeson Decl. ¶ 5). The government withheld permission for several weeks. *Id.* Because of the gag provision, virtually every legal document that plaintiffs have submitted in this case has had to be reviewed, in advance of public filing, by FBI officials and Justice Department attorneys. In other words, the statute has "not only operate[d] to suppress [speech], but to put the [speaker] under an effective censorship." *Near v. State of Minnesota ex. rel. Olson*, 283 U.S. 697, 712 (1931). And the government's censorial power has been used aggressively – not only to redact details about the [redacted] NSL but to redact plaintiffs' criticism of the FBI's investigation, their concerns about the Patriot Act, and their profound skepticism about various national security claims that the government has made in this case. Pl. Br. 20.

C. The gag provisions violate the First Amendment by investing the FBI with unbridled discretion to prohibit speech.

As the government acknowledges, the Supreme Court has stated repeatedly that a licensing scheme violates the First Amendment if it "involves appraisal of facts, the exercise of judgment, and the formation of an opinion." Gov't Br. 25 n. 9 (citing *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992), *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975), *Staub v. City of Baxley*, 355 U.S. 313, 323 (1958), and *Cantwell v. State of Connecticut*, 310 U.S. 296, 305 (1940)); *see also Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without *narrow*, *objective*, and *definite* standards to govern the licensing authority, is unconstitutional" (emphases added)). Under this test, the NSL statute is plainly unconstitutional.

The government's suggestion that "national security" is an objective and well-defined term is without merit, and indeed this suggestion has been rejected more than once by the courts. Pl. Br. 22 (citing cases). Notwithstanding the government's suggestion to the contrary, Gov't Br. 23, the term "national security" is a sweeping one that is elastic, manipulable, and deeply contested. Historically, the term has been used to cloak many questionable executive practices, including practices that are now universally agreed to have been unlawful. *See, e.g., Zweibon v. Mitchell*, 516 F.2d 594, 605 n. 1 (D.C. Cir. 1975) (en banc) (noting that "Watergate burglars believed they were on national security assignment"); *id.* n. 2 (noting that government agents invoked "national security" to justify burglary of Daniel Ellsberg's psychiatrist's office); *id.* at 636 (listing "several recent cases in which national security was used to cloak questionable surveillance practices employed by the Executive Branch"); *id.* (noting that government invoked "national security" to wiretap Dr. Martin Luther King and other civil rights activists).[14] It cannot seriously be argued that the term is "narrow" or confines executive discretion to definite and objective boundaries. Gov't Br. 23; *cf. Bernstein v. Dep't of Justice,* 176 F.3d 1132, 1139 (9th Cir. 1999) (finding that a licensing scheme that permitted the government to deny export licenses on the basis of "U.S. national security and foreign policy interests" impermissibly vested executive officials with unbridled discretion where "no more specific guidance [was] provided," and noting that "this constraint on official discretion [was] little better than no constraint at all").[15]

[14] *See also* Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information,* Wash. Post, Feb. 15, 1989 at A25 (former Solicitor General who fought to keep the Pentagon Papers secret by invoking national security later admitting, "I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such a threat.").

In fact, there is no "objective" test by which to determine which disclosures will jeopardize national security, and the NSL statute does not purport to provide one.[16] How significant must a threat be before it is deemed to "endanger" one of the specified government interests? Is any non-negligible threat sufficient? Is even a *negligible* threat sufficient? The statute does not say. In *Transp. Alternatives, Inc. v. City of New York*, 340 F.3d 72, 78 (2d Cir. 2003), the Second Circuit considered the constitutionality of a New York City park permit scheme that gave the Parks Commissioner the discretion to charge a "special events" fee to certain permit applicants. Unlike the NSL statute, the New York City ordinance "prescribe[d] a list of 'factors' to be considered" by the Commissioner in determining how to exercise his discretion. *Id.* at 78; *see also id.* at 75 (listing factors required to be considered). The Court nonetheless invalidated the ordinance, in part because it failed to "assign . . . weight to any of the factors." *Id.* Of course the NSL statute does not even mention which *factors* the FBI should consider in determining whether disclosure would jeopardize national security (or one of the

---

[15] This opinion was withdrawn by the Ninth Circuit for rehearing *en banc* and ultimately remanded without decision because the government promulgated new regulations. *See Bernstein v. Dep't of Justice,* 192 F.3d 1308 (9th Cir. 1999); *Bernstein v. Dep't of Justice*, No. 97-16686 (9th Cir. Jan. 26, 2000) (en banc); *Bernstein v. Dep't of Justice*, No. 97-16686 (9th Cir. Apr. 11, 2000).

[16] An additional problem with "national security" as a constraint on executive action is that determining which actions are necessary to protect national security *itself* requires a consideration of individual rights. *See, e.g., De Jonge v. State of Oregon*, 299 U.S. 353 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.").

other specified government interests), let alone make clear what *weight* the FBI should give to each of those factors.[17]

The courts have routinely invalidated licensing schemes comparable to the one at issue here. *See, e.g., Shuttlesworth*, 394 U.S. at 156-58 (striking down licensing scheme that permitted executive officer to consider "decency," "good order," and "morals"); *City of Lakewood*, 486 U.S. at 769 (striking down ordinance that allowed Mayor to deny license on the basis of "such other terms and conditions deemed necessary" by him); *MacDonald*, 206 F.3d at 192 (finding constitutionally problematic a regulation that allowed city official to deny parade permit if he believed parade would be "disorderly in character or tend to disturb the peace"); *Transp. Alternatives*, 340 F.3d at 78 (invalidating park event permit scheme where the scheme assigned no weight to the factors to be considered in making the permit determination); *414 Theater Corp v. Murphy,* 499 F.2d 1155, 1156 (2d Cir. 1974) (invalidating statute that permitted city official to grant or deny licenses to public amusement businesses after consideration of "the welfare and benefit of people of and visitors to the city"); *Nichols v. Vill. of Pelham Manor*, 974 F.Supp. 243, 251 (S.D.N.Y. 1997) (invalidating statute that permitted Chief of Police to grant or deny solicitation licenses after consideration of "health, comfort and convenience of the residents").

The government's reliance on *Field Day, LLC v. County of Suffolk*, 463 F.3d 167 (2d Cir. 2006), is misplaced. In *Field Day*, the Second Circuit considered the constitutionality of a New York state statute that regulated large public gatherings and events; the statute allowed executive officials to grant or deny permits based on concerns of "health and safety" and "life and health."

---

[17] The government misconstrues plaintiffs' objection to the statute's use of the term "may." Gov't Br. 25 n. 10. The use of the word "may" does not in and of itself render the statute unconstitutional. However, it does expand the FBI's already exceedingly broad discretion to determine the circumstances in which a gag order can be imposed. As plaintiffs demonstrate, "national security" and similar terms are sweeping, vague, and contested. The statute's use of the word "may" makes an already-problematic statute even more so.

The Court held that the statute did not vest government officials with unbridled discretion. *Id.* at 181. Central to the Court's holding, however, was the fact that the statute challenged in *Field Day* provided an extensive list of narrow, objective, and content-neutral factors – e.g. whether the applicant could provide adequate sewage facilities, adequate toilet and lavatory facilities, and insect and noxious weed control – that strictly confined the discretion of executive officers. *Id.* at 173 (quoting the statute); *id.* at 174 (noting parties' agreement that statute was content-neutral). Although the statute also included a catch-all provision that allowed executive officers to consider "other matters as may be appropriate for security of life or health"), *id.* at 180 the Court interpreted that provision narrowly "by reference to the remainder of the statute." *Id.*[18]

The statute at issue here is far removed from the one that the Second Circuit considered in *Field Day*. The NSL statute does not limit FBI officials' discretion by reference to narrow, objective, and content-neutral factors like the provision of sewage and toilet facilities and insect and noxious weed control. Instead, it invests FBI officials with sweeping authority on matters such as national security and diplomatic relations – i.e. on relatively abstract matters that are among the most politically contested in our society. *Field Day* only underscores the vast

[18] The Court's construction of the catch-all provision was consistent with the interpretive canon *noscitur a sociss*, which requires that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to those enumerated by the specific words." *Wash. State Dep't of Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 387 (2003). This canon – "that a word is known by the company it keeps" – is "wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Janecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1971). All of the terms of the NSL statute, unlike the terms in the statute at issue in *Field Day*, are sweeping.

distance between the licensing scheme at issue here and licensing schemes that are actually constitutional.[19]

The government argues that the NSL statute differs from a true licensing scheme because the FBI imposes gag orders "based on an evaluation of the circumstances of the investigation, not of the content of the speech." Gov't Br. 22. This court properly rejected a similar argument at an earlier phase of this litigation. *See Doe*, 334 F.Supp.2d at 512-513 (rejecting argument that the government's "aim in enforcing [the gag provision] is not to disagree with the message, or to select which issues are worth discussing or debating in public, but instead to apply a neutral ban on disclosures that are potentially harmful to Government investigations" (internal quotation marks omitted)); *see also Library Connection*, 386 F.Supp.2d at 75 (finding gag provision to be a content-based restriction even though the "government may intend the non-disclosure provision to serve some purpose other than the suppression of speech"). The fact that executive officers consider the effect of speech (rather than the speech itself) does not render a regulation content-neutral, *cf. Forsyth County,* 505 U.S. at 134 (stating that a "[l]istener's reaction to speech is not a content-neutral basis for regulation"); nor does it render a licensing scheme constitutional, *Nichols,* 974 F. Supp. at 251 (invalidating local solicitation ordinance on grounds it allowed

[19] The government also relies on *Thomas*, 534 U.S. at 322, another case dealing with a content-neutral time, place and manner restriction designed to protect park facilities and enforce the sanitary code at mass public events. Gov't Br. 24-25. However, as the Second Circuit has recognized, the Supreme Court failed to articulate the reasoning behind its holding in *Thomas*. *Field Day*, 463 F.3d at 178. For this reason, the Second Circuit explicitly considered the context and language of the *Field Day* statute in its entirety in order to determine whether the challenged provision vested the executive with unbridled discretion. *Id.* at 178-81. Read together, these cases merely highlight the fact that executive discretion must be cabined by statutory reference to narrow, objective and content-neutral standards.

Chief of Police to "prevent expression based solely on what he thinks will be the effect of the proposed expression").[20]

The government also argues that the NSL statute is not a licensing scheme because "the prohibited disclosure is always the same." Gov't Br. 21. But the prohibited disclosure is *not* always the same. As plaintiffs have explained, *see generally* Third Beeson Decl.; Pl. Br. 9, the FBI has used its censorial authority to suppress a diversity of speech, not only the mere fact that the FBI sought records from Doe. Moreover, even if it were true that the prohibited disclosure is "always the same," the *significance* of the disclosure varies from one context to the next. In the case, for example, the disclosure of the fact that plaintiffs had received an NSL was especially significant because the Justice Department had previously suggested that it would not serve NSLs on libraries. *Library Connection*, 386 F. Supp. 2d at 80-81. And in this case, the government initially contended that disclosure of even the existence of the suit or the fact that the ACLU had challenged the facial constitutionality of the NSL statute would jeopardize national security. SUF § IV (Third Beeson Decl. ¶ 5). Because the significance of the disclosure varies by context, the FBI's authority to decide which NSL recipients are subject to the prohibition is an authority that can all too easily be channeled to political ends. *Cf. Forsyth*, 505 U.S. at 133 ("Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.").[21]

---

[20] The NSL statute would be unconstitutional under *Shuttlesworth* even if the statute were content-neutral. The requirement that licensing schemes not invest executive officers with unbridled discretion is not limited to licensing schemes that are content-based. *See, e.g., Forsyth,* 505 U.S. at 133-34 (finding ordinance unconstitutional under the First Amendment because it granted executive officers unbridled discretion and *also* because it constituted a content-based regulation on speech); *Field Day*, 463 F.3d at 174 (noting parties' agreement that statute was content-neutral but proceeding to evaluate statute under *Shuttlesworth*).

[21] The government complains that it would be entirely "nonsensical" to require the FBI to seek a judicially approved gag order in every case, since some NSL recipients may not want to

II. THE NSL STATUTE'S SECRECY PROVISIONS SHOULD BE CONSTRUED NARROWLY TO AVOID CONSTITUTIONAL QUESTIONS.

A. 18 U.S.C. § 3511(d) must be construed narrowly.

18 U.S.C. § 3511(d), which mandates the closure of hearings and the sealing of records in certain circumstances, can be read to require closure and sealing even where the First Amendment does not allow it – where the government cannot demonstrate that closure or sealing is narrowly tailored to a compelling interest. If the provision's reference to "unauthorized disclosure[s]" is understood to mean "disclosures not authorized by the government," the provision impermissibly places the constitutional right of access to information in the hands of executive branch officials.

Plaintiffs agree with the government, however, that 18 U.S.C. § 3511(d) need not be read this way, and in particular that the provision can be read (i) to require closure and sealing only "to prevent a violation of the non-disclosure provision," Gov't Br. 37; *see also id.* at 40 n. 17; and (ii) not to displace the reviewing court's authority (and constitutional duty) to determine whether closure and sealing is consistent with the First Amendment, *id.* at 37 n. 15. If plaintiffs correctly understand the government's position, then the parties are in agreement that the Court should expressly adopt the narrow construction to avoid the constitutional questions that would otherwise arise. Gov't Br. 40 n. 17; *Jones v. United States,* 526 U.S. 227, 239 (1999) ("[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the

---

disclose information at all. Gov't Br. 21 n. 7. The requirement the FBI characterizes as "nonsensical," however, is already applicable in the context of grand jury subpoenas, *see supra* at 14, and the FBI has not offered any reason why the NSL context should be dealt with differently. Grand juries routinely investigate the most sensitive crimes, including crimes relating to national security. *See, e.g., United States v. Awadallah*, 349 F.3d 42, 45 (2d Cir. 2003) ("In the days immediately following September 11, 2001, the United States Attorney for the Southern District of New York initiated a grand jury investigation into the terrorist attacks.").

latter" (internal quotation marks omitted)); *United States v. Gonzalez,* 420 F.3d 111, 124 (2d Cir. 2005) ("[w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (quoting *McConnell v. FEC*, 540 U.S. 93, 180 (2003)); *Allstate Ins. Co. v. Serio,* 261 F.3d 143, 149-50 (2d Cir. 2001) ("[i]t is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions").

Notwithstanding the parties' agreement as to the proper construction of the provision, plaintiffs feel obliged to correct three serious errors in the government's analysis. First, the government's argument that "there is no tradition of access to documents that are submitted under seal or proceedings that are closed," Gov't Br. 39 (internal quotations omitted), is utterly circular. The question is not whether there is a presumption of access to information a court has *already* determined should be under seal, but whether the right of access attaches *before* a court makes that determination.

Second, the government is wrong to contend that the constitutional right of access does not extend to "investigatory" documents, even where filed with the court as part of a civil proceeding. Gov't Br. 27. This contention is inconsistent with this Court's previous finding that a presumption of access attached to documents filed in this action. *Doe v. Ashcroft,* 317 F. Supp. 2d 488, 491 (S.D.N.Y. 2004). It is also inconsistent with the decisions of many other courts, including the Second Circuit. *See, e.g., In re the Matter of The New York Times,* 828 F.2d 110, 116 (2d Cir. 1987) (presumptive right of access to motion papers containing wiretap information); *Virginia Dep't of State Police v. The Washington Post,* 386 F.3d 567, 578 (4th Cir. 2004) (presumptive right of access to police documents from criminal investigation file attached

to summary judgment motions); *Doe v. United States,* 253 F.3d 256, 262 (6th Cir. 2001) (presumptive right of access to civil hearing relating to motion to quash administrative subpoena); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (presumptive right of access to documents filed in support of a search warrant application).

Plaintiffs do not suggest, of course, that the presumption of access will attach to *every* document filed in connection with a challenge under section 3511. But obviously the fact that the right of access does not attach to every document does not mean that the right of access attaches to none of them.[22] The question whether the right of access attaches must be evaluated on a case-by-case basis, as must the question whether the right of access prevails over any contrary interest asserted by the government. Pl. Br. 33-34; *see also In re the Matter of The New York Times,* 828 F.2d at 116 (holding that Title III's prohibition on disclosure did not negate presumption of access but was not irrelevant because "the privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure of the Title III material should weigh heavily in a court's balancing equation in determining what portions of motion papers in question should remain sealed or should be redacted."); *Application of Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) ("The presence of material derived from intercepted communications in the warrant application does not change its status as a public document

[22] None of the cases cited by the government stand for the proposition that the presumption of access is automatically negated based on the mere fact that the government chooses to file evidence *in camera* or that the information relates to an investigation. In *Center for National Security Studies v. Dept. of Justice*, plaintiffs were affirmatively seeking access to government information (non-judicial documents, primarily through FOIA) *outside of* the context of a civil proceeding to which the right of access presumptively attaches. 331 F.3d 918, 934-35 (D.C. Cir. 2003). In both *United States v. Wolfson,* 55 F.3d 58 (2d Cir. 1995) and *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002), the court evaluated on a case-by-case basis whether a presumption of public access should apply to information the defendant himself had never seen and was not entitled to discover.

subject to a common law right of access, although the fact that the application contains such material may require careful review by a judge before the papers are unsealed."). As the Fourth Circuit stated in *Virginia Dep't of State Police,*

> [N]ot every release of information contained in an ongoing criminal investigation file will necessarily affect the integrity of the investigation. Therefore, it is not enough simply to assert this general principle without providing specific underlying reasons for the district court to understand how the integrity of the investigation reasonably could be affected by the release of such information. Whether this general interest is applicable in a given case will depend on the specific facts and circumstances presented in support of the effort to restrict public access.

386 F.3d at 579.[23]

Third, the government is wrong to suggest that the sealing of information in this case has been "limited." Gov't Br. 40. Plaintiffs have no desire to burden this Court with an exhaustive list of the information that the government has sealed (or attempted to seal) in this litigation, but such a list would include, among many other things, the mere fact that at some unspecified time, the FBI issued an NSL to some unspecified Internet Service Provider, SUF § IV (Third Beeson Decl. ¶¶ 9-11); the mere fact that the FBI had invoked the gag provision, SUF § IV (Third Beeson Decl. ¶¶ 12-13); the fact that the case implicated "national security," SUF § IV (Third Beeson Decl. ¶ 19); the fact that the case was "sensitive" in nature, SUF § IV (Third Beeson

---

[23] *See also United States v. Gerena,* 869 F.2d 82, 85 (2d Cir. 1989) ("the argument that the [Title III] statute always forbids public disclosure of unsuppressed, intercepted communications in briefs and memoranda cannot withstand scrutiny . . . . In reaffirming this qualified First Amendment right of public access, we stress that it applies not only when defendants want to keep information under seal but also when the government, for its own reasons, desires to keep information out of the public domain."). Indeed, in *United States v. Ressam,* upon which the government relies, the court made clear that the Classified Information Protection Act ("CIPA") itself, a statute that allows for some *ex parte* and *in camera* review of discovery disputes, cannot be *the grounds* for closure. 221 F. Supp. 2d at 1259-60. Unlike CIPA, moreover, section 3511(d) is not limited only to *classified* information.

Decl. ¶ 20); a direct quotation from a Supreme Court case about the danger of censorship in the name of national security, SUF §§ IV, VII (Third Beeson Decl. ¶ 23); that Doe's belief that "the public should be able to monitor how the government is using these new powers so that it can police against possible abuses," SUF § VII (Third Beeson Decl. ¶ 25); the statement that imposition of a broad and indefinite gag was "a classic example of an irresponsible invocation of national security to justify unnecessary secrecy," SUF § VII (Third Beeson Decl. ¶ 24); Doe's concern that the FBI may be impermissibly targeting the subject of the NSL because he/she [redacted] SUF § VII (Third Beeson Decl. at ¶ 27); and the kinds of information the FBI can generally demand through an NSL, SUF § IV (Third Beeson Decl. ¶ 32-33, 35, 37). This list is not "limited" in any reasonable sense of the word. Gov't Br. 40 And the list would be longer still but for the fact that this Court took an active role (as the Constitution requires it to do) in policing the government's sealing of information, reviewing disputed redactions on a case-by-case basis. *See Doe*, 317 F. Supp. 2d at 492-93.

Again, however, the Court need not strike down the provision, as the parties agree that the court should adopt a narrowing construction of the provision. Plaintiffs emphasize, however, that the public will be unprotected without a judicial ruling that expressly adopts the construction proposed here. *See supra* at 23-24. Without a judicial ruling, nothing would prevent the government from construing the statute more broadly tomorrow.

B. 18 U.S.C. § 3511(e) must be construed narrowly.

Section 3511(e) violates the First and Fifth Amendments to the extent it requires a reviewing court to accept and consider *in camera* and *ex parte* evidence – even if the evidence is unclassified – merely because the government requests that it do so. If the statute is read in this

way, it impermissibly divests the court of its authority to determine the requirements of due process and it turns the traditional rule against secret evidence on its head. Pl. Br. 36-38, 42-43.

The government proposes, however, that 18 U.S.C. § 3511(e) can be read in a manner that does not wholly undermine due process principles or place the ultimate authority over introduction and control of evidence in the hands of the executive branch. In particular, it maintains that nothing in the provision "requires the Court to accord any particular weight to the government's evidence" and that the provision does not "strip the district court of its inherent authority to determine that a matter submitted need not remain under seal." Gov't Br. 46. To comport with due process, the provision must be read to leave intact the reviewing court's authority to determine due process requirements on a case-by-case basis, to reject *ex parte* evidence if necessary, to order that evidence be shared with opposing counsel (under a protective order, if appropriate) if principles of fairness so require, to independently assess whether information is properly classified, and, if the introduction of secret evidence is unavoidable, to craft alternatives to mitigate the unfairness of secret evidence. This Court should expressly adopt this construction of the provision in order to avoid any infirmity under the First and Fifth Amendments. *See* Section II.A, *supra*. By expressly adopting a narrow construction of the provision, this Court can avoid the constitutional issues that would otherwise arise.

Here again, however, plaintiffs feel obliged to correct a fundamental error in the government's analysis of the relevant law – in particular, the government's categorical statement that the introduction of secret evidence "does not violate a plaintiff's constitutional rights." Gov't. Br. at 43. In fact, there is overwhelming authority for the proposition that consideration of secret evidence to decide the merits of a civil dispute violates the most fundamental due process principles, even in the face of national security concerns and even where classified

evidence is at issue. Pl. Br. 38-39. The exceptions to this traditional rule are reserved for the most extraordinary circumstances, Pl. Br. 39-40, and even in those circumstances every effort is typically made to ensure the information is shared with opposing counsel in some form, Pl. Br. 40. None of the cases cited by the government supports the notion that the government can submit secret evidence at its whim. Nor do these cases support the notion that, where the government submits evidence *ex parte*, a court must consider the evidence without engaging in any analysis of competing interests or contemplating whether and how the evidence may be shared.

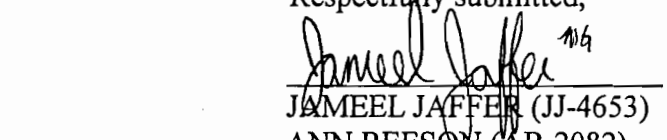
The cases cited by the government primarily involve extraordinary circumstances in which courts consider evidence *ex parte* only because sharing the evidence would either invade a privilege or moot a suit whose very purpose is to force disclosure of the secret information.[24] These cases represent rare exceptions to a well-established main rule against affirmative reliance on secret evidence. Indeed, as the Second Circuit emphasized in *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982), relied upon by the government, "[w]e do not suggest that in camera submissions are to be routinely accepted." Yet, that is precisely what the government proposes the Constitution allows.

[24] The cases cited by the government involving designation of foreign terrorist organizations ("FTOs"), Gov't. Br. 42-43, 46-47, do not apply in this circuit and should not be read broadly to permit consideration of *ex parte* classified evidence as a matter of course in all national security-related contexts. Judicial review of agency FTO designations involve a very narrow review of an administrative record, which may contain classified information. That the D.C. Circuit has held that a court may consider classified evidence *ex parte* in this particular situation does not undermine the fundamental rule that secret evidence cannot serve as the basis for a merits determination in traditional civil litigation.

CONCLUSION

For the foregoing reasons, plaintiffs are entitled to judgment as a matter of law. Plaintiffs' motion for partial summary judgment should be granted and defendants' cross-motion to dismiss or for summary judgment should be denied.

Respectfully submitted,



JAMEEL JAFFER (JJ-4653)
ANN BEESON (AB-2082)
MELISSA GOODMAN (MG-7844)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

December 15, 2006