UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN DOE, INC.; JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ERIC HOLDER, Jr., in his official capacity as Attorney General of the United States; ROBERT MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE CAPRONI, in her official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF THIS COURT'S OCTOBER 20, 2009 ORDER

04 Civ. 2614 (VM)

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF THIS COURT'S OCTOBER 20, 2009 ORDER

Pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 6.3, plaintiffs respectfully request that the Court reconsider the portion of its October 20, 2009 Order that pertains to the FBI's continued suppression of the NSL Attachment.[1]

ARGUMENT

Federal Rule of Civil Procedure 59(e) and Local Rule 6.3 permit parties to file motions for reconsideration within 10 days after the entry of judgment. The moving party must demonstrate "controlling law or factual matters put before the Court . . . that the movant believes the Court overlooked and that might reasonably be expected to alter the conclusion reached by the Court." *R.F.M.A.S., Inc. v. Mimi So*, --- F. Supp. 2d ----, 2009 WL 2431921, *1 (S.D.N.Y. Aug. 5, 2009) (Marrero, J.) (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 225, 257 (2d Cir.

[1] Plaintiffs do not seek reconsideration of the Court's ruling that the FBI can continue to prevent plaintiffs from identifying Doe as the recipient of the NSL and continue to prevent them from disclosing information about the NSL other than the Attachment. For the Court's convenience, plaintiffs have attached hereto as Exhibit A both a redacted and unredacted copy of the NSL Attachment.

1995); *see also* Local Rule 6.3 (a party must set forth "the matters or controlling decisions which counsel believes the court has overlooked").

Plaintiffs respectfully submit that this standard is met here. In rejecting plaintiffs' argument that the FBI had not justified the continued suppression of the NSL Attachment, the Court found that plaintiffs "ha[d] not identified any authority to support [their] contention that the NSL Attachment should be considered separately" from other facts about the NSL the Court believed the FBI could continue to suppress. *Doe v. Holder*, --- F. Supp. 2d ----, 2009 WL 3378524, *5 (S.D.N.Y. Oct. 20, 2009). Plaintiffs respectfully contend that the Court overlooked well-settled law that provides this Court with not only the authority but the obligation to modify the scope of gag orders that are insufficiently tailored the government's interest in nondisclosure. *See, e.g.*, Pl.s' Mem. in Opp'n to Continuation of the NSL Gag Order (Aug. 21, 2009) at 11 (hereinafter "Pl.s' Mem.") (citing "least restrictive means" case law); *id.* at 8 (citing "strict scrutiny" case law). Application of this law makes clear that the continued suppression of the NSL Attachment is unconstitutional.

I. This Court Has Both the Authority and the Obligation to Modify or Lift the NSL Gag Order to the Extent that it Continues to Prevent Plaintiffs From Disclosing the Content of the NSL Attachment.

In its ruling, the Court suggested that it lacked authority to lift the gag order to the extent that it prevents plaintiffs from disclosing the contents of the NSL Attachment, implying that it had to accept or reject the FBI's gag order wholesale because it could not "disaggregate the NSL into component parts." *Doe*, 2009 WL 3378524, at *5. To the contrary, this Court has the authority, and, indeed, the obligation under the First Amendment to ensure that gag orders are no broader than necessary to further the government's interest in nondisclosure.

The First Amendment requires that gag orders must be narrowly tailored. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). As this Court has recognized, a

gag order is unconstitutional if more information is suppressed than is necessary to accomplish the government's interest. *See, e.g.*, *Doe*, 2009 WL 3378524, at *6 (emphasizing nondisclosure orders can be "maintained only as long as [they are] narrowly tailored to promote a compelling government interest, and...there are no less restrictive alternatives that would be at least as effective in achieving the [government's] purpose" (internal citations omitted)); *see also Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (explaining that overbroad speech restrictions are "unacceptable if less restrictive alternatives would be at least as effective in achieving the [government's] legitimate purpose"); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1307 ("less restrictive alternatives must be adopted if feasible"). Thus, this Court plainly has the authority to determine whether the suppression of each particular piece of information encompassed within the gag order here is truly necessary to accomplish the government's interest in nondisclosure. *See, e.g.*, *Doe v. Gonzales*, 386 F. Supp. 2d 66, 75, 80 (D. Conn. 2005) (hereinafter "*Library Connection*") (striking down part of an NSL gag order because preventing recipient from merely identifying itself was not narrowly tailored to government's interest).

The Second Circuit's 2008 ruling makes clear that this Court has the authority to enforce the narrow-tailoring requirement. The court emphasized the narrow-tailoring requirement. *See Doe v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) ("A content-based restriction is subject to review under the standard of strict scrutiny, requiring a showing that the restriction is narrowly tailored to promote a compelling government interest."); *see also id.* at 878. In discussing the proper standard for judicial evaluation of particular NSL gag orders, the court embraced the narrow-tailoring requirement by instructing that courts must assess the particular "*link* between disclosure and risk of harm." *Id.* at 881 (emphasis added).

Authority to enforce the narrow-tailoring requirement also derives from the NSL statute itself. The statute does not contemplate a categorical approach to judicial review of NSL gag

orders. To the contrary, the statute grants courts explicit authority to *modify* NSL gag orders. 18 U.S.C. § 3511(b). This would include modifications that narrow a gag order's scope.

The government's own actions in this litigation make clear that its interest in nondisclosure here does not automatically attach to all aspects of the NSL and, thus, that an independent assessment of each suppressed piece of information is required. For example, the government has permitted the release of, among other things, parts of the NSL itself, parts of the Attachment, the date the NSL was served, and the fact that the NSL sought information about a particular email address. Thus, even the government has acknowledged that there are some portions of this NSL that can be (and have been) disclosed without harm to national security or an ongoing investigation. If the government has not sufficiently shown that disclosure of the NSL Attachment will result in the harms it has identified, this Court can (and must) modify the gag order, even if the Court believes the government has shown that the disclosure of *other* aspects of the NSL might, in fact, result in harm. *See, e.g.*, *Library Connection*, 386 F. Supp. 2d at 80 (finding NSL gag order "overbroad . . . with regard to the types of information that it encompasses" and expressing concern that "[a]ll details relating the NSL are subject to the gag order without any showing that each piece of information, if disclosed, would adversely affect national security").

Throughout the course of this litigation this Court has properly eschewed a categorical approach to the nondisclosure requirement. In each of its rulings, this Court has emphasized the importance of the narrow-tailoring requirement with respect to the *scope* of gag orders. *See, e.g.*, *Doe v. Gonzales*, 500 F. Supp. 2d 379, 420 (S.D.N.Y. 2007) (finding that "narrow tailoring requires that the scope of . . . nondisclosure be decided on a case-by-case basis" and pointing to the range of information suppressed in this case); *see also Doe*, 2009 WL 3378524, at *5; *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 512, 521 (S.D.N.Y. 2004). With respect to sealing and redaction

issues, this Court has required that redactions to be narrowly tailored and that the government "justify each particular redaction," and it has rejected particular redactions where suppression of particular information did not meet "exacting First Amendment standards." *See Doe v. Ashcroft*, 317 F. Supp. 2d 488, 492 (S.D.N.Y. 2004).[2]

In sum, the Court has ample authority to ensure that the scope of the gag order here is narrowly tailored to the government's asserted interest in nondisclosure.[3]

II. Continued Suppression of the NSL Attachment is Not Necessary to Further the Government's Asserted Interests in Non-Disclosure

It is the government's burden to justify why suppression of the Attachment is necessary to further its interest in nondisclosure. *See Ashcroft*, 542 U.S. at 665 (emphasizing that "the burden is on the Government to prove that the proposed alternatives will not be as effective"). In the words of the Second Circuit, the government must demonstrate that the "link between" disclosure of the Attachment and the "risk of harm" "is substantial." *Doe*, 549 F.3d at 882. The government has not met that burden.

It does not appear that the government provided any explanation why suppression of the Attachment is necessary. Gov't Mem. of Law in Opp'n to Pl.s' Mot. to Lift the Nondisclosure

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[2] The Court has authority to order disclosure of the NSL Attachment for an additional and independent reason. The NSL Attachment is a partially sealed document that resides on the Court's public docket. As such, the Court may, pursuant to both its inherent power to control its own docket and its authority to enforce the First Amendment and common law right of access to judicial documents, order disclosure of the NSL Attachment if its suppression no longer meets the First Amendment standard for sealing. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (it is "fundamental that 'every court has supervisory power over its own records and files'" (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)); *Doe*, 317 F. Supp. 2d at 490 (documents may be sealed only if, among other things, "closure is essential to preserve higher values and is narrowly tailored to serve that interest" (quoting *In re New York Times Co*, 828 F.2d 110, 117 (2d Cir. 1987).

[3] The government has asserted that the continued suppression of the Attachment is not legitimately at issue in this proceeding. *See Doe*, 2009 WL 3378524, at *5. The government is incorrect. The Second Circuit remanded the case to this Court so that the government could attempt to show that the gag order on Doe and his attorneys was constitutional under the standards set forth by the Second Circuit. *See Doe*, 549 F.3d at 885. Assessment of whether the gag order is constitutional includes evaluation of whether the gag order is unconstitutionally overbroad in scope and insufficiently tailored to the government's interest in nondisclosure.

Requirement of the National Security Letter (Sept. 11, 2009) at 7 (the government "did not provide justification in the *ex parte* declaration for requiring nondisclosure of the Attachment"). Rather, the government has defended continuation of the entire gag order (or, perhaps, other aspects of the gag order) on the basis that disclosure "could tip off the target of an ongoing investigation as well as other individuals who are under investigation." *Doe*, 2009 WL 3378524, at *4 (citing Unclassified Summary of Classified FBI Declaration). This Court agreed that further disclosures about the NSL, including even Doe's identity, could "inform the Government's target that he or she is still under active investigation" and "identify an active investigation...while simultaneously providing information that could be useful to the Government's target." *Doe*, 2009 WL 3378524, at *5.

These concerns, however, would not seem to apply to disclosure of the NSL Attachment. The suppressed information in the Attachment is a generic list of the types of records an NSL recipient might consider to be an "electronic communication transactional record." Declaration of Melissa Goodman ¶ 3 (Aug. 21, 2009); *see also* Ex. A. It is already public knowledge that this NSL sought information about a particular (unknown) email address. Thus, all disclosure of the Attachment would reveal are the general categories of records the FBI sought. Even if this limited information is added to the other limited information that is publicly known about this NSL, all a member of the public would glean is that more than five years ago, the FBI (unsuccessfully and, perhaps, unlawfully) sought certain kinds of records from an unknown Internet Service Provider about an unknown person or entity somewhere in the world that has an email address. Disclosure of the contents of the Attachment reveals nothing about the target of the NSL, the identity of the NSL recipient, the nature, scope, or focus of any investigation – closed or active, or any other piece of information that could be useful to the target or any other

person under investigation. Thus, suppression of the Attachment does not actually further the government's stated interest in nondisclosure.

Disclosure of the Attachment, would, by contrast, further the public's significant interest in understanding what specific types of personal records the FBI has used NSLs to obtain – information that would surely inform the ongoing congressional debate on the subject. *See* Pl.s' Mem. at 12-14. Moreover, disclosure of the Attachment would reveal concrete evidence of the FBI's abuse of the NSL authority and refute the FBI's repeated claim that NSLs are minimally intrusive – a claim that has gone virtually unchallenged because all concrete evidence to the contrary has been suppressed through NSL gag orders. *Id.* at 14-16.

Because there is no good reason to believe disclosure of the Attachment significantly risks the occurrence of any of the harms the government has identified, this aspect of the gag order does not comport with the First Amendment's narrow-tailoring requirement and must be invalidated.[4]

CONCLUSION

For the reasons stated above, plaintiffs respectfully ask that the Court reconsider its October 20, 2009 ruling to the extent that it permitted the continued suppression of the NSL Attachment.

Respectfully submitted,

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[4] For the same reasons, the continued sealing of the redacted portion of the Attachment no longer meets the First Amendment standard for sealing court records.

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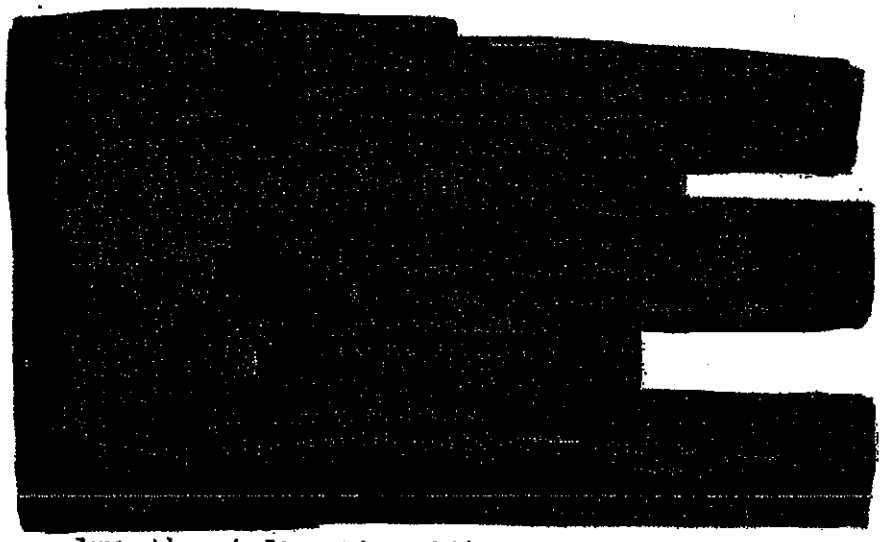
November 3, 2009

EXHIBIT A

[redacted]

ATTACHMENT

"In preparing your response to this request, you should determine whether your company maintains the following types of information which may be considered by you to be an electronic communication transactional record in accordance with Title 18, United States Code, Section 2709:



-- Any other information which you consider to be an electronic communication transactional record

We are not requesting, and you should not provide, information pursuant to this request that would disclose the content of any electronic communication as defined in Title 18, United States Code, Section 2510(8)."