



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK


 AMERICAN CIVIL
LIBERTIES UNION; and AMERICAN CIVIL
LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ALBERTO GONZALES, in his official capacity
as Attorney General of the United States;
ROBERT MUELLER, in his official capacity
as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN, in
his official capacity as Senior Counsel to the
Federal Bureau of Investigation,

Defendants.

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

04 Civ. 2614 (VM)

SEALED CASE

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

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

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INTRODUCTION

In this action, plaintiffs [REDACTED]

American Civil Liberties Union (“ACLU”), and American Civil Liberties Union Foundation (“ACLUF”) challenge the constitutionality of the gag and secrecy provisions of 18 U.S.C. §§ 2709 and 3511 (collectively, the “NSL statute”). *See* 18 U.S.C. §§ 2709 & 3511, *amended by* the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (“Patriot Act”), the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 195 (Mar. 9, 2006) (“PIRA”), and the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (Mar. 9, 2006) (“ARAA”). The gag provisions permit the Federal Bureau of Investigation (“FBI”) to impose a broad and effectively permanent non-disclosure obligation on any person or entity served with a national security letter (“NSL”). *See* 18 U.S.C. §§ 2709(c) & 3511(b) (collectively, the “gag provisions”). The secrecy provisions require courts that hear challenges to individual gag orders to close hearings, seal documents, and consider evidence *ex parte* without compliance with constitutional standards that ordinarily govern such measures. *See* 18 U.S.C. § 3511(d) & (e) (collectively, the “secrecy provisions”).

The statute’s gag provisions violate the First Amendment by failing to provide constitutionally mandated procedural safeguards; by investing executive officers with unbridled discretion to suppress speech; and by authorizing the issuance of gag orders that are not narrowly tailored to a compelling government interest. The gag provisions also violate both the First Amendment and the principle of separation of powers by foreclosing courts that hear challenges to individual gag orders from applying a constitutionally mandated standard of review. Finally, the statute’s secrecy provisions violate the First Amendment by requiring reviewing courts to

close hearings and seal judicial documents even when there is no compelling need for secrecy, and violate the First and Fifth Amendments by requiring reviewing courts to consider evidence *ex parte* and *in camera* upon the government's request.

For these reasons and others described below, plaintiffs' motion for partial summary judgment should be granted.

PROCEDURAL HISTORY

Plaintiffs ██████████ ACLU, and ACLUF initiated this lawsuit on April 6, 2004, and filed an amended complaint on May 13, 2004. In a Motion for Summary Judgment filed on May 17, 2004, plaintiffs argued that the NSL statute, as then codified in 18 U.S.C. § 2709, violated the First and Fourth Amendments by authorizing the FBI unilaterally to compel the disclosure of sensitive records, including records relating to constitutionally protected expressive and associational activity. Plaintiffs also argued that the NSL statute's gag provision violated the First Amendment by authorizing the FBI to impose prior restraints on the speech of NSL recipients.

This Court granted plaintiffs' motion for summary judgment on September 28, 2004. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471, 506 (S.D.N.Y. 2004). The Court found that the NSL statute violated the Fourth Amendment because, as implemented by the FBI, it "essentially force[d] the reasonable NSL recipient[s] to immediately comply" with FBI demands for information. *Id.* at 494. The Court also found that the statute violated the First Amendment by empowering the FBI unilaterally to compel the disclosure of records of protected associational and expressive activity. *Id.* at 506. The Court wrote, "fundamental rights are certainly implicated in some cases in which the Government may employ [the NSL statute] broadly to gather information, thus requiring that the process incorporate the safeguards of some judicial

review to ensure that if an infringement of those rights is asserted, they are adequately protected through fair process in an independent tribunal.” *Id.* at 511.

Turning to the statute’s gag provision, the Court first found that the gag provision imposed a prior restraint and content-based restriction on speech. *Id.* Applying strict scrutiny, the Court faulted the provision for imposing “a *permanent* bar on disclosure in every case, making no distinction among competing relative public policy values over time, and containing no provision for lifting that bar when the circumstances that justify it may no longer warrant categorical secrecy.” *Id.* at 519. The Court wrote:

The Government’s claim to perpetual secrecy surrounding the FBI’s issuance of NSLs . . . presupposes a category of information, and thus a class of speech, that, for reasons not satisfactorily explained, must forever be kept from public view, cloaked by an official seal that will always overshadow the public’s right to know. In general, as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom. Hence, an unlimited government warrant to conceal, effectively a form of secrecy *per se*, has no place in our open society.

Id. at 519-20. The Court concluded that the provision could not survive strict scrutiny, and, finding that the gag provision could not be severed, it invalidated the entire statute. *Id.* at 525-6.

The government appealed this Court’s decision and oral argument was heard by the Second Circuit in November 2005. Before the Second Circuit issued a decision, however, Congress enacted the PIRA and ARAA, which amended the challenged law. In May 2006, the Second Circuit remanded the case to this Court “to receive amended pleadings, request new briefs, conduct oral argument, and, in due course, furnish its views on the constitutionality” of the amended NSL statute. *Doe v. Gonzales*, 449 F.3d 415, 419 (2d Cir. 2006). Plaintiffs filed a Second Amended Complaint on July 24, 2006 and now move for partial summary judgment.¹

¹ The instant Motion seeks summary judgment on plaintiffs’ claims relating to the validity of the amended statute’s gag provisions. Plaintiffs believe that those provisions are

THE CHALLENGED STATUTE

The NSL statute was enacted in 1986 as part of the Electronic Communications Privacy Act (ECPA). *See* Pub. L. No. 99-508, Title II, § 201(a), 100 Stat. 1848 (Oct. 21, 1986) (codified as amended at 18 U.S.C. § 2510, *et seq.*). The statute has since been amended several times.² In its current form, the statute authorizes the FBI to issue NSLs ordering “electronic communication service provider[s]” to disclose “subscriber information,” “toll billing records information,” and “electronic communication transactional records” upon a certification that the information sought is “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709(a) & (b)(1) (2006). An “electronic communication service” is “any service which provides to users thereof the ability to send or receive wire or electronic communications.” *Id.* § 2510(15).

Until recent amendments, the statute did not afford NSL recipients any means of challenging FBI demands before complying with them. Moreover, the statute included a gag provision that permanently barred NSL recipients from disclosing “that the FBI had sought or obtained access to information or records under [the statute].” 18 U.S.C. § 2709(c) (2004). The gag provision, which applied with respect to every NSL issued, permanently foreclosed NSL recipients from notifying surveillance targets that their privacy had been compromised (even if the targets were innocent third parties); from speaking out publicly about the FBI’s investigation (even after the investigation had ended); from contesting the FBI’s demand for records in court; and even from consulting an attorney about the possibility of contesting the FBI’s demand.

unconstitutional on their face and as applied. Together with this Motion, plaintiffs have filed a Petition to Set Aside Demand for Records, which seeks relief relating to plaintiffs’ remaining claims.

² This Court surveyed the statute’s legislative history in its September 2004 Opinion. *See Doe*, 334 F. Supp. 2d at 480-84.

Following this Court's decision in *Doe* and another district court's decision in *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005) (hereinafter, "*Library Connection*"), Congress amended the statute in several respects. First, it amended the statute to permit those served with NSLs to "petition for an order modifying or setting aside the request." 18 U.S.C. § 3511(a) (2006). If the recipient of an NSL files such a petition, the reviewing court may modify or set aside the NSL "if compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* Under the amended statute, the FBI may affirmatively seek judicial enforcement of an NSL by "invok[ing] the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity [served with the NSL] resides, carries on business, or may be found." *Id.* § 3511(c). If a court issues an order requiring compliance with an NSL, non-compliance may be punished by the court as contempt. *Id.*

Congress also replaced the gag provision with a series of provisions that (i) allow the FBI unilaterally to issue gag orders on a case-by-case basis; and (ii) strictly confine the ability of NSL recipients to challenge such orders in court. As amended, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a gag order on any person or entity served with an NSL. *See* 18 U.S.C. § 2709(c). To impose such an order, the Director or his designee must "certify" that, absent the non-disclosure obligation, "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 2709(c)(1). If the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from "disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the

request) that the [FBI] has sought or obtained access to information or records under [the NSL statute].” *Id.* Gag orders imposed under the NSL statute are imposed by the FBI unilaterally, without prior judicial review. While the statute requires a “certification” that the gag is necessary, the certification is not examined by anyone outside the executive branch. No judge considers, before the gag order is imposed, whether secrecy is necessary or whether the gag order is narrowly tailored.

The gag provisions permit the recipient of an NSL to petition a court “for an order modifying or setting aside a nondisclosure requirement.” *Id.* § 3511(b)(1). However, in the case of a petition filed “within one year of the request for records,” the reviewing court may modify or set aside the nondisclosure requirement only if it finds that there is “no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.” *Id.* § 3511(b)(2). Moreover, if a designated senior government official “certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations,” the certification must be “treated as conclusive unless the court finds that the certification was made in bad faith.” *Id.*

In the case of a petition filed under § 3511(b)(1) “one year or more after the request for records,” the FBI Director or his designee must either terminate the non-disclosure obligation within 90 days or recertify that disclosure may result in one of the enumerated harms. *Id.* § 3511(b)(3). If the FBI recertifies that disclosure may be harmful, however, the reviewing court is required to apply the same extraordinarily deferential standard it is required to apply to petitions filed within one year. *Id.* If the recertification is made by a designated senior official,

the certification must be “treated as conclusive unless the court finds that the recertification was made in bad faith.” *Id.*

In amending the NSL statute, Congress also added two secrecy provisions. Under one provision, reviewing courts are required to “close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records,” and to keep filings under seal “to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records.” *Id.* § 3511(d). The statute does not define “unauthorized.” Under a second provision, reviewing courts are required, “upon request of the government,” to “review *ex parte* and *in camera* any government submission or portions thereof, which may include classified information.” *Id.* § 3511(e).³

SUMMARY OF UNDISPUTED FACTS⁴

[REDACTED] Internet access and consulting business located and incorporated in [REDACTED]. Statement of Undisputed Facts in Support of Plaintiffs’ Motion for Partial Summary Judgment (“SUF”) § 1 (Second [REDACTED] Decl. ¶¶ 1, 4-7). On or about [REDACTED] FBI agent [REDACTED] telephoned [REDACTED] President of plaintiff [REDACTED] to inform [REDACTED] that the FBI would be serving an NSL on [REDACTED]. *Id.* (Second [REDACTED] Decl. ¶ 8). Agent [REDACTED] personally delivered the

³ Congress amended the NSL statute and associated laws in a number of other ways. Of these amendments, perhaps the most significant provides that those who violate gag orders issued under the NSL statute may now be subject to criminal penalties. *See* 18 U.S.C. § 1510(e) (“Whoever, having been notified of the applicable disclosure prohibitions or confidentiality requirements of [the NSL statute] . . . knowingly and with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or requirements applicable by law to such person shall be imprisoned for not more than five years, fined under this title, or both.”). Another new provision provides that those subject to gag orders may be required to inform the FBI of the identity of any individual (except an attorney) to whom a disclosure is made. *See id.* § 2709(c)(4).

⁴ This section summarizes Plaintiffs’ Statement of Undisputed Facts in Support of Plaintiffs’ Motion for Summary Judgment, which is filed separately.

[REDACTED] NSL to [REDACTED] on or about [REDACTED] *Id.* (Second [REDACTED] Decl. ¶¶ 2, 10).

The letter, which is dated [REDACTED], was on FBI letterhead and signed by Marion E.

Bowman, Senior Counsel, National Security Affairs, Office of the General Counsel. *Id.* (Second

[REDACTED] Decl. ¶ 10). The letter stated that [REDACTED] is “hereby directed to provide the [FBI] the

names, addresses, lengths of service and electronic communication transactional records [REDACTED]

[REDACTED]

[REDACTED] *Id.*

(Second [REDACTED] Decl. ¶ 11; Second [REDACTED] Decl. Exh. 1.)

The letter included a certification that “the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.” *Id.*

(Second [REDACTED] Decl. ¶ 11; Second [REDACTED] Decl. Exh. 1). It also advised [REDACTED] that Title 18,

U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these

provisions.” *Id.* (Second [REDACTED] Decl. ¶¶ 2, 12; Second [REDACTED] Decl. Exh. 1). The letter further

stated, “You are requested to provide records responsive to this request personally to a

representative of the [REDACTED] of the FBI. Any questions you have regarding this

request should be directed only to the [REDACTED] *Id.* (Second [REDACTED] Decl. ¶ 13;

Second [REDACTED] Decl. Exh. 1). Due to security considerations, you should neither send the

records through the mail nor disclose the substance of this request in any telephone

conversation.” *Id.* (Second [REDACTED] Decl. ¶ 12; Second [REDACTED] Decl. Exh. 1.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* (Second [REDACTED] Decl. ¶ 13; Second [REDACTED] Decl. Exh. 1). [REDACTED]

[REDACTED], among other things, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* (Second [REDACTED] Decl. ¶ 13; Second

[REDACTED] Decl. Exh. 1).

Plaintiffs have now been subject to a gag order for more than [REDACTED]. SUF § III (Second [REDACTED] Decl. ¶¶ 2, 8, 10-12; Third Beeson Decl. ¶¶ 2-5; Second Romero Decl. ¶ 22). The government continues to rely on the gag order to prohibit plaintiffs from disclosing information that is innocuous and non-sensitive. SUF § IV (Third Beeson Decl. ¶¶ 3-5, 8-22, 31-40; Third Beeson Decl. Exh. 1-17, 23-33; Second Romero Decl. ¶¶ 22-29, 32; Second [REDACTED] Decl. ¶¶ 21-25); *see also* SUF § IV (Christian Decl. ¶¶ 15-20). It continues to rely on the gag order to suppress speech about government policy and the conduct of government officials. SUF §§ VI-VII (Second [REDACTED] Decl. ¶¶ 34-46; Second Romero Decl. ¶¶ 31-35); *see also* SUF §§ VI-VII (Christian Decl. ¶¶ 32-37). It continues to rely on the gag provision to prevent the public, the press, and Congress from obtaining facts essential to the ongoing debate about the appropriate place of government surveillance in a democratic society. SUF § VIII (Second [REDACTED] Decl. ¶¶ 37-46; Romero Decl. ¶¶ 22-23, 26, 29-35); *see also* SUF § VIII (Christian Decl. ¶¶ 32-37).

ARGUMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (c); *see also, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Lang v. Retirement Living Publ’g Co.*, 949 F.2d 576, 580 (2d Cir. 1991). Under this standard, plaintiffs are entitled to summary judgment.

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

- a. The NSL statute’s gag provisions authorize the FBI to issue content-based prior restraints and are therefore presumptively unconstitutional.

In *Doe*, this Court found that the gag provision then codified in 18 U.S.C. § 2709 “function[ed] as a prior restraint because . . . it prohibit[ed] speech before [it] occurs.” *Doe*, 334 F. Supp. 2d at 511-12. The amended gag provisions have the same essential character. Gag orders issued under the statute still prohibit NSL recipients from disclosing to any person (now with the limited exception of counsel and others to whom disclosure is necessary to comply with the NSL) the fact that they have received NSLs. Gag orders issued under the statute are still issued by the executive branch unilaterally, without prior judicial review.

Gag orders issued under section 2709(c) are prior restraints because they do not merely impose a penalty for a general category of speech but rather stifle speech before it occurs. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993) (“the term prior restraint describes orders forbidding certain communications that are issued before the communications occur” (internal quotation marks omitted)); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (noting that the distinction between a “prior restraint” and “limits on expression imposed

by criminal penalties” is “deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand”); *In re G. & A. Books, Inc.*, 770 F.2d 288 (2d Cir. 1985) (“governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated”(internal quotation marks omitted)); *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001). In *Doe*, this Court found that gag orders issued under the statute operated as prior restraints because they “authorize[d] suppression of speech in advance of its expression.” *Doe*, 334 F. Supp. 2d at 512 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989)). This is equally true of gag orders issued under the amended statute.

In fact, the amended statute’s gag provisions comprise a paradigmatic licensing scheme – “the classic type of prior restraint.” Erwin Chemerinsky, *Constitutional Law Principles and Policies* § 11.2.3.4 (2d ed. 2002). Under the amended statute, the FBI is invested with the discretion to determine, on a case-by-case basis, whether a gag order should be issued with respect to any given NSL. An NSL recipient’s right to speak is thus conditioned on the approval of executive officers. The courts have characterized analogous laws as licensing schemes, and they have evaluated such laws as prior restraints. See, e.g., *MacDonald v. Safir*, 206 F.3d 183, 194 (2d Cir. 2000) (“if rules condition the exercise of expressive activity on official permission . . . they . . . constitute a prior restraint on speech” (internal quotation marks omitted)); *Beal v. Stern*, 184 F.3d 117, 124 (2d. Cir. 1999).⁵

⁵ Indeed, the amended statute’s gag provisions comprise a licensing scheme even under the narrow definition that the government itself advanced earlier in this litigation. See *Doe*, 334 F. Supp. 2d at 512 (“The Government . . . maintains that § 2709(c) does not operate as a prior restraint because it does not create a licensing system by which the Government can pick and choose among speakers to restrain.”); Government’s 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, at 50 (filed June 28, 2004) (arguing that pre-

“Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (“*Pentagon Papers*”); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (prior restraints may be issued only in “exceptional cases,” such as when necessary to prevent the overthrow of the government). Because they are uniquely disfavored, prior restraints are subject to the strictest scrutiny. See *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303 (1983); *Southeastern Promotions, Ltd.*, 420 U.S. at 558-59; *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

Strict scrutiny is appropriate here for at least three other reasons. First, as this Court found in *Doe*, gag orders issued under the NSL statute restrict speech according to its substantive message; in other words, gag orders impose content-based restrictions on speech. See *Doe*, 334 F. Supp. 2d at 513 (noting that the gag provision “prohibits any discussion of the first-hand experiences of NSL recipients . . . and thus closes off that entire topic from public discourse” (internal quotation marks omitted)); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) (content-based restrictions subject to strict scrutiny); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (same); *Library Connection*, 386 F.Supp.2d at 75 (concluding that pre-amendment gag provision was “both a prior restraint and a content-based restriction on speech”).

Second, gag orders issued under the NSL statute restrict the communication of information that is lawfully acquired and truthful. The Supreme Court has said that “the

amendment gag provision did not impose licensing scheme because it did not “condition[] speech on prior government approval” and “allow[] officials to grant permission only to favored speakers”).

Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a state interest of the highest order.” *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (internal quotation marks omitted); *see also Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2001) (stating that a law “implicates the core purposes of the First Amendment [if] it imposes sanctions on the publication of truthful information of public concern.”); *The Florida Star v. B.J.F.*, 491 U.S. 524, 533-34 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 98, 101-02 (1979).

Third, the speech that gag orders suppress pertains to the activities of the government. The Supreme Court has recognized that “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system”).

In fact, the gag provisions suppress speech that is at the core of the First Amendment’s concern, as the instant case illustrates. Because of the gag order to which [REDACTED] has now been subject for over [REDACTED] plaintiff [REDACTED] has been prevented from publishing information about government activity on [REDACTED] website. SUF § VI (Second [REDACTED] Decl. ¶¶ 37-38). [REDACTED] has been foreclosed from disclosing that the government has ordered [REDACTED] to disclose information

about one of [REDACTED] clients – including information that [REDACTED] believes to be constitutionally protected. SUF §§ V, VII (Second [REDACTED] Decl. ¶¶ 3, 12-14, 22, 26, 41). [REDACTED] has been foreclosed from participating in the ongoing national debate about the Patriot Act and about the wisdom of new surveillance authorities. SUF § VI (Second [REDACTED] Decl. ¶¶ 38-45). [REDACTED] has been foreclosed from sharing information with the public, with the press, and even with [REDACTED] representatives in Congress. SUF § VI (Second [REDACTED] Decl. ¶¶ 37-45).

The gag order has had a similar effect on plaintiff ACLU. Though the ACLU has spent the past five years engaged in a campaign to educate the public and Congress about the civil liberties implications of the government's national security policies, the gag order has prevented the ACLU from fully discussing this litigation and the [REDACTED] NSL with the public, the press, and Congress. SUF § IV (Second Romero Decl. ¶¶ 7-24, 26-34). The gag order severely hampered the ACLU's lobbying and public education efforts during the Patriot Act reauthorization debate. SUF § VI (Second Romero Decl. ¶¶ 22-34). To take just one example, the gag order precluded ACLU staff from fully responding to the administration's repeated claim that the Patriot Act had not led to any "abuses." SUF §§ VI-VII (Second Romero Decl. ¶¶ 34-35). The gag order precluded ACLU staff from responding to this claim by describing the FBI's dubious use of the NSL statute in this case. SUF § VI (Second Romero Decl. ¶¶ 33-35).

Plaintiffs' experience with the gag provisions is not unique. In the only other known NSL litigation, the government used its authority in similar ways. During the Patriot Act reauthorization debate, the government insisted that national security precluded the NSL recipient – Library Connection – from disclosing even the fact that it had received an NSL. SUF § III (Third Beeson Decl. ¶¶ 43-45); SUF § VI (Christian Decl. ¶¶ 11, 15-20, 29-32).

Government spokespeople had previously stated publicly that the Patriot Act had not been used

to compel the production of library records, and by preventing Library Connection from disclosing its identity the government ensured that its spokespeople's statements could stand unqualified and unchallenged. SUF § VI (Christian Decl. ¶¶ 32-37). In the Library Connection case, as in this case, the government used the gag order to skew and impoverish public debate about a matter of national concern. SUF § VI, VIII (Christian Decl. ¶¶ 32-37). As the courts have signaled on countless occasions, the First Amendment was meant to protect against precisely this kind of abuse.

- b. The NSL statute's gag provisions violate the First Amendment because they fail to provide constitutionally mandated procedural safeguards.

Licensing schemes are constitutional only if they provide procedural safeguards sufficient to minimize the risk that protected speech will be suppressed. The NSL statute fails to provide those safeguards. The statute violates the First Amendment because it fails to require that gag orders issued by the FBI be subjected to judicial review within a "specified brief period," and because it places the burden of going to court not on the government but on the NSL recipient – i.e. on the prospective speaker.⁶

⁶ It is well-settled that a party need not actually apply for a license under a government licensing scheme before challenging the facial validity of that scheme. As the Supreme Court stated in *City of Lakewood v. Plain Dealer Publishing Co.*, "our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." 486 U.S. 750, 755-56 (1988); see also *id.* at 759 (holding that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (remarking that "it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license"); *MacDonald v. Safir*, 206 F.3d 183, 189 (2d Cir. 2000) (holding that "there is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance (or parts of it) on the ground that the ordinance gives the regulating entity unbridled discretion").

The Court's seminal case in this area is *Freedman v. Maryland*, 380 U.S. 51 (1965), which involved the constitutionality of a Maryland statute that made it unlawful to exhibit any motion picture without first obtaining the approval of a state licensing board. In considering the validity of the licensing scheme, the Court observed that, "[u]nlike a prosecution . . . a censorship proceeding puts the initial burden on the exhibitor or distributor" – that is, on the prospective speaker. *Id.* at 57. One danger of such schemes, the Court noted, is that they are likely to suppress more speech than is constitutionally acceptable. The Court wrote, "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression." *Id.* at 57-58. Moreover, "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Id.* at 58.

In view of such dangers, the Court held that a licensing scheme "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* The Court set forth three safeguards in particular: First, any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained. *Id.* at 58-59. Second, expeditious judicial review of that decision must be available. *Id.* Third, the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Id.* at 58. The Court found that the Maryland censorship scheme afforded none of these safeguards. Under the Maryland statute, "once the censor [had] disapprove[d] [a] film," – that is, once the censor had suppressed speech – the prospective speaker was required to "assume the burden of initiating judicial proceedings and of persuading the courts that the film is protected expression." *Id.* at 59-60. Exhibition of the film

was prohibited pending judicial review, “however protracted.” *Id.* at 60. Moreover, the statute “provide[d] no assurance of prompt judicial determination.” *Id.* The Court invalidated the statute on its face.

The courts have applied the *Freedman* analysis in a variety of contexts. In *Blount v. Rizzi*, 400 U.S. 410 (1971), the Supreme Court applied the *Freedman* analysis to a federal statute under which the Postmaster General, following administrative hearings, could halt use of the mails for commerce in allegedly obscene materials. The Court found the statute unconstitutional because it did not guarantee prompt judicial review and because it placed the burden of instituting judicial proceedings on the citizen rather than the government. *Id.* at 418, 420 (faulting statute because “the section does not satisfy the requirement that the [government] assume the burden of seeking a judicial determination”). Similarly, in *Southeastern Promotions Ltd.*, 420 U.S. 546, the Supreme Court applied the *Freedman* analysis to an informal process under which the board of directors of a municipal theatre considered applications for use of its theatre facility. The Court found the procedures unconstitutional because they “did not provide a procedure for prompt judicial review”; because “it was [the] petitioner, not the board, that bore the burden of obtaining judicial review”; and because, “during the time prior to judicial determination,” the petitioner was foreclosed from using the municipal theatre facilities. *Id.* at 561-62. Noting the special danger presented by prior restraints, the Court wrote: “Insistence on rigorous procedural safeguards under these circumstances is ‘but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.’” *Id.* at 561 (quoting *Bantam Books, Inc.*, 372 U.S. at 66).

It is now well settled that “[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of

constitutionally protected rights – rights which we value most highly and which are essentially to the workings of a free society.” *Speiser v. Randall*, 357 U.S. 513, 521 (1958). In particular, because “a scheme conditioning expression on a licensing body’s prior approval of content presents peculiar dangers to constitutionally protected speech,” such a scheme must afford the “procedural safeguards” described by the Court in *Freedman*. *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002); *see also City of Littleton v. Z.J. Gifts*, 541 U.S. 774, 779-80 (2004); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 802 (1988) (finding that licensing scheme that governed the solicitation of charitable contributions by professional fundraisers was unconstitutional because of failure to specify a deadline by which the state would have to commence judicial proceedings); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971) (finding that statute authorizing federal customs agents to seize obscene material at the border must be construed to require government to commence forfeiture proceedings within 14 days and to require completion of judicial proceedings within an additional 60 days); *Bantam Books*, 372 U.S. at 70 (noting that Court had tolerated licensing schemes “only where [they] operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint”); *MacDonald*, 206 F.3d at 183; *Beal*, 184 F.3d at 117.⁷

The amended NSL statute imposes a licensing scheme because it effectively conditions the ability of an NSL recipient to speak publicly about government activity upon the FBI’s prior

⁷ In *FW/PBS, Inc.*, a plurality of the Court held that only the first two of *Freedman*’s three procedural requirements apply to time, place, and manner regulations that are content-neutral. *See FW/PBS, Inc.*, 493 U.S. at 606-07. A unanimous Court adopted this position in *Thomas*. *See Thomas*, 534 U.S. at 322. All three of *Freedman*’s requirements plainly apply, however, to licensing schemes that, like the one at issue in the instant case, are content-based. *See, e.g., MacDonald*, 206 F.3d at 183, 194-95.

approval. Yet the statute fails to provide the safeguards required by *Freedman*. The statute fails to require the FBI to initiate judicial proceedings at all, let alone within a specified, brief period of time, as *Freedman* requires. Instead, the statute places the burden of initiating judicial proceedings on the prospective speaker. As a result, a gag order issued under the NSL statute is presumptively permanent, and it is subject to judicial review, if at all, only when the NSL recipient affirmatively chooses to contest it. Of course, not all NSL recipients will have the motivation or resources to commence judicial proceedings against the government. *Cf. Freedman*, 380 U.S. at 59 (“[w]ithout these safeguards, it may prove too burdensome to seek review of the censor’s determination”). Consequently, it is likely that the overwhelming majority of gag orders issued under the statute will never be subjected to judicial review at all.

The NSL statute’s failure to conform to *Freedman* is of particular concern because, as noted above, the speech suppressed by the statute is speech concerning government activity. In *Library Connection*, the court recognized that the pre-amendment gag provision

has the potential for becoming a means of suppressing a particular point of view, that is, the view that certain federal investigative powers impose profoundly on individual civil liberties to the point that they violate our constitution. . . . The statute has the practical effect of silencing those who have the most intimate knowledge of the statute’s effect and a strong interest in advocating against the federal government’s broad investigative powers . . . those who are actually subjected to the governmental authority by imposition of the non-disclosure provision (internal quotation marks omitted).

Library Connection, 386 F. Supp. 2d at 75; *see also Doe*, 449 F.3d at 422 (Cardamone, J., concurring); *Doe*, 334 F. Supp. 2d at 520. As the *Library Connection* court proceeded to recognize, “The potential for abuse is written into the statute.” *Id.* at 82; *see also Beal*, 184 F.3d at 124 (stating the “constitutional limitation on excessive official discretion exists because a regulation susceptible to arbitrary application ‘has the potential for becoming a means of suppressing a particular point of view.’” (quoting *Forsyth*, 505 U.S. at 130-31)).

In fact plaintiffs' experience in the instant case underscores the likelihood of this kind of abuse. In one instance, the government relied on the gag order to redact a quote from a Supreme Court opinion about the dangers of censorship conducted under the rubric of national security. SUF § VII (Third Beeson Decl. ¶ 23). In another instance, it redacted from one of plaintiffs' briefs the contention that the gag order was "a classic example of an irresponsible invocation of national security to justify unnecessary secrecy." SUF § VII (Third Beeson Decl. ¶ 24). In another instance, the government redacted a sentence in which ██████ stated ██████ belief that "the public should be able to monitor how the government is using [its Patriot Act] powers so that it can police against possible abuses." SUF § VII (Third Beeson Decl. ¶ 25). In still another instance, the government redacted a sentence in which ██████ expressed concern that the subject of the ██████ NSL was impermissibly targeted ██████ SUF § VII (Third Beeson Decl. at ¶ 27).⁸

- c. The NSL statute's gag provisions violate the First Amendment because they invest the FBI with unbridled discretion to suppress speech.

The NSL statute also violates the First Amendment because it invests the FBI with unbridled discretion to suppress speech. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-50 (1969), the Supreme Court addressed the constitutionality of a Birmingham, Alabama ordinance that allowed city officials to refuse a parade permit if, in their judgment, "the public welfare, peace, safety, health, decency, good order, morals or convenience require[d] that [the

⁸ While plaintiffs believe that the FBI has *already* used the statute as a means of suppressing speech critical of the government, plaintiffs note that the statute would be unconstitutional even if it had not been used in this way. As the Second Circuit has observed, "it is the *risk* of an abuse of discretion that has motivated the [Supreme] Court's decisions in this area, . . . and a risk of abuse exists whenever a decisionmaker can effectively discriminate against certain viewpoints." *Beal*, 184 F.3d at 126 n.6; *see also Forsyth*, 505 U.S. at 133 n.10 ("[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion" (internal quotation marks omitted)).

permit] be refused.” The Supreme Court found the ordinance unconstitutional because it “conferred upon [city officials] virtually unbridled and absolute power to prohibit any parade, procession, or demonstration on the city’s streets or public ways.” *Id.* at 150. The Court wrote,

[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without *narrow, objective, and definite* standards to guide the licensing authority, is unconstitutional. It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Id. at 150-151 (emphases added); *cf. Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (finding that a statute authorizing Secretary of State to deny passports for travel to Cuba could not be read to “grant the Executive totally unrestricted freedom of choice”); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (finding that the Secretary of State’s authority to deny passports to citizens could not constitutionally be construed “to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose”).

Importantly, a licensing scheme that invests unbridled discretion in executive officers is unconstitutional even if it affords the procedural safeguards required by *Freedman*. *See, e.g., FW/PBS, Inc.*, 493 U.S. at 226 (recognizing that licensing scheme may be unconstitutional because it vests unbridled discretion in executive agency *or* because it fails to afford sufficient procedural protections); *Infinity Outdoor, Inc. v. City of New York*, 165 F. Supp. 2d 403, 426 (E.D.N.Y. 2001) (same). To survive constitutional scrutiny, a licensing scheme must provide the procedural protections specified in *Freedman*. But it must also adequately confine the discretion of the censor.

In *Shuttlesworth* itself, the Court determined that the challenged law allowed excessive discretion because it allowed prior restraints to be issued upon executive officers’ consideration

of such things as “decency,” “good order,” and “morals.” *Shuttlesworth*, 394 U.S. at 156-58. Since *Shuttlesworth*, the courts have consistently invalidated licensing schemes that invest executive agents with unfettered discretion. See, e.g., *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769 (1988) (finding discretion to be impermissibly unfettered where ordinance allowed Mayor to deny license for “such other terms and conditions deemed necessary” by him); *MacDonald*, 206 F.3d at 192 (finding constitutionally problematic a regulation that allowed city official to deny parade permit if he believed parade would be “disorderly in character or tend to disturb the public peace”). In a recent case, the Supreme Court wrote that “[I]f [a] permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion . . . by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted.” *Forsyth County*, 505 U.S. at 131 (internal quotations omitted).

The amended NSL statute does not cabin the FBI’s discretion with narrow, objective, and definite standards. Under the amended statute, the FBI may suppress speech whenever, in its view, there otherwise may result a danger to national security, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person. 18 U.S.C. § 2709(c)(1). That language is subjective and extraordinarily sweeping. Cf. *United States v. United States District Court*, 407 U.S. 297, 314 (1972) (“Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.”); *New York Times Co.*, 403 U.S. at 719 (Black, J., concurring) (“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”). The statute is made more problematic by the fact that it allows the FBI to suppress speech

whenever the FBI believes that one of the enumerated harms “may” result. 18 U.S.C.

§ 2709(c)(1). The NSL statute plainly requires executive officers to appraise facts, exercise judgment, and form opinions. *Cf. Forsyth County*, 505 U.S. at 131. The First Amendment does not permit executive officials to have such unfettered discretion to suppress speech. *Cf. id.* at 133 (“Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.”).

d. The NSL statute’s gag provisions violate the First Amendment by foreclosing reviewing courts from applying a constitutionally mandated standard of review.

Even if the amended statute afforded NSL recipients the procedural protections that *Freedman* requires, and even if the statute did not invest executive officers with unbridled discretion to suppress speech, the statute would fail constitutional scrutiny because it forecloses reviewing courts from applying a standard of review mandated by the First Amendment.

The judicial review contemplated by the amended statute is inadequate at best and, in some contexts, altogether illusory. As noted above, gag orders issued under the amended statute are both prior restraints and content-based restrictions on speech. As such, the First Amendment requires that they be subject to “the strictest scrutiny.” To survive strict scrutiny, the government must demonstrate, on a case-by-case basis, that a gag order issued under the statute is narrowly tailored to a compelling interest. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 677 (2004); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000); *R.A.V.*, 505 U.S. at 382; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Hobbs v. County of Westchester*, 397 F.3d 133 (2d Cir. 2005).

Rather than require (or permit) reviewing courts to apply the constitutionally mandated standard of review, the amended statute effectively rejects strict scrutiny – and indeed, any form

of heightened scrutiny – in favor of a standard that is even less protective than “rational basis” review. Specifically, the statute permits reviewing courts to set aside gag orders only where “there is *no reason to believe* that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.” 18 U.S.C. § 3511(b)(2), (b)(3) (emphasis added). This exceedingly deferential standard of review is entirely foreign to the First Amendment. The First Amendment does not permit the imposition of a content-based restriction on speech simply because there is *some* reason, however remote or speculative, to believe the restriction will mitigate a harm. *See, e.g., Blount*, 400 U.S. at 420 (rejecting legislative attempt to substitute “probable cause” standard for traditional First Amendment scrutiny). The First Amendment requires the restriction to be narrowly tailored to serve a compelling interest.

In addition, the statute places the burden of proof on the NSL recipient – the prospective speaker – rather than on the government. The Constitution does not permit this. *See, e.g., Ashcroft v. ACLU*, 542 U.S. at 660 (“[T]he Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality” (internal quotation marks omitted)). In *Speiser*, 357 U.S. 513, the Supreme Court considered the constitutionality of a state law that permitted veterans the benefit of a property tax exemption if they certified that they did not advocate the overthrow of the government by force. The Court observed that the statute required veterans to demonstrate their entitlement to the exemption and thereby unconstitutionally relieved the government of the obligation of justifying a burden on speech. *Id.* at 522 (“Not only does the initial burden of bringing forth proof of nonadvocacy rest on the taxpayers, but throughout the judicial and

administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption.”). The Court therefore found the statute unconstitutional. The Court wrote, “The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding – inherent in all litigation – will create the danger that legitimate utterance will be penalized.” *Id.* at 526. “[A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment.” *Id.* (internal quotation marks omitted).

The judicial review contemplated by the amended statute is inadequate in every instance. In some cases, however, the contemplated judicial review is not simply inadequate but entirely illusory. The amended statute instructs that, where any of a set of specified government officials certifies that lifting a gag “may” endanger national security or interfere with diplomatic relations, the reviewing court must take such a certification as *conclusive* absent bad faith. *See* 18 U.S.C. § 3511(b)(2), (b)(3). The statute thus unconstitutionally reduces reviewing courts to nothing more than rubber stamps for executive decisionmaking. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995) (noting with disfavor the government’s “perplexing” reading of a statute where that “reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer’s decision, but stripped of capacity to evaluate independently whether the executive’s decision is correct.”); *United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990) (“Under no circumstances should the Judiciary become the handmaiden of the Executive. The independence of the Judiciary must be jealously guarded at all times against efforts . . . to erode its authority.”).

- c. The NSL statute's gag provisions violate the First Amendment by authorizing the issuance of gag orders that are not narrowly tailored.

The amended NSL statute also violates the First Amendment by authorizing the issuance of gag orders that are not narrowly tailored to a compelling governmental interest. Gag orders issued under the amended statute are likely to be overbroad both in scope and duration. They are likely to be overbroad in scope because every gag provision issued under the statute forecloses the NSL recipient – or any officer, employee, or agent of the NSL recipient – from “disclos[ing] to any person . . . that the [FBI] has sought or obtained access to information or records” under the statute. 18 U.S.C. § 2709(c). Such sweeping secrecy is unlikely to be necessary in every case in which some degree of secrecy is required. In some cases, the FBI may have a compelling interest in prohibiting the NSL recipient, for a limited period of time, from notifying the subject of the NSL that her privacy has been compromised. In very rare cases, the FBI may have a compelling interest in prohibiting the NSL recipient, for a limited period of time, from disclosing even the fact that it was served with an NSL. But the amended gag provision is a blunt instrument: in each case that the FBI invokes the provision, the scope of the gag order is exactly the same. The statute’s failure to require that gag orders be tailored on a case-by-case basis renders the statute unconstitutional for yet another reason. *Cf. Speiser*, 357 U.S. at 525 (“[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .”).

Gag orders issued under the amended statute are likely to be overbroad in duration for two reasons. First, the statute provides that, if the recipient of an NSL unsuccessfully challenges a gag order one year or more after the issuance of the NSL, the recipient “[is] precluded for a period of one year” from filing another challenge. 18 U.S.C. § 3511(b)(3). This provision

effectively renders some gag orders immune from judicial review regardless of the government's interest in keeping those orders in place. Where an NSL recipient is unsuccessful in challenging a gag order twelve months after the service of the NSL but the government's interest in secrecy dissipates a month later – perhaps because the investigation has closed, or because the government itself has disclosed the information that it previously sought to keep secret – the recipient will, for the next eleven months, be subject to a gag order that is unsupported by any legitimate government interest, let alone an interest that is “compelling” for the purposes of the First Amendment. Thus, some gag orders will inevitably endure much longer than the Constitution permits. *See, e.g., Doe*, 449 F.3d at 422 (Cardamone, J., concurring) (“The government’s urging that an endless investigation leads logically to an endless ban on speech flies in the face of human knowledge and common sense: witnesses disappear, plans change or are completed, cases are closed, investigations terminate.”). It is clear that “less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *Reno v. ACLU*, 521 U.S. 844, 874 (1997).⁹

Second, gag orders are likely to be overbroad in duration because, as discussed above, the judicial review contemplated by the statute is virtually meaningless. That the statute places the burden on the NSL recipient to challenge a restraint on speech means that few challenges will be filed in the first place. The statute’s substantive standards – the “no reason to believe” standard

⁹ Notably, the statute does not expressly permit the FBI itself to vacate a gag order once issued. Even if the statute could be read to *implicitly* provide the FBI with such authority, however, the Constitution does not permit fundamental rights to be placed at the mercy of executive officers. The possibility that FBI officials will agree to vacate unnecessary gag orders is not a sufficient assurance that First Amendment rights will be protected. *See, e.g., Doe*, 334 F. Supp. 2d at 520 (faulting the pre-amendment statute for failing to provide for balancing of interests “by an independent tribunal”); *id.* at 521 (“instances may arise in which the justification for concealment may have attenuated and the rights of both the NSL recipient and the public to disclosure may have correspondingly acquired greater weight and deserve heightened consideration in the balancing of pertinent public values *by a neutral arbiter*” (emphasis added)).

and the required deference to FBI certifications – means that, of the few challenges that are actually filed, virtually all are certain to fail. The result is that, except in truly extraordinary cases, gag orders issued under the statute are likely to be permanent. As this Court found in *Doe*, the First Amendment does not countenance this result. *Doe*, 334 F. Supp. 2d at 520 (“an unlimited government warrant to conceal, effectively a form of secrecy *per se*, has no place in our open society”); *see also Doe*, 449 F.3d at 422 (Cardamone, J., concurring) (“A permanent ban on speech seems highly unlikely to survive the test of strict scrutiny.”); *id.* (“a ban on speech and a shroud of secrecy in perpetuity are antithetical to democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens”).

That the statute authorizes the issuance of gag orders that are not narrowly tailored supplies yet another basis upon which to find the statute unconstitutional.

- f. The NSL statute’s gag provisions violate the principle of separation of powers by foreclosing reviewing courts from applying a constitutionally mandated standard of review.

By requiring reviewing courts to rubber stamp gag orders issued by the executive branch, the amended NSL statute violates not only the First Amendment but also the principle of separation of powers. Under our constitutional system, Congress does not have the power to legislatively override a standard of review required by the Constitution. “It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” *Loving v. United States*, 517 U.S. 748, 757 (1996). In this constitutional scheme, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress cannot “require[] the federal courts to exercise ‘[t]he judicial Power of the United States,’ U.S. Const.,

Art III, § I, in a manner repugnant to the text, structure, and traditions of Article III.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995).

As discussed above, the Supreme Court has said that prior restraints – and content-based restrictions on speech – warrant strict scrutiny. The Supreme Court having interpreted the First Amendment in this way, it is not open to Congress to dictate a different standard. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court considered the constitutionality of the Religious Freedom Restoration Act of 1993, which required courts to apply strict scrutiny to challenges brought under the free exercise clause to neutral, generally applicable laws. In an earlier case, the Supreme Court had held that neutral, generally applicable laws could be applied to religious practices even when *not* supported by a compelling governmental interest. See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). In *City of Boerne*, the Court wrote:

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court’s precedent, not RFRA, which must control.

Id. at 535-536. The Court found the Act unconstitutional. *Id.* at 536.

The Court addressed a similar issue in *Dickerson v. United States*, 530 U.S. 428 (2000), which involved the constitutionality of Congress’s attempt to legislatively override *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court had held that a suspect’s statement made during custodial interrogation could not be admitted into evidence in a criminal trial unless the

suspect had been warned, in advance of his statement, that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had a right to the presence of an attorney, and that if he could not afford an attorney one would be appointed for him. *Id.* at 479. The statute at issue in *Dickerson* permitted statements made during custodial interrogation to be admitted as evidence as long as the statements were “voluntary.” *Dickerson*, 530 U.S. at 432. The Court found the statute unconstitutional. Writing for a unanimous Court, then-Chief Justice Rehnquist wrote, “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” *Id.* at 437.

It is well settled, then, that Congress does not have the authority to defy or repeal a judicial decision construing the Constitution. Yet this is precisely what Congress has attempted to do here. As discussed above, the Supreme Court has held that prior restraints and content-based restrictions on speech are subject to strict scrutiny. The amended NSL statute purports to substitute the constitutionally mandated standard with a standard that is significantly more deferential to the executive branch. As a result, the statute violates the principle of separation of powers.¹⁰

¹⁰ Even if courts must afford some degree of deference to executive branch decisions in the realm of national security, that deference should be afforded on a case-by-case basis and within the confines of the “strict scrutiny” framework. *See, e.g., Library Connection*, 386 F. Supp. 2d at 73-74. The judiciary has an important – and constitutionally mandated – role to play even in the realm of national security. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (“the United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake”); *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) (“[T]he notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present” is extremely troubling.”); *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983 (“[W]hile the [executive’s] tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary’s tasks include the protection of individual rights.”)).

II. THE NSL STATUTE'S SECRECY PROVISIONS VIOLATE THE FIRST AND FIFTH AMENDMENTS.

- a. The NSL statute's secrecy provisions violate the First Amendment by requiring the closure of hearings and the sealing of judicial documents even when such measures are not necessitated by a compelling interest and narrowly tailored to that interest.

The amended statute provides that, "[i]n all proceedings under this section, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records." 18 U.S.C. § 3511(d). It also states that "[p]etitions, filings, records, orders, and subpoenas must . . . be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records." *Id.* The provision is unconstitutional because it requires the closure of hearings even when closure or sealing is not necessitated by a compelling interest and narrowly tailored to that interest.

The First Amendment right of access to civil proceedings is now well established. *See, e.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (stating that the First Amendment right of access to judicial proceedings "applies to civil as well as criminal proceedings"); *Huminski v. Corsones*, 396 F.3d 53, 82-83 (2d Cir. 2004); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (recognizing right of access to civil libel trial); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984) (recognizing right of access to preliminary injunction hearings); *Doe v. United States*, 253 F.3d 256, 262 (6th Cir. 2001) (recognizing right of access to appellate argument relating to motion to quash administrative subpoena).

The First Amendment right of access also extends to documents filed in connection with civil proceedings. *See, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir.

2006) (“where documents are used to determine litigants’ substantive legal rights, a strong presumption of access attaches” (internal citation omitted)); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“[t]he First Amendment presumes that there is a right of access to proceedings and documents which have historically been open to the public and where the disclosure of which would serve a significant role in the functioning of the process in question”) internal quotation marks omitted); *In re the Matter of The New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (recognizing right of access to “written documents submitted in connection with judicial proceedings that themselves implicate the right of access”); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) (“relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies”).

Accordingly, the Second Circuit has held that the First Amendment right of access attaches to an array of documents filed in civil litigation. *See, e.g., Lugosch*, 435 F.3d at 124 (recognizing First Amendment right of access to documents filed in support of summary judgment); *The Hartford Courant Co.*, 380 F.3d at 96 (recognizing First Amendment right of access to civil docket sheets); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988) (recognizing First Amendment right of access to documents filed in support of a search warrant application); *Rushford v. New Yorker Magazine, Inc.*, 486 F.2d 249, 252-53 (4th Cir. 1988) (recognizing First Amendment right of access to documents filed in support of summary judgment).

The “presumption of openness cannot easily be overcome.” *ABC Inc. v. Stewart*, 360 F.3d 90, 98 (2d Cir. 2004). As this Court has recognized, documents may be sealed or

proceedings closed only “if specific, on the record findings are made demonstrating that closure [or sealing] is essential to preserve higher values and is narrowly tailored to serve that interest.” *Doe v. Ashcroft*, 317 F. Supp. 2d 488, 491 (S.D.N.Y. 2004) (quoting *In re New York Times Co.*, 828 F.2d 110, 117 (2d Cir. 1987)); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (closure or sealing must be “necessitated by a compelling . . . interest and [must be] narrowly tailored to serve that interest”). A court must also consider alternatives to closure that would adequately protect the interests the court seeks to protect. *Huminski*, 396 F.3d at 86; *ABC Inc.*, 360 F.3d at 98, 104-105.

These stringent requirements apply with equal force in the national security context. *See, e.g., Pentagon Papers*, 403 U.S. 944 (rejecting government’s request to close part of oral argument); *United States v. Moussaoui*, 65 Fed. App. 881, 887 (4th Cir. 2003) (rejecting government’s argument for entirely closed appellate argument and noting that “the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents”); *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1987) (holding that traditional First Amendment prerequisites to closure or sealing are “fully applicable in the context of closure motions based on threats to national security”).

The guarantee of public access to judicial proceedings and documents serves multiple ends. It promotes confidence in the judicial system. *See, e.g., Press-Enterprise Co. v. Superior Court of California for Riverside County*, 464 U.S. 501, 508 (1984) (hereinafter “*Press Enterprise I*”); *Huminski*, 396 F.3d at 81 (“[I]n these cases, . . . the law itself is on trial, quite as much as the cause which is to be decided. Holding court in public thus assumes a unique significance in a society that commits itself to the rule of law.”); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (“This preference for public access is rooted in the public’s first

amendment right to know about the administration of justice. It helps safeguard the integrity, quality and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.” (internal quotation marks and citations omitted)); *Matter of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (“What happens in the halls of government is presumptively open to public scrutiny Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification”). Public access also serves as a check against abuse. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (discussing the value of an open justice system and noting that “[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account” (quoting Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827))); *United States v. Amodeo*, 71 F.3d 1044, 1048 (1995).

The NSL statute requires closure and sealing “to the extent necessary to prevent an unauthorized disclosure.” The problem with the statute is that it does not define the term “unauthorized.” The statute thus impermissibly allows the executive branch to dictate whether proceedings must be closed or documents sealed. *See, e.g., Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 15 (1986) (hereinafter “*Press Enterprise I*”) (“The First Amendment right of access cannot be overcome by [a] conclusory assertion.”). As the Supreme Court and the Second Circuit have made clear, the courts have an important role to play in ensuring that judicial proceedings and documents remain open to the public, and, specifically, in ensuring that proceedings are closed, and documents sealed, only where necessary to serve a compelling interest. Plainly, the First Amendment does not permit the right of access to be placed at the mercy of executive officers. *Cf. Moussaoui*, 65 Fed. App. at 887 (emphasizing that regardless of national security concerns raised by the government, the court

must “independently determine whether, and to what extent, the proceedings and documents must be kept under seal”).¹¹

The statute is unconstitutional even if it is construed to refer to the gag provisions. While the government will sometimes have a compelling interest in protecting information that falls within the scope of a gag order, this will not always be the case. *See, e.g., Library Connection*, 386 F. Supp. 2d at 79-80 (finding that government did not have compelling interest in enforcing gag order insofar as order prohibited NSL recipient from disclosing mere fact that it had been served with an NSL). Even where a gag order issued under the NSL statute covers the information that the government seeks to protect by closure or sealing, the court has an obligation to assess whether the government’s interest in suppressing the information rises to the level of a compelling interest. In an analogous context, the Second Circuit has held that a court cannot seal documents relating to wiretaps conducted under a federal statute simply because the same statute prohibits disclosure of certain information relating to wiretaps. *See In re the Matter of The New York Times*, 828 F.2d at 115 (stating that government could not justify seal “simply [by] cit[ing] Title III” because “a statute cannot override a constitutional right”).

The secrecy provisions are unconstitutional because they require the closure of hearings even when closure or sealing is not necessitated by a compelling interest and narrowly tailored to that interest.

¹¹ Many of the proceedings and documents to which the provision potentially applies will implicate the First Amendment. Where an NSL recipient challenges a gag order, for example, the First Amendment right of access will attach to the arguments and hearings held in the course of that civil proceeding. *Cf. Doe*, 317 F. Supp. 2d at 491 (recognizing that right of access attached to documents filed in connection with civil challenge to NSL and gag order). The right of access will also attach to many of the documents filed in connection with challenges to NSLs themselves, at least where those documents are “used to determine litigants’ substantive legal rights.” *Lugosch*, 435 F.3d at 121; *see also Doe v. Ashcroft*, 317 F.Supp.2d at 491.

- b. The NSL statute's secrecy provisions violate the Fifth Amendment by requiring courts to consider evidence *ex parte* and *in camera* "upon request of the government."

The NSL statute provides that, "In all proceedings under this section, the court shall, upon request of the government, review *ex parte* and *in camera* any government submission or portions thereof, which may include classified information." 18 U.S.C. § 3511(e). This provision violates the Fifth Amendment.

It is well established that a civil litigant's right to due process "encompasses the individual's right to be aware of and refute the evidence against the merits of his case." *Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) (internal quotation marks omitted); see also *Greene v. McElroy*, 360 U.S. 44, 496 (1959); *United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) ("due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other"). Thus, the courts have recognized the "firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986); see also *Vining*, 99 F.3d at 1057 (reversing lower court determination based on *ex parte* evidence because "[o]ur adversarial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case" (quoting *Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. Unit B Sept. 1981))); *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) ("Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." (quoting *Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975))); *Hansberry v. Father Flanagan's Boys Home*, 2004 WL 3152393, at *4 n.9 (E.D.N.Y. Nov. 28, 2004) (refusing to consider evidence submitted *ex parte* in ruling on a summary judgment motion).

Consideration of secret evidence is strongly disfavored for at least three distinct reasons. First, it undermines the fairness of the adversarial process. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (“fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights”) (Frankfurter, J., concurring); *Allende v. Shultz*, 605 F. Supp. 1220, 1226 (D.Mass. 1985) (“the very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment”); *Abourezk*, 785 F.2d at 1060-61. Second, consideration of *ex parte* evidence creates an unacceptable risk of error. See, e.g., *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999); *Lynn v. Regents of Univ. of California*, 656 F.2d 1337, 1346 (9th Cir. 1981); *Doe*, 386 F. Supp. 2d at 70 (“For good reason, our system of justice relies on the adversarial process to bring to the attention of the finder of fact the strengths and deficiencies in parties’ litigation postures.”); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (in evaluating the risk of error, holding that the “[u]se of secret evidence creates a one-sided process by which the protections of our adversarial system are rendered impotent”).

Finally, the rule against consideration of *ex parte* evidence to decide the merits of a dispute furthers the vital appearance of fairness in judicial decision-making. See, e.g., *Abourezk*, 785 F.2d at 1060-61 (open proceedings “preserve both the appearance and the reality of fairness”). As Justice Frankfurter wrote:

Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Ant-Fascist Refugee Comm., 341 U.S. at 171-72 (Frankfurter, J., concurring). In sum, “reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness.” *Kiareldeen*, 71 F. Supp. 2d at 413.

The rule against secret evidence means that a party must ordinarily choose between making evidence available to its adversary or forgoing reliance on the evidence altogether. See, e.g., *Vining*, 99 F.3d at 1058 (ordering that the district court should either share whatever portion of the *ex parte* evidence was discoverable with plaintiff or “it must reconsider [the] summary judgment motion without relying on the information contained in these files”); *Ass’n for the Reduction of Violence*, 734 F.2d at 68 (same); *Allende*, 605 F. Supp. at 1226 (refusing, on due process grounds, to “examine” or “consider” any *ex parte* classified evidence submitted by the government in support of summary judgment motion); *Kinoy*, 67 F.R.D. at 15 (“Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties, in which case the Court will rule after full argument on the merits.” (internal citations omitted)).

This rule applies even where the evidence in question is classified. As a D.C. district court stated in rejecting the constitutionality of the government’s use of *ex parte* classified evidence in an immigration proceeding, the question is not whether the government has an interest in protecting national security information but rather “whether that interest is so all-encompassing that it requires that [the opposing party] be denied virtually every fundamental feature of due process.” *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992); see also *American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1070 (upholding the district court’s holding that consideration of undisclosed classified evidence in deportation proceeding violated due process);

Kiarelddeen, 71 F. Supp. 2d at 404, 414 (holding consideration of *ex parte* classified evidence in immigration proceeding violated due process); *Naji v. Nelson*, 113 F.R.D. 548, 552-54 (N.D. Ill. 1986) (refusing to rule on government's summary judgment motion where it was supported by *ex parte* classified evidence that had not yet been shared in some form with the opposing party); *Rafeedie*, 795 F. Supp. at 19 (holding use of *ex parte* classified evidence in this summary exclusion proceeding violated due process); *Allende*, 605 F. Supp. at 1226 (stating that summary judgment could not be granted on basis of classified evidence that was not provided to opposing party). Even in the face of national security concerns, due process mandates that "no party [should] be faced . . . with a decision against him based on evidence he was never permitted to see and to rebut." *Abourezk*, 785 F.2d at 1061 (noting "grave concern" about the district court's reliance on *ex parte* classified evidence).

The exceptions to the rule against *ex parte* evidence are "both few and tightly contained." *Abourezk*, 785 F.2d at 1061; *AAADC v. Reno*, 70 F.3d at 1070 ("the use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process."). Generally, the use of *ex parte* evidence is limited to circumstances in which the evidence is being used defensively – for example, in circumstances in which a party seeks to prevent disclosure of privileged material. Courts have almost universally rejected attempts to use *ex parte* evidence offensively. *See, e.g., Bane v. Spencer*, 393 F.2d 108, 109 (1st Cir. 1968) (stating that a defendant cannot wield information presented *ex parte* "as a sword to seek [a dispositive legal ruling] and at the same time blind plaintiff so that he cannot counter"); *Abourezk*, 785 F.2d at 1061; *Naji*, 113 F.R.D. at 552 ("While it is not unusual for a court to engage in the inspection of *in camera* materials when a party seeks to prevent the use of materials in litigation, reliance on *ex parte* evidence to decide

the merits of a dispute can be permitted in only the most extraordinary of circumstances.”); *Kinoy*, 67 F.R.D. at 15; *Allende*, 605 F. Supp. at 1226 (distinguishing cases in which *ex parte* review was permitted because the party submitting the evidence had not “attempt[ed] to use classified information offensively to obtain judgment in its favor”).

In those exceedingly rare circumstances in which *ex parte* evidence has been permitted, courts have given effect to the due process guarantee by fashioning alternatives to total secrecy. In some cases involving classified evidence, courts have required the government to provide a summary of the evidence to be shared with opposing counsel. *See, e.g., Abuhamra*, 389 F.3d at 321, 330 (stating that due process requires, at a minimum, some “substitute disclosure”); *Naji*, 113 F.R.D. at 553 (requiring at a minimum that the government “disclose to plaintiffs all non-classified portions of the documents withheld”); *Ass’n for Reduction of Violence*, 734 F.2d at 68 (directing district court to redact or summarize the privileged material if necessary); *Allende*, 605 F. Supp. at 1226.

In other cases, sensitive evidence has been shared under a protective order. Such protective orders have been entered both in civil cases, *see, e.g., In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); *Heine v. Raus*, 399 F.2d 785, 787 (4th Cir. 1968); *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. 434, 436-37 (Fed. Cl. Ct. 1997); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004); *United States v. Lockheed Martin Corp.*, 1998 WL 306755 (D.D.C. May 29, 1998), and in criminal cases, *see, e.g., 18 U.S.C. app. III § 3; United States v. Pappas*, 94 F.3d 795, 797 (2d Cir. 1996); *United States v. Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993); *United States v. Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995). In still other cases, opposing counsel have been granted security clearance. *See, e.g., In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 179-80; *Al Odah v. U.S.*, 346 F.

Supp. 2d 1, 14 (D.D.C. 2004); *United States v. Lockheed Martin Corp.*, 1998 WL 306755, at *5; *Doe v. Tenet*, 329 F.3d 1135, 1148 (9th Cir. 2003), *rev'd on other grounds*, 544 U.S. 1 (2005); *In re United States*, 1993 WL 262656, at *2-3 (Fed. Cir. Apr. 19, 1993); *Library Connection*, 386 F. Supp. 2d at 71-72 (examining classified evidence *ex parte* because of time constraints but directing the government to attempt “to provide plaintiffs with the opportunity for their lead attorney to seek to obtain the security clearance required to review and respond to the classified materials in connection with the resolution” of the case).

The NSL statute turns the rule against consideration of *ex parte* evidence on its head. Not only does the statute *permit* the introduction of *ex parte* evidence, it *requires* courts to admit such evidence “upon the government’s request.” The statute does not require the government to justify the introduction of secret evidence, nor even to explain its rationale for secrecy. Moreover, the statute extends even to evidence that is not classified. *See* 18 U.S.C. § 3511(e) (“the court shall, upon request of the government, review *ex parte* and in camera any government submission or portions thereof, which *may include* classified information” (emphasis added)).

In effect, the statute transfers control over the evidence in the case to executive officers. A court ordinarily has wide latitude to control the introduction and protection of sensitive or classified information in the litigation process. Even where evidence is classified, courts have the authority, and indeed the obligation, to independently assess whether the evidence is *properly* classified. *See, e.g., McGehee*, 718 F.2d at 1148 (requiring *de novo* judicial review of pre-publication classification determinations to ensure that information was properly classified and to ensure that agency “explanations justif[ied] censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification”); *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (requiring judicial review

of pre-publication classification determinations).¹² Yet the NSL statute requires courts to admit evidence *ex parte* even if the evidence has been classified improperly. And, again, the statute requires courts to admit evidence *ex parte* even if the evidence has not been classified at all.

The statute also appears to foreclose courts from considering alternatives to secret evidence. The NSL statute is extraordinary in this respect. The few other statutes that contemplate consideration of *ex parte* evidence explicitly require courts to consider alternatives that would mitigate the unfairness of secret evidence. *See, e.g.*, 50 U.S.C. § 1806(f) (providing that court can order partial release of classified material previously submitted by government to FISA court); 8 U.S.C. § 1534(e)(3) (requiring an unclassified summary in summary terrorism removal proceedings and in some cases designation of counsel with security clearance); 18 U.S.C. app. 3 § 4 (requiring summaries or substitute admissions). The NSL statute does not require the court to consider alternatives to total secrecy. As to both classified evidence and unclassified evidence, the statute appears to contemplate proceedings that are entirely one-sided.

¹² The fear that the executive branch will overclassify information is not speculative. *See generally* Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989 at A25; (former Solicitor General who fought to keep the Pentagon Papers secret stating “It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principle concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another.”); Meredith Fuchs, *Judging Secrets: The Role the Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 133-34 (2006) (noting that classification of information has nearly doubled since 2001, and noting that “[o]fficials throughout the military and intelligence sectors have admitted that much of this classification is unnecessary”); National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, at 417 (G.P.O. 2004) (“Current security requirements nurture overclassification No one has to pay the long-term costs of over-classifying information, though these costs—even in literal financial terms—are substantial.”); *Editorial*, N.Y. Times, July 12, 2005, at A20 (“The Bush administration is classifying the documents to be kept from public scrutiny at the rate of 125 a minute. . . . No one questions the need for governments to keep secret things that truly need to be kept secret, especially in combating terrorists. But the government’s addiction to secrecy is making an unnecessary casualty of the openness vital to democracy.”)

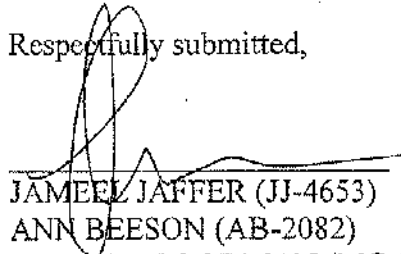
By requiring courts to admit secret evidence whenever the government “requests” that it be admitted, the statute forecloses courts from exercising their own judgment as to what due process requires. Plainly, the Constitution does not permit this. *Cf. United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) (stating that judicial control “over the evidence in a case cannot be abdicated to the caprice of executive officers.”); *In re Wash. Post Co.*, 807 F.2d at 391 (stating that “we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present”); *id.* at 392 (stating that “a blind acceptance by the courts of the government’s insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse”). Congress cannot constitutionally deprive the courts of the authority to determine whether or not evidence must be disclosed. Even in those rare cases in which secret evidence is constitutionally permissible, due process requires that courts consider alternatives that would mitigate the unfairness that otherwise attends the introduction of secret evidence. The NSL statute appears to divest the court of the authority to consider and order such alternatives.¹³

CONCLUSION

For the foregoing reasons, plaintiffs are entitled to judgment as a matter of law and plaintiffs’ motion for partial summary judgment should be granted.

¹³ Because it requires courts to deprive not only NSL recipients but also the public of access to judicial documents, section 3511(e) violates the First Amendment as well as the Fifth. *Cf. Abuhamra*, 389 F.3d at 323-24. As discussed above, the First Amendment embraces a right of access to judicial documents, which can be abridged only where specific, on the record findings are made demonstrating that closure or sealing is both essential to preserve higher values and narrowly tailored to serve that interest.

Respectfully submitted,



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

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

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