NOS. 16-16067, 16-16081, 16-16082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL SECURITY LETTER, UNDER SEAL, Petitioner-Appellant (Nos. 16-16067, 16-16081), v. LORETTA E. LYNCH, Attorney General, Respondent-Appellee (Nos. 16-16067, 16-16081).	In re: NATIONAL SECURITY LETTER, UNDER SEAL, Petitioner-Appellant (No. 16-16082), v. LORETTA E. LYNCH, Attorney General, Respondent-Appellee (No. 16-16082).

On Appeal From the United States District Court
For the Northern District of California
Case Nos. 11-cv-02173-SI; 13-mc-80089-SI; 13-cv-01165-SI
The Honorable Susan Illston, United States Senior District Judge, Presiding

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INTRODUCTION

Since 2001, courts have twice struck down the National Security Letter (NSL) statute. In response, Congress has twice made tweaks and small changes to the statute while retaining its unconstitutional core: authorizing the FBI, on its own, to indefinitely prevent NSL recipients from telling the public, their customers or even members of Congress that they have received these requests. This is no theoretical problem: the gag orders here prevented Appellants from sharing the truth of their experiences as part of the public and congressional debate about NSLs that preceded the latest amendments to the statute, as well as in their public transparency reports.

No matter how important an investigative tool is to protecting national security, its use must comport with the Constitution. By authorizing prior restraints that allow the FBI to unilaterally gag recipients indefinitely without judicial determination of necessity, and as a content-based restriction not narrowly tailored to those very national security concerns, the NSL statute fails constitutional standards.

In effort to avoid exacting First Amendment scrutiny, the government asks this Court to carve out NSLs from well-established doctrine from the Supreme Court and this Court, arguing for the creation of a new, "non-classic" category of prior restraints that receive lesser protection. But there is no reason to treat NSL

gag orders differently than other administrative gag orders.

Properly viewed as prior restraints, NSL gags fail to include either the substantive or procedural protections required by the First Amendment. And, because they restrict far more speech than is necessary to achieving the government's objective, the gags also fail strict scrutiny required of content-based restrictions.

The district court's ruling upholding the statute should be reversed.

ARGUMENT

I. THE NSL STATUTE IS A PRIOR RESTRAINT AND CANNOT MEET THE EXACTING SCRUTINY REQUIRED BY THE FIRST AMENDMENT.

The NSL statute empowers the government to preemptively gag a communications service provider from speaking about the government's request for information. 18 U.S.C. § 2709(a), (c). The provider may not even say that it has received an NSL, let alone discuss how it responded to the request or what the request entailed. *Id.* § 2709(c)(1)(A).

The constitutional implications of this scheme are clear: by "prohibit[ing] the publication or broadcast of particular information," the statute authorizes prior restraints. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976). All courts to consider the matter—including the district court below—have held that the NSL gag is a prior restraint. *In re Nat'l Sec. Letters*, Nos. 11-2173, 13-80089, 13-1165,

2016 WL 4501210, at *13 (N.D. Cal. Mar. 29, 2016) ("*In re NSL II*") ("[T]he nondisclosure provision clearly restrains speech of a particular content[.]").

The district court nevertheless erred when it failed to apply the rigorous First Amendment scrutiny and demanding substantive and procedural protections that settled law imposes on prior restraints. *See* Appellants' Br. at 15-17.

Substantively, to survive constitutional scrutiny, the government must show that a prior restraint is *necessary* to further an interest of the highest order. *Nebraska Press*, 427 U.S. at 562-63. In order to be "necessary," the government must demonstrate that (1) harm is highly likely to occur absent a prior restraint; (2) the harm will be irreparable; (3) no alternative to the prior restraint exists; (4) and the prior restraint will actually prevent the harm. *Id.* at 565-67; *Levine v. U.S. Dist. Ct.,* 764 F.2d 590, 595 (9th Cir. 1985). The NSL statute fails this test because it does not ensure that NSL gags are necessary.[1] Appellants' Br. at 24-27. The government asks this Court to affirm the district court's error by attempting to separate prior restraints into "classic" versions that get full First Amendment protection and non-classic versions that get lesser protection. This must be rejected: fracturing the prior restraint doctrine would radically undermine the First Amendment's protection against the "core abuse" at which it is directed. *Thomas v.*

[1] While the government contests the applicability of the substantive prior restraint doctrine as a whole, it offers no defense of the statute under the *Nebraska Press* test. *Compare* Appellants' Br. at 24-27 *with* Opp'n Br. at 36-37.

Chicago Park Dist., 534 U.S. 316, 320 (2002).

A. The government's attempts to fracture prior restraint doctrine must be rejected.

Prior restraints are prior restraints. First Amendment law has no sliding scale whereby some prior restraints get the near-absolute protection the Supreme Court has repeatedly imposed in decisions such as *Nebraska Press*, while others get a milder form of protection. That a given prior restraint might be described as "classic," "textbook," or "prototypical" indicates only that the restriction at issue is clearly and indisputably a prior restraint, as opposed to some other kind of speech restriction. This rich history of precedent does not indicate a hierarchy of prior restraints, with some receiving full protection and some receiving less.

Contrary to the government's assertion, the Supreme Court's definition of prior restraints as "*forbidding* certain communications . . . in advance" in *Alexander v. United States*, 509 U.S. 544, 550 (1993), placed no limitation on the prior restraint doctrine, and did not indicate that only some communications, and not others, are subject to the prior restraint doctrine. Indeed, the Supreme Court has never used the phrase "certain communications" in the doctrinally novel way the government suggests.[2]

[2] *See, e.g., City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 757 (1988) (defining a prior restraint as "a licensing statute placing unbridled discretion in the hands of a government official or agency"); *Vance v. Universal Amusement Co., Inc.,* 445 U.S. 308, 316 (1980) (defining prior restraint as "an injunction against a

"Certain communications" refers instead to the fact that, when prior restraints take the form of injunctions as opposed to licensing schemes, they typically ban specific publications, information, or topics. Thus in *Nebraska Press*, 427 U.S. at 556, the Court defined "prior restraints" as "orders that prohibit the publication or broadcast of particular information or commentary." The Court then explained that the information at issue was "certain kinds of information about the Simants case." *Id.* at 561. "Certain communications" thus delineates the scope of the restraint imposed by the government, not the scope of the First Amendment's protection against prior restraints.

Accordingly, *Alexander*'s use of the term "certain communications" was not a limitation of prior restraint doctrine. Rather than a "careful reference" to a non-existent body of law the government imagines, the *Alexander* Court simply quoted "certain communications" from a treatise that likewise did not use the term as a limit on prior restraint doctrine.[3] 509 U.S. at 550 (quoting *Nimmer on Freedom of*

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future exhibition" as opposed to "the imposition of a criminal sanction for a past communication"); *Smith v. Daily Mail Pub'g Co.*, 443 U.S. 97, 101 (1979) (defining prior restraint as "prior injunction against publication"); *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (explaining that although prior restraints historically took a "variety of forms," they all "had this in common: they gave public officials the power to deny use of a forum in advance of actual expression").

[3] That treatise cited no authority as the source of the "certain communications" language, and did not discuss the categorical exclusion the government now insists exists. *See Nimmer on Freedom of Speech*, § 4 (1984). Indeed, the current version of the treatise excludes the "certain communications" language from its definition of "prior restraints." *See Smolla & Nimmer on Freedom of Speech*, § 15:1, at p. 15-

Speech, § 4.03, at p. 4-14 (1984)). The Court did not use "certain communications" to distinguish some communications subject to the prior restraint doctrine from other communications not subject to the doctrine. Rather, it held that the defining characteristic of prior restraints is that they prohibit future speech, in contrast to "subsequent punishments" imposed on speech only after it is uttered. *Alexander*, 509 U.S. at 553-54.

B. The prior restraints authorized by the NSL statute are materially different from permissible prohibitions on speech in other contexts.

Contrary to the government's arguments, the prior restraints authorized by the NSL statute are materially different from orders prohibiting speech in other exceptional contexts, and the statute cannot be saved by the comparison.

1. Unlike *Seattle Times* and *Snepp*, NSL recipients do not receive information conditioned on voluntary acceptance of a ban on publication.

No court has adopted the government's *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1992), argument, and this Court should not be the first. *Seattle Times* is limited to the situation in which a party to litigation is subject to a single order that

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4 (1996 & 2016 update) ("The phrase 'prior restraint' . . . is a term of art referring to judicial orders or administrative rules that operate to forbid expression before it takes place.").

both provides access to and limits publication of certain information.[4] The judicial ban on publication in that case—a protective order—was an inseparable part of the judicial order *granting* the defendant newspapers' motion to compel certain discovery of the information it sought to publish. *Id.* at 24-27. The "critical question" in the case was thus "whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used." *Id.* at 32. In finding that the protective order was not a prior restraint, the Court repeatedly referred back to this link between the access and protective orders. *See id.* at 32, 33. This makes sense: a party who has voluntarily chosen to use the power of the state to compel another party to disclose private information takes that information subject to the restrictions the state imposes for the protection of the disclosing party.

Appellants here were given no such choice. The information, and indeed the whole situation, was thrust upon them involuntarily. As the Second Circuit put it, "We fail to appreciate the analogy between the individuals or the entity seeking disclosure in those cases and [NSL recipient] John Doe, Inc., who had no interaction with the Government until the Government imposed its nondisclosure

[4] *See Butterworth v. Smith*, 494 U.S. 624, 631-32 (1990) (declining to extend *Seattle Times* to situations where the information was obtained independent of participation in a judicial proceeding).

requirement upon it." *Doe v. Mukasey*, 549 F.3d 861, 877 (2d Cir. 2008)

Seattle Times thus does not extend to all information learned by way of participation in governmental proceedings, especially when it is the government that discloses the information.[5] This Court applies prior restraint doctrine to orders barring the parties' counsel from speaking to the press during the pendency of trial. *Levine*, 764 F.2d at 595. And the prior restraint doctrine applies when the banned information is revealed to a *non*-party during litigation, even when that information was by law supposed to be kept confidential. *See Nebraska Press*, 427 U.S. at 543 (press heard confession and other evidence while attending pretrial hearing); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 309 (1977) (reporters obtained juvenile's name by attending court hearing which by law was supposed to be closed).

Snepp v. United States, 444 U.S. 507, 511 (1980), is even less analogous. There, Snepp voluntarily and without contest contracted away his First Amendment rights to publish information he would obtain during the course of his

[5] The government's ambitious proposed new rule that a "Restriction on Speech Concerning Information Obtained Solely Through Participation in a Secret Government Investigation Is Not a Classic Prior Restraint" is far too broad and must be rejected. For example, in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), the Supreme Court "examined the tension between First Amendment rights and government investigatory proceedings" and came out in favor of First Amendment rights prevailing over enforced secrecy despite assuming that "the confidentiality of the judicial review proceedings served legitimate state interests." *Butterworth*, 494 U.S. at 631.

employment with the CIA without governmental approval, as a condition to accepting his employment. He only sought to have his voluntary relinquishment of his right declared a prior restraint many years later. *See Mukasey*, 549 F.3d at 877 (rejecting the analogy to *Snepp*).

2. Grand jury secrecy requirements are much narrower than NSL gags and involve judicial supervision.

Nor are cases addressing gag orders placed on grand jury participants applicable here.

As an initial matter, NSL gags are far more extensive than their grand jury counterparts. Unlike NSL gags, a grand jury witness cannot be gagged from disclosing the fact of her subpoena or testimony. *See* 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).

Butterworth v. Smith, 494 U.S. 624 (1990), does not support the government's position. The Court in that case invalidated a Florida law that prohibited grand jury witnesses from disclosing their own testimony even after the grand jury was discharged. 494 U.S. at 632. Even the interest in maintaining the secrecy of a grand jury proceeding could not support a "permanent ban on disclosure," *id.*, while the NSL statute authorizes the FBI to impose indefinite and

unlimited gags on recipients. Indeed, the case makes it clear how limited grand jury speech bans actually are compared to the breadth of NSL gags.

Moreover, section 2709(c) has different underlying policy rationales than grand jury secrecy rules, and contains no temporal limitation. *Mukasey*, 549 F.3d at 877. Gag orders issued in the grand jury context originate from the court and are not unilaterally imposed by the Executive on its own authority. *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1199 (9th Cir. 2005) (documenting the historical operation of the grand jury, noting that it is "an appendage of the court" and "subject to the supervision of a judge").[6] As the *Mukasey* court observed, "Unlike the grand jury proceeding, as to which interests in secrecy arise from the nature of the proceeding, the nondisclosure requirement of subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy." *Mukasey*, 549 F.3d at 877. The district court below similarly rejected this analogy both times it confronted this issue. *In re NSL II*,

[6] The distinction between Executive Branch gag orders and those supervised by the judiciary is well founded in prior restraint law. As the Supreme Court explained in a seminal prior restraint case, "We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (finding an administrative book permitting scheme to be a prior restraint because the permitting agency was not "judicial body" and its decisions banning books did "not follow judicial determinations that such publications may lawfully be banned").

2016 WL 4501210, at *13 (finding analogy "misplaced" because federal grand jury witnesses "are not bound by secrecy with respect to the content of their testimony", and state law restrictions are "either limited in duration or allow[] for broad judicial review").

This Court should therefore reject the government's ill-fitting analogies and subject the NSL statute to the rigorous constitutional scrutiny required of prior restraints.

II. THE NSL STATUTE FAILS TO INCLUDE PROCEDURAL PROTECTIONS FOR PRIOR RESTRAINTS REQUIRED BY THE FIRST AMENDMENT.

In their opening brief, Appellants demonstrated that the NSL statute is unconstitutional because it fails to incorporate the procedural safeguards for prior restraints required by *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965): the statute fails to require that (1) any restraint imposed prior to judicial review must be limited to "a specified brief period"; (2) the period of restraint after review is initiated but before final judicial determination must be limited to "the shortest fixed period compatible with sound judicial resolution"; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government. Appellants' Br. at 28-34. As explained below, the NSL statute fails the *Freedman* test, and nothing the government argues rehabilitates it.

A. The NSL statute does not require that the government initiate judicial review in all instances.

The government mischaracterizes the NSL statute when it says that a "nondisclosure requirement may be imposed by an NSL only for a short period prior to judicial review." Opp'n Br. at 56. The statute actually provides the opposite. No judicial review occurs at all unless a recipient files a petition or affirmatively requests review under the "reciprocal notice procedure" originally suggested in *Mukasey*, 549 F.3d at 879.[7]

The invocation of reciprocal notice under § 3511(b) is not a *de minimis* burden on the communications provider. Rather, it requires defying the FBI's assertion that disclosure of the NSL might harm national security. Indeed, in district court case number 11-2173, the recipient was countersued by the government in response for making its initial objection to the NSL. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1066 & n.2 (N.D. Cal. 2008) ("*In re NSL I*"). Exercising First Amendment rights must not be conditioned on any special degree of courage. To the contrary, the First Amendment must protect those with the *most*

[7] The government claims, incorrectly, that the Appellant in case 11-2173 conceded in 2013 that the *Mukasey* court's requirements would be constitutional if adopted by Congress. Opp'n Br. at 12. In any event, such a concession would be irrelevant since the district court's 2013 *In re NSL I* ruling was vacated by this Court and superseded by its 2016 *In re NSL II* ruling. *In re NSL II*, 2016 WL 4501210, at *5-6 (discussing procedural history). On remand after the statute was amended, both Appellants argued that the *Mukasey* court's suggestions, including reciprocal notice, failed to meet the constitutional requirements set forth in *Freedman*. *Id.* at *14 (holding that *Freedman* applies to the revised statute).

to fear. *See Talley v. California*, 362 U.S. 60, 65 (1960) (recognizing need to protect right of "persecuted groups" to anonymously criticize government's "oppressive practices").

But even if the government were correct that making such a reciprocal notice request is a *de minimis* burden, that procedure still fails to ensure judicial review in all cases, as required by *Freedman*. Instead, in the vast majority of cases, for hundreds of thousands of NSLs issued since 2001, no court has ever reviewed the gag. By default, therefore, NSL gags are indefinite.

Just like the film distributors in *Freedman*, NSL recipients are restrained the moment they receive a government order *prohibiting them from speaking*; the First Amendment does not require they take additional steps to demonstrate their injury. As the Supreme Court explained, where the "'transcendent value of speech is involved'. . . *only* a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, [and] *only* a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman*, 380 U.S. at 58 (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958)) (emphasis added). The government admits that the NSL statute does not require such a proceeding in all cases, instead placing the onus on the recipient to initiate judicial review in one of two ways. 18 U.S.C. § 3511(a), (b).

In an effort to avoid the fact that the NSL statute does not require judicial

review in every instance, the government claims that an NSL "acts as a restraint only on the subset of NSL recipients who wish to disclose the government's request for information." Opp'n Br. at 58.

This Court must reject this dangerous argument, which is little more than a repackaging of the claim that NSL recipients are not "customary speakers." *See* Appellants' Br. at 15-18. The practical effect of the NSL statute is to impose a permit system, where NSL recipients who wish to speak must apply for permission. But if the government began requiring a permit for those who wished to criticize the President, it would be no less offensive a prior restraint if the government claimed that "only a subset" of the population actually wanted to engage in this criticism.

The First Amendment does not allow the government to play the odds by imposing hundreds of thousands of indefinite prior restraints on the expectation it will only have to defend a tiny fraction in court.

B. The NSL statute does not prevent judicial review from dragging on indefinitely.

As *Freedman* makes clear, the First Amendment requires that courts reviewing prior restraints rule in a specified amount of time; anything else would "lend an effect of finality to the censor's determination." 380 U.S. at 58. The Court need look no further than the NSLs at issue here, where there has yet to be a final

ruling after several years.[8]

The amended NSL statute fails to include a specific time frame by which the reviewing court must issue its opinion; a reviewing court need only "rule expeditiously." 18 U.S.C. § 3511(b)(1)(C). In contrast, the Second Circuit in *Mukasey* required that a constitutional scheme involving an NSL review proceeding "would have to be concluded within a *prescribed* time, perhaps 60 days." 549 F.3d at 879 (emphasis added). Although, as the government points out, the *Freedman* Court did not set out similarly concrete timelines for completion of judicial review, instead leaving it for "the State to decide," Opp'n Br. at 59 (quoting *Freedman*, 380 U.S. at 60), that omission only reflected a concern for federalism not present here.[9]

In the very next sentence of *Freedman*, the Court identified as "a model" the very tight time limits approved of in its *Kingsley Books* decision: "a hearing one day after joinder of issue; [and] the judge must hand down his decision within *two days* after termination of the hearing" *Id*. at 61 (citing *Kingsley Books, Inc. v.*

[8] The government's claim that Appellants have waived their as-applied challenge is easily rebutted. In their opening brief, Appellants listed numerous reasons why the NSLs at issue and the resulting judicial proceedings failed to meet the First Amendment, including, *inter alia*, the specific speech Appellants sought to engage in and the protracted nature of judicial review. *See* Appellants' Br. at 19-22, 26, 32-33. Moreover, the government itself says that the as-applied nature of Appellants' arguments is highly "intertwined" with their facial challenge, Opp'n Br. at 39, highlighting the absurdity of the alleged "waiver" of these claims.

[9] The Court abided by concerns of federalism and offered "considerations in drafting legislation to accord with local exhibition practices." *Id.*

Brown, 354 U.S. 436 (1957)). And in a similar case without federalism concerns, the Court readily imposed a 60-day review time limit for a *federal* statute that failed to comport with *Freedman*. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), *relied upon by Mukasey,* 549 F.3d at 883.

C. The NSL statute does not place the proper burden of proof on the government.

As Appellants previously explained, the NSL standard of review in section 3511(b)(3)—directing a court to issue an order enforcing a gag if it finds "reason to believe" a specified harm "may result"—does not put the government to the proper burden of proof required by *Freedman*.

The government's claim that Congress incorporated the Second Circuit's standard requiring the government to demonstrate "some reasonable likelihood" that harm will result is incorrect. Opp'n Br. at 60 (quoting *Mukasey*, 549 F.3d at 875). Congress did not incorporate the Second Circuit's standard. It adopted a *different* change to the statute. *Compare* 18 U.S.C. § 3511(b)(3) (2015) (reviewing court "*shall* issue a nondisclosure order" if it "determines that there is *reason to believe*" that disclosure will result in harm) *with* 18 U.S.C. § 3511(b)(2) (in effect March 9, 2006 – June 1, 2015) (court "*may*" set aside nondisclosure order if it finds "there is *no reason to believe* that disclosure may endanger the national security) (emphasis added). Congress knows how to legislate a "reasonable likelihood" standard, *see, e.g.,* 18 U.S.C. §§ 1514(b)(2), 3127(4); it did not do so

here. Moreover, as discussed above, even the government's proposed "reasonable likelihood" standard is incompatible with the substantive standard for prior restraints, which requires a higher showing of necessity. *See* Section I, *supra*; Appellants' Br. at 25-26.

Thus, the NSL statute is unconstitutional because it fails to meet the procedural requirements for prior restraints set out in *Freedman.*

III. THE NSL STATUTE FAILS STRICT SCRUTINY.

A. Strict scrutiny applies to the NSL statute, which prohibits speech by NSL recipients.

The government wisely makes little effort to avoid the application of strict scrutiny to the NSL statute, since the statute "clearly restrains speech of a particular content—significantly, speech about government conduct." *In re NSL II*, 2016 WL 4501210, at *13. Every court to consider the NSL statute has applied strict scrutiny. *See id.*; *Mukasey*, 549 F.3d at 878; *Merrill v. Lynch*, 151 F. Supp. 3d 342, 347 n.5 (S.D.N.Y. 2015).

The government's efforts to minimize the importance of the speech restricted by NSL gag orders are unpersuasive. The government writes that "NSL recipients are restricted, at most, from disclosing that they received an NSL and the contents of the NSL." Opp'n Br. at 22. But, of course, that restriction is one "defining regulated speech by particular subject matter"—namely the NSLs at issue—which is all that is required to trigger strict scrutiny. *Reed v. Town of*

Gilbert, 135 S. Ct. 2218, 2227 (2015).

Nor can the NSL statute's prohibition on revealing specific NSLs be so easily divorced from more general public discussion of the NSL statute. As the government itself confirms, NSL recipients are constrained from making certain arguments they could otherwise marshal against the NSL statute, simply by virtue of having received an NSL gag order. For example, when confronted by a key legislative official who claimed that it *could not even receive* an NSL, a representative of Appellant Cloudflare was barred from informing her that it had in fact received one. ER 129.

The government's proposed alternative—simply discussing the scope of the statute "as a matter of statutory interpretation" without dispositive reference to concrete fact of its receipt, Opp'n Br. at 38, is both unpersuasive and beside the point. The legal analysis would prove a disagreement on the interpretation of the law; the fact of receipt would reveal that the official was unquestionably incorrect.

Recipients thus become a class of speakers who are systematically disadvantaged by NSL gag orders, a disadvantage not shared by officials in the executive branch. That is the essence of viewpoint discrimination, which is an even "'more blatant' and 'egregious form of content discrimination'" requiring strict scrutiny. *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995)).

B. The NSL statute is not narrowly tailored.

Under strict scrutiny, the government has the burden of showing that its restriction on NSL recipients' speech is "narrowly tailored to serve compelling state interests." *Reed,* 135 S. Ct. at 2226. Narrow tailoring requires that (1) the restriction directly advance a compelling governmental interest, (2) the restriction be neither overinclusive nor underinclusive with respect to that interest, and (3) there are no less speech-restrictive alternatives to advancing the governmental interest.[10] *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). The government does not, and indeed cannot, meet its burden here.

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[10] In its brief, the government confuses the overinclusiveness element of strict scrutiny with the doctrinally distinct overbreadth doctrine. Opp'n Br. at 50. Overinclusiveness is an essential element of the holistic narrow tailoring analysis of First Amendment strict scrutiny. *See Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 804 (2011); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd*., 502 U.S. 105, 121-22 (1991). Even if not "substantial," overinclusiveness is always relevant to the strict scrutiny narrow tailoring analysis. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (finding that a speech regulation failed strict scrutiny because it was "both overinclusive and underinclusive" without requiring either to be of any particular magnitude). Indeed, overinclusiveness is relevant even when the narrow tailoring is done under less-demanding intermediate scrutiny, for example. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948-50 (9th Cir. 2011) (applying overinclusiveness to intermediate scrutiny). The overbreadth doctrine, by contrast, confers both standing and a substantive basis for a facial invalidation of a governmental restriction on speech if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (describing the overbreadth doctrine as designed as a "departure from traditional rules of standing"). It is that doctrine which does not apply if the overbreadth is not "substantial."

First, the government is incorrect that the NSL statute restricts only "a narrow slice of speech." Opp'n Br. at 42 (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015)). Unlike the narrow ban on fundraising by judicial candidates in *Williams-Yulee*, which left candidates "free to discuss any issue with any person at any time," 135 S. Ct. at 1670, an NSL gag order serves as a complete bar on NSL recipients identifying themselves as such at all times, in all manners, and in all fora.

Hence, it is cold comfort that companies may "identify[] themselves as the *sort* of service providers that *could* receive NSLs."[11] Opp'n Br. at 42-43 (emphasis added). "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). If an NSL recipient service provider is engaged in a debate with someone who incorrectly claims that it is ineligible to receive an NSL or who otherwise discounts the provider's viewpoint as uninformed, it cannot respond with "the simple truth." *Id.*

Second, the government fails to demonstrate that the NSL statute restricts no more speech than necessary to achieve the objective of protecting against the harms discussed in the statute's nondisclosure requirement. *Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989). Nowhere does the statute require that

[11] As the record indicates, that was unhelpful to Appellant Cloudflare, since the governmental official simply did not believe it could receive an NSL.

the government restrict the minimum amount of speech necessary to protect against one of the statutory harms. Instead, it at most merely requires the government to certify that disclosure of the NSL "may" lead to such harms.[12] But there are many ways such a certification is likely to restrict more speech than necessary—a recipient could disclose only its receipt of an NSL, or the type of records the government seeks, without notifying the target of the letter, for instance. While the government might point to hypothetical instances in which the mere fact of receipt could cause harm, the statute does not mandate this inquiry in all cases, as required by strict scrutiny.

Third, although the most recent amendments to the NSL statute authorize the

[12] The government's reliance on *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), is misplaced. In that case, the Court explained that Congress was entitled to deference for its "considered judgment" that "providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization." *Id*. at 36. But the Court's holding was dependent on the fact that the material support statute restricted only a "a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations", not "independent advocacy." *Id.* at 26. The speakers were not limited in what they could say, only to whom they could say it. The Court was careful to say that "we in no way suggest that a regulation of independent speech would pass constitutional muster[.]" *Id*. at 39. Hence, the material support statute was narrowly tailored to achieving the government interest—*coordinated* material support to known terrorist organizations. By contrast, the NSL statute restricts a far larger swath of speech and at a diminished level of certainty. The statute lacks the linkage between proscribed speech and support of terrorist activities that was present in *Holder* and prohibits "independent speech" of the sort that *Holder* expressly excluded from its analysis and holding.

FBI to permit "disclosure to other persons" and district courts to "issue a nondisclosure order that includes conditions appropriate to the circumstances," Opp'n Br. at 45 (quoting 18 U.S.C. § 2709(c)(2)(A)(iii) and § 3511(b)(1)(C)), neither of these provisions cure the statute's overinclusiveness.

To the contrary, subsection 2709(c)(2)(A)(iii) exacerbates the overinclusiveness by expanding the discretion of executive branch officials to administer a content-based restriction on speech as they see fit. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) (danger of "content and viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official"). Subsection 2709(c)(2)(A)(iii) imposes no conditions, guidelines, or other limits on the FBI's discretion whatsoever regarding whether it should permit disclosure of the NSL to "other persons," nor does the statute even allude to allowing partial disclosure of the contents of an NSL. Similarly, subsection 3511(b)(1)(C)—at best—expresses the tautology that, in the rare instance where a court reviews an NSL gag order, the court must determine whether the FBI's use of the gag is narrowly tailored and rule accordingly. That is, of course, always a court's duty when applying strict scrutiny.

Fourth, the government fails to refute Appellants' arguments that the statute does not use the least restrictive means because it permits indefinite gag orders.

Appellants' Br. at 38-41. As Appellants explained in their opening brief, the NSL statute allows for gags of indefinite duration because a nondisclosure requirement issued by the FBI remains in place unless and until it is removed at the sole discretion of the FBI or it is struck down by a court.[13] *Id*. The USA FREEDOM Act directs the FBI to develop procedures to review NSL gags "at appropriate intervals," Pub. L. No. 114-23, § 502(f)(1)(A), but the procedures actually promulgated by the FBI fail to ensure that this review limits gags to the least restrictive time period as required by strict scrutiny. It is the government's burden, not Appellants', to demonstrate how these procedures suffice to save the statute by rendering it narrowly tailored.[14] The government makes no effort to do so, ignoring the D.C. District Court's determination that the procedures are plagued by "several

[13] In arguing that the USA FREEDOM Act requires the FBI to withdraw a gag when the facts "no longer support nondisclosure," Opp'n Br. at 54 (quoting Pub. L. 114-23 § 502(f)(1)(B)), the government overlooks that a court need not review this determination. In order to survive strict scrutiny, content-based restrictions require clear guidelines limiting executive discretion. *City of Lakewood*, 486 U.S. at 776.

[14] It is puzzling that the government claims that Appellants have "waived any challenge to the Termination Procedures." Opp'n Br. at 47 n.5. Appellants' opening brief discusses these procedures at length. *See* Appellants' Br. at 39-41. Moreover, Appellants raise a facial challenge to the NSL statute as a whole; it is the government that has invoked the termination procedures as a defense of the statute. Finally, the government's citation to the district court's statement that Appellants "do not raise any specific challenge" to the procedures is highly misleading. The procedures were published on November 24, 2015, four days after Appellants filed their final briefs in the district court. *See* ER 74, 119, 181 (district court docket sheets). Even so, the transcript of oral argument held on December 18, 2015 demonstrates that Appellants asserted that the procedures were "not sufficient" if applied to the NSLs at issue, an argument they maintain here. Appellants' Further Excerpts of Record 1.

large loopholes." *In re Nat'l Sec. Letters*, No. 16-518, slip op. at 4 (D.D.C. July 25, 2016); *see also Lynch v. Under Seal*, No 15-1180, slip op. at 4 (D. Md. Sept. 17, 2015) (finding it "problematic" that statute as amended by USA FREEDOM Act still allowed for gags of "indefinite duration" and requiring review of NSL gag twice annually in absence of Attorney General's review procedures).

Fifth, the "reporting bands" in the USA FREEDOM Act that allow selective and vague disclosure by certain NSL recipients do not render the statute narrowly tailored. As Appellants described in their opening brief, these bands represent at most a coarse judgment by Congress that NSL recipients who receive many NSLs may reveal they have received some NSLs, whereas recipients who get fewer may not. Appellants' Br. at 37-38. Despite the government's efforts to defend this judgment as worthy of deference, it adduces no evidence that the judgment is rational, let alone that it suffices for narrow tailoring. Common sense suggests the number of NSLs a provider receives bears faint relationship to the possibility that disclosure that a service provider has received an NSL "may" cause a specified harm. Service providers vary widely; some may have millions of customers or cater to a broader section of society than others, to name but a few of the factors which may influence what constitutes a narrowly tailored gag order to a given provider.

CONCLUSION

For the reasons stated above, the district court's judgment upholding the NSL statute and denying Appellants' petitions to set aside the NSLs in appeals Nos. 16-16067, 16-16081 and 16-16802 should be reversed and the cases remanded for further proceedings.

Dated: December 21, 2016

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-16067, 16-16081, 16-16082

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Signature of Attorney or Unrepresented Litigant [/s/Andrew Crocker] Date [Dec 21, 2016]

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STATEMENT OF RELATED CASES

Nos. 16-16067, 16-16081, and 16-16082 have been consolidated by order of this Court. Appellants are not aware of other related cases pending before this Court.

CERTIFICATE OF FILING AND 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 December 21, 2016.

Dated: December 21, 2016

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STATUTORY AND CONSTITUTIONAL ADDENDUM

All applicable statutes, constitutional provisions, treaties, regulations and rules are contained in the briefs or addenda of the Appellants and Appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE
SEALED DOCUMENTS
INTERIM CIRCUIT RULE 27-13

Case Number: 16-16067, 16-16081, 16-16082

Case Title: In re: National Security Letter, UNDER SEAL v. Loretta E. Lynch, Attorney General

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Appellants' Under Seal Reply Brief
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