

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
[REDACTED]
AMERICAN CIVIL LIBERTIES UNION; and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

JOHN ASHCROFT, 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.
-----X

FILED UNDER SEAL

04 Civ. 2614 (VM)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S
CROSS-MOTION TO DISMISS THE COMPLAINT OR FOR SUMMARY JUDGMENT

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Preliminary Statement

Defendants John Ashcroft, Attorney General of the United States; Robert Mueller, Director of the Federal Bureau of Investigation ("FBI"); and Marion E. Bowman, Senior Counsel to the FBI (collectively, the "Government"), respectfully submit this reply memorandum in further support of their cross-motion to dismiss the complaint filed by plaintiffs [REDACTED], American Civil Liberties Union ("ACLU"), and American Civil Liberties Union Foundation ("ACLUF") (collectively, "Plaintiffs") for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment in the Government's favor, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

Plaintiffs seek to have this Court strike down a statute -- enacted in 1986, as part of a set of provisions designed to protect both privacy interests and the Government's legitimate law enforcement needs -- whose sole purpose is to aid the FBI in preventing clandestine intelligence activities and future terrorist acts. Plaintiffs, however, have not shown their entitlement to such extraordinary relief, as their arguments misstate the law, misconstrue several of the Government's arguments, and fail to respond to others. Section 2709 provides the FBI with constitutional, appropriate, and necessary authority to request from communication service providers "subscriber information" and transactional records relevant to

authorized foreign counterintelligence and counter-terrorism investigations. In addition, the non-disclosure provision in § 2709(c) properly protects the integrity and efficacy of such investigations, by prohibiting the disclosure of particular investigative inquiries that have been made.

Plaintiffs' facial challenges to the FBI's statutory authority to request information under § 2709 fail as matter of law. Plaintiffs' Fourth and First Amendment challenges fail because, contrary to Plaintiffs' assertions, § 2709 affords adequate judicial oversight of NSLs. The Constitution does not require judicial review or approval when a request for records (or subpoena) is issued. Meanwhile, once an NSL is served, a communication service provider has two avenues to challenge the request: (1) it can file a pre-production action to enjoin enforcement, as [REDACTED] has done; or (2) it can take no action, wait to see if the Government chooses to initiate an enforcement action, and then challenge the NSL as a defense to enforcement. Plaintiffs' Fifth Amendment challenge fails because a person simply does not have a right to notice that the Government has requested, from a third party, information or records pertaining to him in the course of an investigation.

Plaintiffs' as-applied First Amendment challenge to the NSL served on [REDACTED] (the "challenged NSL") likewise fails. As demonstrated by the Ex Parte FBI Declaration -- which this Court may properly consider -- [REDACTED] and the Government has a need for the information sought. Thus, constitutional strictures are fully satisfied.

Plaintiffs' First Amendment challenge to the non-disclosure requirement in § 2709(c) (and to the challenged NSL incorporating it) should also be rejected. Most fundamentally, the Government provided a detailed, 15-page declaration -- the Declaration of David W. Szady, executed June 28, 2004 ("Szady Decl.") (annexed as Exhibit C to the Declaration of Meredith Kotler, executed June 28, 2004 ("Kotler Decl.)) -- describing the need for full non-disclosure with respect to any NSL. Plaintiffs have submitted

no evidence to dispute the Szady Declaration; indeed, Plaintiffs fail even to mention the declaration in their 57-page opposition brief. Meanwhile, Plaintiffs' strident complaints about the non-disclosure required under § 2709(c), made by counsel in a memorandum of law, do not constitute evidence. In addition, Plaintiffs are ill-suited to evaluate the need for non-disclosure, given that they have no experience, let alone expertise, in conducting counterintelligence and counter-terrorism investigations. Even putting aside Plaintiffs' failure to raise any disputed issue of fact with respect to the need for § 2709(c), however, the non-disclosure requirement -- like those validated by the Supreme Court and United States Court of Appeals for the Second Circuit -- passes constitutional muster.

Finally, Plaintiffs' vagueness challenge to § 2709(c) (and to the challenged NSL incorporating it) similarly fails. The statute plainly provides adequate notice of prohibited conduct: any disclosure revealing that the FBI has made a particular investigative inquiry is barred.

POINT I

PLAINTIFFS' CHALLENGES TO THE FBI'S AUTHORITY TO REQUEST RECORDS FROM COMMUNICATION SERVICE PROVIDERS UNDER § 2709 AND THROUGH THE CHALLENGED NSL ARE MERITLESS

A. Plaintiffs' Fourth Amendment Claim Is Meritless

In their opposition papers, Plaintiffs continue to insist that § 2709 violates the Fourth Amendment because it does not "afford service providers any opportunity to contest the validity of an NSL in court." Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to the Government's Cross-Motion to Dismiss the Complaint or for Summary Judgment, filed July 30, 2004 ("Pl. Opp. Br."), at 4-5. Plaintiffs are wrong. Indeed, despite Plaintiffs' rhetoric, they cannot avoid the obvious: [REDACTED] has refused to produce documents responsive to the NSL served on it, and it has had a full opportunity to challenge the NSL in a pre-production action to enjoin the NSL's enforcement. Meanwhile, the FBI cannot "compel" [REDACTED] to produce records without pursuing an enforcement action before this

Court -- which, of course, would provide [REDACTED] a separate opportunity to challenge the validity of the NSL prior to production.

1. **The FBI's Authority to Request Records
Is Fully Consistent with the Fourth Amendment**

As described in the Government's moving papers, Plaintiffs' challenge to the statute authorizing the FBI to request records relevant to foreign counterintelligence and counter-terrorism investigations is fundamentally misplaced. Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the Government's Cross-Motion to Dismiss the Complaint or for Summary Judgment, filed June 28, 2004 ("Gov. Br."), at 18-19. In 97 pages of briefing (with an additional 38 pages from amici), Plaintiffs fail to cite a single case striking down a statute that authorizes an agency to request records to fulfill its investigatory mandate. Plaintiffs have not done so because they cannot: the Supreme Court has repeatedly upheld agencies' broad authority to request records to conduct investigations. See Gov. Br. at 18. Any challenge to an agency's authority to request records must be considered in the context of a challenge to a particular request.¹

In addition, as noted in the Government's moving papers, it is well settled that the Fourth Amendment does not require an agency to seek judicial approval before issuing a request for records. Gov. Br. at 19 (citing cases). Plaintiffs' lengthy briefing nowhere addresses this well-settled principle, and they cite no case holding to the contrary. Meanwhile, § 2709 adds a requirement for issuance of an NSL: a certification, from a high-level FBI official (the Director of the FBI or his designee not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office), that the request is "relevant to an authorized investigation to protect against international terrorism or clandestine

¹ Plaintiffs' only response simply reverts to their meritless Fourth Amendment argument: they claim that "[f]acial invalidation is necessary" because service providers do not have an opportunity to challenge particular NSLs on a case-by-case basis. Pl. Opp. Br. at 28-29. As demonstrated infra at 6-12, however, service providers have two separate avenues for challenging NSLs served on them.

intelligence activities." 18 U.S.C. § 2709(b) (Supp. II 2002). Such a certification is not required for issuance of grand jury or administrative subpoenas.²

Plaintiffs' assertion that the FBI's certification of relevance "can be no substitute for the usual requirements of the Fourth Amendment," Pl. Opp. Br. at 15, is entirely unavailing. As demonstrated supra at 4, the Fourth Amendment imposes no "usual requirements" -- including judicial review -- when an agency (or grand jury) issues a request for records. The Fourth Amendment requires only that, if the recipient of a request ultimately decides to challenge the request (or if the Government chooses to pursue an enforcement action), the request must be reasonable. Indeed, in the face of a challenge to a particular request for records, the request must be enforced by a court so long as it "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Gov. Br. at 19 (quoting United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)).

Plaintiffs also inappropriately, and inaccurately, remark that the certification requirement is "no more protective of constitutional rights than would be a requirement that an FBI agent, before issuing any NSL, dance a little jig." Pl. Opp. Br. at 15. Plaintiffs' comment -- derisively insinuating that a high-level FBI official's certification is meaningless -- betrays a cavalier attitude toward those high-level officials in the FBI who have dedicated themselves to preventing terrorism and clandestine intelligence activities. That is wrong. The required certification comes from a high-level FBI official, who is presumed to act in accordance with the Constitution. See generally Withrow v. Larkin, 421 U.S. 35, 47, 58 (1975) (agency decision-makers act with "presumption of honesty and integrity"); FCC v. Schreiber, 381 U.S. 279, 296 (1965) (agencies entitled to presumption that they act properly and according to law).

² While Plaintiffs take issue with the Government's analogy to grand jury subpoenas, Pl. Opp. Br. at 17-18, they cannot dispute that grand jury subpoenas are issued without judicial oversight, and that when a particular grand jury subpoena is challenged, the Fourth Amendment requires only a demonstration of reasonableness. United States v. R. Enterprises, Inc., 498 U.S. 292, 300-01 (1991).

Plaintiffs, meanwhile, have presented no evidence of false certification -- indeed, there can be no question that the certification of relevance in this case was entirely proper. (See Ex Parte FBI Declaration ("Ex Parte FBI Decl."), at ¶ 30 (annexed as Exhibit B to the Kotler Decl.)). Despite Plaintiffs' flippant assertion, the required certification does afford greater protection than the numerous statutes that impose no such requirement for issuance of a record request.

2. **Plaintiffs' Assertion that § 2709 Authorizes the FBI to Compel Production of Records from a Communication Service Provider Without Allowing an Opportunity to Challenge an NSL Is Incorrect**

What is most striking about Plaintiffs' Fourth Amendment claim is what they do not say. Despite lengthy briefing, Plaintiffs fail to cite a single case holding that a statute authorizing an agency to request records must expressly notify recipients of requests that they can file pre-production challenges. To the contrary, numerous statutes authorizing agencies to request records nowhere mention such challenges. The Government cited several such statutes in its moving brief, see Gov. Br. at 18-19, 23, but Plaintiffs' opposition ignores them.

Instead, Plaintiffs now ratchet up their claim, insisting that § 2709 affirmatively prohibits a communication service provider from contesting the validity of an NSL in court. Pl. Opp. Br. at 5-9. Even if one could ignore the reality that Plaintiffs are currently challenging the validity of an NSL in court, Plaintiffs advance four meritless arguments in support of their assertion. First, although Plaintiffs contend that the statute and an NSL use "mandatory and unqualified" language that "direct[]" a recipient to produce records, Pl. Opp. Br. at 5, the fact that the statute creates a legal obligation of production says nothing about whether a recipient can challenge an NSL in court. Indeed, all subpoenas and summonses employ "mandatory and unqualified" language that creates a mandatory obligation to produce records; that does not mean that a subpoena or summons cannot be challenged.

Second, while Plaintiffs note that § 2709 does not expressly authorize challenges to NSLs, Pl. Opp.

Br. at 5-6, no court has held that a statute authorizing agency requests for records must expressly describe pre-production challenges. Indeed, while Plaintiffs cite two rules governing subpoenas and two statutes that discuss pre-production challenges, Pl. Opp. Br. at 8, many statutes authorizing agency record requests nowhere mention such challenges, Gov. Br. at 18-19, 23 (citing cases).

Third, contrary to Plaintiffs' insistence -- and as demonstrated by Plaintiffs' own actions -- the non-disclosure provision in § 2709(c) does not prohibit a service provider from challenging an NSL in court. Pl. Opp. Br. at 6, 8-9. An NSL recipient can, as Plaintiffs did, file an action seeking to enjoin enforcement under seal. Any rational reading of the phrase "shall not disclose" in § 2709(c) excludes the recipient's attorney as well as a court filing under seal. Gov. Br. at 16 (citing cases holding that statute must be read to avoid constitutional doubt).

Finally, the legislative history and Congressional Research Service report cited by Plaintiffs do not indicate that a communication service provider is barred from challenging an NSL in court. Pl. Opp. Br. at 7 & n.3. As an initial matter, Plaintiffs fail to discuss the legislative history from the 1986 enactment of § 2709, which makes clear that the statute's purportedly "mandatory" language was intended to override state laws that otherwise would prevent production -- and not to indicate that recipients of NSLs cannot challenge the requests in court. Gov. Br. at 22 n.6. In any event, Plaintiffs wrongly seize on a sentence from 1993 legislative history. The 1993 amendment changed the requisite certification for issuing NSLs while also strengthening the congressional reporting requirement; the amendment had nothing to do with the question of whether, once issued and served, an NSL can be challenged in court. See H. Rep. 103-46 at 4 (Mar. 29, 1993), reprinted in 1993 U.S.C.C.A.N. 1913, 1916. While the legislative history states that NSLs are "[e]xempt from the judicial scrutiny normally required for compulsory process," id. at 3, the clear import of this statement is that NSLs can be issued without judicial approval. Indeed, the legislative history specifically notes that NSLs can be "signed" (i.e., issued) "without judicial review." Id. at 2. As

noted supra at 4-5, the Fourth Amendment does not require that an agency obtain judicial approval before issuing a request for records.

Meanwhile, Plaintiffs mischaracterize the Congressional Research Service report on which they rely. Pl. Opp. Br. at 7 n.3. The report does not state that § 2709 "allow[s] the FBI to obtain information" without recourse to the courts. Id. (emphasis added). Rather, the report states only that the FBI may "issue" NSLs without aid of court. Charles Doyle, Libraries and the USA PATRIOT Act 2 (Congressional Research Service Feb. 26, 2003) ("In addition, without recourse to the courts, the FBI in foreign intelligence cases may issue so-called national security letters" (emphasis added)). The report says nothing about the ability of an NSL recipient to challenge a request that has been served, or about the FBI's ability to compel production when, as here, an NSL recipient refuses to produce requested records.

Plaintiffs also make the irrelevant assertion that the "effect" of § 2709 and an NSL is to "unilaterally . . . compel" the production of records. Pl. Opp. Br. at 9-15. The only relevant question is whether NSL recipients have a right, if they choose to exercise it, to challenge an NSL prior to production. As the Government described in its moving brief, NSL recipients have two opportunities to challenge NSLs: (1) a recipient can file a pre-production action seeking to enjoin enforcement, as ██████████ has done; or (2) a recipient can take no action, wait to see if the Government opts to pursue an enforcement action, and then challenge the NSL as a defense to enforcement. Gov. Br. at 22-23.

Plaintiffs' subjective (and inaccurate) view of the purported "effect" of § 2709 and an NSL has nothing to do with whether, as a matter of law, a service provider is permitted to challenge an NSL prior to production. Contrary to Plaintiffs' protestations, see Pl. Opp. Br. at 10, neither the statute nor the text of an NSL provides that a pre-production challenge is prohibited. Likewise, while Plaintiffs maintain that no service provider (other than ██████████ has challenged an NSL, id., that fact has no bearing on the legal question of whether an NSL may be challenged.

In addition, Plaintiffs are simply incorrect in insisting that the FBI can "unilaterally . . . compel" production of records without affording an NSL recipient the opportunity to challenge the NSL. Again, Plaintiffs' argument rests on a fundamental flaw: Plaintiffs erroneously conflate (1) an entity's legal obligation to produce records in the face of a subpoena or record request, with (2) a requester's ability to compel production when the entity refuses to produce. As with any subpoena or record request, the request triggers a mandatory obligation of production (or formal objection), but the requester cannot compel production without going to court to enforce the request. Indeed, [REDACTED] actions in this case -- continuing to refuse to produce the requested records (see Declaration of [REDACTED] executed June 25, 2004 [REDACTED] Decl."); at ¶ 15) -- plainly demonstrate that the FBI cannot "compel" any action by an NSL recipient that wishes to pursue a pre-production challenge.

Plaintiffs' only response to this obvious reality is to manufacture a licensing system that does not exist under § 2709. See Pl. Opp. Br. at 11 (asserting that [REDACTED] filed this action "only after seeking and obtaining the FBI's permission to consult an attorney"). As an initial matter, Plaintiffs' response ignores half of the picture: having decided not to comply with the NSL, [REDACTED] could have waited to see if the Government instituted an enforcement action; if such an action had been brought [REDACTED] would have had full opportunity to challenge the NSL as a defense to enforcement. In any event, Plaintiffs have submitted no evidence to dispute Agent [REDACTED] sworn declaration that he did not understand [REDACTED] president [REDACTED] to have sought "permission" to consult an attorney, that he did not intend to grant (or deny [REDACTED] such "permission," and that he did not believe § 2709 authorized him to either grant or deny a service provider such "permission." [REDACTED] Decl. ¶¶ 7-9).³ While [REDACTED] may have believed

³ Plaintiffs compound this error when they separately claim: "Plaintiff [REDACTED] was able to file this challenge only because FBI Agent [REDACTED] . . . informed [REDACTED] that he could consult an attorney. . . . The government now argues that Mr. [REDACTED] should not have been so informed." Pl. Opp. Br. at 28 n.8. First, as the Government's undisputed evidence proves, Agent [REDACTED] did not understand [REDACTED]

(continued...)

that he obtained such "permission," that was a product of his own misunderstanding. At bottom, Plaintiffs do not dispute that it was ██████ who -- on his own initiative -- thought of consulting an attorney. Just as ██████ considered consulting an attorney, it strains credulity for Plaintiffs to assert that a communication service provider desiring to challenge an NSL before a court would not think it could do so, as ██████ did.⁴

Plaintiffs also misconstrue the Government's statements with respect to a communication service provider's ability to challenge an NSL as a defense to an enforcement action. Pl. Opp. Br. at 11-15. Plaintiffs inaccurately describe that the Government "conten[ds] that its actions must remain exempt from constitutional scrutiny until it seeks judicial enforcement of an NSL." Pl. Opp. Br. at 11. Rather, the Government noted a second avenue for an NSL recipient to challenge the request: as ██████ has done, an NSL recipient may file a pre-production action seeking to enjoin the NSL's enforcement. Gov. Br. at 22. Contrary to Plaintiffs' assertion, the Government simply does not "conduct[] its activities in this context entirely free from judicial scrutiny." Pl. Opp. Br. at 11.

Plaintiffs' reliance on five cases in asserting that the Government cannot "insulate its coercive actions from constitutional scrutiny" is therefore entirely unavailing. Pl. Opp. Br. at 11-15 (discussing cases). There is no such "insulation" because NSL recipients have full opportunity to challenge NSLs -- as this case readily demonstrates. In any event, the cases cited by Plaintiffs (the majority of which deal with alleged censorship of obscene materials and not a statute authorizing requests for information relevant

(...continued)

to have sought permission to consult an attorney, and Agent ██████ did not intend to inform ██████ that he could (or could not) so consult. ██████ Decl. ¶¶ 7-9). Second, the Government's moving brief nowhere stated that Agent ██████ should not have informed ██████ that he could consult an attorney. To the contrary, the Government's point was that Agent ██████ did not inform ██████ one way or the other -- that he could consult an attorney. Gov. Br. at 11, 50 n.16, 66.

⁴ Similarly, while Plaintiffs announce that "[n]o 'reasonable, law-abiding person' could conclude that he had any choice but immediately to comply with" an NSL, Pl. Opp. Br. at 15, ██████ on his own -- thought of consulting an attorney, and his company has refused to comply with the NSL and instead filed this action.

to foreign counterintelligence and counter-terrorism investigations) simply have no applicability here. None of the cases cited by Plaintiffs involved a challenge to a government inquiry that was subject to two different avenues of judicial challenge. Likewise, none of the cases dealt with the constitutionality of a statute that authorizes an agency (or other body) to request records kept in the ordinary course of business.⁵

Finally, Plaintiffs inappositely -- and inaccurately -- assert that the four layers of Congressional oversight imposed by 18 U.S.C. § 2709(e) is not an "adequate substitute for the judicial review required by the First and Fourth Amendments" when the Government requests records. Pl. Opp. Br. at 16. Again, Plaintiffs misconstrue the Government's statements. The Government noted that the FBI is required to regularly and "fully" inform four different Congressional committees concerning NSLs issued under § 2709 in response to Plaintiffs' (and amici's) incorrect assertions that § 2709 provides the FBI with "unchecked power." Gov. Br. at 23-24. More importantly, the Government did not claim that Congressional oversight was a "substitute" for judicial review. To the contrary, even before mentioning congressional oversight, the Government pointed out that "NSL recipients have several opportunities to challenge a request for

⁵ See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 62, 68 (1963) (finding unconstitutional activities of Rhode Island Commission to Encourage Morality in Youth, which sent notices to book distributors advising that certain material they distributed was obscene and reminding distributors that Commission had duty to recommend prosecution of purveyors of obscenity); Rattner v. Netburn, 930 F.2d 204, 209-10 (2d Cir. 1991) (reversing summary judgment dismissing free speech claim predicated upon defendant village official's letter to Chamber of Commerce, which caused Chamber to stop publication of newspaper that plaintiff used as outlet to express criticism of village leadership; letter could have been read as "veiled threat of boycott or reprisal" against members of Chamber); In re Grand Jury Proceedings, 814 F.2d 61, 70 (1st Cir. 1987) (in defendant's challenge to prosecutor's conduct of grand jury investigation, finding that government letter sent to grand jury witnesses could only be viewed as stating that witness had legal obligation not to disclose grand jury subpoena, contrary to Federal Rule of Criminal Procedure 6(e)(2)); Penthouse Int'l v. McAuliffe, 610 F.2d 1353, 1359-62 (5th Cir. 1980) (Solicitor General of Georgia's actions in arresting various sellers of magazines and printing advertisement in newspaper "making it clear to all retailers selling the suspect magazines that they would be arrested" constituted unconstitutional prior restraint on magazines); Drive in Theatres v. Huskey, 435 F.2d 228, 229-30 (4th Cir. 1970) (county sheriff's actions in seizing several films, threatening prosecution of persons exhibiting films rated "X" and "R," and declaring his intention to confiscate all adult rated films exhibited in county constituted "informal censorship" and unconstitutional prior restraint).

records prior to production." Gov. Br. at 24. In any event, as demonstrated supra at 4-15, the Constitution does not impose a requirement of judicial review of record requests at the time they are issued; full review is afforded if the recipient of a request chooses to challenge it.

In discussing Congressional oversight, Plaintiffs improperly seize the opportunity to quote from an unrelated report that is critical of some of the Government's cooperation with certain Congressional oversight (the report states that the Government cooperated with some oversight efforts, but delayed in answering or did not answer certain questions). Pl. Opp. Br. at 16. In an apparent effort to justify their discussion of the report, Plaintiffs mischaracterize it as addressing "oversight of implementation of the Patriot Act." Id.⁶ However, the report -- entitled "FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures" ("Report") -- discusses oversight of the Government's use of investigative authority provided under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 et seq. The 40-page report nowhere discusses (much less criticizes) the Government's reporting on NSLs under 18 U.S.C. § 2709(e) -- which has been ongoing since 1986. Thus, Plaintiffs proffer no evidence concerning the effectiveness of Congressional oversight of NSLs.

In sum, Plaintiffs are simply incorrect in insisting that § 2709 does not afford an NSL recipient opportunity to challenge the request, and thus Plaintiffs' Fourth Amendment claim fails as a matter of law.

B. Plaintiffs' First Amendment Claims Are Meritless

Plaintiffs' First Amendment challenge to § 2709 -- that the statute is unconstitutional because it

⁶ Plaintiffs' invocation of the Patriot Act, Pl. Opp. Br. at 16, is also misleading. Plaintiffs repeatedly attempt to portray this case as a challenge to the Patriot Act. (See, e.g., Amended Complaint ("Compl.") ¶¶ 61-63, 65-67; Declaration of [REDACTED] executed May 15, 2004 ([REDACTED] Decl.) at ¶ 24; Declaration of Anthony Romero, executed May 15, 2004 ("Romero Decl.") at ¶¶ 14, 16), Declaration of Ann Beeson, executed May 15, 2004 ("First Beeson Decl."), Exh. 13 ("ACLU Challenge to Patriot Act Spying Powers Unsealed"). In fact, Plaintiffs' claims have little to do with that statute. Each of the aspects of § 2709 that Plaintiffs challenge has been a feature of the statute since its 1986 enactment. See Gov. Br. at 7-10.

authorizes the FBI to obtain "constitutionally protected information" without affording judicial oversight -- is likewise meritless. Plaintiffs devote most of their briefing to support the broad, and vague, assertion that the statute "reaches information protected by the First Amendment." Pl. Opp. Br. at 18-25. Whatever that means, Plaintiffs miss the point: as the Government's moving papers demonstrated, § 2709 does not unconstitutionally abridge any right of anonymous speech or association. More fundamentally, however, whether or not § 2709 "reaches information protected by the First Amendment," Plaintiffs' First Amendment challenge to the statute simply fails. The First Amendment does not require "judicial oversight" before any request for records may be issued. And once an NSL is served, a communication service provider has full opportunity to challenge it, thus providing for "judicial oversight."

Plaintiffs' as-applied First Amendment challenge to the NSL served on [REDACTED] is also devoid of merit. The Ex Parte FBI Declaration unquestionably demonstrates the relevance of the NSL to an authorized [REDACTED] investigation, and that the Government [REDACTED] for the information sought. Meanwhile, Plaintiffs' motion to exclude the declaration is baseless, as consideration of the declaration is both permissible and appropriate.

1. The FBI's Authority to Request Records Does Not Unlawfully Abridge Subscribers' First Amendment Freedoms of Speech or Association

Though Plaintiffs' opposition briefing does not carefully describe the First Amendment rights invoked, they appear to discuss anonymous speech and anonymous association. See Pl. Opp. Br. at 18-24. Plaintiffs' opposition delineates four types of "information protected by the First Amendment" that they claim § 2709 "clearly reaches": (1) the identity of a person who has communicated over the Internet; (2) a list of websites that a person has visited; (3) a list of e-mail addresses with which a person has corresponded; and (4) a list of people who have e-mail accounts with "particular advocacy" or political organizations." Pl. Opp. Br. at 18, 30. The Government addresses each of these categories below, with respect to both speech and association.

As an initial matter, again what is most significant about Plaintiffs' opposition is what they do not say. Plaintiffs fail even to acknowledge that the Internet, while it generally facilitates speech and association, is also an important tool for operatives in international terrorist and foreign intelligence networks to communicate with each other, to obtain and relay information for future terrorist attacks or intelligence activities, to build and support their organizations, and to disseminate propaganda. Gov. Br. at 31-32; Szady Decl. ¶ 14. Essentially, Plaintiffs' argument is that a person has an absolute right to anonymity with respect to any interaction with the Internet -- even the fact that he or she uses communication services -- notwithstanding that information sought has been certified as relevant to an authorized counterintelligence or counter-terrorism investigation. Such a proposition is both unwise and contrary to the law.

a. § 2709 Does Not Unconstitutionally Compel Identification of Anonymous Speakers

As demonstrated in the Government's moving papers, Plaintiffs' invocation of the protection against compelled identification of an anonymous speaker is misplaced for two reasons. First, and contrary to Plaintiffs' characterization, § 2709 does not authorize the FBI to obtain the contents of an Internet user's speech. Gov. Br. at 24-25. While Plaintiffs now appear to have abandoned their erroneous claim that the FBI can obtain "subject lines" of e-mails through NSLs, they make the remarkable assertion that the Government "recogniz[es]" that § 2709 "does not prohibit the government from using NSLs to obtain 'content' information." Pl. Opp. Br. at 22. Plaintiffs' assertion is simply false, and demonstrates their fundamental misunderstanding of § 2709 and the remainder of Title II of the Electronic Communications Privacy Act ("ECPA").

Section 2709 -- entitled "Counterintelligence access to telephone toll and transactional records" -- only authorizes the FBI to request "subscriber information" (specifically, "name," "address," and "length of service"), "toll billing records information," and "electronic communication transactional records." 18

U.S.C. § 2709(a), (b) (Supp. II 2002). The statute nowhere authorizes the FBI to obtain the "content" of communications. See id. In addition, the legislative history from the statute's 1986 enactment directly states: "It should be noted that [§ 2709] applies only to transactional records, not to the content of the electronic messages of a customer or subscriber." S. Rep. 99-541 at 44 (Oct. 17, 1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3598. Meanwhile, ECPA Title II (of which § 2709 is a part) carefully distinguishes between requests for the content of communications and for non-content records pertaining to communications. Compare 18 U.S.C. §§ 2702(a)(1), (2) (Supp. II 2002) with 18 U.S.C. § 2702(a)(3) (Supp. II 2002); compare 18 U.S.C. § 2703(a), (b) with 18 U.S.C. § 2703(c). The challenged NSL was consistent with ECPA's clear statutory scheme, expressly stating that "[w]e are not requesting, and you should not provide, information pursuant to this request that would disclose the content of any electronic communication as defined in Title 18, United States Code, Section 2510(8)." [REDACTED] Decl. Exh. 1).

Indeed, the four categories of "information" that Plaintiffs claim § 2709 "clearly reaches" are not properly considered speech or even expressive conduct. See NYC C.L.A.S.H. v. City of New York, 315 F. Supp. 2d 461, 476 (S.D.N.Y. 2004) (discussing conduct that "has been found to be sufficiently expressive to merit First Amendment protection" and noting "requirement that some articulable message must still exist and otherwise 'speak' to someone"). While Plaintiffs complain that the FBI may obtain the identity of a person who has used the Internet (presumably a reference to a request for "subscriber information"), the fact that someone purchases electronic communication services does not constitute speech or conduct that expresses anything. Likewise, obtaining a list of websites that a person has visited does not reveal that person's speech or any expressive conduct; Plaintiffs provide no rationale (much less case law) explaining how merely accessing a website on a computer expresses anything one way or the other. Similarly, obtaining a list of e-mail addresses with which a person has communicated -- without the content of such communications -- does not constitute a person's speech or expression. Finally, the fact

that a person purchases or otherwise obtains communication services through an entity (even an "advocacy or political organization[]") is not speech or expressive of anything.

Second, § 2709 does not authorize the FBI to obtain information that is "anonymous." Gov. Br. at 25. Internet users have no reasonable expectation of privacy in non-content subscriber information provided to and transactional records maintained by communication service providers, Gov. Br. at 17 n.4; they voluntarily identify themselves to service providers and they know (or are presumed to know) that service providers maintain transactional records in the ordinary course of business. Contrary to Plaintiffs' assertion, Pl. Opp. Br. at 18 (citing NAACP v. Alabama, 357 U.S. 449 (1958)), the Government does not claim that a member of the NAACP surrenders her right to anonymity by providing her name to the organization. Putting aside the fact that this raises an issue of association rather than speech, the member has maintained the anonymity of her membership; she provided information about her association only to the organization with which she associated. In contrast, § 2709 authorizes the FBI to obtain information voluntarily provided to a communication service provider, with whom a speaker enjoys no associational or confidential speech rights.⁷ Meanwhile, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 (1995) (cited in Pl. Opp. Br. at 19), involved the very different circumstance of a statute requiring a person distributing campaign literature to place her name on the literature, thus compelling identification as the speaker communicates her views. The case did not involve, as here, a request to a third party for non-content information voluntarily provided or exposed to it.

⁷ Likewise unavailing is Plaintiffs' assertion that the Supreme Court has "extended First Amendment protection to information entrusted to third parties." Pl. Opp. Br. at 19 (citing Gibson v. Florida Legislative Investigative Comm'n, 372 U.S. 539 (1963), and Shelton v. Tucker, 364 U.S. 479 (1960)). Again putting aside the fact that these cases involve association rather than speech, information was not entrusted to third parties outside the association. Rather, both cases involved identification of membership in particular groups where the fact of membership had been entrusted only to the group itself, and not to a third party unrelated to the group. See Gibson, 372 U.S. at 891 (request to obtain membership list of Miami branch of NAACP); Shelton, 364 U.S. at 248 (requirement that teacher annually file affidavit listing every organization to which he has belonged or regularly contributed within preceding five years).

In addition, as demonstrated in the Government's moving papers, Plaintiffs' reliance on a handful of Supreme Court cases involving anonymous speakers is fundamentally misplaced. Gov. Br. at 26-27. As the Government noted, those cases involved requirements that a person (1) identify himself as he spoke, or (2) inform the government and obtain approval before speaking. Gov. Br. at 26-27. Section 2709 does neither. Plaintiffs wrongly assert that "it is difficult to understand why the First Amendment would prevent the government from compelling a person to disclose his identity and speech simultaneously but permit the government to compel him to disclose his identity after he has spoken." Pl. Opp. Br. at 23. This argument again overlooks the fact that § 2709 does not authorize the FBI to obtain the content of any identified person's speech; only the fact that a speaker has communicated (and with which e-mail accounts) may be obtained. Meanwhile, the Supreme Court has made clear that a speaker can be required to disclose his identity (and thus the fact that he has communicated) to the Government. See Buckley v. American Constitutional Law Found., 525 U.S. 182, 200 (1999) (requirement that petition circulator file affidavit disclosing name and address is type of permissible regulation).

Plaintiffs also wrongly predict that "adopting the government's argument would virtually eviscerate any right to anonymous communication on the Internet." Pl. Opp. Br. at 20 (emphasis in original). Again, Plaintiffs fundamentally overlook the fact that § 2709 does not authorize the FBI to obtain the content of any person's speech. The anonymity of speech remains undisturbed; the FBI learns only of the fact that a person has spoken and with whom he or she has spoken. Plaintiffs also overlook the fact that § 2709 only authorizes the FBI to request records "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b) (Supp. II 2002).⁸

⁸ Plaintiffs' attempt to distinguish Branzburg v. Hayes, 408 U.S. 665 (1972), Pl. Opp. Br. at 20 n.7, fails, and instead further supports the Government's argument. As Plaintiffs point out, the Branzburg Court specifically noted that two grand juries -- which had lawfully subpoenaed reporters to testify about "confidential" sources -- did not seek disclosure "for a purpose that was not germane to the (continued...)

Finally, while Plaintiffs cite several cases addressing requests for discovery about Internet users in civil suits, see Pl. Opp. Br. at 21-22, these cases do not advance their facial challenge. None of these cases involved a facial challenge to a statute authorizing requests for discovery. In addition, none involved requests for information relevant to authorized counterintelligence or counter-terrorism investigations. In any event, while the courts imposed various levels of scrutiny for particular discovery requests, as demonstrated infra at 22, the challenged NSL in this case easily satisfies First Amendment scrutiny.⁹

b. § 2709 Does Not Unconstitutionally Disclose Internet Users' Associational Activity

Plaintiffs' invocation of protection against disclosure of associational activity fares no better. Again, the four categories of "information" that Plaintiffs claim § 2709 "clearly reaches," Pl. Opp. Br. at 18, 30, do not involve any type of association about which the Government cannot seek disclosure from a third party. Obtaining the identity of a person who purchases or obtains communication services does not disclose that person's association with any particular person or entity through the services. In addition, Plaintiffs' opposition brief wholly fails to explain how an Internet user's mere accessing of a website constitutes an "association" with that entity, such that disclosure of the fact of accessing cannot be requested. See Gov. Br. at 28-29. Likewise, Plaintiffs fail to explain how the mere fact of sending an e-mail to or receiving an e-mail from some account constitutes such "association" that disclosure of the fact

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determination of whether a crime has been committed." 408 U.S. at 700 (emphasis added). Similarly, § 2709 only authorizes the FBI to obtain information that has been certified relevant to an authorized counterintelligence or counter-terrorism investigation. See Gov. Br. at 27-28.

⁹ Plaintiffs also misconstrue the Government's arguments with respect to the Declaration of Simson L. Garfinkel, executed May 13, 2004 ("Garfinkel Decl."). Pl. Opp. Br. at 24. The Government's point is that, while Mr. Garfinkel speculates on the issue of which entities constitute "electronic communication service providers" under § 2709 (as do the amici), that legal issue must be analyzed in the context of a particular set of facts, and is entirely irrelevant here -- given that [REDACTED] alleges that it provides clients with e-mail accounts to communicate with others. Gov. Br. at 12-14.

of communication -- but not disclosure of what was said -- cannot be requested. Finally, Plaintiffs fail to explain how the fact that a person purchases or otherwise obtains communication services through an entity (even a "political organization[]") constitutes such "association" that the fact of obtaining services cannot be requested.

As noted in the Government's moving brief, the association cases on which Plaintiffs rely are easily distinguishable. Gov. Br. at 29-31. Plaintiffs, however, misunderstand or misconstrue the Government's discussion of these cases. Contrary to Plaintiffs' characterization, the Government did not distinguish NAACP v. Alabama and other membership list cases on the ground that NSLs are "narrow demands for particular subscriber information," whereas the membership list cases involved "broad" demands. Pl. Opp. Br. at 19. Rather, the Government's point is that a request to an organization for its membership list is very different from a request to a communication service provider that it provide business records pertaining to its customers (who may use communication services to associate with others). Plaintiffs, of course, do not claim that § 2709 improperly discloses an Internet user's association with its communication service provider; the service provider is a third party unrelated to any allegedly protected association.¹⁰

¹⁰ In making this argument, Plaintiffs refer, as they did in their moving papers, to the removal of a purported "individualized suspicion requirement" from § 2709(b) in 2001. Pl. Opp. Br. at 19; see also Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pl. Mov. Br.") at 15, 28. Plaintiffs' description of the prior standard for issuing NSLs is inaccurate. The statutory certification prior to 2001 required more than a showing of "individualized suspicion" -- a term Plaintiffs nowhere define. Beyond certifying relevance to an ongoing authorized investigation, the FBI also had to certify that there were specific and articulable facts giving reason to believe that the subject of the NSL is an agent of a foreign power or has been in contact with an agent of a foreign power. 18 U.S.C. § 2709(b) (1994). As Congress found, this second requirement was so cumbersome and high that it precluded the FBI from using NSLs as a helpful investigative tool. H. Rep. 107-236(I) at 62 (Oct. 11, 2001) (available at 2001 WL 1205861) ("The additional requirement of documentation of specific and articulable facts showing the person or entity is a foreign power or an agent of a foreign power cause substantial delays in counterintelligence and counterterrorism investigations. Such delays are unacceptable as our law enforcement and intelligence community works to thwart additional terrorist attacks that threaten the national security of the United States and her citizens' lives and livelihoods."); (see also First Beeson Decl. Exh. 10 at 2 ("This [additional] requirement and the complexity of the standard itself often led to extensive (continued...)

In addition, Plaintiffs fail to respond persuasively to the Government's observation that Supreme Court precedent makes clear that disclosure of association is invalid only where there is evidence that disclosure has or would cause significant, non-speculative injury that would dissuade persons from associating. Gov. Br. at 29-30 (citing cases). Plaintiffs respond by invoking the unrelated principle that, in the First Amendment context, standing requirements are relaxed and a litigant may advance the rights of others not before the court (such as Internet users here). Pl. Opp. Br. at 19 n.5 (quoting Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392-93 (1988)). Plaintiffs miss the point; the Government has not argued that Plaintiffs lack standing. Rather, Plaintiffs have failed to introduce any evidence that any person -- even an Internet user not before this Court -- has experienced or reasonably fears significant, non-speculative injury in light of the fact that the FBI can issue NSLs under § 2709. Nor have Plaintiffs introduced any evidence that any person has stopped "associating" because of the FBI's authority under § 2709. See generally Dole v. Local Union 375, 921 F.2d 969, 972-74 (9th Cir. 1990) (discussing prima facie showing for claim that subpoena violates associational rights).

2. There Is Adequate Judicial Oversight with Respect to NSLs Issued Under § 2709

Regardless of whether § 2709 "reaches information protected by the First Amendment," Pl. Opp. Br. at 18-25, Plaintiffs' particular challenge to the statute simply fails. According to Plaintiffs, the statute is unconstitutional because it authorizes the FBI to request records "implicating First Amendment rights without judicial oversight, thus foreclosing any application of the heightened scrutiny" required by the Constitution. Pl. Opp. Br. at 25 (emphasis in original).

This argument suffers from the same fatal defects in Plaintiffs' Fourth Amendment claim. Again, Plaintiffs fail to cite a single case holding that the First Amendment requires judicial review before any

(...continued)
delays in generating NSLs.")).

request for records (or subpoena) may be issued. In addition, once a record request has been served, an NSL recipient has two avenues to challenge the request before a court. See supra at 6-12. During such challenge, the Government must show that the NSL seeks information that is relevant to an ongoing investigation and that it has a need for the information sought. FEC v. LaRouche Campaign, 817 F.2d 233, 233-34 (2d Cir. 1987); FEC v. Automated Bus. Services, 888 F. Supp. 539, 541-42 (S.D.N.Y. 1995). Thus, contrary to Plaintiffs' assertion, judicial oversight and application of First Amendment scrutiny is fully afforded.

Contrary to Plaintiffs' protestations, facial invalidation is simply inappropriate. Pl. Opp. Br. at 30-31. Again, despite lengthy briefing, Plaintiffs fail to cite a single case striking down a statute that authorizes an agency to request records relevant to an ongoing investigation. In addition, Plaintiffs' speculation that § 2709 "is likely to have a . . . chilling effect on individuals not before the court," Pl. Opp. Br. at 31, is insufficient. The record contains no evidence that § 2709 has caused or reasonably would cause a "chilling effect." Indeed, Plaintiffs' claim of a "chilling effect" on Internet use rings particularly hollow given that the statute has been in effect since 1986. In any event, the Supreme Court has made clear that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" in order to give rise to a judicially cognizable First Amendment violation. Laird v. Tatum, 408 U.S. 1, 13-14 (1972); see generally Hankard v. Town of Avon, 126 F.3d 418, 423 (2d Cir. 1997) ("not every assertion of a chilling effect will be considered a judicially cognizable First Amendment violation").¹¹

¹¹ Plaintiffs also speculate that the purported "chilling effect" is likely to be "particularly severe" now that "the statute can be used to obtain information about people who have no connection to terrorism, espionage, or criminal activity of any sort." Pl. Opp. Br. at 31 n.10. Again, Plaintiffs mischaracterize the statute. Section 2709 expressly requires a connection to terrorism or espionage: the records requested must be "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b) (Supp. II 2002).

In sum, Plaintiffs' facial First Amendment challenge to § 2709 fails.

3. The Challenged NSL Complies with the First Amendment, and Plaintiffs' Motion to Exclude the Ex Parte FBI Declaration Is Meritless

In support of their as-applied challenge to the NSL served on [REDACTED], Plaintiffs argue that the Government "offers no justification for its demand," and that the Government instead "offers only arguments to justify hypothetical NSLs." Pl. Opp. Br. at 50-51. Again, Plaintiffs are simply wrong.

The Government submitted an Ex Parte FBI Declaration detailing [REDACTED] [REDACTED] (Kotler Decl. Exh. B (Ex Parte FBI Decl.)). As the Government's moving papers made clear, this declaration described both the relevance and the Government's [REDACTED] the information sought in the NSL, which are beyond question. See Gov. Br. at 35 (citing Ex Parte FBI Decl. ¶ 30).

Contrary to Plaintiffs' assertions, the Government's submission of the Ex Parte FBI Declaration was entirely proper. Pl. Opp. Br. at 51 n.22; Pl. Motion to Exclude Ex Parte Declaration Filed in Support of the Government's Cross-Motion to Dismiss the Complaint or for Summary Judgment, dated July 30, 2004 ("Motion to Exclude"), at 1-2. Plaintiffs chose to pursue an as-applied challenge to the NSL served on [REDACTED] triggering the Government's obligation to demonstrate that (1) the NSL is relevant to an authorized foreign counterintelligence or counter-terrorism investigation, and (2) the Government has a need for the information sought. See supra at 21. Much of the information concerning the underlying [REDACTED] investigation is classified, and the Government is barred from sharing such information with persons who lack the requisite security clearance. See Exec. Order No. 12958, § 4.2 ("General Restrictions on Access"), 60 Fed. Reg. 19825, 19836 (Apr. 17, 1995); see also 18 U.S.C. § 793(d) (imposing criminal penalties on person who, having lawful possession of information relating to national defense, transmits information to person not entitled to receive it); 18 U.S.C. § 798(a) (imposing criminal penalties on person who transmits certain classified information to unauthorized person); see generally Dep't of the Navy v. Egan,

484 U.S. 518, 527 (1988) (stating that Executive Branch has control over access to classified information under constitutional scheme and has "a 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business").

The Government's submission of the Ex Parte FBI Declaration was not "violat[ive of] the fundamental principles of our adversary system of justice." Motion to Exclude at 2. To the contrary, this Court has "inherent authority to review classified material ex parte, in camera as part of its judicial review function." Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004). Indeed, courts have consistently recognized -- and exercised -- their authority to consider ex parte submissions containing information that is classified [REDACTED]. See Jifry, 370 F.3d at 1181-82 (affirming agency determination that plaintiff pilots were security risks based on record evidence that included "ex parte in camera review of the classified intelligence reports," and observing that plaintiffs' "motion to bar the [Government's] reliance on classified information in this court is not well-taken"); Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003) (noting that court of appeals had already rejected "claim that the use of classified information disclosed only to the court ex parte and in camera in the designation of a foreign terrorist organization . . . was violative of due process"); Global Relief Found. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting constitutional challenge to statute authorizing district court's ex parte consideration of classified evidence in connection with judicial challenges to Executive decision to freeze assets of entity that assists or sponsors terrorism); Torbet v. United Airlines, 298 F.3d 1087, 1089 (9th Cir. 2002) (affirming district court's dismissal of complaint challenging airline search based, in part, on in camera review of national security-related information); United States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987) (district court's ex parte consideration, pursuant to 50 U.S.C. § 1806(f), of sealed FBI affidavit to determine whether electronic surveillance was legally obtained did not violate due process).

Likewise, even outside the national security context, it is beyond dispute that courts may consider ex parte materials submitted by the Government to demonstrate the legality of its subpoenas or requests for information. See In re John Doe, Inc., 13 F.3d 633, 635-36 (2d Cir. 1994) (where Government moved to compel compliance with grand jury subpoena, district court properly considered Government's submission of ex parte affidavit from FBI agent justifying basis for subpoena); In re John Doe Corp., 675 F.2d 482, 485-86, 489-91 (2d Cir. 1982) (district court properly considered Government's ex parte submission, detailing ongoing grand jury investigation, in support of challenged grand jury subpoena); see also In re Grand Jury Subpoena, 223 F.3d 213, 216-17, 219 (3d Cir. 2000) (where target of grand jury investigation challenged subpoena for testimony, district court properly relied on Government's ex parte affidavit detailing grand jury investigation in order to demonstrate legality of subpoena). Just as in these cases, the Government properly submitted a declaration that detailed [REDACTED] in order to demonstrate the constitutionality of its request.

In addition, contrary to Plaintiffs' insistence, ex parte submissions are not limited to the context of claims of privilege in discovery disputes. Motion to Exclude at 4. Indeed, Plaintiffs do not -- because they cannot -- provide any reasoned justification for limiting ex parte submissions to that single category of issues. In any event, as demonstrated supra at 23 and infra at 25, ex parte submissions are made in numerous, varying contexts. By way of further example, in cases seeking relief under the Freedom of Information Act, courts regularly consider ex parte submissions in order to resolve the merits of the case. See Weberman v. NSA, 668 F.2d 676, 677 (2d Cir. 1982) (district court properly considered ex parte affidavit detailing national security concerns raised by plaintiff's action seeking release of document); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 626 (S.D.N.Y. 1996) ("The Court requested that the Government submit additional affidavits demonstrating that the CIA's justifications for nondisclosure satisfied FOIA's

statutory exceptions. Because the Court recognized that such affidavits could be sensitive and contain confidential information, the Government was allowed to submit the affidavits in camera."), aff'd, 128 F.3d 788 (2d Cir. 1997); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 34 (D.D.C. 2003) ("In order to resolve these conundrums, the Court requested that DOJ provide these disputed . . . documents for in camera review. Now that defendant has done so, it is clear that its withholdings are proper.").¹²

Nor does the Government's submission violate Rule 56 of the Federal Rules of Civil Procedure. Motion to Exclude at 5. Plaintiffs conflate admissibility of evidence with access to evidence. The fact that Plaintiffs will not have access to the document does not render it inadmissible for consideration by a fact-finder, or inappropriate for consideration on summary judgment. See Harrison v. McGrath, C 02-1924, 2004 WL 1465698, at *3 (N.D. Cal. June 21, 2004) (in prisoner civil rights action, granting summary judgment in favor of Government based on, inter alia, document submitted ex parte); Doe v. Browner, 902 F. Supp. 1240, 1450 n.7 (D. Nev. 1995) (in action against Environmental Protection Agency alleging violations under Resource Conservation and Recovery Act, finding that plaintiffs' "lack of access to [information submitted ex parte] . . . does not preclude granting summary judgment on these claims"), aff'd in part and dismissed in part on other grounds, 133 F.3d 1159 (9th Cir. 1998); see also Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984) (affirming dismissal of First Amendment challenge to termination from employment based, inter alia, on ex parte submission). Meanwhile, Ass'n for Reduction of Violence v. Hall, 734 F.2d 63, 67 (1st Cir. 1984) (cited in Motion to Exclude at 5), did not hold that material submitted ex parte is "inadmissible." Rather, the court concluded that the district court should not have based its grant of summary judgment on evidence submitted ex parte in light of the reasoning in Bane v. Spencer.

¹² Nor is the Government required to assert a state secret privilege in particular in order to submit materials ex parte. See Motion to Exclude at 2 n.1. Again, Plaintiffs provide no rational justification for limiting ex parte submissions to that single privilege, and caselaw does not support such a limitation. See supra at 23-25 (citing cases).

393 F.2d 108 (1st Cir. 1968) -- which, in turn, did not rely on Rule 56 at all.¹³ In addition, both Ass'n for Reduction of Violence and Bane are distinguishable on the ground that the plaintiffs' complaints did not challenge a record request issued by the Government, triggering the Government's obligation to demonstrate the relevance of the requested information [REDACTED]

Plaintiffs also wrongly complain that the Government did not provide a sufficiently detailed justification for its submission of the Ex Parte FBI Declaration. Motion to Exclude at 6. The Government expressly described that the [REDACTED] Gov. Br. at 11. The Government also made clear that the declaration details the relevance of the challenged NSL to the underlying investigation, and the Government's [REDACTED] for the requested information. Gov. Br. at 35.

Finally, Plaintiffs wrongly demand that they be given "full access" to the declaration. Motion to Exclude at 7. As demonstrated supra at 22-26, the Government's ex parte submission was entirely permissible -- and particularly appropriate given the facts of this case. (See Ex Parte FBI Decl. ¶¶ 33, 48-53, 59-63); see also Weberman, 668 F.2d at 678 (finding that district court properly excluded plaintiff's counsel from in camera inspection of secret affidavit given potential harm to "nation's security operations"). Plaintiffs' assertion that the Government has "no argument for resisting disclosure of the ex parte declaration to plaintiffs where a sealing order is already in place" is baseless. As an initial matter, as Plaintiffs again repeat in their motion, Motion to Exclude at 7, Plaintiffs have vigorously opposed the sealing order. In addition, notwithstanding the order, Plaintiffs have twice disclosed information covered by it: (1) Plaintiffs included, in a press release posted on their website, information that was contained in

¹³ Bane involved the very different case of a plaintiff suing, inter alia, a doctor in connection with his confinement for psychiatric examination; the plaintiff was denied access to medical records. 393 F.2d at 109.

a document stamped "SEALED" three times, and (2) Plaintiffs advised the Court in May 2004 that they had "inadvertently disclosed" information subject to the order. (See Kotler Decl. Exhs. D, E). In any event, the order cannot cure the fact that Plaintiffs are not authorized to obtain classified information.¹⁴

At bottom, the fact that Plaintiffs have filed a constitutional challenge to a single NSL issued [REDACTED]

[REDACTED]

Accordingly, Plaintiffs' motion to exclude the Ex Parte FBI Declaration, as well as their as-applied challenge to the NSL served on [REDACTED] should be rejected.

C. Plaintiffs' Fifth Amendment Claim Is Meritless

Plaintiffs rightly make short work of their Fifth Amendment claim, which is devoid of merit. Well-settled precedent makes clear that the FBI is not required to justify the non-provision of notice to persons about whom it seeks information during investigations. Gov. Br. at 36.

In response, Plaintiffs wrongly contend that a person has a right to notice when records requested from a third party "implicate the First Amendment." Pl. Opp. Br. at 26. Plaintiffs do not -- because they cannot -- cite any case holding that a person is entitled to notice of a subpoena or record request issued to a third party, even when it allegedly "implicate[s] the First Amendment." Likewise, Plaintiffs do not -- because they cannot -- cite any case holding that the Government must provide (or justify the lack of) notice to persons about whom it seeks information when it requests records from a third party, again even when the request allegedly "implicate[s] the First Amendment." Indeed, in the context of grand jury and civil subpoenas, persons are not entitled to notice that the Government has sought records pertaining to

¹⁴ While Plaintiffs reference the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, Motion to Exclude at 7 n.2, that statute governs disclosure of classified information in criminal cases. See CIPA § 2. In any event, the CIPA expressly provides for a district court's ex parte consideration of evidence in support of a Government request to limit a criminal defendant's access to classified information. CIPA § 4; see generally United States v. Klimavicius-Viloria, 144 F.3d 1249, 1260-61 (9th Cir. 1998) (district court may hold ex parte hearing and consider documents submitted ex parte when considering whether to refuse disclosure of classified information to criminal defendant).

them from a third party (although the subpoenaed party may disclose that records were sought, if desired).

Plaintiffs wholly fail to respond to Supreme Court precedent making clear that when agencies act in an investigative fashion, they do not make determinations that "deprive anyone of his life, liberty, or property." Hannah v. Larche, 363 U.S. 420, 441 (1960). Nor do Plaintiffs respond to the fact that a notice requirement "would substantially increase the ability of persons who have something to hide to impede legitimate investigations." SEC v. O'Brien, 467 U.S. 735, 750 (1984).

Finally, Plaintiffs' attempt to distinguish Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978), is wholly unavailing. Pl. Opp. Br. at 26-27. Plaintiffs make the remarkable assertion that the plaintiffs in that case "did not contend . . . that the telephone records at issue implicated the First Amendment." Pl. Opp. Br. at 26. The plaintiffs in Reporters Comm. specifically made a First Amendment challenge to the lack of notice that their telephone records were sought; they did so because they claimed to have a "First Amendment interest" in the records. 593 F.2d at 1047. Indeed, it is impossible to conceive that the plaintiffs in Reporters Comm. would have pursued a First Amendment challenge other than because they believed that the records were protected by, and implicated, the First Amendment. In addition, while the plaintiffs claimed a special First Amendment right to notice because they were journalists, they did so because they apparently conceded that "citizens in general have no such right" to notice. 593 F.2d at 1046; see also id. at 1051 ("The First Amendment does not guarantee plaintiff 'journalists,' or other citizens, a special right to immunize themselves from good faith investigation simply because they may be engaged in gathering information." (emphasis added)).

In sum, Plaintiffs Fifth Amendment challenge to § 2709 fails.¹⁵

¹⁵ Although Plaintiffs' moving papers grounded their notice claim in the Fifth Amendment, Pl. Mov. Br. at 37-39, their opposition papers add the First Amendment as a basis for relief, Pl. Opp. Br. at 26. As explained supra at 27, like the Fifth Amendment, the First Amendment does not require provision of notice to individuals that records pertaining to them have been sought from a third party.

POINT II

PLAINTIFFS' FIRST AMENDMENT CHALLENGE TO THE NON-DISCLOSURE REQUIREMENT IN § 2709(c) AND THE CHALLENGED NSL IS MERITLESS

A. § 2709(c) Satisfies First Amendment Strictures. As Does the Challenged NSL

Contrary to Plaintiffs' claim, § 2709(c) does not impose an "unconstitutional prior restraint" on speech. Pl. Opp. Br. at 32. Rather, just as Congress may deny access to information harmful to the Nation or punish speech that betrays such secrets, so too Congress -- through § 2709(c) -- may bar the disclosure of information that harms the integrity and efficacy of authorized foreign counterintelligence or counter-terrorism investigations. In addition, like the non-disclosure requirements upheld in Butterworth v. Smith, 494 U.S. 624 (1990), Kamasinski v. Judicial Review Council, 44 F.3d 106 (2d Cir. 1994), Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003), and First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467 (3d Cir. 1986), § 2709(c) satisfies First Amendment strictures. Gov. Br. at 46-50.

1. The Undisputed Evidence Demonstrates that § 2709(c) Is Necessary to Protect the Integrity of Counterintelligence and Counter-terrorism Investigations

Plaintiffs wrongly insist that the Government "furnishes no justification" for the non-disclosure provision in § 2709(c). Pl. Opp. Br. at 38. To the contrary, the Government cited extensive legislative history documenting Congress' findings that non-disclosure of investigative requests is essential to the effective conduct of counterintelligence and counter-terrorism activities. Gov. Br. at 38-39, 40-41.¹⁶ In addition, the Government submitted a declaration signed by the Assistant Director of the FBI's

¹⁶ Plaintiffs seek unpersuasively to discount the "considerable amount" of legislative history cited by the Government, claiming that it pre-dates the 2001 amendment to the certification for issuing NSLs under § 2709(b). Pl. Opp. Br. at 38 n.13. The amendment to the certification in subsection (b) had nothing to do with the basic fact -- as the undisputed evidence in the record demonstrates -- that secrecy is essential in conducting counterintelligence and counter-terrorism investigations. In any event, it makes no sense that Congress, in amending subsection (b), would not consider whether any other subsection had to be amended due to the change. See generally Trigon Ins. Co. v. United States, 215 F. Supp. 2d 687, 699 (E.D. Va. 2002) (noting "familiar principle that Congress is presumed to be aware of existing statutory provisions when it enacts amending legislation").

Counterintelligence Division detailing how secrecy is essential in conducting foreign counterintelligence and counter-terrorism investigations, and describing why the full non-disclosure required in § 2709(c) is critical to ensure the integrity and efficacy of such investigations. (Szady Decl. ¶¶ 9-12, 17-33).¹⁷

Moreover, as the Government noted, a number of statutes require secrecy of individual investigative requests. Gov. Br. at 38-41. Buried in a footnote, Pl. Opp. Br. at 40 n.14, Plaintiffs' response is wholly unpersuasive: contrary to Plaintiffs' assertion, the Government does not point only to non-disclosure provisions associated with surveillance that requires judicial approval. In addition to six separate NSL statutes, the Government noted, for example, that 18 U.S.C. § 1510(b)(2) imposes criminal sanctions on a bank officer who notifies his customer that a grand jury has subpoenaed records pertaining to the customer. Gov. Br. at 41; see also 31 U.S.C. § 5318(g) (where financial institution reports suspicious transaction, institution "may not notify any person involved in the transaction that the transaction has been reported"). Likewise, the Government noted that where the Attorney General (rather than a court) may authorize electronic surveillance or physical searches, he may direct that an entity furnish all assistance necessary to accomplish the surveillance or search "in such a manner as will protect its secrecy." Gov. Br. at 40 (citing 50 U.S.C. §§ 1802(a)(4)(A), 1822(a)(4)(A)).

Plaintiffs have failed to submit a single piece of evidence raising any dispute of fact with respect to the need for full non-disclosure as required by § 2709(c). Rather, Plaintiffs offer only the conclusory statements of their counsel in a memorandum of law. See, e.g., Pl. Opp. Br. at 43-44, 55. It is well settled that assertions by counsel do not constitute evidence, Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 20 (1st Cir. 1999); Skyline Corp. v. NLRB, 613 F.2d 1328, 1337 (5th Cir. 1980); Ortiz v. Regan, 749 F. Supp. 1254, 1263 (S.D.N.Y. 1990) ("assertions in a brief are not evidence of anything"), and are insufficient to

¹⁷ The Szady Declaration necessarily employs general terms, as details of particular counterintelligence and counter-terrorism investigations are highly confidential, if not also classified.

defeat summary judgment, Vivid Technologies v. American Sci. & Eng'g, 200 F.3d 795, 812 (Fed. Cir. 1999); Nieves v. Univ. of Puerto Rico, 7 F.3d 270, 276 n.9 (1st Cir.1993).

In addition, Plaintiffs (and their counsel) are simply ill-suited to question the need for full secrecy in conducting counterintelligence and counter-terrorism investigations. Indeed, they have no experience -- let alone expertise -- in conducting such investigations. Meanwhile, even sources cited by Plaintiffs recognize that secrecy of individual investigative requests in counter-terrorism investigations is critical. See Report at 6 (noting that secrecy of "individual FISA cases is certainly necessary"), 16 (noting that report omits "any substantive issues relating to any criminal or national security investigation or proceeding"); The 9/11 Commission Report at 103 (2004) (noting while it can impede congressional oversight, secrecy is "necessary").

Thus, even putting aside the deference owed to a statute duly enacted by Congress in the area of national security, see Gov. Br. at 15-16, 55-56, Plaintiffs have failed to raise a genuine dispute as to the need for full non-disclosure of FBI investigative requests in counterintelligence and counter-terrorism investigations. Summary judgment upholding § 2709(c) is therefore appropriate on this basis alone.

2. § 2709(c) Is Not a Prior Restraint or Otherwise Subject to Traditional Strict Scrutiny

As demonstrated in the Government's moving papers, § 2709(c) does not constitute a "prior restraint," as it does not impose a licensing system or injunction against any particular proposed speech, but rather delineates a general category of information -- "that the [FBI] has sought or obtained access to information or records under" § 2709 -- which may not be disclosed. Gov. Br. at 50-51. While Plaintiffs rely on two sentences from Near v. Minnesota, 283 U.S. 697 (1931), stating that the press should be free from "legislative restraint," Pl. Opp. Br. at 33, that case does not describe what is referred to as "legislative restraint" -- much less hold that the phrase refers to a statute prohibiting the disclosure of certain categories of information. The statute at issue in Near, different from § 2709(c), criminalized the publishing of

obscene, malicious, or scandalous periodicals, and created a system under which a court could permanently enjoin particular publications. 283 U.S. at 702. Indeed, the Supreme Court invalidated the statute only "so far as it authorized the [judicial] proceedings in this action" to enjoin publication of a particular newspaper. Id. at 722.¹⁸ Meanwhile, neither the Supreme Court nor the Second Circuit evaluated as prior restraints those portions of non-disclosure provisions upheld in Butterworth and Kamasinski.¹⁹

In addition, in Landmark Communications v. Virginia, 435 U.S. 829, 838 (1978), the Supreme Court expressly stated that a statute imposing a non-disclosure requirement was not a prior restraint. Plaintiffs' attempt to distinguish Landmark, Pl. Opp. Br. at 33 n.11, is unavailing. While Plaintiffs assert -- without citation to any particular page of the decision -- that the challenged statute "did not gag speech

¹⁸ In Alexander v. United States, 509 U.S. 544, 550 (1993), a case upon which Plaintiffs rely, the Supreme Court noted that the "term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" The Court described its holding in Near as "invalidat[ing] a court order that perpetually enjoined the named party" Id.

¹⁹ Plaintiffs' contention that courts "have analyzed statutes prohibiting categories of disclosures" as prior restraints, Pl. Opp. Br. at 33 (internal marks omitted), does not advance their cause. Two of the cases cited by Plaintiffs adopt an analysis that is inconsistent with Plaintiffs' argument: the statutes did not prohibit the disclosure of certain categories of information; rather, they imposed after-the-fact penalties for certain disclosure -- which, according to Plaintiffs, Pl. Opp. Br. at 32 & n.11; Pl. Mov. Br. at 7, is not a prior restraint. See Doe v. Gonzalez, 723 F. Supp. 690, 690 (S.D. Fl. 1988), aff'd, 886 F.2d 1323 (11th Cir. 1989); Dove Audio v. Lungren, CV95-2570, 1995 WL 432631, at *2 (C.D. Cal. June 14, 1995). Meanwhile, though not noted by Plaintiffs, the decision in ACLU of Mississippi v. Mabus, 719 F. Supp. 1345 (S.D. Miss. 1989), was vacated by the United States Court of Appeals for the Fifth Circuit; the appellate court specifically found that the challenged statute did not subject the plaintiffs to a prior restraint. 911 F.2d 1066, 1072 (5th Cir. 1990). The statute at issue in Gardner v. Bradenton Herald, 413 So.2d 10, 11 (Fla. 1982), was only found to be a prior restraint on the press. The statute at issue in People v. Denver Publ'g Co., 198 Colo. 213, 215 (1979), required prior court permission to publish certain information, thus expressly creating a licensing system. Finally, the court in First Amendment Coalition addressed a statute providing that "papers filed with and proceedings before the [Judicial Inquiry and Review Board] shall be confidential." 784 F.2d at 471. Even assuming that this statute can be considered analogous to the non-disclosure provision in § 2709(c), the Second Circuit in Kamasinski did not analyze a similar statute -- which prohibited disclosures about proceedings before a judicial council -- as a prior restraint. Of course, First Amendment Coalition reversed a district court's finding that the confidentiality provision was unconstitutional (except as it related to disclosure of a witness' own testimony).

before it was spoken but rather imposed after-the-fact criminal penalties for certain prohibited disclosures," id., the statute operated as § 2709(c) does: § 2.1-37.13 of the Virginia Code expressly provided that all papers filed with and proceedings before a judicial commission "shall not be divulged." 435 U.S. at 830 n.1. Although the section additionally imposed a penalty for violating the non-disclosure requirement, that does not change the fact that the statute imposed such a requirement. The Supreme Court stated that "the challenged statute" (i.e., § 2.1-37.13) "does not constitute a prior restraint." 435 U.S. at 838.

Nor does § 2709 "effectively operate[] as a licensing scheme." Pl. Opp. Br. at 33. The plain language of the statute makes clear that a person is not required to seek Government approval before disclosing anything. Likewise, the plain language makes clear that the Government is not authorized to grant -- or deny -- "licenses" to disclose information. Plaintiffs' reliance on Doe v. Supreme Court of Florida, 734 F. Supp. 981, 984 (S.D. Fla. 1990) (cited in Pl. Opp. Br. at 33), is simply misplaced, as that case nowhere stated that the non-disclosure provision at issue operated as a licensing system or granted officials the power to permit or deny speech.

Meanwhile, Plaintiffs' assertion that § 2709 constitutes a "content-based restriction on speech" does not advance their case. Pl. Opp. Br. at 34. Contrary to Plaintiffs' characterization, the Government did not argue that § 2709(c) "is not content-based." Id. Rather, the Government stated that the statute "is not the type of 'content-based' restriction that requires traditional strict scrutiny." Gov. Br. at 51. While Plaintiffs accuse the Government of being "misleading, to say the least," Pl. Opp. Br. at 35 n.12, the Government correctly noted that, in analyzing non-disclosure provisions, Butterworth, First Amendment Coalition, and Hoffman-Pugh did not mention "strict scrutiny" or require the "narrow tailoring" that Plaintiffs demand. Gov. Br. at 52 n.18. In addition, the Government expressly acknowledged that the Second Circuit in Kamasinski employed "strict scrutiny." Id. As the Government correctly observed, however, Kamasinski did not consider the Supreme Court's statements in Virginia v. Black, 538 U.S. 343, 361-62 (2003), R.A.V.

v. City of St. Paul, 505 U.S. 377, 382 (1994), and City of Renton v. Playtime Theatres, 475 U.S. 41, 48-49 (1986), indicating that the purpose of the First Amendment is to ensure that the Government does not proscribe speech "because of disapproval of the ideas expressed." Gov. Br. at 51-52 & n.18.²⁰ More importantly, the Government correctly noted that Kamasinski did not discuss or require "narrow tailoring." Id. at 52 n.18. Thus, as the Government noted, precedent involving non-disclosure provisions indicates that traditional strict scrutiny, such as a narrow tailoring requirement, is inappropriate in this context.

Because § 2709(c) is not subject to traditional strict scrutiny, and because the statute advances important governmental interests and does not burden substantially more speech than necessary, the statute easily satisfies First Amendment scrutiny. Gov. Br. at 54.

3. Even If It Applied, § 2709(c) Would Pass Heightened Scrutiny

As demonstrated in the Government's moving papers, even if heightened scrutiny applied, § 2709 would pass muster. Gov. Br. at 54-62. In response, Plaintiffs contend that § 2709 is not narrowly tailored for three reasons, each of which is incorrect.

First, Plaintiffs assert that § 2709(c) is not narrowly tailored because it does not require the Government to justify non-disclosure on a case-by-case basis. Pl. Opp. Br. at 37-42. No such requirement exists. Indeed, Butterworth, Kamasinski, Hoffman-Pugh, and First Amendment Coalition upheld non-disclosure provisions that were categorical; none required a case-by-case determination of the need for non-disclosure. In addition, while Plaintiffs correctly observe that the federal rule governing grand jury secrecy does not impose a categorical non-disclosure requirement on witnesses, Pl. Opp. Br. at 39, Plaintiffs ignore that the rule does impose a categorical non-disclosure requirement on all other participants in the proceedings, see Fed. R. Crim. P. 6(e).

²⁰ While the court in Baugh v. Judicial Inquiry and Review Comm'n, 907 F.2d 440, 444 (4th Cir. 1990) (cited in Pl. Opp. Br. at 34), distinguished between viewpoint and content neutrality, it similarly did not discuss R.A.V. and Virginia v. Black (indeed, Baugh pre-dated both cases).

Plaintiffs' argument simply disregards that § 2709(c) applies to only one limited set of investigations: authorized foreign counterintelligence or counter-terrorism investigations. Congress made the judgment that, in this particular and limited context, secrecy is necessary for every investigative request.²¹ Congress' determination is entitled to deference, see Gov. Br. at 15-16, 55-56, and in any event is fully supported by the undisputed evidence in the record (see Szady Decl. ¶¶ 9-12, 17-33). Indeed, common sense dictates that when the FBI is conducting counterintelligence and counter-terrorism investigations -- the primary objective of which is to disrupt and interdict clandestine intelligence activities and terrorist acts before they occur (id. at ¶ 8) -- its actions must be covert.

Contrary to Plaintiffs' assertion, the Government's moving papers did not state that the need for secrecy depends on the facts surrounding a particular NSL. Pl. Opp. Br. at 39. The need for secrecy exists for every investigative request. At the most basic level, what may appear in Plaintiffs' view as "non-sensitive" or innocuous information concerning a particular NSL can be pieced together by foreign intelligence services or terrorist organizations, allowing them to construct pictures of particular investigations, to discern patterns of intelligence gathering methods and capabilities, and to learn how to circumvent particular investigative methods. (Szady Decl. ¶¶ 9-12, 24-25, 27, 33); Gov. Br. at 42-43, 57-58.²² In addition, though ignored by Plaintiffs, non-disclosure of an NSL protects its subject from

²¹ Thus, contrary to Plaintiffs' assertion, § 2709 does not "cede[] all authority to the government to determine whether, and to what extent, constitutional rights must be restricted to accommodate" security needs. Pl. Opp. Br. at 38. Plaintiffs' reference to an "unchecked exercise of executive branch power," id., is, again, a mischaracterization of the statute. It was Congress -- expressly aiming to balance privacy interests and law enforcement needs -- that made the determination that full non-disclosure is required with respect to all NSLs.

²² Courts, including the Supreme Court, have repeatedly recognized this most basic fact. See Gov. Br. at 42-43 (citing cases); ACLU, 265 F. Supp. 2d at 29, 31 (in response to ACLU's request for, inter alia, statistical information about use of NSLs, Government properly withheld such information under national security exemption; information about how particular investigative tools are used may "undermine the efficiency and effectiveness of such surveillance"). While Plaintiffs note that none of the cases cited

(continued...)

harassment; if it is ultimately determined that the person has no connection to terrorism or clandestine intelligence activities, then the public is never informed of the inquiry and suspected connection. (Szady Dec. ¶23). Of course, there may be additional reasons further mandating non-disclosure of any particular NSL (see id. at ¶¶ 19-28), but that does not change the fact that secrecy is necessary in every case.

In addition, contrary to Plaintiffs' suggestion, any requirement that the FBI obtain judicial orders of non-disclosure -- which would have to be sought and obtained before an NSL can be served -- would be unwise. Pl. Opp. Br. at 38-39, 40. Any such requirement is simply unnecessary, given that the justification for secrecy exists with respect to any NSL. See supra at 35-36. In addition, such a requirement would hinder the FBI's ability to use NSLs (like subpoenas) as a method to quickly obtain information as an investigation -- to stop counterintelligence activities and terrorist acts -- is unfolding.

Second, Plaintiffs assert that § 2709(c) is not narrowly tailored because the non-disclosure requirement is indefinite. Pl. Opp. Br. at 42-43. As noted in the Government's moving papers, Plaintiffs' argument is based on a fundamental misapprehension of the nature of foreign counterintelligence and

(...continued)

by the Government involved a challenge to a non-disclosure provision, Pl. Opp. Br. at 40-41, Plaintiffs assert a distinction without a difference. The posture in which courts have recognized this obvious principle is irrelevant; foreign intelligence services and terrorist organizations maintain the ability to piece together information about our intelligence gathering capabilities -- and to use that information to harm the United States -- regardless of the posture in which a judicial action is brought. Meanwhile, Plaintiffs' reliance on Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (cited in Pl. Opp. Br. at 41 n.15), is unavailing. That case involved an administrative directive closing to the public certain deportation proceedings connected to terrorism, and thus the separate question of a public right of access to deportation proceedings. As noted in the Government's moving papers -- and to which Plaintiffs fail to respond -- there is no public right of access to particular investigative steps in foreign counterintelligence or counter-terrorism investigations. Gov. Br. at 45 n.13. In addition, the court in Detroit Free Press found that the directive was not narrowly tailored because, while the deportation proceedings were closed, the participants were nonetheless free to publicize what had occurred. 303 F.3d at 707. In contrast, § 2709(c) prohibits a communication service provider from making any disclosure about a particular NSL. Although not mentioned by Plaintiffs, the United States Court of Appeals for the Third Circuit reached the opposite conclusion, upholding the administrative closing directive. North Jersey Media Group v. Ashcroft, 308 F.3d 198, 218-20 (3d Cir. 2002) (noting dangers raised by public access to deportation proceedings in which there is connection to terrorism).

counter-terrorism investigations. Gov. Br. at 60-61. Given that such investigations principally aim to prevent future threats to national security (as the undisputed evidence in the record shows), the FBI must move from target to target, attempting to track the different links and cells of terrorist and foreign intelligence networks. (Szady Decl. ¶ 30). Even if one target is arrested, prosecuted, or expelled from the country, the FBI must continue its search -- secretly -- for other co-conspirators plotting to commit future terrorist acts or clandestine intelligence activities. (Id. ¶¶ 30-31). More generally, even if the FBI completes its investigation of an entire terrorist or intelligence organization, the FBI's patterns and capabilities of intelligence gathering must remain secret, so that other terrorist or intelligence organizations cannot use such information to circumvent or disrupt future detection. (Id. ¶ 33).

Plaintiffs' opposition completely ignores the arguments raised in the text of the Government's brief (see Gov. Br. at 60-61) and described in the preceding paragraph, and instead inaccurately asserts that the Government's "chief response" is that an NSL recipient can pursue an as-applied challenge to the continued application of § 2709(c). Pl. Opp. Br. at 42-43. The Government's point in making that brief observation, Gov. Br. at 61 n.24, was that an NSL recipient is not without remedy with respect to § 2709(c); the recipient can bring an as-applied challenge to its continued application.²³

Third, Plaintiffs assert that § 2709(c) is not narrowly tailored because it assertedly "suppresses a broad array of non-sensitive information," the disclosure of which, according to Plaintiffs, poses no risk.

²³ Plaintiffs' attempt to distinguish the Government's reliance on Kamasinski and Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), on the ground that the non-disclosure requirements discussed therein were not permanent, is unavailing. Pl. Opp. Br. at 46. Neither of those cases involved counterintelligence or counter-terrorism investigations, which are forward looking and principally aim to prevent future crimes. Meanwhile, the non-disclosure requirement that remained effective in Butterworth was permanent. 494 U.S. at 629 n.2. Similarly, the federal rule governing grand jury secrecy imposes a permanent non-disclosure requirement on non-witness participants in the proceedings. Fed. R. Crim. P. 6(e). In addition, while Plaintiffs note that the plaintiffs in Kamasinski and Seattle Times had voluntarily invoked the process of a court (or judicial review council), they again rely on a distinction without a difference. Pl. Opp. Br. at 46. Neither the Supreme Court nor the Second Circuit stated that a plaintiff's voluntary invocation of process affected the inquiry.

Pl. Opp. Br. at 43-47. As noted supra at 31, however, Plaintiffs are ill-suited to declare what information is "sensitive" or "non-sensitive" with respect to foreign counterintelligence and counter-terrorism investigations. What may appear "non-sensitive" or innocuous to Plaintiffs -- who do not have the full picture of any counterintelligence or counter-terrorism investigation -- may indeed harm the integrity and efficacy of such investigation. See Gov. Br. at 43, 56-58. Meanwhile, Plaintiffs have failed to submit a single piece of evidence disputing the evidence in the record demonstrating that full non-disclosure with respect to individual NSLs is necessary.

In addition, Plaintiffs' opposition papers again improperly insist that the FBI should have to draw lines between acceptable and unacceptable disclosures about a particular NSL. See Pl. Opp. Br. at 43-45. As pointed out in the Government's moving papers -- and to which Plaintiffs fail to respond -- any disclosure about a particular NSL can lead to additional inquiries, raising the possibility that service providers will disclose further details about a particular NSL. Gov. Br. at 58. In addition, inadvertent (and improper) disclosures can and do happen. Id. As common sense dictates, once any disclosure about a particular NSL is permitted, it is impossible to ensure that communication service providers -- who do not know the context underlying the issuance of an NSL received -- will not also disclose information that undermines the underlying investigation. Id.

Moreover, Plaintiffs again overstate the scope of the non-disclosure provision. Contrary to Plaintiffs' insistence, § 2709(c) does not prevent a communication service provider from discussing "general categories of information" sought through or "generic language" contained in NSLs. Pl. Opp. Br. at 44. Such disclosure is permissible to the extent such information is contained in the statute, see 18 U.S.C. § 2709(a), (b) (Supp. II 2002), or is otherwise publicly available (see First Beeson Decl. Exhs. 10, 11 (documents generally discussing NSLs)) -- so long as the service provider does not disclose that the FBI has made a particular inquiry, or the details of such inquiry. Gov. Br. at 44-46.

Plaintiffs also inappositely claim that § 2709(c) prevents service providers from criticizing the "actual exercise of government authority." Pl. Opp. Br. at 45. As noted in the Government's moving papers, Plaintiffs' complaint is not with the exercise of the Government's authority; indeed, they have not claimed that any NSL (including the challenged NSL) has exceeded the FBI's authority under § 2709. Rather, the gravamen of their complaint is that the FBI should not have authority to issue NSLs under the procedures outlined in § 2709. The disclosure of such criticism -- while groundless -- is not precluded.

In sum, even if it applied, § 2709(c) would pass heightened scrutiny.

4. The Challenged NSL Is Constitutional

Plaintiffs also claim that the challenged NSL, which incorporates § 2709(c) [REDACTED] Decl. Exh 1), has "suppressed a wide array of non-sensitive speech in this case and is far from narrowly tailored." Pl. Opp. Br. at 52-56. Again, Plaintiffs are wrong. Just as § 2709(c) passes constitutional muster, see supra at 29-39, the challenged NSL incorporating the statute is constitutional.

In addition, Plaintiffs again wrongly attempt to manufacture a licensing system under the statute, suggesting that the Government has the power to define what may or may not be disclosed. See Pl. Opp. Br. at 53. As this Court's May 14, 2004 Order makes clear, it is -- and has been -- for this Court to determine what Plaintiffs may publicly disclose.

Plaintiffs also again overstate the scope of § 2709(c)'s application in this case. Plaintiffs, of course, have not been prevented from making any statements to the Court, and thus have had full opportunity to pursue their claims. In addition, Plaintiffs have not been prevented from making their facial challenge to § 2709 available to the press and public -- including through press releases and postings on the ACLU's website. Similarly, contrary to their assertion, Pl. Opp. Br. at 54, Plaintiffs have not been prevented from criticizing the Government. As noted in the Government's moving papers, Plaintiffs' complaint lies not with the way in which the FBI sought records from [REDACTED] but rather with the fact that the FBI is

authorized, through § 2709, to request such information. Again, Plaintiffs have been free to publicize such criticism to the press and public. Moreover, while Plaintiffs focus on individual phrases or sentences that have been redacted from their papers, Pl. Opp. Br. at 52-55, they ignore what those statements communicate when considered in the context of all of their publicly-available statements about this case.²⁴

Finally, Plaintiffs wrongly suggest that the Government has "minimize[d] real threats to national security" by "suggesting that innocuous information must be kept from the public." Pl. Opp. Br. at 55. Again, Plaintiffs are in no position to declare what information is "innocuous." Meanwhile, the statements that have been affected by § 2709(c) in this case are far from "innocuous." The undisputed evidence in the record demonstrates that disclosure of the fact that a particular NSL has been issued [REDACTED]

[REDACTED] see [REDACTED] Decl. ¶ 22; Ex Parte FBI Decl. ¶¶ 32-33, 48-52) -- threatens the integrity and efficacy of an [REDACTED].²⁵

In sum, the non-disclosure required by § 2709(c) and the challenged NSL is constitutional.²⁶

B. Plaintiffs' Vagueness Challenge to § 2709(c) and the Challenged NSL Is Meritless

1. Plaintiffs' Facial Vagueness Challenge Fails

As noted in the Government's moving papers, Plaintiffs' vagueness challenge to § 2709(c) is meritless. The statute provides fair warning of prohibited conduct, making it clear that disclosures

²⁴ While Plaintiffs reference that the Government inadvertently did not redact the words "the challenged NSL" at the end of their moving papers, Pl. Opp. Br. at 54, Plaintiffs simply highlight the need for full non-disclosure with respect to a particular NSL. As noted *supra* at 38, inadvertent disclosures can, and do, happen -- even where a party is taking all precautions to avoid problematic disclosure.

²⁵ Plaintiffs also fail in their attempt to coopt a statement from the 9/11 Commission Report. Pl. Opp. Br. at 55 n.25. The clear import of this statement is that secrecy in counter-terrorism investigations is "necessary," although it "can also harm oversight" by Congressional committees. *Id.*

²⁶ While Plaintiffs' moving papers included a footnote containing an overbreadth challenge to § 2709(c), Pl. Mov. Br. at 18 n.7, Plaintiffs apparently have abandoned the argument in their reply and opposition papers. In any event, any overbreadth challenge would fail. *See* Gov. Br. at 62 n.25.

revealing that the FBI has made a particular inquiry are prohibited. Gov. Br. at 62-66. In their opposition, Plaintiffs assert that § 2709(c) is vague because it does not expressly provide that an NSL recipient can consult an attorney, file a motion to quash, or pursue an as-applied challenge to § 2709(c). Pl. Opp. Br. at 47. Plaintiffs' assertion is unavailing.

Section 2709(c) is sufficiently clear with respect to actions that may be taken. As for consultation with an attorney, Plaintiffs wholly ignore the maxim that a statute must be construed to avoid constitutional doubt. Gov. Br. at 63-64. In addition, Plaintiffs' response, Pl. Opp. Br. at 47-48, simply misses the point. While a service provider's consultation with an attorney about an NSL does "expose" the NSL to the attorney's view, the communication is privileged and an attorney cannot divulge the information further. In essence, the service provider has merely communicated within itself (*i.e.*, to an agent who is covered by privilege). Indeed, though ignored by Plaintiffs, courts have implied exceptions to non-disclosure requirements for purposes of consultation with counsel. Gov. Br. at 64.²⁷

With respect to pursuing a pre-production motion to quash, Plaintiffs -- on their own, without any (inaccurate) claim of permission from Agent ██████ -- concluded that they could seek to enjoin enforcement of the NSL served on ██████.²⁸ In fact, that is exactly what they did, determining on their own

²⁷ Plaintiffs wrongly accuse the Government of "exploit[ing] the statute's vagueness" with respect to consulting an attorney. Pl. Opp. Br. at 48. Plaintiffs again mischaracterize the Government's moving papers, wrongly stating that the Government took the limited position that a service provider may consult an attorney only "to the extent necessary to fulfill the FBI request." *Id.* (citing Gov. Br. at 64 n.27). Plaintiffs again ignore the text of the Government's moving brief, which provided that a service provider may consult an attorney "for the purpose of securing legal advice with respect to an FBI request for records" -- to fulfill the request or to pursue a challenge to it. Gov. Br. at 64; see also Gov. Br. at 46 n.15 ("§ 2709(c), properly construed, does not prohibit a communication service provider from consulting with an attorney about a particular NSL").

²⁸ Plaintiffs claim only that Agent ██████ gave ██████ permission to consult an attorney (rather than to file a pre-production motion to quash or an as-applied challenge to § 2709(c)). ██████ Decl. ¶ 16); Pl. Opp. Br. at 11, 28 n.8. As demonstrated supra at 9 & n.3 and in the Government's moving papers, even that limited claim is inaccurate. See also Gov. Br. at 11, 50 n.16; ██████ Decl. ¶¶ 6-9).

to file their complaint under seal. While Plaintiffs cite several rules and statutes expressly providing for motions to quash, Pl. Opp. Br. at 48, they ignore that numerous statutes authorizing record requests do not expressly provide for such challenges, see supra at 6-7. Likewise, with respect to pursuing an as-applied challenge to § 2709(c), Plaintiffs -- again on their own, and without any claim of permission -- concluded that they could pursue an as-applied challenge to the statute. It simply strains credulity for Plaintiffs to assert that a communication service provider would not think that it could challenge an NSL received or the statute governing NSLs, notwithstanding § 2709(c).

2. Plaintiffs' As-Applied Vagueness Challenge Fails

Just as § 2709(c) is not vague, the challenged NSL incorporating it is not vague. Plaintiffs again wrongly level the accusation that "the government does not know what [§ 2709(c)] means." Pl. Opp. Br. at 56. The Government has consistently maintained that § 2709(c) does not prevent the ACLU, a second John Doe Plaintiff -- or any other person or entity -- from disclosing a facial challenge to the statute (although discussion referencing a particular NSL, or indicating that a particular NSL was issued, is barred). Gov. Br. at 65-66. Contrary to Plaintiffs' claim, Pl. Opp. Br. at 56, the Government never stated that the ACLU could not disclose the fact that it represents another plaintiff in this case. Indeed, the caption of the redacted complaint makes clear that there is another plaintiff (whose identity is redacted). Compl. at 1. Rather, the Government stated that § 2709(c) bars the ACLU from disclosing that it represents another plaintiff who was served with an NSL.

Also contrary to Plaintiffs' claim, Pl. Opp. Br. at 56, the Government has not taken inconsistent positions with respect to Plaintiffs' statements about the alleged effect of the non-disclosure provision in this case. The Government has consistently sought redaction of any statement by Plaintiffs that the non-disclosure provision applies in this case. See id. ("That [§ 2709(c)] is exceedingly broad is evident from the effect of the provision in this case."). Such statements directly communicate that one of the plaintiffs

received an NSL, because the non-disclosure provision otherwise would not apply. Consistent with this Court's May 17, 2004 ruling, however, the Government has not sought redaction of Plaintiffs' statements that are vague enough that they could be construed as an (erroneous) assertion that the non-disclosure provision prevents a service provider from disclosing a facial challenge to the statute. See id. at 56-57 ("The [non-disclosure requirement in § 2709(c)] is preventing us from communicating information that is relevant to the public debate about the Patriot Act"; "Because of [§ 2709(c)], I have not disclosed information about [redacted] this lawsuit to the press and public.").²⁹

In sum, Plaintiffs' vagueness challenge fails.

* * *

In a dismissive footnote at the end of their brief, Plaintiffs attempt to downplay the extraordinary nature of their request for an injunction barring the use of § 2709, claiming that the FBI would not be prevented "from obtaining records through other, constitutionally valid procedures." Pl. Opp. Br. at 49 n.21. Significantly, Plaintiffs fail to point to any other statute authorizing the FBI to subpoena or request records for use in counterintelligence or counter-terrorism investigations. Grand jury subpoenas, for example, are available only once a grand jury is investigating a particular matter; many counterintelligence and counter-terrorism investigations, however, proceed without connection to a grand jury investigation. See generally H. Conf. Rep. 104-427 at 35-36 (Dec. 20, 1995) (discussing NSL statute for consumer reporting agencies) ("Many counterintelligence investigations never reach the criminal stage but proceed for intelligence purposes or are handled in diplomatic channels."), reprinted in 1995 U.S.C.C.A.N. 934,

²⁹ At the May 17, 2004 conference, this Court ruled that the following sentence could be made publicly available: "Plaintiffs originally filed the case under seal because their Complaint [REDACTED] might be construed to fall within the scope of 18 U.S.C. § 2709(c) . . ." The Government understood the Court's ruling to have been based on the fact that the sentence, as redacted, was vague enough such that it could be read to communicate only that Plaintiffs feared that a facial challenge to § 2709 would trigger applicability of § 2709(c).

983, 997-98. In announcing that their requested injunction "will not undermine any legitimate government interest," Pl. Opp. Br. at 49 n.21, Plaintiffs again betray a fundamental misunderstanding of the nature of counterintelligence and counter-terrorism investigations, and fail to appreciate the detrimental nature of their request that this Court strike down an important statute whose sole purpose is to aid the FBI in preventing clandestine intelligence activities and terrorist acts.

CONCLUSION

For the foregoing reasons, the Government's cross-motion to dismiss the complaint or for summary judgment in its favor should be granted.

Respectfully submitted,

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