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CW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

INTERNET ARCHIVE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, INC.; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.; and ELECTRONIC FRONTIER FOUNDATION,

Plaintiffs,

v.

MICHAEL B. MUKASEY, in his official capacity as Attorney General of the United States; ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and ARTHUR M. CUMMINGS II, in his official capacity as Deputy Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation,

Defendants.

Case No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION OF PLAINTIFF INTERNET ARCHIVE TO SET ASIDE NATIONAL SECURITY LETTER

DOCUMENT SUBMITTED UNDER SEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION

On November 26, 2007, an agent of the Federal Bureau of Investigation ("FBI") served a National Security Letter ("NSL") pursuant to 18 U.S.C. § 2709 on petitioner Internet Archive ("Archive"), demanding that it turn over records about one of its patrons. An NSL is akin to an administrative subpoena. Through NSLs, the FBI can demand records from an electronic communication service provider so long as the FBI certifies that the information sought is relevant to a counter-terrorism or counter-intelligence investigation. *See* 18 U.S.C. § 2709(a)-(b). The NSL statute also permits the FBI to impose broad and effectively permanent gag orders on an NSL recipient. *See* 18 U.S.C. § 2709(c). Where the FBI certifies that certain harms may result from disclosure, *see* 18 U.S.C. § 2709(c), the recipient is prohibited from disclosing that the FBI has sought or obtained information. *Id.* The NSL served on the Archive ("November 2007 NSL") demanded that it disclose the subscriber name, address, length of service, and electronic communication transactional records related to [redacted] the Archive's services. It also imposed a gag order on the Archive, its officers, its employees, and its agents.

As authorized by 18 U.S.C. § 3511(a), the Archive asks this Court to issue an order setting aside the NSL on the ground that the demand for records is unlawful for several reasons. First, section 2709 only authorizes the issuance of an NSL to an electronic communication service provider. But the Archive is not such a provider for two reasons: (1) in permitting patrons to upload materials to the site, the Archive is not acting as a *provider* of an electronic communication service; and (2) the Archive is a library which, pursuant to 18 U.S.C. § 2709(f), is not a provider of electronic communication services. Second, the provision governing the gag order in the November 2007 NSL, 18 U.S.C. § 2709(c), is unconstitutional on its face. Since that provision is not severable from the remainder of the statute, the entire NSL statute is unconstitutional, as one court has already concluded. *See Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), *appeal pending*. Because the November 2007 NSL was issued under a facially unconstitutional statute, it is unlawful.

STATEMENT OF FACTS

A. The Internet Archive

The Internet Archive is a digital library established in San Francisco, California in 1996. Declaration of Brewster Kahle ("Kahle Decl.") ¶ 4; Internet Archive, About IA, http://www.archive.org/about/about.php (last visited Dec. 13, 2007), attached to Kahle Decl. as Ex. A. Its overarching mission is to help provide universal access to all knowledge. *Id.* ¶ 5. To fulfill that mission, the Archive works with national libraries, museums, universities, and the general public to collect and offer free access to a wide variety of materials in digital format. *Id.* ¶ 6. Some of its partners include the Library of Congress, the National Archives, and the British Library. *Id.* ¶ 9. The State of California has formally recognized the Archive as a library for the purposes of the 1996 Library Services and Technology Act, 20 U.S.C. § 9122(1)(E). *Id.* ¶ 10 and Ex. B. The Archive has been a member of the American Library Association since 2000. *Id.* ¶ 10.

One of the unique features of the Archive is the "Wayback Machine," which allows people to visit archived versions of websites. Visitors to the Wayback Machine can type in a URL, select a date, and then begin surfing on an archived version of the Web. Kahle Decl. ¶ 11. The Archive has created and maintained the Wayback Machine by collecting snapshots of billions of public web pages, except those that have opted not to be archived, every two months for the last ten years. *Id.*

In addition to preserving an archival copy of the Web, the Archive is dedicated to preserving digital copies of other sources of knowledge and culture. The Archive has digitized archival and education movies since 1999. Kahle Decl. ¶ 8. It also has been involved in several book digitization projects in collaboration with other institutions. *Id.* ¶ 9. In 2005, the Archive formed the Open Content Alliance to build a joint collection of digitized public domain books. *Id.* The Archive's book collection currently contains over 200,000 volumes from over 70 contributing libraries. *Id.* In fact, the Archive's holdings contain more material than 95% of the world's libraries. *Id.* All of these materials are available to patrons through the Archive's website. To ensure continued access to this material, the Archive provides storage and preservation services for its extensive digital collections. *Id.* ¶ 6; *Id.* Ex. A.

The Archive also accepts donated material that belongs in a library from individual patrons, including audio and video recordings. Kahle Decl. ¶ 6. Thus, members of the public directly contribute resources to the Archive's digital collection. Kahle Decl. ¶ 12. To ensure continued access to this material, as with other portions of its collection, the Archive provides permanent, archival storage and preservation services for these recordings and other materials donated by the public. *Id.* [redacted]

As a library, the Archive actively works to serve its patrons as a resource for exploration, research, and learning. Kahle Decl. ¶ 13. Providing a safe environment for a patron's activities has long been an important function of libraries with physical materials. The Archive seeks to continue this practice for those patrons accessing its website. *Id.* An individual wishing to view digital materials on the Archive's website may do so as an "anonymous user"—that is to say, without logging in to the website. *Id.* However, individuals seeking to upload materials, post reviews, or communicate on message boards must first register with the Archive, which includes agreeing to the Archive's "Terms of Use," providing a "valid" (although unverified) e-mail address, creating a password, and supplying a screen name. *Id.* They must then log in to their accounts. *Id.* While the Archive intentionally limits the information that it collects and retains from users, from time to time it may possess some information about its patrons. *Id.* ¶ 14. Such records may include the date the patron's account was opened, the screen names associated with the patron's account, an unconfirmed e-mail address associated with the patron, and messages of those who communicate with the Archive via e-mail. *Id.*

B. <u>The November 2007 National Security Letter</u>

Many U.S. Attorneys and other law enforcement officials find the Archive a valuable resource, and the Archive has regularly received requests for information about its collections, most frequently for information stored in the Wayback Machine. Kahle Decl. ¶ 15. The Archive regularly interacts with the federal government, including the Department of Justice, the FBI, and the Central Intelligence Agency and has complied with lawful subpoenas requesting information. *Id.*

In June 2007, Special Agent Scott Rakowitz and Supervisory Special Agent Chuck Esposito of the San Francisco office of the FBI met with attorneys at the Electronic Frontier Foundation ("EFF"), who provide legal representation to the Archive for various purposes. Declaration of Kurt Opsahl ("Opsahl Decl.") ¶ 4. At that meeting, EFF agreed that it would accept service of any future legal process from the FBI on behalf of the Archive. *Id.*

On Monday, November 26, 2007, Supervising Special Agent [redacted] left a voicemail message for Kurt Opsahl, Senior Staff Attorney at EFF. Opsahl Decl. ¶ 5. Similar messages were left with Senior Staff Attorney Lee Tien and Staff Attorney Kevin Bankston. *Id.* The messages informed them that an FBI agent would be coming to EFF's office that day. *Id.* Later that morning, Special Agent [redacted] arrived at EFF's office, met with Bankston, and served an NSL addressed to the Archive, dated November 19, 2007 ("November 2007 NSL"). *Id.* ¶ 6 and Ex. A to Opsahl Decl. The November 2007 NSL was signed by defendant Arthur M. Cummings, II, Deputy Assistant Director of the Counterterrorism Division of the FBI. Opsahl Decl., Ex. A.

The November 2007 NSL directs the Archive "to provide the [FBI] the subscriber's name, address, length of service, and electronic communication transactional records" pertaining to a particular [redacted] *Id.* It covers the period [redacted] *Id.* Parroting the language of the NSL statute's non-disclosure certification provision, 18 U.S.C. §2709(c), the November 2007 NSL includes the following certification:

> disclosure of the fact that the FBI has sought or obtained access to the information sought by this letter may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of a person.

Id. The certification does not specify which of these harms may result from disclosure. *Id.* The November 2007 NSL further advises the Archive that the NSL statute "prohibits you, or any officer, employee, or agent of yours, from disclosing this letter, other than to those to whom disclosure is necessary to comply with the letter or to an attorney to obtain legal advice or legal assistance with respect to this letter." *Id.*

Appended to the November 2007 NSL is a page titled "ATTACHMENT" that states, "In preparing your response to this National Security Letter, you should determine whether your company maintains the following types of information which may be considered by you to be an electronic communications transactional record in accordance with Title 18 United States Code Section 2709." Opsahl Decl., Ex. A. The page lists, among other things, [redacted] and "[a]ny other information which you consider to be an electronic communication transactional record." *Id.* The November 2007 NSL requires that the Archive provide the requested information "personally to a representative of the FBI [redacted] or through use of delivery service or through secure fax" by December 14, 2007 (14 business days from receipt of the letter). *Id.*

On Tuesday, November 27, 2007, Opsahl and EFF Staff Attorney Marcia Hofmann brought the November 2007 NSL to the Archive and showed it to Brewster Kahle, who is the Chair of the Archive's Board of Directors as well as one of its Digital Librarians. Kahle Decl. ¶ 18; Opsahl Decl. ¶ 8.

On Wednesday, November 28, 2007, Special Agent [redacted] left a message for Bankston inquiring about the status of the Archive's response. Opsahl Decl. ¶ 11. Later that day, Opsahl spoke with Special Agent [redacted] on the telephone and informed him that the Archive was reviewing and considering the letter and notified him, pursuant to section 2709(c)(4), that the Archive would be bringing in additional counsel. *Id.* ¶ 12.

The NSL statute and the November 2007 NSL have prevented the Archive from disclosing information about the November 2007 NSL and this lawsuit to the Archive's board of directors, to its staff, to its patrons, to other libraries, to the press, to members of the public, and to members of Congress. They likewise have prevented the Archive from making it known that it is speaking from experience in publicly advocating for legislative change with respect to the NSL demand and gag power. Kahle Decl. ¶ 21.

ARGUMENT

I. THE NOVEMBER 2007 NSL IS NOT AUTHORIZED BY 18 U.S.C. § 2709

The Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712, which was enacted as Title II of the Electronic Communications Privacy Act ("ECPA"), regulates the government's access to stored information maintained by network service providers. Section 2709, which is part of the SCA, governs the FBI's issuance of an NSL. Section 2709(a) provides in pertinent part:

> **Duty to provide.**—A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

By its terms, section 2709 permits the issuance of an NSL only to a wire or electronic communication service ("ECS") provider.[1] The Internet Archive, however, is not an ECS provider and hence may not be required to comply with the November 2007 NSL. First, in configuring its site so that patrons can contribute materials by uploading them to the site, the Archive is only a user, not a provider of an ECS. Second, the activity at issue under the November 2007 NSL – permitting patrons [redacted] part of the Archive [redacted] – is not the provision of an electronic communication service; rather, it is providing storage and preservation services, more akin to providing remote computing storage. The NSL must therefore be set aside.

A. The Archive Is A User, Not A Provider of An Electronic Communication Service

The SCA defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). The issue here, however, is not whether electronic communications are being sent and

[1] The reference to a "wire" communication service in section 2709 is redundant, since the definition of an "electronic" communication service encompasses "any service which provides to users thereof the ability to send or receive *wire* or electronic communications." 18 U.S.C. § 2510(15) (emphasis added) (incorporated by reference into the SCA at 18 U.S.C. § 2711).

received between the Archive and its patrons. They plainly are. The issue is whether the Archive actually *provides* the service that allows the communications to be sent and received or whether, as the case law discussed below makes clear, the Archive, like its patrons, is simply a user of that service.

Allowing those who visit a website to provide information to it does not make that website a *provider* of an ECS. This is true whether a visitor is providing information to the site in order to complete a purchase, *see* Crowley *v. Cybersource Corp.*, 166 F. Supp. 2d 1263 (N.D. Cal. 2001), or is providing information in connection with downloading streaming "visual programming," *see In re Broadcast.com, Inc.*, 2001 WL 36050382 (E.D. Tex. 2001), or is making online airline reservations, *see In re JetBlue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005), or is [redacted] the Internet Archive. To the contrary, both the website in question and the person or entity communicating with the site are *users* of an ECS. Here, as in the cases cited above, the entity that enables the communications to take place is the Internet access provider used by the Archive or the visitor to the Archive website. Those access providers are the ECS providers. *See In re Doubleclick Privacy Litigation*, 154 F. Supp. 2d 497, 508 (S.D.N.Y. 2001) ("the 'service which provides to users thereof the ability to send or receive wire or electronic communications' is 'Internet access.'"); *In re Broadcast.com, Inc.*, 2001 WL 36050382 at *2 (same).

In a number of cases, website patrons have alleged that the defendant was an ECS provider that had violated the SCA by unlawfully disclosing personal information provided in connection with obtaining the products or services of the website. In each case, the court rejected the plaintiff's claim because the website in question did not provide an electronic communication service and hence was not subject to the SCA's proscription. *In re JetBlue Corp. Airways Privacy Litigation*, 379 F. Supp. 2d 299; *Dyer v. Northwest Airlines Corporations*, 334 F. Supp. 2d 1196, 1199 (D.N.D. 2004) ("businesses offering their traditional products and services online through a website are not providing an 'electronic communication service'"); *Crowley*, 166 F. Supp. 2d at 1270 (Amazon.com is not an ECS provider, it is an ECS user); *In re Broadcast.com*, Inc., 2001 WL 36050382 at *2, 3 ("Broadcast.com operates a website and, in doing so, does not provide Internet

access to the public. It uses it."); *see also, In re Doubleclick Privacy Litigation*, 154 F. Supp. 2d at 508-09 (websites are users of an ECS under ECPA for purposes of determining applicability of exception to prohibition against obtaining access to an electronic communication). As the court in *In re JetBlue Corp. Airways Privacy Litigation* explained:

> Although JetBlue operates a website that receives and transmits data to and from its customers, it is undisputed that it is not the provider of the electronic communication service that allows such data to be transmitted over the Internet. Rather, JetBlue is more appropriately characterized as a provider of air travel services and a consumer of electronic communication services. The website that it operates, like a telephone, enables the company to communicate with its customers in the regular course of business. Mere operation of the website, however, does not transform JetBlue into a provider of internet access, just as the use of a telephone to accept telephone reservations does not transform the company into a provider of telephone service. Thus, a company such as JetBlue does not become an "electronic communication service" provider simply because it maintains a website that allows for the transmission of electronic communications between itself and its customers."

In re JetBlue Corp. Privacy Litigation, 379F. Supp. 2d at 307 (fn. omitted). [2]

The Archive is no more an ECS provider than were the websites in the cases cited above. Like those websites, the Archive is a user of the Internet so that it may, for example, [redacted] the Archive's collection. Its purpose is not to provide basic connectivity, *i.e.*, access to an electronic communications service to third parties. Its purpose is to act as a repository of information and knowledge, stored in digital form, so that knowledge and information may be preserved and made available to those seeking it, now and for generations to come. Because the Archive is not an ECS provider, the Archive falls outside the parameters of section 2709(a) and hence the NSL at issue here must be set aside as unlawful.

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[2] The Archive's public Internet website stands in stark contrast to the elaborate, internal American Airlines computerized customer reservation system, known as SABRE, that was at issue in *United States v. Mullins*, 992 F.2d 1472 (9th Cir. 1993). In *Mullins*, the defendant travel agents used the system, access to which they leased from American, to defraud the airline by stealing frequent flyer miles. *Id.* at 1474-75. In upholding the constitutionality of the manner in which evidence against the defendants was obtained from SABRE, the Ninth Circuit assumed, without analysis, that American was a provider of a wire or electronic communications service with respect to the system. *Id.* at 1478. The court's conclusion, with respect to a private, internal system, access to which was leased to others, in no way contradicts the conclusions of the decisions cited in the text.

B. **In Allowing Patrons [redacted] the Archive Is Providing Storage and Preservation Services and Therefore Is Not an ECS Provider**

The SCA regulates the activities of providers of an "electronic communication service" and those of a "remote computing service" ("RCS").[3] Section 2709 applies only to ECS providers, however, not to RCS providers, nor to entities that are neither an ECS nor an RCS provider. In determining whether an entity is an ECS provider, an RCS provider, or neither, the court must examine the nature of the activity in question in order to ascertain whether the statute applies. That is because an entity may be an electronic communication service provider with respect to some activities but not with respect to others. As the Department of Justice itself recognizes:

> Whether an entity is a provider of an "electronic communication service," or a provider of "remote computing service," or neither depends on the nature of the particular communication sought [by the government]. For example, a single provider can simultaneously provide "electronic communications service" with respect to one communication and "remote computing service" with respect to another communication.

U.S. Dep't of Justice, Criminal Division, Computer Crime and Intellectual Property Section, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 88 (July 2002); *accord, Quon v. Arch Wireless Operating Company, Inc.*, 445 F. Supp. 2d 1116, 1136 (C.D. Cal. 2006) ("Congress recognized that service providers can offer a wide variety of different services, each one being characterized differently under the statute." (citing S. Rpt. No. 99-541, at 16 (1986)). As Professor Orin Kerr explains:

> The distinction between providers of ECS and RCS is made somewhat confusing by the fact that most network service providers are multifunctional. . . . The classifications of ECS and RCS are context sensitive: the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract.

Orin S. Kerr, *A User's Guide to the Stored Communications Act—and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1215 (2004).

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[3] As noted above, the Act defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). It defines a "remote computing service" as the "provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

The characteristics the courts rely on to distinguish an RCS from an ECS also demonstrate that the storage and preservation services that the Archive provides to those who [redacted] take the Archive outside the definition of an ECS. The discussion in *Quon v. Arch Wirless Operating Co., Inc.*, 445 F. Supp. 2d 1116, is particularly useful. The court there delineates three essential characteristics that distinguish storage by an ECS from storage by an RCS:

First, "the centrality a computer plays in facilitating the communication is key to Congress' definition of a remote computing service. . . . [A]t a minimum, a computer must play a central role in facilitating the storage of the communication." *Id.* at 1132-33 (emphasis added). Second, the fact that the material is being stored is a critical factor. *Id.* at 1134. Finally, the length and purpose of the storage must be examined. When an entity provides long term storage that "is not incidental to the transmission of the communication itself, and is not meant for backup protection but . . . as the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism," it is acting as an RCS. *Id.* at 1136; *accord United States v. Jackson*, 2007 WL 3230140 at *3 (D.D.C. 2007) (quoting *Quon* with approval).

Like the text message storage service at issue in *Quon* and *Jackson*, the service the Archive provides in [redacted] the public takes it outside the definition of an ECS. As in *Jackson* and *Quon*, the Archive provides permanent, archival storage as part of [redacted] the collection. Kahle Decl. ¶ 12. This differentiates the Archive from an ECS whose electronic storage of communications is either temporary, intermediate storage in connection with the transmission of a communication or is for purposes of backup protection for the communication. *See Quon*, 445 F. Supp. 2d at 1136. The Archive is intended as the final point where the material is stored—that is, the material becomes part of the Archive's permanent collection.[4]

[4] Although the Archive provides many other services to the public, including the ability to [redacted] and [redacted] that does not change the fact that the service in question here—[redacted] is one of storage, not the provision of an electronic communication service. Whether the Archive might be considered an ECS provider with respect to those services is a question better left for another day. *See United States v. Steiger*, 318 F.3d 1039, 1049 (11th Cir. 2003) (equating, in dictum, an electronic bulletin board system with

The FBI cannot obtain from the Archive the particular records it seeks using an NSL issued under 18 U.S.C. 2709(a) because the Archive is not an electronic communication service provider for purposes of maintaining the records sought.

II. THE ARCHIVE IS NOT SUBJECT TO THE NOVEMBER 2007 NSL BECAUSE IT IS A LIBRARY PURSUANT TO 18 U.S.C. § 2709(f)

18 U.S.C. § 2709 contains an additional protection to ensure that libraries cannot be treated as electronic communication service providers for providing essential library services to the public. Specifically, the statute provides:

> A library (as that term is defined in section 213(1) of the Library Services and Technology Act (20 U.S.C. § 9122(1)), the services of which include access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication in print or digitally by patrons for their use, review, examination, or circulation, is not a wire or electronic communication service provider for purposes of this section, unless the library is providing the services defined in section 2510(15) ("electronic communication service") of this title.

18 U.S.C. § 2709(f).

In turn, the 1996 Library Services and Technology Act defines a "library" as including, *inter alia*, "a private library or other special library, but only if the State in which such private or special library is located determines that the library should be considered a library for purposes of this subchapter." 20 U.S.C. § 9122(1)(E). The Archive has been formally recognized as a library by the State of California for purposes of the 1996 Library Services and Technology Act, and thus satisfies this definition. Kahle Decl., Ex. B. The Archive is therefore the type of library to which 18 U.S.C. § 2709(f) applies, and cannot be considered a wire or electronic communication service provider under 18 U.S.C. § 2709(f) unless it provides an "electronic communication service" under 18 U.S.C. § 2510(15).

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a telephone company or an ISP); *Konop v. Hawaiian Airlines*, Inc., 302 F.3d 868, 879-80 (9th Cir. 2002) (accepting the parties' assumption that host of Web-based message board was an electronic communication service provider).

See Quon, 445 F. Supp. 2d at 1136-37 (A single entity can offer differing services and whether it is treated as an ECS or an RCS with respect to that service depends on the nature of the service in question).

As explained above, the Archive does not provide an "electronic communication service" with respect to the [redacted] It provides access to those [redacted] "patrons for their use review, examination or circulation," 18 U.S.C. § 2709(f). Thus, 18 U.S.C. § 2709(f) provides an additional reason why the Court should not classify the Archive as a provider of electronic communication services subject to demands for records under 18 U.S.C. § 2709(a), and the Court must therefore set aside the November 2007 NSL.

III. THE NOVEMBER 2007 NSL IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FIRST AMENDMENT

The November 2007 NSL must also be set aside because the statutory authority under which it was issued is unconstitutional on its face. The gag order provision in section 2709(c) violates the First Amendment and cannot be severed from the remainder of the statute. That renders 18 U.S.C. § 2709 unenforceable in its entirety. Notably, the one court that has already considered the constitutionality of the NSL statute concluded that the statute's gag provisions violate the First Amendment and that because those gag provisions are not severable, the entire statute is unconstitutional. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), *appeal pending*. The *Doe* court enjoined the FBI from issuing NSLs under 18 U.S.C. § 2709, but that ruling is stayed pending appeal. That the November 2007 NSL was issued under a facially unconstitutional statute provides yet another reason that the NSL should be set aside.

The Court need not, however, decide the question of the facial constitutionality of the NSL statute's gag provisions in the context of this petition. That issue will be briefed in connection with the motion for summary judgment that plaintiffs will be filing in this case, challenging the facial and as-applied constitutionality of 18 U.S.C. § 2709 and of § 3511, which sets forth the procedures and standards governing a challenge to a section 2709(c) a gag order. Accordingly, petitioner's constitutional argument can, most appropriately, be fully explicated in the context of that action.

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CONCLUSION

For the foregoing reasons, the Archive requests that this Court issue an order setting aside the November 2007 NSL.

Respectfully submitted,

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DATED: December 14, 2007