

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

**PETITION TO SET ASIDE  
DEMAND FOR RECORDS**

04 Civ. 2614 (VM)

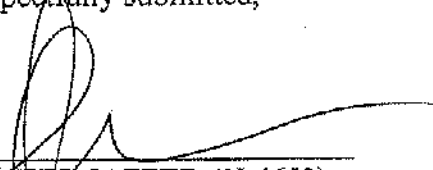
**SEALED CASE**

**PETITION TO SET ASIDE DEMAND FOR RECORDS**

Plaintiffs [REDACTED] and its President and [REDACTED]

[REDACTED] having received a national security letter ("NSL") under 18 U.S.C. § 2709 demanding certain records, hereby petition the court under 18 U.S.C. § 3511(a) for an order setting aside the NSL on the grounds that the FBI's demand is unlawful under the First and Fourth Amendments. A Memorandum in Support of Plaintiffs' Petition To Set Aside Demand for Records is attached hereto. For the reasons expressed therein, plaintiffs are entitled to an order setting aside the NSL served on plaintiff [REDACTED] in [REDACTED]

Respectfully submitted,



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September 8, 2006

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SOUTHERN DISTRICT OF NEW YORK

  
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LIBERTIES UNION; and AMERICAN CIVIL  
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**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' PETITION TO SET  
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## INTRODUCTION

As detailed in Plaintiffs' Second Amended Complaint ("SAC"), filed July 24th, 2006, an agent of defendant Federal Bureau of Investigation ("FBI") served a demand for records in the form of a national security letter ("NSL") under 18 U.S.C. § 2709, on plaintiff [REDACTED] [REDACTED] via its President and [REDACTED], in [REDACTED]. The NSL directed [REDACTED] to disclose the name, [REDACTED] addresses, [REDACTED] [REDACTED] and other sensitive information relating to one of [REDACTED] clients. See Second [REDACTED] Decl. ¶¶ 2, 10-13; Second [REDACTED] Decl. Exh. 1.<sup>1</sup>

A "recipient of a request for records, a report, or other information under section 2709(b) of this title . . . may . . . petition for an order modifying or setting aside the request" where "compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a).<sup>2</sup> The NSL served on plaintiffs is unlawful because it violates both the First and Fourth Amendments, and plaintiffs are therefore entitled to have the NSL set aside.

### I. THE [REDACTED] NSL VIOLATES THE FIRST AMENDMENT RIGHTS OF PLAINTIFF [REDACTED] SUBSCRIBER.

The [REDACTED] NSL demands a broad range of information about one of [REDACTED] subscribers.<sup>3</sup> Specifically, the letter "direct[s]" [REDACTED] to provide the [FBI] the names,

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<sup>1</sup> Declarations cited herein are declarations that were submitted in support of Plaintiffs' Motion for Partial Summary Judgment, which was filed together with the instant Petition.

<sup>2</sup> The appropriate venue for such a petition is "the United States district court for the district in which [the petitioning] person or entity does business or resides." 18 U.S.C. § 3511(a). Plaintiff [REDACTED] at the time the [REDACTED] NSL was served, [REDACTED] Internet access and consulting business incorporated and located in [REDACTED] [REDACTED] Second [REDACTED] Decl. ¶ 1, 4-7.

<sup>3</sup> Plaintiffs here have standing to raise the First Amendment rights of [REDACTED] subscriber. See, e.g., *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988) (permitting third-party standing in First Amendment context); *Sec'y of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 957 (1984) ("Even where a First Amendment challenge could be

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

[REDACTED]

[REDACTED] Second

[REDACTED] Decl. ¶¶ 11-13; Second [REDACTED] Decl. Exh. 1. The scope of this demand is made clear in an [REDACTED] to the NSL, entitled [REDACTED] which explains: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Second

[REDACTED] Decl. ¶¶ 10-13; Second [REDACTED] Decl. Exh. 1. (Emphasis in original.) The page then lists, among other things, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Second [REDACTED] Decl. ¶¶

10-13; Second [REDACTED] Decl. Exh. 1. Thus the [REDACTED] NSL seeks to [REDACTED]

who uses the [REDACTED] This speaker would otherwise remain [REDACTED]

---

brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser.”). Courts have specifically held that Internet Service Providers have standing to assert the First Amendment rights of their subscribers in order to resist being compelled to identify those subscribers. *See, e.g., In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257-58 (D.D.C. 2003), *rev'd on other grounds sub nom. Recording Industry Ass'n of Am., Inc., v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, at \*4-\*5 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

a. The First Amendment protects anonymous speech and association on the Internet.

The First Amendment protects against the compelled identification of an anonymous speaker. See *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 164-65 (2002) (striking down ordinance requiring individuals to obtain permit prior to engaging in door-to-door advocacy); *Buckley v. Am. Constitutional Law Found. Inc.*, 525 U.S. 182, 199-200 (1999) (striking down statute requiring petition circulators to wear identification badge bearing circulator's name); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341-42 (1995) (striking down statute prohibiting distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. 60, 64 (1960) (striking down ordinance prohibiting distribution of anonymous handbills); *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 506 (S.D.N.Y. 2004) (recognizing "the First Amendment right to anonymous speech"). As the Supreme Court has explained, "an author is generally free to decide whether or not to disclose his or her true identity. . . . [A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342.

The compelled identification of anonymous speakers threatens the core of the First Amendment. The right to communicate anonymously shields unpopular speakers, protects the right to dissent, and ensures that political debate is robust and uninhibited. In *Talley v. California*, the Supreme Court wrote:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all . . . .

Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

362 U.S. at 64-65; *see also McIntyre*, 514 U.S. at 357 (“[U]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”); *id.* (“Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.”); *Buckley*, 525 U.S. at 198 (noting that decision to communicate anonymously may be motivated by a speaker’s “reluctance . . . to face the recrimination and retaliation that [speakers] on ‘volatile’ issues sometimes encounter”).

The fact that the [REDACTED] speaker in this case is exercising his or her First Amendment rights over the Internet in no way diminishes the speaker’s entitlement to these rights. In accordance with the Supreme Court’s categorical admonition that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium,” *Reno v. ACLU*, 521 U.S. 844, 870 (1997), numerous courts, including this Court, have specifically held that the rights to communicate and associate anonymously apply with full force on the Internet. *See, e.g., Doe*, 334 F. Supp. 2d at 508 (“individual internet subscribers have a right to engage in anonymous internet speech”); *Best Western Int’l, Inc. v. Doe*, 2006 WL 2091695, at \*4 (D. Ariz. July 25, 2006) (finding it “clear” that “the John Doe Defendants have a First Amendment right to anonymous Internet speech”); *Anderson v. Hale*, 2001 WL 503045, at \*7 (N.D. Ill. May 10, 2001) (quashing subpoenas for computer account information of anonymous members of defendant organization, because “[d]isclosure that aims to identify anonymous . . . members directly chills associational rights”); *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing the “legitimate and valuable right to participate in online forums anonymously or pseudonymously”); *Doe v. Cahill*, 884 A.2d 451, 456 (Pa. 2005) (“It is clear

that speech over the internet is entitled to First Amendment protection. Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering.” (footnotes omitted)); *see also, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 765 (N.J. Super. Ct. App. Div. 2001); *Polito v. AOL Time Warner, Inc.*, 2004 WL 3768897, at \*3 (Pa. Com. Pl. Jan. 28, 2004).

As one court cogently explained, the right to speak anonymously is particularly important in the unique context of the Internet. “The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *2theMart.com*, 140 F. Supp. 2d at 1093. Indeed, “[t]o fail to recognize that the First Amendment right to speak anonymously should be extended to communications on the Internet would require [a] Court to ignore either United States Supreme Court precedent or the realities of speech in the twenty-first century.” *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, at \*6 (Vir. Cir. Ct. 2000)(rev’d on other grounds by *American Online Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (Virginia Supreme Ct. 2001)). For these reasons, in *Doe*, this Court rejected the government’s argument that anonymous Internet speakers should receive no First Amendment protection: “Considering, as is undisputed here, the importance of the internet as a forum for speech and association, the Court rejects the invitation to permit the rights of internet anonymity and association to be placed at such grave risk.” *Doe*, 334 F. Supp. 2d at 509.

Indeed, this Court has previously found that the First Amendment right to anonymous speech is implicated by NSLs in many cases. In *Doe*, this Court noted that the First Amendment right to anonymous Internet speech and association “may be infringed by application of § 2709 in a given case.” *Id.* at 507. Finding that “information available through a § 2709 NSL served upon an ISP could easily be used to disclose vast amounts of anonymous speech and associational activity,” *id.* at 509, the Court specifically noted the possibility that anonymous Internet speakers could be impermissibly unmasked even where that information is not relevant to an authorized investigation or where the NSL subject was being investigated solely on the basis of First Amendment protected activity, *id.* at 507. *See also id.* at 508 (“NSLs issued pursuant to § 2709 may seek information about or indirectly obtained from subscribers that may be protected from disclosure by the First Amendment”).

In short, the [REDACTED] NSL reaches sensitive information that would expose the identity of [REDACTED] speaker – a disclosure that would implicate the core of the First Amendment’s protection.

- b. The government may obtain information protected by the First Amendment only if it demonstrates that its demand is narrowly tailored to serve a compelling interest.

It is well settled that the government may not compel the production of records protected by the First Amendment without first demonstrating a compelling need and showing that the demand is narrowly drawn. In *McIntyre*, the Court considered the constitutionality of a statute that prohibited the distribution of anonymous political campaign literature. The Court subjected the statute to “exacting scrutiny,” ultimately striking it down on the grounds that it was not “narrowly tailored to serve an overriding state interest.” *McIntyre*, 514 U.S. at 347. In *NAACP v. Alabama*, the Supreme Court considered the constitutionality of a civil contempt judgment

entered against the NAACP for its refusal to disclose the identities of its Alabama members to the state Attorney General, as required by a state statute. The Court overturned the judgment, finding that the state had not demonstrated a compelling need for the membership list. *See* 357 U.S. 449, 464-66 (1958). In *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) the Supreme Court considered the constitutionality of a contempt judgment entered against the president of the NAACP's Miami branch for refusing to comply with a legislative subpoena for its membership list. Finding the subpoena inconsistent with the First Amendment, the Court wrote:

It is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.

*Id.* at 546.

The Supreme Court has invoked this principle in contexts involving all aspects of the First Amendment. It has done so in the context of government attempts to compel the identification of anonymous speakers. *See, e.g., Watchtower Bible & Tract Soc.*, 536 U.S. at 150. It has done so in the context of government attempts to compel the disclosure of associational information. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). And it has done so in the context of government attempts to compel the disclosure of journalists' sources. *See Branzburg v. Hayes*, 408 U.S. 665, 700-01 (1972); *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982) (executive branch cannot compel disclosure of journalist's source except on clear and specific showing that information is highly material and relevant, necessary or critical to maintenance of the claim, and not obtainable from other available sources).

As there is “no basis for qualifying the level of First Amendment scrutiny that should be applied” to the Internet, *Reno v. ACLU*, 521 U.S. at 870, it stands to reason that the same level of scrutiny applicable generally to intrusions on the First Amendment rights to speak and to associate anonymously is equally applicable when those rights are exercised over the Internet. Indeed, many courts have so held. For example, the court in *Doe v. 2theMart.com* admonished that “discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts,” 140 F. Supp. 2d at 1093, and concluded more specifically that disclosure of an anonymous speaker’s identity “is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker,” *id.* at 1095. “[M]indful that it [was] imposing a high burden,” *id.* at 1095, the court granted a motion to quash a subpoena issued to an Internet Service Provider in order to obtain the identity of an Internet user, *id.* at 1098. Likewise, where plaintiffs in a tort case sought discovery of the computer account information of several anonymous members of the defendant organization, the court held that “heightened scrutiny applies,” because “disclosure of anonymous [organization] members’ identities is likely to chill associational rights.” *Anderson v. Hale*, 2001 WL 503045, at \*7 (N.D. Ill. 2001). Applying this standard, the court quashed those subpoenas. *Id.* at \*9.

Although courts have differed over the precise formulation of the standard, there is broad consensus among federal and state courts that a heightened showing of necessity is required before a court will order the disclosure of an anonymous speaker’s identity or associations. *See, e.g., seescandy.com*, 185 F.R.D. at 578-80 (requiring plaintiff in trademark infringement case to make heightened showing to justify subpoena to service provider for disclosure of Internet user’s identity); *Dendrite*, 775 A.2d at 771 (requiring defamation plaintiff to make heightened showing

to justify discovery of Internet user's identity); *Cahill*, 884 A.2d at 460 (requiring defamation plaintiff to satisfy summary judgment standard to justify discovery of Internet user's identity); *see also, e.g., Best Western*, 2006 WL 2091695, at \*4 (following *Cahill*); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 974-75 (N.D. Cal. 2005) (following *Dendrite*); *Rocker Mgmt. LLC v. Does 1-20*, No. 03-MC-33, 2003 WL 22149380, at \*1 (N.D. Cal. 2003) (following *seescandy.com*); *cf. Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004) (applying heightened scrutiny using hybrid of other courts' factors, even though expression at issue "qualifie[d] as speech, but only to a degree" and therefore was entitled to only "limited" First Amendment protection).

Under these clear precedents, the [REDACTED] NSL cannot stand unless the government's demand for information about the identity and associations of [REDACTED] subscriber is narrowly drawn to serve a compelling interest.

- c. The [REDACTED] NSL is invalid because the government has neither demonstrated a compelling need for the information nor shown that the demand is narrowly drawn.

In the [REDACTED] NSL, all the government provided by way of justification for its demand for records was the minimum required by the statute – a certification that the records sought were "*relevant* to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Second [REDACTED] Decl. ¶¶ 11-13; Second [REDACTED] Decl. Exh. 1 (emphasis added); *cf. 18 U.S.C. § 2709(b)(1), (b)(2)* (requiring this certification). But, as detailed above, the First Amendment requires a heightened showing where a government request for records implicates the rights to speak and associate anonymously. That heightened scrutiny,

though variously described by the courts, clearly requires much more than a showing of mere relevance. The government has not met its burden here.<sup>4</sup>

Specifically, the government offers no justification whatsoever for its demand that plaintiff [REDACTED] disclose the [REDACTED] – a speaker who has affirmatively chosen to communicate [REDACTED] on the Internet. See *McIntyre*, 514 U.S. at 342; *2theMart.com*, 140 F. Supp. 2d at 1093; *seescandy.com*, 185 F.R.D. at 578; *Cahill*, 884 A.2d at 456. The government also fails to justify the demand that [REDACTED] disclose [REDACTED]

[REDACTED] The government has not even stated whether the subject of the NSL is an innocent witness who may have information relevant to another investigation or the actual target of an investigation himself or herself – a fact of obvious relevance to whether the burden on the speaker’s First Amendment rights is justified. Because the government offers no justification for the [REDACTED] NSL, the letter is unlawful under the First Amendment, and plaintiffs are entitled to have the NSL set aside.

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<sup>4</sup> Earlier in this litigation, the government attempted to introduce an *ex parte* declaration “describing some of the details of the authorized [REDACTED] investigation in connection with which the [NSL] challenged by plaintiffs was issued.” See Declaration of Meredith Kotler filed in support of Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of the Government’s Cross-Motion to Dismiss the Complaint or for Summary Judgment (filed June 28, 2004) (describing *ex parte* declaration). Plaintiffs objected to the introduction of *ex parte* evidence and urged this Court to allow them access to the declaration or preclude the government from relying on it. See Plaintiffs’ Motion to Exclude *Ex Parte* Declaration (filed July 30, 2004). This Court ultimately found it unnecessary to consider the *ex parte* evidence in order to resolve Plaintiffs’ summary judgment motion. See *Doe*, 334 F. Supp. 2d 526 n.267 (“Plaintiffs’ motion to exclude the Government’s *ex parte* affidavit . . . is rendered moot because the information presented in that affidavit has no bearing on the Court’s judgment.”).

II. THE [REDACTED] NSL VIOLATES THE FOURTH AMENDMENT BECAUSE, AFTER [REDACTED] THE INFORMATION IT SEEKS IS LIKELY NO LONGER RELEVANT.

It has long been held that the Fourth Amendment's prohibition against "unreasonable searches and seizures," U.S. Const. amend. IV, applies to administrative subpoenas. *See, e.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 207-208 (1946). Although administrative subpoenas do not require probable cause or a warrant as ordinary searches and seizures do, they must be reasonable. *Id.* at 202 n.28. As NSLs are "in the family" of administrative subpoenas, the same requirements apply. *Doe*, 334 F. Supp. 2d at 497.

To be reasonable, an administrative subpoena must be within the authority of the agency, the request for information must not be too indefinite, and the requested information must be reasonably relevant to the investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Doe*, 334 F. Supp. 2d at 495. To satisfy the relevancy requirement, in turn, the underlying investigation must be conducted pursuant to a legitimate purpose, the inquiry must be relevant to that purpose, the information sought must not be in the agency's possession already, and the administrative steps required by the relevant statute must have been followed. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964).<sup>5</sup>

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<sup>5</sup> The government must satisfy an even higher standard if the subscriber about whom the FBI seeks records is not himself or herself the subject of the investigation. *See In re McVane*, 44 F.3d 1127, 1138 (2d Cir. 1995) (holding that agency demands "which seek personal records of persons who are not themselves targets of the investigation" are subject to intermediate scrutiny); *see also, e.g., FDIC v. Garner*, 126 F.3d 1138, 1144 (9th Cir. 1997) (adopting legal standard from *McVane*). Thus, when the executive branch demands information pertaining to a person who is not himself or herself the subject of an investigation, the government "is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation." *McVane*, 44 F.3d at 1138 (citation and internal quotation marks omitted). Instead, the Fourth Amendment requires that "the agency must make some showing of need for the material sought beyond its mere relevance . . ." *Id.* (citation and internal quotation marks omitted). As the government has never informed plaintiffs how [REDACTED] client fits into its investigation, plaintiffs cannot assert with certainty that this heightened standard applies.

Applying these standards, the [REDACTED] NSL fails the reasonableness test because the information it seeks to obtain is likely no longer relevant to the FBI's investigation. The NSL served on [REDACTED] was dated [REDACTED] more than [REDACTED] ago. The FBI's stated purpose for requesting the information was that it was "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." After [REDACTED] the information that the FBI seeks is not current and therefore highly unlikely to be of continued relevance to the investigation – if indeed the investigation to which this information was once considered relevant is still ongoing after all this time.

In the unlikely event the information sought by the NSL is still relevant to the investigation, the FBI may well already possess it. The FBI was granted broad investigative and surveillance powers after September 11th and has devoted copious resources to terrorism investigations. If the information about [REDACTED] client is actually relevant to a [REDACTED] investigation, the FBI may already have used other means to obtain it.

### CONCLUSION

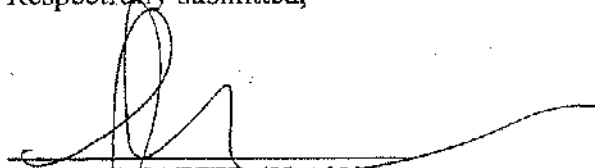
For the foregoing reasons, plaintiffs are entitled to an order setting aside the [REDACTED]

[REDACTED] NSL.

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However, plaintiffs urge the Court to apply the Second Circuit's heightened Fourth Amendment standard for relevance if the Court finds, based on its review of the government's sealed submissions, that the subject of this NSL is not the target of the FBI's investigation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jameel Jaffer', written over a horizontal line.

JAMEEL JAFFER (JJ-4653)

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