UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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[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 VALERIE E. CAPRONI, in her official capacity as General Counsel of the Federal Bureau of Investigation,

Defendants.

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04 Civ. 2614 (VM)

**FILED UNDER SEAL**

**REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

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## I. The NSL Non-Disclosure Requirement Is Consistent with the First Amendment

### A. The Non-Disclosure Provision Satisfies Strict Scrutiny

Plaintiffs' complaint that the government has in effect re-briefed the issue of whether strict scrutiny is the appropriate standard for adjudicating the constitutionality of the NSL non-disclosure provision, 18 U.S.C. § 2709(c), is simply mistaken. *See* Reply in Support of Plaintiffs' Motion for Partial Summary Judgment and Opposition to the Government's Motion to Dismiss or for Summary Judgment, dated December 15, 2006 ("Pls.' Reply Br."), at 2. The government made clear in its opening brief that in light of the Court's prior determination, the government was not going to contest before the district court that strict scrutiny was applicable, but reserved that issue for appeal. *See* Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of the Government's Motion to Dismiss Or for Summary Judgment, dated November 8, 2006 ("Gov't Br."), at 11. Plaintiffs' assertions to the contrary are based on a misquotation of the government's brief and a misunderstanding of the government's argument.

Plaintiffs quote the government's brief as arguing that the non-disclosure provision should be subject to "less First Amendment scrutiny." Pls.' Reply Br. at 2 (quoting Gov't Br. at 11–12). However, the government's brief actually states, quoting from this Court's prior merits opinion, that laws (like § 2709(c)) that "'prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings trigger *less First Amendment concerns* tha[n] laws which prohibit disclosing information a person obtains independently.'" Gov't Br. at 11–12 (quoting *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 518

(S.D.N.Y. 2004) (emphasis added), *vacated*, 449 F.3d 415 (2006)). What plaintiffs fail to appreciate is that a less stringent application of strict scrutiny is warranted here because the information that is subject to non-disclosure is information that the recipient of the NSL learned only by virtue of his or her participation in a confidential government investigation. *See* Gov't Br. at 11–13, 26–27. Far from being a novel argument that has "no merit," Pls.' Reply Br. at 2, this principle is expressly set forth in this Court's prior merits opinion, as well as in several Supreme Court and Second Circuit decisions.

As this Court observed, even while applying strict scrutiny, courts have recognized the "basic principle" that "it presumptively does little violence to First Amendment values" when an individual is barred from disclosing only information that he or she obtained through participation in a confidential government investigation. *Doe*, 334 F. Supp. 2d at 518–19; *accord id.* at 518 (noting that such laws "trigger less First Amendment concerns tha[n] laws which prohibit disclosing information a person obtains independently"). That is because "where an individual learns information to which he ordinarily would have no right of access, the individual takes that information subject to the statutory scheme (confidentiality rules included) which made the information available in the first place." *Doe*, 334 F. Supp. 2d at 518; *id.* at 519; *accord Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (observing that where an individual obtained information to which he had no First Amendment right of access via a court order, "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations").

As a consequence, "courts generally uphold secrecy statutes in connection with official investigations in recognition of two vital considerations: the importance of secrecy and that the

secrecy is limited (as here) to facts learned only by virtue of a given person's participation in the proceedings." *Doe*, 334 F. Supp. 2d at 516. Although courts have expressed the test that they are applying differently, the bottom line is that a "limited ban on disclosure" may survive strict scrutiny in light of the government's interest in secrecy, as long as it does not prevent divulgence of "information of which [the speaker] was in possession before" becoming involved in the government's investigation. *Id.* at 517 (internal quotation marks and citation omitted); *accord Butterworth v. Smith*, 494 U.S. 624, 630 (1990) ("We must thus balance respondent's asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings."); *id.* at 636 (Scalia, J., concurring) (observing that the state may have "quite good reasons" for prohibiting disclosure of "knowledge [the witness] acquires not 'on his own' but only by virtue of being made a witness" to a grand jury proceeding); *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 110–11 (2d Cir. 1994) (applying strict scrutiny, but adopting Justice Scalia's concurrence in *Butterworth* and concluding: "Recognizing the full account of Connecticut's interests in preserving the integrity of its judiciary, we conclude that the limited ban on disclosure of the fact of filing or the fact that testimony was given does not run afoul of the First Amendment."); *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) (upholding Colorado's grand jury secrecy rule, and stating: "In our judgment, drawing the line at what Ms. Hoffmann-Pugh knew prior to testifying before the grand jury protects her First Amendment right to speak while preserving the state's interest in grand jury secrecy."); *see Rhinehart*, 467 U.S. at 32–33 (ruling that First Amendment was not infringed by protective order prohibiting disclosure of private information obtained through judicially compelled disclosure).

Here, plaintiffs do not (and cannot) contest that the non-disclosure provision serves a

compelling government interest, *i.e.*, "protecting the integrity and efficacy of international terrorism and counterintelligence investigations." *Doe*, 334 F. Supp. 2d at 513. Nor do plaintiffs persuasively challenge that the statute is sufficiently tailored to serve that purpose. As amended, the non-disclosure requirement is limited both temporally, because the recipient of an NSL may seek an order lifting or modifying that obligation at its inception or over time, *see* 18 U.S.C. § 3511(b), and in scope, because the only disclosure that is prohibited is the fact that an NSL was issued, *see* 18 U.S.C. § 2709(c)(1). Accordingly, the non-disclosure provision passes strict scrutiny. *Doe*, 334 F. Supp. 2d at 521 (suggesting that to make the prior non-disclosure provision more narrowly tailored to serve the government's compelling purpose "Congress could require the FBI to make at least *some* determination concerning need before requiring secrecy, and ultimately it could provide a forum and define at least *some* circumstances in which an NSL recipient could ask the FBI or a court for a subsequent determination whether continuing secrecy was still warranted.") (emphasis in original); *see Hoffmann-Pugh*, 338 F.3d at 1140 (rejecting First Amendment challenge to Colorado grand jury secrecy rule on the ground, *inter alia*, that the "rule provides a mechanism for Hoffmann-Pugh to free herself of the restriction on her disclosure of her grand jury testimony at such time as the investigation is truly closed and the state no longer has a legitimate interest in preserving the secrecy of that testimony").

## B. Section 3511(b)'s Standard of Review Is Not Unconstitutional

Plaintiffs' further argument that § 3511(b) precludes courts from applying a constitutionally mandated standard of review in adjudicating petitions to modify or set aside the non-disclosure requirement, *see* Pls.' Reply Br. at 3–10, is also without merit. As a threshold matter, plaintiffs' premise that reviewing courts must conduct a "searching and nuanced case-by-

case inquiry" into whether disclosure of an NSL would present a danger to national security, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person, Pls.' Reply Br. at 10; *see also id.* at 3, 6–7, is contrary to settled law. As set forth in the government's opening brief and this Court's prior merits opinion, in matters implicating national security courts do not conduct "searching and nuanced" probes of the government's justification of the need for secrecy; rather, courts must defer to the Executive's expertise in this area. *See* Gov't Br. at 27–30; *Doe*, 334 F. Supp. 2d at 523–24.

Nor is this requirement of deference limited, as plaintiffs suggest, to the context of FOIA. *See* Pls.' Reply Br. at 5. Numerous decisions outside the context of FOIA, including in First Amendment cases like this one, have recognized the need for substantial deference to the expert judgments of the Executive in matters implicating national security and related concerns. *See* Gov't Br. at 27–30; *Doe*, 334 F. Supp. 2d at 522–24; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (holding that closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism does not violate the First Amendment, and emphasizing that the court is "quite hesitant to conduct a judicial inquiry into the credibility of th[e government's] security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise"); *see also, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (observing that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); *Snepp v. United States*, 444 U.S. 507, 509 n.3, 512 (1980) (recognizing need to defer to CIA's judgment in context of contract action to enforce pre-

publication review requirement against former CIA employee).[1]

At bottom, no matter how many times plaintiffs deride the statutory standard of review as a "rubber stamp," "purely cosmetic," "stunted," and a "fig leaf," *id.* at 3–4, they cannot escape the fact that an extremely deferential standard of review is applicable (and appropriate) here because of the confluence of two factors: (1) the information that is subject to non-disclosure is of less First Amendment concern because it was acquired only by virtue of participation in a confidential government investigation; and (2) the basis for non-disclosure involves the Executive's expert judgments with regard to potential harm to, *inter alia*, the national security of the United States and diplomatic relations. As demonstrated by the case law, the "no reason to believe" and "bad faith" standards of review are proper in this unique situation. *See* Gov't Br. at 30–32; *Rhinehart*, 467 U.S. at 34 ("In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.").

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[1] Plaintiffs' related assertion that the mosaic argument is only appropriate in the FOIA context (as a means of withholding information), and not in the First Amendment context (when the government is regulating speech), *see* Pls.' Reply Br. at 5–6, is not supported by logic or the case law. Indeed, in its prior merits opinion, this Court expressly recognized the force of the government's mosaic argument. *See Doe*, 334 F. Supp. 2d at 523. Other courts have done the same in the context of First Amendment challenges. *See North Jersey Media*, 308 F.3d at 219 (agreeing that "given judges' relative lack of expertise regarding national security and their inability to see the mosaic, we should not entrust to them the decision whether an isolated fact is sensitive enough to warrant closure"); *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927, 935 (D.C. Cir. 2003) (adopting mosaic theory in rejecting FOIA and First Amendment claims).

Tellingly, plaintiffs have little to say about the numerous cases cited in the government's opening brief in which courts have applied a similar standard in reviewing challenges to the withholding of information by the government in the interest of national security, especially in the context of international terrorism or foreign counterintelligence. *See* Gov't Br. at 27–31. Plaintiffs' assertion that "[c]ourts have routinely applied strict scrutiny—*actual* strict scrutiny, not the stunted version of it the government envisions here—in national security cases," Pls.' Reply Br. at 4, is of no moment because in those cases the speech that was being restrained was of an entirely different nature than the speech at issue here. *See, e.g., New York Times Co. v. United States* ("*Pentagon Papers*"), 403 U.S. 713, 714 (1974).[2] Plaintiffs also argue, with some force, that the cases in which courts have applied such a deferential standard of review generally occur in the context of FOIA, where the plaintiff is seeking to enforce a statutory right, as opposed to in this context where a constitutional right is at issue. Pls.' Reply Br. at 5. That argument fails here, however, because in addition to the fact that the court's determination necessarily involves review of the Executive's complex judgments about national security and related interests, the speech at issue is of significantly less First Amendment concern. *See, e.g., Doe*, 334 F. Supp. 2d at 518–19.

Moreover, plaintiffs are wrong to suggest (again) that the statutory standard of review violates the principle of separation of powers. Pls.' Reply Br. at 3 & n.4. As demonstrated in the

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[2] Plaintiffs' reliance on *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005) (Pls.' Reply Br. at 7–8), is entirely misplaced. In *Cooper*, the Eleventh Circuit, applying strict scrutiny, ruled that a Florida statute which made it a crime for an individual to willfully disclose non-public information obtained by virtue of being a participant in an internal investigation of a law enforcement officer was unconstitutional because it was "not supported by a compelling state interest." *Id.* at 1218–19. Here, the Court has already ruled that the NSL statute serves a compelling government interest. *Doe*, 334 F. Supp. 2d at 513.

government's opening brief, courts have reconciled the differing roles of the Executive and the judiciary in the context of national-security- and terrorism-related cases:

> In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.

*Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003); *accord ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 35 (D.D.C. 2004). Furthermore, courts are not "near[ly] servile" to the Executive in performing this review, as plaintiffs maintain. Pls.' Reply Br. at 1. Where there is reason to disbelieve that any one of the four enumerated harms will result, *see* 18 U.S.C. § 3511(b)(2) & (3), or some showing of bad faith is made regarding the certification of the need for non-disclosure, *see id.*, nothing in § 3511(b) prevents the district court from requesting additional information from the government to ensure that the certification is supported by specific facts or rationales tied to the particular situation at issue. *See* 18 U.S.C. § 3511(e).

### C. The NSL Non-Disclosure Requirement Provides Constitutionally Sufficient Procedural Safeguards

Plaintiffs argue that the NSL statute must require the extraordinary procedural protections mandated by *Freedman v. Maryland* and its progeny—in effect, that requiring a censor's approval before a film can be shown to the public, and barring disclosure of sensitive government-originated law-enforcement and national-security information, are one and the same. Pls.' Reply Br. at 10–16. This proposition is contrary to both common sense and to the law. *Freedman* and other Supreme Court precedents make clear that heightened procedural

requirements apply only to classic prior restraints, to avoid constitutional dangers inherent in such censorship. The more a restriction deviates from the classic prior-restraint model, the less it requires in procedural protections; and restrictions that are not prior restraints at all require no unusual procedural protections. Here, because the NSL statute is in no way similar to the censorship of *Freedman*, no extraordinary procedures are needed to comply with the First Amendment.

### 1. Extraordinary Procedural Protections Are Required Only for Classic Prior Restraints

The Supreme Court has consistently upheld "the time-honored distinction between barring speech in the future and penalizing past speech"—a distinction "critical to our First Amendment jurisprudence." *Alexander v. United States*, 509 U.S. 544, 553–54 (1993); *accord Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714–20 (1931) (distinguishing "previous restraint" from "subsequent punishment"; the latter is "appropriate remedy, consistent with constitutional privilege"). The danger of a prior restraint, and the reason it receives "special emphasis" in First Amendment jurisprudence, *Near*, 283 U.S. at 714, is that the speaker can be punished solely for violating an administrative or judicial order barring that speech, even if the content of the speech itself is protected: a prior restraint "permits sanctions to be imposed for failure to obtain the censor's approval, regardless of the nature of the expression. Expression may be punished in a censorship scheme upon proof of one fact—the failure to obtain prior approval." *In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979), *abrogated on other grounds by Rhinehart*, 467 U.S. at 31; *accord Near*, 283 U.S. at 712–13 ("[F]urther publication is made punishable as a contempt. This is of the essence of censorship."); *Lawson v. Murray*, 515 U.S.

1110, 1114 (1995) (Scalia, J., concurring in denial of certiorari) ("The very episode before us illustrates the reasons for this distinction between remedial injunctions and unconstitutional prior restraints. . . . [T]he only defense available to the enjoined party is factual compliance with the injunction, *not* unconstitutionality."); *see Lusk v. Village of Cold Spring*, __ F.3d __, No. 05-4999, 2007 WL 259873, at *5–*6 & n.6 (2d Cir. Jan. 31, 2007) (defining prior restraint as "law requiring prior administrative approval of speech," citing cases, and discussing historical danger).[3]

Inherent in predetermining particular speech that may be allowed is a risk of punishing constitutionally protected speech. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). It is to minimize that risk that *Freedman* imposed heightened procedural protections. *Id.* at 54 (question is whether "danger of unduly suppressing protected expression" warrants procedural protections). In fact, *Freedman* itself squarely presents the constitutional danger of a prior restraint: there, the defendant was convicted of displaying a film without a license, despite the state's concession that "the picture does not violate the statutory standards and would have received a license if properly submitted." 380 U.S. at 52–53. The Court held that such an unusual prior-restraint system,

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[3] In considering the pre-amendment non-disclosure provision, this Court observed: "axiomatically the categorical non-disclosure mandate embodied in § 2709(c) functions as prior restraint because of the straightforward observation that it prohibits speech before the speech occurs." *Doe*, 334 F. Supp. 2d at 511–12. Respectfully, the government submits that the inquiry is not so straightforward: if the only question is whether a statute prohibits speech before it occurs, then *any* statute regulating speech is a prior restraint. (Indeed, if barring speech prior to its occurrence were the only test, any criminal statute governing speech would have to be a prior restraint by virtue of the ex post facto clause of the Constitution.) Among many examples, the provision at issue in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), 18 U.S.C. § 1464, criminalizes the broadcast of constitutionally protected "indecent" and "profane" language, yet the *Pacifica* Court did not characterize the statute as a prior restraint. If it had, the distinction between prior restraints and subsequent punishments would evaporate.

permitting punishment of lawful (but unlicensed) speech, required unusual procedural safeguards. *Id.* at 58–59.[4]

On the other hand, prior-restraint regulations less like "a censorship system"—such as regulations that do not engage in "direct censorship of *particular* expressive material," or where the government "does not exercise discretion by passing judgment on the content of any protected speech"—do not require "the full procedural protections set forth in *Freedman*." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228–29 (1990) (plurality opinion) (emphasis added; internal quotation marks omitted). *City of Littleton v. Z.J. Gifts D-4, L.L.C.* cut back on *Freedman* even further, holding that normal judicial-review procedures—with no time limits, and no burden on the government to go to court or to persuade once there—were sufficient in a licensing case. 541 U.S. 774, 781–84 (2004). And no case applies *Freedman*'s heightened procedural requirements to a regulation that is not a prior restraint at all, despite other arguments of constitutional infirmity. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559

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[4] Plaintiffs suggest that procedural safeguards are required for regulations that are content-based, rather than for prior restraints. Pls.' Reply Br. at 15. That is simply incorrect, contradicted by both the cases cited in the next paragraph as well as those cited by plaintiffs. Neither *FW/PBS, Inc. v. City of Dallas* nor *MacDonald v. Safir* actually decided if the regulation at issue was content-based, completely vitiating plaintiffs' argument. 493 U.S. 215, 223 (1990) (plurality opinion) ("we do not reach the issue . . . whether the ordinance is properly viewed as a content-neutral . . . restriction"); *id.* at 229 (plurality) ("the city does not exercise discretion by passing judgment on the content of any protected speech"); 206 F.3d 183, 195 (2d Cir. 2000) ("we are not able, on the present record, to determine whether the Commissioner actually does exercise discretion by passing judgment on the content of any protected speech").

Plaintiffs also suggest that the distinction between a content-based regulation and one in which a censor pre-approves speech (i.e., a prior restraint) is "elusive." Pls.' Reply Br. at 15. Their confusion is bewildering, for at least one of the plaintiffs here has litigated content-based statutes that were not prior restraints all the way to the Supreme Court. For example, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (speech "harmful to minors"), and *Reno v. ACLU*, 521 U.S. 844 (1997) ("indecent" and "patently offensive" speech), both involved content-based restrictions that involved no censor reviewing speech before its expression.

(1975) ("We held in *Freedman* . . . that a system of *prior restraint* runs afoul of the First Amendment if it lacks certain safeguards" (emphasis added)); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 280–81 (2001) (describing *Freedman*'s procedural requirements as "guard[ing] against unconstitutional *prior restraint* of expression"; in *Freedman*, "expression [could not] begin prepermission" (emphasis added)); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (characterizing *Freedman* as averting dangers of licensing scheme); *Waters v. Churchill*, 511 U.S. 661, 687 (1994) (Scalia, J., concurring in judgment) ("*Freedman* . . . was . . . a prior restraint case; review and requirement of procedures were to be expected.").[5]

### 2. The NSL Non-Disclosure Provision Is Not a Prior Restraint in the Mold of *Freedman* and Therefore Needs No Extraordinary Procedures

For two reasons, the NSL non-disclosure provision is not subject to *Freedman*'s

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[5] Plaintiffs mischaracterize the government's (actually, Judge Posner's) observation that "the cases in which the most stringent procedural safeguards were imposed 'all involve special licensing regimes for sexually oriented businesses.'" Gov't Br. at 19 (quoting *Thomas v. Chicago Park Dist.*, 227 F.3d 921, 927 (7th Cir. 2000)). Extraordinary procedures for sexual speech do not result from any judgment of the speech's value, *contra* Pls.' Reply Br. at 13 & n.11, but from the need for "greater judicial vigilance" for "regulation targeted at unpopular expression," *Thomas*, 227 F.3d at 927–28. This rather innocuous observation is a far cry from plaintiffs' straw man, that the government has suggested "that the principles underlying the licensing scheme cases are limited to contexts involving sexual speech." Pls.' Reply Br. at 13. Plainly, prior restraints involving non-sexual speech may require certain procedural safeguards, but plaintiffs cannot cite a single non-sexual-speech case where the full panoply of *Freedman* protection has been required (and in fact themselves describe the precedents that do impose the most stringent safeguards as "cases involving obscenity," *id.* at 11).

Plaintiffs cite *MacDonald v. Safir* and *Riley v. Nat'l Fed'n of the Blind*, neither of which fully "applies" *Freedman*'s requirements. *Riley* merely faults a state licensing program for overlong delay, 487 U.S. 781, 802 (1988); *MacDonald* notes that *Freedman*'s full protection is "limit[ed] . . . to those situations in which 'the censor engaged in *direct censorship* of *particular* expressive material,'" 206 F.3d at 195 (quoting *FW/PBS*, 493 U.S. at 229; emphasis added)—precisely the government's argument here. Moreover, to the extent *MacDonald* requires any procedural protections at all, it is no longer good law after *Thomas*, 534 U.S. at 322, which called *Freedman* "inapposite" in the context of demonstration permits.

heightened requirements as an unconstitutional prior restraint (or even subject to the lesser procedures mandated by, e.g., *City of Littleton*, 541 U.S. at 781–84, or *Thomas*, 534 U.S. at 320, 323). First, § 2709(c) imposes subsequent punishment rather than prior restraint, akin to restrictions on disclosing classified information. Second, the statute applies only to government-originated information.

### a. The NSL Statute Imposes Subsequent Punishment, Not Prior Restraint

As the court held in *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), a non-disclosure provision like that in the NSL statute provides for subsequent punishment rather than prior restraint. In *Cooper*, as here, the statute forbade the disclosure of information obtained from participation in a law-enforcement investigation. Noting that "[a] prior restraint . . . does not exist where a publisher is faced with criminal sanctions for publishing certain information," the court held that the statute "cannot be characterized as a prior restraint on speech because the threat of criminal sanctions imposed after publication is precisely the kind of restriction that the [Supreme] Court has deemed insufficient to constitute a prior restraint." *Id.* at 1215–16. That such a statute is "not a prior restraint is underscored by the fact that [a speaker may] publish the information he obtained pursuant to the . . . investigation without first having to obtain a government-issued license or challenge a government-imposed injunction. Because the statute did not silence [the speaker] before he could speak, it cannot be classified as a prior restraint." *Id.* at 1216.[6]

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[6] Although *Cooper* went on to find that the restriction was content-based and therefore subject to strict scrutiny, consistent with its conclusion that the statute was not a prior restraint, nowhere did the court mention the need for heightened procedural protections as in *Freedman*.

As did the statute in *Cooper*, the NSL non-disclosure provision indeed bars communication, but as a subsequent punishment rather than as a prior restraint. The statute prohibits the recipient from disclosing the NSL's existence if the FBI has certified that such a disclosure may result in a danger to national security, diplomatic relations, an investigation, or life or safety, 18 U.S.C. § 2709(c)(1), and imposes criminal penalties if the disclosure is made "knowingly and with the intent to obstruct an investigation or judicial proceeding," *id.* § 1510(e). As in *Cooper*, the NSL recipient need not seek a license or challenge an injunction. 403 F.3d at 1216. Section 2709(c), therefore, operates in the same manner as a statute prohibiting the disclosure of classified information, such as, for example, 18 U.S.C. § 798:[7] it is a criminal violation to disclose information that a federal authority has designated as requiring secrecy. No court has held or suggested that § 798 is a prior restraint; even in the Pentagon Papers case, several justices distinguished § 798 from a prior restraint and found that it could legitimately be used to prosecute publication after the fact. *Pentagon Papers*, 403 U.S. at 733, 735–36 & n.7 (White, J., concurring) (publishers not "immune from criminal action"; "no difficulty in sustaining convictions" under § 798 and other statutes).[8] Section 2709(c) operates the same way,

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[7] That statute provides, in part: "(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information [concerning cryptography or communications intelligence] . . . [s]hall be fined under this title or imprisoned not more than ten years, or both." Tortured syntax aside, the provision "proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States." *Pentagon Papers*, 403 U.S. at 735–36 & n.7 (White, J., concurring).

[8] In *Pentagon Papers*, "a majority of the Court believed that release of the documents . . . might even be prosecuted after publication as a violation of various espionage statutes."

(continued...)

and thus—as *Cooper* held—is not a prior restraint.

### b. The Information at Issue Originates with the Government

Second, as this Court has recognized, information obtained through government investigations or processes is different, as far as the First Amendment is concerned, from information a potential speaker has obtained on her own.

The Supreme Court first spoke to this question in *Rhinehart*, considering whether a litigant who had access to information only by virtue of civil discovery could be restrained by court order from publishing that information. 467 U.S. at 22. Although a judicial order prohibiting a person from publishing specific information in the future is on its face the very definition of a prior restraint,[9] the *Rhinehart* Court dismissed that argument out of hand: "an order prohibiting dissemination of discovered information before trial is *not the kind of classic prior restraint* that requires exacting First Amendment scrutiny." *Id.* at 33–34 (emphasis added). The reason for the distinction was precisely what distinguishes an NSL from a licensing scheme:

> a protective order prevents a party from disseminating *only that information obtained through use of the discovery process*. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes. In sum, judicial limitations on a party's ability to disseminate information discovered

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[8] (...continued)
*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 591–92 (1976) (Brennan, J., concurring in judgment).

[9] "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. . . . [C]ourt orders that actually forbid speech activities . . . are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks, citations, and emphasis omitted). The Third Circuit has characterized the order upheld in *Rhinehart* as a prior restraint. *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 474 (3d Cir. 1986).

> in advance of trial *implicates the First Amendment rights of the restricted party to a far lesser extent* than would restraints on dissemination of information in a different context.

*Id.* at 34 (emphasis added).[10]

The distinction between information gained from being part of a governmental process, and that gained on one's own, is thus critical—both to the question of whether the restriction constitutes a prior restraint and, more generally, in weighing the various First Amendment interests at stake. Plaintiffs argue that government's reliance on this distinction is "myopic," Pls.' Reply Br. at 10, but the government urges nothing more than what this Court already concluded: it is a "basic principle . . . that laws which prohibit persons from disclosing information they learn solely by means of participating in confidential government proceedings *trigger less First Amendment concerns* tha[n] laws which prohibit disclosing information a person obtains independently." *Doe*, 334 F. Supp. 2d at 518 (emphasis added). That conclusion is supported by a long line of authorities. *E.g.*, *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 837 & n.10 (1978) ("question presented . . . is whether the First Amendment permits the criminal punishment of third persons who are *strangers to the inquiry* . . . for divulging or publishing truthful information regarding confidential proceedings . . . . We do not have before us any constitutional challenge to a State's power . . . to punish *participants* [including "witnesses or putative witnesses"] for breach of this mandate" (emphasis added)); *Rhinehart*, 467 U.S. at 32; *Butterworth*, 494 U.S. at 636–37 (Scalia, J., concurring).

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[10] Although the court in *Doe v. Gonzales*, 386 F. Supp. 2d 66, 74–75 (D. Conn. 2005), rejected reliance on *Rhinehart* for the argument that the NSL statute is not a prior restraint, it did so in an entirely conclusory fashion, merely stating without analysis that the cases "differ[ ] greatly."

Therefore, an NSL recipient's ability to publish information about receiving the NSL is not properly seen as being qualified or conditioned on the issuance of a government *license*. Rather, the ability to disseminate information obtained as part of a government information is, as Judge Wilkey put it, "'*necessarily* qualified or conditioned by the potential restrictions that are part of the system through which the materials have been obtained.'" *Doe*, 334 F. Supp. 2d at 519 (emphasis added) (quoting *Halkin*, 598 F.2d at 206 (Wilkey, J., dissenting), *abrogated on other grounds by Rhinehart*, 467 U.S. at 31 (citing Wilkey dissent with approval)).

Accordingly, statutes similar to the NSL provision, proscribing the disclosure of investigatory or other government information, have not been found to be prior restraints. The Supreme Court expressly found that a state statute prohibiting disclosure of information before an inquiry commission "does not constitute a prior restraint or attempt by the State to censor the news media." *Landmark Commc'ns*, 435 U.S. at 838. In *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, the Third Circuit made the distinction between a witness's own information (as to which a restriction on disclosure was an unconstitutional prior restraint) and information obtained by participation in the proceeding (for which the restriction was permissible). 784 F.2d 467, 479 (3d Cir. 1986). And other cases, discussed at length in the Court's earlier opinion and the government's opening brief, consider similar statutes without even mentioning either prior restraints or extraordinary procedural protections. *Doe*, 334 F. Supp. 2d at 516–19; Gov't Br. at 15–19; *Butterworth*, 494 U.S. 624; *Kamasinski*, 44 F.3d 106; *Hoffmann-Pugh*, 338 F.3d 1136.

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For these reasons and those in the government's opening brief, § 2709(c) is not a classic

prior restraint and therefore requires no extraordinary procedural protections.

### 3. Similar Non-Disclosure Statutes Do Not Require Extraordinary Procedures

Non-disclosure statutes similar to § 2709(c) provide no procedural protection for the proposed speaker at all, much less heightened safeguards under *Freedman*. Plaintiffs note that "most subpoena statutes do not contemplate non-disclosure orders at all," Pls.' Reply Br. at 14, but that is wholly irrelevant to consideration of the statutes that do. Plaintiffs also cite grand jury subpoenas and the fact that non-disclosure orders require an extraordinary showing in that context, Pls.' Reply Br. at 14, 23 n.21—a result not of constitutional concerns, but of the simple fact that the federal grand jury rules do not impose secrecy on witnesses or subpoena recipients. Fed. R. Crim. P. 6(e)(2)(B) (listing persons under non-disclosure obligation); *id.* 1944 advisory committee's note ("This rule does not impose any obligation of secrecy on witnesses."); *In re Grand Jury Subpoena*, 103 F.3d 234, 240 (2d Cir. 1996) (same). Section 2709, in contrast, does impose secrecy.

As for the statutes that actually are similar to § 2709 in that they impose non-disclosure obligations, plaintiffs argue that prior court approval is necessary. Pls.' Reply Br. at 14. While this is true, it is irrelevant to the First Amendment analysis. *Freedman* and the cases that follow it impose procedural protections expressly to protect the speaker—but the process required by the statutes the government cited occurs *ex parte*, and does not even permit the speaker to appear or assert an interest.[11] For instance, to obtain a pen register, a government attorney submits an application to the court, which "*shall* enter an ex parte order" based solely on the government

[11] 18 U.S.C. §§ 2518, 3123; 50 U.S.C. §§ 1842, 1861.

attorney's certification "that the information likely to be obtained . . . is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1) (emphasis added). Furthermore, the pen register order "*shall* direct that . . . the [telephone line owner] not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court." *Id.* § 3123(d)(2) (emphasis added). The telephone line owner is thus subject to an indefinite non-disclosure order, having never been given the opportunity—before or after the pen register order—to appear or to argue for the chance to speak about the existence of the pen register or any collateral matter that would disclose the existence of the pen register or the underlying investigation.[12] Similarly, wiretap applications are made *ex parte* and granted upon a showing of probable cause, and disclosure of the wiretap is a criminal offense. *Id.* §§ 2518(1), (3), 2232(d). Yet these statutes in various forms have operated since 1968,[13] without a word from the courts suggesting that they violate the First Amendment. In contrast, unlike the wiretap and pen register statutes, the NSL provision permits potential speakers to seek relief from the non-disclosure order, *id.* § 3511, thereby providing more protection for free expression than those longstanding and uncontroversial laws.

Finally, plaintiffs attempt to distinguish other non-disclosure statutes cited by the government simply by noting that they apply to financial institutions, which are heavily regulated. Pls.' Reply Br. at 14 n.12. While the cases plaintiffs cite do state that some

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[12] The pen register statute also belies plaintiffs' argument that other non-disclosure requirements must be issued by "an Article III judge," Pls.'s Reply Br. at 14, as pen registers may be issued by magistrate judges. 18 U.S.C. § 3127(2)(A); *In re United States*, 10 F.3d 931, 935–36 (2d Cir. 1993).

[13] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Title III, § 802, 82 Stat. 218.

regulations that would be unconstitutional in other contexts are permissible for financial institutions, not one of them addresses a First Amendment challenge. *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947) (non-delegation); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 1995) (taking); *Am. Commerce Nat'l Bank v. United States*, 38 Fed. Cl. 271 (1997) (taking). No authority supports the argument that financial institutions are entitled to less First Amendment protection simply by virtue of being financial institutions.

Under plaintiffs' theory, every single wiretap or pen register would require the government to file a lawsuit against the telephone company. Plaintiffs argue that this is already the case when the government seeks a non-disclosure order for a grand jury subpoena recipient, Pls.' Reply Br. at 23 n.21; but again, that is simply because grand jury witnesses—unlike pen register and wiretap recipients—are presumptively free under the grand jury rule to disclose their participation in the investigation. Fed. R. Crim. P. 6(e)(2)(B). The same rule, however, does automatically impose secrecy regarding the grand jury proceedings on the grand jurors themselves, with no judicial avenue for relief. Presumably, then, plaintiffs would also require the government to sue each grand juror separately under *Freedman*. That absurd result—or the equally absurd requirement to sue telephone companies for each pen register or wiretap, or each Internet service provider receiving an NSL whose disclosure would threaten an investigation or national security—cannot be the law.

### D. The NSL Statute Does Not Provide Unconstitutional Discretion to the FBI

Plaintiffs' argument regarding the supposedly unbridled discretion vested in the FBI boils down to their contention that the term "national security" is susceptible to abuse. Pls.' Reply Br. at 16–22. That proves too much. If the Court were to accept that argument, the government

could *never* designate information as a threat to national security and prohibit its disclosure.

As a threshold matter, the law concerning unbridled discretion itself is a branch of the law of prior restraints. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) ("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"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (same). For the reasons stated above, the NSL statute is not a prior restraint; therefore, the *Shuttlesworth* line of cases do not apply for that reason alone.

Even if they did, the NSL statute's use of "national security" meets constitutional standards. The courts have described "national security," standing alone, as a sufficient justification for the government to impose even a prior restraint on speech (though, of course, not as a blanket exception, *e.g.*, *Pentagon Papers*, 403 U.S. at 714 (per curiam)). *E.g.*, *Harman v. City of New York*, 140 F.3d 111, 122 (2d Cir. 1998) (recognizing unique status of "need to protect the national security" as justification for prior restraint); *Stokes v. City of Madison*, 930 F.2d 1163, 1169 (7th Cir. 1991) ("national security" as exception to rule against prior restraints (citing *Near*, 283 U.S. at 716)); *Burch v. Barker*, 861 F.2d 1149, 1155 (9th Cir. 1988) (same); *In re Providence Journal Co.*, 820 F.2d 1342, 1353 n.75 (1st Cir. 1986) (prior restraints not allowed "in the absence of the most compelling of circumstances, *at least where national security is not involved*" (emphasis added)).

Plaintiffs cannot question that "[n]ational security is a paramount value, unquestionably one of the highest purposes for which any sovereign government is ordained." *Doe*, 334 F. Supp. 2d at 476. Indeed, "[t]he Government has a compelling interest in protecting . . . the secrecy of

information important to our national security . . . ." *Snepp*, 444 U.S. at 510 n.3 (citations omitted). But plaintiffs argue that "*there is no* 'objective' test by which to determine which disclosures will jeopardize national security." Pls.' Reply Br. at 18 (emphasis added). Therefore, in plaintiffs' view, with no objective and certain means to ascertain the threat to the government and its people, government decisionmakers can *never* consider national security as a criterion regulating speech. Besides being breathtaking in its scope, this position flies in the face of the law, which has never required criteria that "establish with absolute certainty each and every concern or issue," or " 'perfect clarity and precise guidance' " in regulations that restrict expression—" 'flexible' standards granting 'considerable discretion' to public officials can pass constitutional muster." *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 179 (2d Cir. 2006) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989)); *accord Thomas*, 534 U.S. at 324 (grounds for denial need only be "*reasonably* specific and objective" (emphasis added)); *Lusk*, 2007 WL 259873, at *13 ("subjective" judgments "sufficiently tied to objective . . . standards" adequate to constrain discretion). Unanswered in plaintiffs' briefs is why a standard as open-ended and undefined as "health and safety" can be upheld by a unanimous Supreme Court, *Thomas*, 534 U.S. at 318 n.1, 324, or how the same Court can hold up laws protecting "public safety" as being at the opposite pole from censorship, *id.* at 322–23, but "national security" is insufficient on its face to pass constitutional scrutiny.

Plaintiffs make no suggestions for how Congress could protect national-security information without using "national security" as a factor. As noted above (*supra* page 14), existing laws make the disclosure of certain types of classified information a criminal offense; those statutes define classified information in terms of "national security" with no further

elaboration. *E.g.*, 18 U.S.C. § 798(b) ("'classified information' means information which . . . is, for reasons of national security, specifically designated . . . for limited or restricted dissemination or distribution"); 50 U.S.C. § 783(a) (criminal offense for government employee to communicate information "classified . . . as affecting the security of the United States"). These statutes have long operated without judicial censure. *See Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("If the Government classified the information properly, then Stillman simply has no first amendment right to publish it."); *United States v. Truong Dinh Hung*, 629 F.2d 908, 920 (4th Cir. 1980) ("no unconstitutional ambiguity" in classification requirement of 50 U.S.C. § 783).

Plaintiffs' suggestion that the NSL statute contains no factors at all, Pls.' Reply Br. at 18, is entirely unfounded. In fact, § 2709(c) expressly sets forth the criteria to be considered: "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." Plaintiffs' real argument appears to be that the Constitution requires factors within factors—a perhaps endless nesting doll of definitions that will precisely define every conceivable circumstance under which national security may be threatened. That is not the law, as demonstrated by the far looser standards upheld in *Thomas* and *Field Day*. The fact that some other system "might constrain the [government's] discretion more narrowly" is not enough to invalidate the statute, as only a reasonable level of specificity is required. *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1140–41 (9th Cir. 2004).

Nor are plaintiffs helped by *Transportation Alternatives, Inc. v. City of New York*, a case in which government officials had "uncontrolled discretion in deciding the amount of [a] fee"

charged to speakers for a permit, a scheme of a type invalidated by the Supreme Court in *Forsyth County*. 340 F.3d 72, 77–78 (2d Cir. 2003). *See* Pls.' Reply Br. at 18–19. The fact that no weight was assigned to any of the prescribed factors in *Transportation Alternatives*—one of which was "such other information as the Commissioner shall deem relevant"—was merely one part of the court's determination that the commissioner could impose a fee "for any reason she deems pertinent." *Id.* Other cases have upheld regulations that require permits for expressive conduct even in the absence of a specified weight assigned to any particular factor. *E.g.*, *Thomas*, 534 U.S. at 324; *Field Day*, 463 F.3d at 179.

Plaintiffs also contend that the concept of "national security" may be abused by government officials. That is nothing but conjecture,[14] and similarly speculative arguments have been rejected in similar contexts: "Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this *abuse must be dealt with if and when a pattern of unlawful favoritism appears*, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Thomas*, 534 U.S. at 325 (emphasis added). As the Second Circuit recently held, even when a law "may be subject to abuse," that possibility must be dealt with "in a particular case." *Lusk*, 2007 WL 259873, at *14. The First Amendment requires reasonably specific standards to constrain officials' discretion, but does not require the complete elimination of all possibility of improper enforcement. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503–04 (1982) ("The language of the ordinance is sufficiently clear that the speculative danger of arbitrary

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[14] Plaintiffs here rely on nothing but a 32-year-old case that simply lists occasions in which the concept of "national security" has been misused, and a decision that has been vacated by the full circuit court. Pls.' Reply Br. at 17.

enforcement does not render the ordinance void for vagueness."). Any NSL recipient with reason to believe that the FBI has abused the concept of national security may raise that challenge under 18 U.S.C. § 3511; until then, plaintiffs' raw speculation is insufficient to declare the NSL statute unconstitutional.

## II. Plaintiffs Have Effectively Conceded Their Challenges to § 3511(d) and (e)

In response to the Government's opening brief, plaintiffs have effectively conceded their challenges to 18 U.S.C. § 3511(d) and (e). *See* Pls.' Reply Br. at 23–29. Specifically, plaintiffs agree that § 3511(d)—which requires the court to seal any document and close any hearing to the extent necessary to prevent a violation of the non-disclosure provision—is consistent with the First Amendment. *See* Pls.' Reply Br. at 23. Plaintiffs also agree that § 3511(e)—which permits the government to submit classified information *ex parte* and *in camera* in connection with challenges to the issuance of an NSL request or the imposition or continuation of the non-disclosure requirement—comports with due process. *See* Pls.' Reply Br. at 27–29.[15] Accordingly, the Court should uphold the constitutionality of § 3511(d) and (e).

## Conclusion

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

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[15] Despite conceding these two issues, plaintiffs "feel obliged to correct" numerous purported errors in the government's analysis. *See* Pls.' Reply Br. at 24–27, 28–29. While the government strongly disagrees with plaintiffs' arguments, because plaintiffs acknowledge that these points are irrelevant to the merits of their claims, the government simply refers the Court to the government's prior discussion of these issues. *See* Gov't Br. at 37–41, 41–47. The government would be happy to address these points directly should the Court so request.

Dated: New York, New York
February 5, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Naomi Peña, a legal assistant for the United States Attorney's Office for the Southern District of New York, hereby certify that on February 26, 2007, I caused a copy of the *Reply Memorandum of Law in Opposition to Plaintiffs' Motion Partial Summary Judgment and in Support of the Government's Motion to Dismiss or for Summary Judgment* to be served, by First-Class mail, upon the following:

Jameel Jaffer
American Civil Liberties Union
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Dated: New York, New York
February 26, 2007

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