NOS. 13-15957, 13-16731

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNDER SEAL,

PETITIONER-APPELLEE (No. 13-15957),
PETITIONER-APPELLANT (No. 13-16731),

v.

ERIC H. HOLDER, JR., Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and FEDERAL BUREAU OF INVESTIGATION,

RESPONDENT-APPELLANTS (No. 13-15957),
RESPONDENT-APPELLEES (NO. 13-16731)

On Appeal from the United States District Court
for the Northern District of California
Case Nos. 11-cv-2173 SI, 13-mc-80089 SI
Honorable Susan Illston, District Judge

APPELLEE/APPELLANT UNDER SEAL'S REPLY BRIEF FILED UNDER SEAL

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I. INTRODUCTION

The Government makes no attempt to defend the constitutionality of the statutes governing National Security Letters ("NSLs"), 18 U.S.C. §§ 2709, 3511 (collectively the "NSL statute") as written by Congress. Recognizing that the statutory language is indefensible, the Government instead asks this Court to consider the constitutionality of an ad hoc procedure it has adopted but that is unmoored to Congress' words and that fails to comply with *Freedman v. Maryland*, 380 U.S. 51 (1965). But regardless of what theory the Government advances, the NSL statute is a content-based prior restraint that is not susceptible to the narrowing constructions or implementations proffered by the Government and that fails to provide the prior judicial review required by the Constitution.

Petitioner-Appellant-Appellee Under Seal ("Appellee") has been silenced for too long. The district court's decision striking down Sections 2709(c), 3511(b)(2) and (b)(3) as unconstitutional should be affirmed.

II. ARGUMENT

A. The NSL Statute Violates *Freedman;* the *Mukasey* Suggestions Do Not Save It.

1. The *Mukasey* Suggestions Are Not a Reasonable Construction of the NSL Statute.

The Government's "reasonable construction" argument is easily disposed of because the construction the Government urges is not a construction at all. Rather, it entails entirely new provisions untethered from the language of the statute,

including the reciprocal notice provisions with deadlines for the Government that were suggested, but not required by the *Mukasey* decision and injunction. *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

The Government admits the scheme upon which its arguments depend is "not contained within the four corners of the statute" and offers no reading of the statutory text that supports its view. Gov't Opening Br. at 53; Gov't Reply Br. at 17.

The Government's reliance on *Mukasey* is especially inapt. That court recognized that it was "beyond the authority of a court to 'interpret' or 'revise' the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement." 549 F.3d at 883; *see also Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010) (court considers proffered limiting constructions but does not "insert missing terms into the statute or adopt an interpretation precluded by the plain language"); *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397 (1988) (courts "will not rewrite a ... law to conform it to constitutional requirements."); *see also Reno v. ACLU*, 521 U.S. 844, 885, n.50 (1997) ("[J]udicial rewriting of statutes would derogate Congress' 'incentive to draft a narrowly tailored law in the first place.'" (quoting *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)).

The Government puzzlingly cites to *Doe v. Holder*, 665 F. Supp. 2d 426, 429 (S.D.N.Y. 2009), the opinion issued by the district court on remand from the Second Circuit in *Mukasey*. Because the Second Circuit had found that the Government's obligation under *Freedman* to initiate judicial review "[wa]s waived because judicial review ha[d] already been initiated," *id.* at 430 n.6, the sole issue in *Holder* on remand was "whether the Government [wa]s justified in continuing to require nondisclosure for" the NSL recipient, John Doe, Inc., *id.* at 428. Hence, the *Holder* court's conclusion that "the continuation of the nondisclosure requirement ... is justified" says absolutely nothing about whether the reciprocal notice procedure is a proper limiting construction on the statute that satisfies *Freedman* by placing the burden of initiating judicial review on the Government.

2. The Government Does Not Even Follow the Full Procedures *Mukasey* Suggested.

While the Government claims to follow the advisory opinion aspects of *Mukasey*, it is undisputed that not everything suggested by the Second Circuit has occurred here or will occur as a result of the Government's ad hoc procedures.[1] As

[1] As Appellee explained in its previous brief, it has not conceded that the NSL statute would satisfy the *Freedman* requirements if it contained the *Mukasey* reciprocal notice provisions. Appellee's Br. at 32, n.11. Nevertheless, perhaps realizing that *Freedman* has additional requirements, the Government continues to insist upon the supposed concession, contending that it establishes the legal conclusion that the Government's current procedures are constitutional, Gov't Answering Br. at 1-2, 7.

It does not. The supposed concession was about the legal effect of hypothetical facts—assuming Congress rewrote the NSL statue and the

a result, not only does the Government's claim that it has adhered to the *Mukasey* procedures fail, even under the Government's own formulation, so too does its assertion that the statute was applied constitutionally in these cases.[2]

In particular, the Second Circuit suggested time limits for judicial decision making: "the proceeding would have to be concluded within a prescribed time, perhaps 60 days." *Mukasey*, 549 F. 3d at 879. The Government does not contest the fact that the proceedings here have taken years, even at the district court level. Neither the statute nor the FBI's practices request or require a *conclusion* within a set period of time, let alone 60 days, for this NSL or any NSL the Government has ever issued. And of course the FBI cannot require judicial review to be concluded on any sort of timeline—that requires Congress.

The Government attempts to explain away the time limit for judicial review, claiming that *Freedman* only requires judicial review to be initiated. To the contrary, the First Amendment requires that judicial review be *completed*

Government implemented the new statute as written. Even if facts were conceded, this Court is not bound by the legal conclusion. "Where ... the question is 'the legal effect of admitted facts,' the court cannot be controlled by a concession of counsel." *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987) (appeals court not bound by party's erroneous view of the law). "The policy is longstanding and applied whether it is the government or a private party which has made the erroneous concession." *Id.* (citing *Avila v. INS*, 731 F.2d 616, 620-21 (9th Cir.1984)).

[2] *See, e.g.*, Appellee Br. at 40-41 (noting the failure of the Government to seek judicial review in this case and in 13-16732) and 27 (noting that prompt judicial review has not occurred in this case).

promptly, not merely initiated. *Mukasey* was unambiguous on this point.[3] Indeed, the requirement comes directly from *Freedman*.

Instead, the Government over-reads *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), a case which actually confirms that "prompt judicial review ... encompass[es] a prompt judicial decision." 541 U.S. at 781 (internal quotations omitted). As the Court explained, "*Freedman's* 'judicial review' safeguard is meant to prevent 'undue delay,' ... which includes judicial, as well as administrative, delay." *Id.* at 781 (citation omitted). While *Littleton* found a referral to Colorado's state judicial system constitutionally sufficient, it did so expressly based upon "four sets of considerations taken together," specifically first, Colorado had procedures to expedite review; second, Colorado courts were willing to avoid undue delay; third, the ordinance did not seek to censor material and had reasonably objective, nondiscretionary criteria; and fourth, because "many cities and towns lack the state-law legal authority to impose deadlines on state courts." *Id.* at 783-784.

By contrast, the NSL statute is enforced by federal, not state courts. Congress, unlike municipalities, can set deadlines for judicial action. More importantly, the decision whether to proscribe a particular NSL recipient's speech is not a blanket prohibition imposed by the statute but is made by the individual

[3] The Government offers no explanation how it can reconcile its claim to follow *Mukasey*, and yet not follow all of *Mukasey*.

FBI agent on a case-by-case basis before the speech occurs—creating a classic, discretionary censorship scheme far different from *Littleton's* content-neutral zoning.

Dream Palace v. County of Maricopa, 384 F. 3d 990 (9th Cir. 2004), is similar. It too considered a zoning ordinance that had objective, content-neutral criteria, rather than a censorship scheme controlled by an individual FBI agent like the NSL statute. *Id.* at 1002 ("the licensor 'does not exercise discretion by passing judgment on the content of any protected speech.'") *Dream Palace* also recognized that "[w]hen the First Amendment requires certain safeguards before a system of prior restraint may be enforced, a local government cannot evade that requirement by pointing to its lack of legal authority to ensure such safeguards exist." *Id.* at 1004. So, too, here, the Executive cannot evade the *Freedman* judicial time limit requirement by pointing to its inability to compel a timely decision by the district court.

3. The NSL Statute's Conclusive Certifications Violate *Freedman*.

The Government's argument that this Court need not consider whether 18 U.S.C. § 3511(b)(2) violates the third prong of *Freedman* by making certifications by certain officials "conclusive" unless they can proven to be in bad faith must be rejected. The Government's assertion is that, since none of those officials made a certification here, it "*may* never apply to any NSL recipient," and

so cannot be part of this facial challenge. Gov't Answering Br. 16 (emphasis added).

Mukasey correctly rejected this provision despite the fact that no certification was made in its case either, finding it unconstitutionally "inconsistent with strict scrutiny standards." *Mukasey,* 549 F.3d at 882-83. This is another way that the Government urges a standard significantly different from the *Mukasey* decision.

In any event, even if the Government has not invoked this section yet, the possibility that it *might* play this trump card has an impermissible chilling effect. Any recipient considering whether to challenge an NSL must do so in the face of Section 3511(b)(2), knowing that the Government may choose to have a top level official certify at an impossible standard.

B. The Government's Reliance on Overbreadth Cases Is Misplaced.

The Government errs when it asserts that overbreadth is the only manner to facially attack a statute, ignoring that *Freedman* itself found no need to conduct a separate overbreadth analysis, after finding that the procedural safeguards were not sufficient. 380 U.S. at 56. But it's not just *Freedman.* The Government fails to respond to *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998), cited by Appellee, in which this Court clarified that a "facial challenge is also appropriate when there is a lack of adequate procedural safeguards necessary

to ensure against undue suppression of protected speech." *Id.* at 1100 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990)), or *MacDonald v. Safir*, 26 F. Supp. 2d 664, 674 n.14 (S.D.N.Y. 1998), in which the court noted that overbreadth analysis is "not an accurate statement of the law with respect to *Freedman* challenges."

The Government's reliance on the overbreadth analysis in *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988), as requiring this court to consider the "actual facts" rather than the statutory language in applying the procedural prior restraint, is misplaced. Gov't Reply Brief at 3. The case reference to "actual facts" is addressing whether the club's right of association would be impacted by an anti-discrimination statute. In the Court's words, the question was whether there are, in fact, "clubs for whom the antidiscrimination provisions will impair their ability to associate together or to advocate public or private viewpoints." *Id.* at 14.

As the Eleventh Circuit has noted, *N.Y. State Club* has been read to require presenting realistic scenarios for overbreadth challenges, to ensure that "[m]ore than a law school exam hypothetical is required" to establish overbreadth. *United States v. Martinez*, 736 F.3d 981, 992 (11th Cir. 2013). The case does not stand for the proposition that the court must consider the authoritative judicial construction of the statute, any injunctions or the manner in which the Government has

implemented the statute. And of course it does not even reach a facial challenge under *Freedman.*

For example, in *Virginia v. Hicks*, 539 U.S. 113 (2003), the Court cited *N.Y. State Club*, stating that "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Id.* at 122 (*quoting N.Y. State Club*, 487 U.S. at 14). The Court considered a city law that prohibited trespass in a public low-income housing development, but permitted entry for a "legitimate business or social purpose." *Id.* The claimant was unable to show overbreadth because he was unable to show that the housing authority would go beyond the scope of the statutory language and bar leafleting or protesting as illegitimate business or social purposes.

Even if one did consider the "actual facts" of this case, the Government's position is not bolstered. The actual fact is that the gag imposed upon Appellee was not limited to a specified brief period of time. The actual fact is that the Appellee was not provided with a prompt judicial resolution and remains gagged to this day, more than three years later. The actual fact is that the Appellee, not the Government, initiated judicial review.[4]

[4] The Government attempt to minimize this fact: stating it was "merely because the recipient chose to file first." Gov't Reply Br. at 7, n.2. This does not change the "actual fact" that the process here did not comply with *Freedman.*

The Government does not want this Court to look at these actual facts. It only wants the court to consider its "authoritative construction" of the statute and its practices. But the District Court correctly found the Government has presented no evidence to support this claim. *In re NSL*, 930 F. Supp. 2d 1064, 1073 (N.D. Cal. 2013). The Government makes no effort to show that the district court's finding is clearly erroneous.

C. The Well-Established Practice Doctrine Does Not Apply Here.

Nor does the Government fare better with its claim that its "well-established practice" of providing reciprocal notice defeats a facial challenge. As Appellee has explained, unless the statute is "fairly susceptible" to a narrowing construction, that doctrine is inapplicable. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 & n.11 (1988) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)). As explained above, and in Appellee's opening brief, it is not. Section I.A.1, *supra*, and Appellee Br. at 24-26, 37-38.

Additionally, the Government makes a number of unavailing arguments about the scope of the "well-established practice" doctrine. First, it states that the Second Circuit's interpretation of the statute is binding, so the Government's compliance with the court's injunction necessarily creates a "well-established" practice. Gov't Reply Br. at 17. That is incorrect. Although the Second Circuit barred the Government from issuing NSLs with gag orders unless it initiates

judicial review, it *did not* mandate that the Government use the reciprocal notice procedure to satisfy this requirement. *Mukasey*, 549 F.3d at at 885. *See also id.* at 883 ("[T]he Government might be able to *assume* such an obligation without additional legislation") (emphasis added).[5]

Next, the Government takes issue with Appellee's statement that the well-established practice doctrine applies only to state statutes. As Appellee noted, the rationale for the distinction is one of federalism: state courts issue authoritative constructions of state laws, so state agency practices that have "virtually the force of judicial of a [state] judicial construction" receive similar deference. Appellee Br. at 38 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)). By contrast, when considering a constitutional challenge to a federal statute, a federal court can determine for itself whether a federal agency's interpretation of the statute is a fair one. *See, e.g., Free Speech Coalition v. Attorney General*, 677 F.3d 519, 538-39 (3d Cir. 2012). Furthermore, "[i]t is axiomatic that regulations cannot supersede a federal statute [to remedy facial

[5] The assertion that the "well-established practice" doctrine "necessarily includes consideration" of courts' interpretation of a statute turns the doctrine on its head. *See* Gov. Reply Br. at 17. Under *Lakewood*, a court looks to authoritative judicial constructions to which the statute is fairly susceptible, such as those issued by a state supreme court. 486 U.S. at 770 n.11. If none exists, a court may then look to "a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction." *Id. Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), cited by the Government, does not hold otherwise. *See id.* at 339 (holding that in a facial challenge, "we must abide by the narrowing constructions announced by" the local court.)

unconstitutionality]." *Id.* at 539 (citing *In re Complaint of Naútilus Motor Tanker Co.*, 85 F.3d 105, 111 (3d Cir. 1996)).

Jordan v. Sosa, 654 F.3d 1012, 1019, 1020 (10th Cir. 2011), upon which the Government relies for its expansion of the "well-established practices" doctrine to federal statutes, Gov. Reply Br. at 18, did not consider the issue. The cited passage from *Jordan* appears in a discussion of an inmate's standing to bring a *pro se* facial challenge to an act of Congress and the corresponding Bureau of Prisons ("BOP") regulation governing publications distributed to inmates. *Id.* at 1019-20. The court found that the inmate only had standing to challenge the regulation because the BOP applied only the regulation to inmates, not the statute. *Id.* at 1020.

Finally, the Government quibbles with Appellee's characterization of the reciprocal notice procedure as "voluntary," suggesting that all "well-established practices" are partially voluntary. Gov't Answering Br. at 18-19. This argument is inconsistent with the Government's claim that it is bound by the *Mukasey* injunction and the *Mukasey* court's recognition that it was beyond its power to rewrite the statute. *Mukasey*, 549 F.3d at 885. Moreover, the Government misconstrues the type of voluntariness at issue. Because a well-established practice must embody a fair reading of the challenged statute, it is voluntary in the sense that a state or local agency chooses to act on a construction of the statute to which the statute is fairly susceptible and does not choose another reasonable

interpretation that is more constitutionally difficult. It is not voluntary in the way the Government is acting here, voluntarily engaging in an entirely separate process that is unmoored from the statute.[6]

D. The NSL Statute Violates the First Amendment.

1. NSL Is a Content Based Prior Restraint Requiring Strict Scrutiny.

As discussed in Appellee's previous brief, the gag order provision is a content-based restriction on speech because it singles out a certain category of speech for differential treatment precisely because it seeks to blunt the communicative impact of that speech. Appellee Br. at 47-48 (citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989)).

The Government does not attempt to proffer either a content-neutral reading or purpose for the statute. Rather it argues that the statute does not raise "the sort of concern that subjects a restriction to strict scrutiny." Gov't Reply Br. at 22.

There is, of course, no authority for the proposition that some content-based statutes are not subject to strict scrutiny. To the contrary, the Supreme Court has explained (in a passage omitted by the Government's briefs) that even laws with a

[6] The cases Government cites involve well-established practices of state or local entities that were held to embody permissible constructions of the statutes at issue, a prerequisite for deference to the well-established practice doctrine. *See, e.g., Sullivan v. City of Augusta*, 511 F.3d 16, 30 (1st Cir. 2007) (city's practice "fits reasonably within the language of the two ordinances" at issue); *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798, 802, 803 (9th Cir. 2007) (city's implementation of ordinance supports its proffered construction of statute which court finds "plausible").

content-neutral purpose may be subject to strict scrutiny. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642 (1994) ("[B]ut while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.").

The Government defends the gag, asserting that its purpose is not that it "disagrees with the NSL recipient or is seeking to discourage public debate over NSLs." Gov't Reply Br. at 22. Even if true, the Government concedes that the gag does limit discussion, if not "debate," of the NSL at issue. And of course this gag, and the fact that the Government gags nearly all recipients, also limits the debate on NSLs as a whole.

Thus, at most, the Government's claim might render the gag order viewpoint-neutral; it does not render the gag order content-neutral. *See Texas v. Johnson*, 491 U.S. at 414, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992), *Brown v. California Dept. of Transp.*, 321 F. 3d 1217, 1223 (9th Cir. 2003); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 509-10 (9th Cir. 1988) (distinguished in *DISH Network Corp. v. FCC*, 653 F.3d 771, 779-80 (9th Cir. 2011), because unique environment of broadcast regulation raised different concerns).

Lastly, the Government's heavy reliance on *United States v. Aguilar*, 515 U.S. 593, 602 (1995), observing that the Court's opinion "contains no suggestion that strict scrutiny should apply," remains misplaced. Gov't Reply Br. at 21. As

explained in Appellee's previous brief, in *Aguilar*, it was the defendant's status as a judge who had voluntarily taken an oath of confidentiality that led the court to apply a less stringent scrutiny; the court affirmed that strict scrutiny would have applied if the government sought to restrict the speech of "unwilling members of the public" as Appellee is here. *Id.*

The Government emphasizes that the statute serves the purpose of preventing NSL recipients from "alert[ing] terrorists and spies to the existence or progress of counterterrorism or counterespionage investigations or of investigatory methods." Gov't Reply Br. at 22. Appellee does not dispute that, in the abstract, this purpose can be a compelling governmental interest. But the strict scrutiny test requires more than the assertion of such an interest; it requires that the speech restriction be narrowly tailored to that interest.

Here it is not. Indeed, despite its earlier emphasis on this appeal being a facial challenge to the statute, the Government's strict scrutiny argument reverts to an as applied analysis, arguing only that the there was no claim here that the specific gags issued were not narrowly tailored. But obviously such an argument need not be made with respect to a facial challenge. And even as applied, the Government is wrong. Appellee has never sought to reveal the identity of the target of the NSL and has long suggested that more narrowly tailored option even in this case.

2. The NSL Statute Provides Too Much Discretion to Meet Constitutional Muster.

The Government acknowledges, as it must, that the standard for censorship in the NSL statute is merely whether the disclosure "may result" in a list of enumerated harms. Nevertheless, the Government attempts to bolster is argument by citation to cases with a higher standard, and ignores the line of cases that have held that the Government must demonstrate a greater probability of harm than "may" before it can suppress speech on the basis of content. Gov't Reply Brief at 25-26. The Government relies on *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1075 (1991), where the standard was "likely" to result in harm and *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 514 (1969), where the students' speech (wearing black armbands to protest the Vietnam war) was not "forecast" to be disruptive at school.

A closer look at *Tinker* illustrates the error in the Government's argument, as it specifically discusses the problems with a "may result" standard. In *Tinker*, nothing in the record "demonstrate[d] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." 393 U.S. at 514. The District Court had found the school authorities were acting reasonably, based "upon their fear of a disturbance from the wearing of the armbands." *Id.* at 508.

As the Supreme Court noted, this standard is too low because "[a]ny departure from absolute regimentation *may* cause trouble." *Id.* (emphasis added). But, in *Tinker*, the fact that the student' silent armband protest "may cause" a harm was not enough: "our Constitution says we must take this risk." *Id.* Instead, the Government has to have a "reason to anticipate that the wearing of the armbands *would substantially interfere* with the work of the school." *Id.* at 509 (emphasis added).

This Court's decision in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), is also instructive. In that case, the Court considered a policy to censor student speech under a test with the same critical "may result" language as Section 2709:

> When there is evidence that reasonably supports a judgment that significant or substantial disruption of the normal operation of the school or injury or damage to persons or property *may result*.

861 F.2d at 1156 (emphasis added). This was not enough, and this Court struck down this standard under *Tinker* and its progeny.

In *Gentile*, 501 U.S. at 1075, also relied on by the Government, the standard was a more demanding "likely"-to-result requirement, and that case arose under the less demanding standard of commercial speech.

The word "may" is fundamentally different from the words connoting some degree of certainty used in the cases the Government cites. The term "may" is used to express possibility, not probability—merely that something might happen. *See*

Oxford Dictionary Online, Oxford University Press, definition of "may,"[7] *see also Black's Law Dictionary* 1068 (9th ed. 2009) (defining "may" as "[t]o be a possibility").

A possibility is insufficient. As Justice Stewart explained in his concurrence in the Pentagon Papers case, the prior restraint had to be reversed because he could not say "disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring); *see also Nebraska Press Assoc. v. Stuart,* 427 U.S. 539, 569-70 (1976) (asserting likely harm did not "possess the requisite degree of certainty to justify restraint").

Without a requirement of certainty, the NSL statute vests expansive and unfettered discretion in the government, one reason why the *Freedman* factors were needed. *See Talk of the Town v. Dep't of Fin. & Bus. Servs.,* 343 F.3d 1063, 1070 (9th Cir. 2003).

This discretion is illustrated by the DOJ's letter to various service providers, licensing them to disclose receipt of NSLs in broad bands of 1,000. This shift, occurring after public pressure, shows both the arbitrariness of this discretion and illustrates that the Government's licensing scheme is not narrowly tailored. The DOJ has simply decided that some service providers, who have received 1,000 or

[7] Available at http://www.oxforddictionaries.com/definition/american_english/may #may (last visited June 16, 2014).

more NSLs, can participate—vaguely and partially—in public debates as recipients of NSLs.[8]

E. The NSL Statute's Substantive Provisions Are Unconstitutional Because Prior Judicial Authorization Is Required.

The Government's argument that this Court should exercise its discretion not to address the issue of the constitutionality of the NSL statute substantively under the First and Fifth Amendment must be rejected. Judicial efficiency is best served by addressing this issue now since it is an issue of law, upon which this court has de novo review authority and does not depend on any disputed factual issues.

The authorities the Government relies on are not to the contrary. In *United States v. Apel*, __ U.S. __, 134 S. Ct. 1144, 1153 (2014), the Supreme Court, in rejecting the Court of Appeals' interpretation of a statute, declined to pass on the constitutionality because the appeals court had not addressed that issue. But unlike an appeal to this Court, which brings the entire case before the Court, the Supreme Court limits its review to "[o]nly the questions set out in the petition" for *certiorari*, S.Ct. R. 14(1)(a), and its policy reasons for declining to address issues

[8] Likewise, some recipients have reached stipulations where they can speak publicly about receiving an NSL. *See, e.g.,* Stipulation and Order of Dismissal, *John Doe, Inc. v. Holder*, Case No. 04-cv-2614 (S.D.N.Y. July 30, 2010); Order to Unseal Case, *Internet Archive v Mukasey*, Case No. 4:07-cv-06346-CW (N.D Cal. May 2, 2008), Order, *In re National Security Letter,* Case No. 2:13-cv-01048-RAJ (W.D. Wa. May 21, 2014) (allowing Microsoft to speak about receiving an NSL).

never ruled on below are unique to its position at the apex of the judicial hierarchy. *Miller v. Hedlund*, 813 F.2d 1344, 1352 (9th Cir. 1987), is also distinguishable. In that case, this Court declined to address a constitutional issue never ruled upon by the district court that turned on disputed factual issues, upon which the district court had also never ruled. *Id.* That is not the situation here; here there are no factual disputes and only issues of law.

1. [redacted]

The Government complains that Appellee cited to *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), [redacted]

2. Section 2709(b) Does Not Save the Statute.

The Government incorrectly asserts that the NSL statute's prohibition on investigations "conducted solely on the basis of activities protected by the First Amendment," Section 2709(b), resolves the First and Fifth Amendment requirements. It points to no case, for there is none, holding that either the First or the Fifth Amendment concerns can be washed away if a government's investigation rests on a scintilla of activities in addition to those protected by the Constitution.

3. The Government Gains No Support from *Smith v. Maryland.*

The Government citation to *Smith v. Maryland*, 442 U.S. 735 (1979) is inapposite. This controversial case[9] focused on the Fourth Amendment, and found no protected interest under that Amendment for telephone numbers (digits dialed) disclosed to a third party because those digits did not reveal the content of the communications.

In contrast, in *NAACP v. Alabama*, *supra*, the Supreme Court found that the right of association was protected in the NAACP's membership lists, which were also not content and were also held by a third party—the NAACP. More recently, when addressing subpoenas for records identifying online speakers, courts have consistently recognized that there are First Amendment rights to be balanced before disclosure, even where the subpoena is to be sent to a third party. *See, e.g.*, *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal 1999); *In re Subpoena Duces Tecom to AOL, LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008); *Highfields Capital Mgmt., LP v. Doe.*, 385 F. Supp. 2d 969 (N.D. Cal 2005); *Doe*

[9] In two concurring opinions in *United States v. Jones*, 132 S. Ct. 945 (2012), five Justices recognized an expectation of privacy in information shared with the public or third party, casting doubt on the continued validity of the Government reliance on *Smith v. Maryland. See Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (*Smith* is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."); *id.* at 964 (Alito, J., concurring). This Court need not reach that issue here.

v. 2TheMart.com, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

F. The Government's Analogies Are Not Analogous.

Both *Mukasey* and the district court below rejected the false analogies the Government seeks to draw between the NSL statute and other situations where confidentiality is required.

For example, as noted above, the Government continues to rely upon *United States v. Aguilar*, which considered "prohibit[ion on] the disclosure of information that a wiretap has been sought or authorized," in the context of judicial misconduct. *Aguilar*, 515 U.S. at 602. Yet *Aguilar* affirms that the speech restrictions at issue here should receive strict scrutiny. In *Aguilar*, a federal judge was convicted for disclosing the existence of an expired wiretap order. *Id.* at 595. Addressing a First Amendment challenge, the Supreme Court first noted that "the Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a state interest of the highest order." *Id.* It then held that the unique circumstances of a judge unlawfully disclosing information he received in the course of his duties fell within an exception to the general rule of strict scrutiny: "As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on

unwilling members of the public." *Id.* at 606. This case falls within the general rule, for Appellee is an "unwilling member[] of the public," not a judge.

The Government again looks to *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), Gov't Reply Br. at 20, but never explains why a civil discovery case is properly analogous. As Appellee explained, Appellee Br. at 51-52, the Court addressed information obtained in discovery and set forth the reasonable rule that information sought by a party using the power of a court-supervised process can be protected from further disclosure.

The Government's reliance on its analogy to grand juries also remains unavailing. Citing to the federal rules of criminal procedure does not help its argument, for the federal rules do not prohibit grand jury witnesses from disclosing the fact of their testimony, which is precisely what the Government seeks to restrict here. Fed. R. Crim. P. 6(e)(2) (listing those who "must not disclose a matter occurring before the grand jury," not including grand jury witnesses, and expressly prohibiting any "obligation of secrecy" beyond that list.). Moreover, even though a grand jury may not be a "judicial proceeding" *per se*, it is supervised by a judge, and subpoenas are issued pursuant to that judge's authority, and thus not subject only to the Government's unbridled discretion as NSLs are.

Nor does *Butterworth v. Smith*, 494 U.S. 624 (1990), support the Government's argument. As an initial matter, while the *Butterworth* Court

discussed the gagging of "information which [a grand jury witness] may have obtained as a result of participation in the proceedings of the grand jury," *id.* at 632, Justice Scalia acknowledged that such a question was "not presented by the narrow question we decide today." *Id.* at 637 (Scalia, J., concurring). Moreover, the district court correctly disavowed the grand jury analogy to the NSL process, as did the Second Circuit. *See In re NSL*, 930 F. Supp. 2d at 1072; *Mukasey*, 549 F.3d at 877. *Butterworth* and other grand jury cases are inapposite because the NSL gag is imposed unilaterally by the Executive, outside any court proceeding or any judicial determination of the appropriateness of that gag, a fact that lies at the heart of Appellee's challenge.

The Government quibbles over whether the secrecy of grand juries originates with the court, contrasting *United States v. Navarro-Vargas*, 408 F.3d 1184, 1199 (9th Cir. 2005) (grand jury "an appendage of the court" and "subject to the supervision of a judge") with *United States v. Williams*, 504 U.S. 36, 47 (1992) (grand jury "an institution separate from the courts"). Yet there is no question that grand juries function to provide a check on executive power; they are not an extension of that power.

G. The Gag Provisions Are Not Severable.

The Government argues that the gag provisions are severable, yet the Government does not dispute that NSLs issued without gags are exceedingly rare;

in fact the Government admits that it will only refrain from issuing one when the recipient agrees to a gag voluntarily, giving it the same result. *See* Gov't Opening Br. at 62. This is an illusory limitation. If the NSL is only issued without a gag when no speech would occur, there is no principled distinction between gags 97% of the time and 100% of the time. Thus the Government's use of the statute only confirms its belief that Congress would have wanted all NSLs to issue with a gag.

Moreover, when the convenience of an FBI issued gag provision is not necessary, Congress has given the Government multiple other authorities to obtain the same information – through a warrant, a court order, an "administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena." 18 U.S.C. § 2703(c)(2). The FBI-issued gag provisions of the NSL statute are the key differentiators from those authorities.

H. A Nationwide Injunction Was Proper.

There is a certain irony to the Government's argument about the geographic scope of the injunction. While the main brief relies heavily on the notion that the statute is saved by the fact that the Second Circuit's injunction is binding nationwide, when it comes to an injunction it does not like, it pleads for a smaller scope. In fact, it pleads for a scope so small that it only binds the Government as to Appellee and would require every other litigant—even in this circuit—to re-litigate the facial invalidity of the statute.

As Appellee previously noted there is no conflict between the injunction issued by this court and the one issued by the Second Circuit. Appellee Br. at 62-64. Neither injunction is limited geographically on its face, nor need they be. The Government can comply with both.

Even if the two injunctions could be construed as inconsistent, the Government is incorrect in asserting that *Apple v. Psystar,* 658 F.3d 1150, 1161 (9th Cir. 2011) means that the *Mukasey* injunction prevents this Court from affirming the District Court's nationwide injunction. To the contrary, *Apple* noted that the general rule of comity between courts handling similar matters "is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." *Id. Apple* found no conflict and upheld the nationwide injunction.[10]

[10] The Government's argument that Appellee has waived any argument that the injunction should not be limited to just the parties is misplaced. Appellee argued that the injunction, which was not limited to the parties, was not an abuse of discretion, and should be upheld, and explained why: if a court finds that a statute is unconstitutional, it is obligated to declare it void. Appellee Br. at 61, 64-65. Of course the FBI is a party to this injunction, so if it is enjoined, even by this formulation, it is enjoined everywhere.

III. CONCLUSION

For the foregoing reasons, the district court's decision striking down Sections 2709(c), 3511(b)(2) and (b)(3) as unconstitutional—and enjoining the future use of NSLs and enforcement of NSL gags—should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. Appellees' Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4 because this brief contains 6,618 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 for Mac, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: June 16, 2014 By: /s/ Kurt Opsahl
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2014.

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