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FILED

07 DEC 14 PM 12:17  
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CLERK, U.S. DISTRICT COURT  
FOR THE DISTRICT OF CALIFORNIA

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12 \*Pro hac vice applications to be filed upon the assignment of this case to a judge.

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SEALED  
BY COURT ORDER

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

15 INTERNET ARCHIVE; AMERICAN CIVIL  
LIBERTIES UNION; AMERICAN CIVIL  
16 LIBERTIES UNION FOUNDATION;  
17 AMERICAN CIVIL LIBERTIES UNION OF  
NORTHERN CALIFORNIA, INC.;  
18 AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN  
19 CALIFORNIA, INC.; and ELECTRONIC  
FRONTIER FOUNDATION,

Plaintiffs,

21 v.

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

Defendants.

Case No. 07

6346

CW

ADMINISTRATIVE MOTION FOR  
LEAVE TO FILE CASE UNDER SEAL

DOCUMENT SUBMITTED UNDER  
SEAL

1 Plaintiffs Internet Archive (“the Archive”), American Civil Liberties Union, American  
2 Civil Liberties Union Foundation, American Civil Liberties Union of Northern California, Inc.,  
3 American Civil Liberties Union Foundation of Northern California, Inc., and Electronic Frontier  
4 Foundation hereby move for leave to file the above-captioned case under seal.

5 On November 26, 2007, an agent of the Federal Bureau of Investigation (“FBI”) served a  
6 National Security Letter (“November 2007 NSL”) on the Archive through the Archive’s counsel at  
7 the Electronic Frontier Foundation. The November 2007 NSL directed the Archive to disclose  
8 records pertaining to one of its patrons, and pursuant to 18 U.S.C. § 2709(c), expressly prohibited  
9 the Archive, its officers, employees, and agents from disclosing that the FBI had demanded  
10 information from it through the NSL.

11 This case challenges the facial and as-applied constitutionality of 18 U.S.C. §§ 2709 and  
12 3511(b),(d), and (e) (collectively, “the NSL statute”). Section 2709 authorizes the FBI to issue  
13 national security letters (“NSLs”) and to impose broad and effectively permanent non-disclosure  
14 obligations on those served with NSLs. Section 3511(b),(d), and (e) set forth the procedures and  
15 standards governing a challenge to a Section 2709(c) gag order. *See* 18 U.S.C. §§ 2709 & 3511, as  
16 amended by the USA PATRIOT Act, Pub. L. 107-56 (“Patriot Act”); by the USA PATRIOT  
17 Improvement and Reauthorization Act of 2005, Pub. L. 109-177 (“PIRA”); and by the USA  
18 PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. 109-178 (“ARAA”).  
19 Plaintiffs seek, *inter alia*, a declaration that the NSL statute is unconstitutional on its face and as  
20 applied and an injunction prohibiting the FBI from issuing NSLs under the statute. Plaintiffs also  
21 seek a declaration that the November 2007 NSL is unconstitutional and an injunction prohibiting  
22 the FBI from enforcing it.<sup>1</sup>

23 Section 2709(c) allows the FBI to impose gag orders on any person or entity served with an  
24 NSL so long as the Director of the FBI or his designee “certifies” to himself or herself that, absent  
25 the gag, “there may result a danger to the national security of the United States, interference with a

26 <sup>1</sup> Plaintiffs note that simultaneously with the filing of the Complaint, plaintiff Internet Archive is  
27 filing a Petition to Set Aside the November 2007 NSL, pursuant to 18 U.S.C. § 3511(a), on the  
grounds that, in addition to being unconstitutional, Section 2709 does not apply to it.

1 criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic  
2 relations, or danger to the life or physical safety of any person.” 18 U.S.C. § 2709(c)(1). Where  
3 the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from  
4 “disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with  
5 the request or an attorney to obtain legal advice or legal assistance with respect to the request) that  
6 the [FBI] has sought or obtained access to information or records under [the NSL statute].” *Id.*  
7 The gag order extends to any person consulted in order to comply with the NSL, and to any  
8 attorney consulted for legal advice or assistance with respect to the request. *Id.*

9 As a result of the gag order imposed by the November 2007 NSL, plaintiffs are prohibited  
10 from disclosing even the mere fact that the FBI has served an NSL on the Archive. Violating the  
11 NSL-imposed gag order could subject plaintiffs to penalties.

12 Plaintiffs believe that the NSL statute’s gag provisions, both facially and as applied, violate  
13 the First and Fifth Amendments, as well as the principle of separation of powers. In fact, the only  
14 court to have considered the constitutionality of the NSL statute’s gag provisions has concluded  
15 that they violate the First Amendment and the principle of separation of powers, and that because  
16 those provisions are not severable, the entire statute is unconstitutional. *Doe v. Gonzales*, 500 F.  
17 Supp. 2d 379 (S.D.N.Y. 2007). Nevertheless, it appears that the filing of the Complaint on the  
18 public docket would violate the NSL statute’s gag provision and the gag order imposed by the  
19 November 2007 NSL. Therefore, in order to avoid any legal penalties, plaintiffs believe that they  
20 are obligated to seek the Court’s leave to file this suit initially under seal.

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