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 17 Twitter, Inc.

18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN FRANCISCO DIVISION

21 TWITTER, INC.,

22 Plaintiff,

23 v.

24 ERIC HOLDER, Attorney General of the
 25 United States,

26 THE UNITED STATES DEPARTMENT
 27 OF JUSTICE,

28 JAMES COMEY, Director of the Federal
 Bureau of Investigation, and

THE FEDERAL BUREAU OF
 INVESTIGATION,

Defendants.

Case No. 14-cv-4480

**COMPLAINT FOR DECLARATORY
 JUDGMENT, 28 U.S.C. §§ 2201 and 2202**

I. NATURE OF THE ACTION

1
2 1. Twitter brings this action for declaratory judgment pursuant to 28 U.S.C. §§ 2201
3 and 2202, requesting relief from prohibitions on its speech in violation of the First Amendment.

4 2. The U.S. government engages in extensive but incomplete speech about the scope
5 of its national security surveillance activities as they pertain to U.S. communications providers,
6 while at the same time prohibiting service providers such as Twitter from providing their own
7 informed perspective as potential recipients of various national security-related requests.

8 3. Twitter seeks to lawfully publish information contained in a draft Transparency
9 Report submitted to the Defendants on or about April 1, 2014. After five months, Defendants
10 informed Twitter on September 9, 2014 that “information contained in the [transparency] report is
11 classified and cannot be publicly released” because it does not comply with their framework for
12 reporting data about government requests under the Foreign Intelligence Surveillance Act
13 (“FISA”) and the National Security Letter statutes. This framework was set forth in a January 27,
14 2014 letter from Deputy Attorney General James M. Cole to five Internet companies (not
15 including Twitter) in settlement of prior claims brought by those companies (also not including
16 Twitter) (the “DAG Letter”).

17 4. The Defendants’ position forces Twitter either to engage in speech that has been
18 preapproved by government officials or else to refrain from speaking altogether. Defendants
19 provided no authority for their ability to establish the preapproved disclosure formats or to
20 impose those speech restrictions on other service providers that were not party to the lawsuit or
21 settlement.

22 5. Twitter’s ability to respond to government statements about national security
23 surveillance activities and to discuss the actual surveillance of Twitter users is being
24 unconstitutionally restricted by statutes that prohibit and even criminalize a service provider’s
25 disclosure of the number of national security letters (“NSLs”) and court orders issued pursuant to
26 FISA that it has received, if any. In fact, the U.S. government has taken the position that service
27

1 providers like Twitter are even prohibited from saying that they have received zero national
2 security requests, or zero of a particular *type* of national security request.

3 6. These restrictions constitute an unconstitutional prior restraint and content-based
4 restriction on, and government viewpoint discrimination against, Twitter’s right to speak about
5 information of national and global public concern. Twitter is entitled under the First Amendment
6 to respond to its users’ concerns and to the statements of U.S. government officials by providing
7 more complete information about the limited scope of U.S. government surveillance of Twitter
8 user accounts—including what types of legal process have *not* been received by Twitter—and the
9 DAG Letter is not a lawful means by which Defendants can seek to enforce their unconstitutional
10 speech restrictions.

11 II. PARTIES

12 7. Plaintiff Twitter, Inc. (“Twitter”) is a corporation with its principal place of
13 business located at 1355 Market Street, Suite 900, San Francisco, California. Twitter is a global
14 information sharing and distribution network serving over 271 million monthly active users
15 around the world. People using Twitter write short messages, called “Tweets,” of 140 characters
16 or less, which are public by default and may be viewed all around the world instantly. As such,
17 Twitter gives a public voice to anyone in the world—people who inform and educate others, who
18 express their individuality, who engage in all manner of political speech, and who seek positive
19 change.

20 8. Defendant Eric Holder is the Attorney General of the United States and heads the
21 United States Department of Justice (“DOJ”). He is sued in his official capacity only.

22 9. Defendant DOJ is an agency of the United States. Its headquarters are located at
23 950 Pennsylvania Avenue, NW, Washington, D.C.

24 10. Defendant James Comey is the Director of the Federal Bureau of Investigation
25 (“FBI”). He is sued in his official capacity only.

1 11. Defendant FBI is an agency of the United States. Its headquarters are located at
2 935 Pennsylvania Avenue, NW, Washington, D.C.

3 **III. JURISDICTION**

4 12. This Court has original subject matter jurisdiction under 28 U.S.C. § 1331, as this
5 matter arises under the Constitution, laws, or treaties of the United States. More specifically, this
6 Court is authorized to provide declaratory relief under the Declaratory Judgment Act, 28 U.S.C.
7 §§ 2201–2202, relating to, among other things, Twitter’s contention that certain nondisclosure
8 requirements and related penalties concerning the receipt of NSLs and court orders issued under
9 FISA, as described below, are unconstitutionally restrictive of Twitter’s First Amendment rights,
10 either on their face or as applied to Twitter, and Twitter’s contention that Defendants’ conduct
11 violates the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*

12 **IV. VENUE**

13 13. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part
14 of the events giving rise to the action occurred in this judicial district, Twitter resides in this
15 district, Twitter’s speech is being unconstitutionally restricted in this district, and the Defendants
16 are officers and employees of the United States or its agencies operating under the color of law.

17 **V. FACTUAL BACKGROUND**

18 **A. NSL and FISA Provisions Include Nondisclosure Obligations**

19 *i. The NSL Statute*

20 14. Section 2709 of the federal Stored Communications Act authorizes the FBI to
21 issue NSLs to electronic communication service (“ECS”) providers, such as Twitter, compelling
22 them to disclose “subscriber information and toll billing records information” upon a certification
23 by the FBI that the information sought is “relevant to an authorized investigation to protect
24 against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709(a), (b).

1 15. Section 2709(c)(1) provides that, following certification by the FBI, the recipient
2 of the NSL shall not disclose “to any person (other than those to whom such disclosure is
3 necessary to comply with the request or an attorney to obtain legal advice or legal assistance with
4 respect to the request) that the Federal Bureau of Investigation has sought or obtained access to
5 information or records.” 18 U.S.C. § 2709(c)(1). This nondisclosure obligation is imposed upon
6 an ECS by the FBI unilaterally, without prior judicial review. At least two United States district
7 courts have found the nondisclosure provision of § 2709 unconstitutional under the First
8 Amendment. *In re Nat’l Sec. Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013); *Doe v. Gonzales*,
9 500 F. Supp. 2d 379 (S.D.N.Y. 2007), *affirmed in part, reversed in part, and remanded by Doe,*
10 *Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

11 16. Any person or entity that violates a NSL nondisclosure order may be subject to
12 criminal penalties. 18 U.S.C. §§ 793, 1510(e).

13 ii. *The Foreign Intelligence Surveillance Act*

14 17. Five subsections (“Titles”) of FISA permit the government to seek court-ordered
15 real-time surveillance or disclosure of stored records from an ECS: Title I (electronic surveillance
16 of the content of communications and all communications metadata); Title III (disclosure of
17 stored content and noncontent records); Title IV (provisioning of pen register and trap and trace
18 devices to obtain dialing, routing, addressing and signaling information); Title V (disclosure of
19 “business records”) (also referred to as “Section 215 of the USA Patriot Act”); and Title VII
20 (surveillance of non-U.S. persons located beyond U.S. borders).

21 18. A number of authorities restrict the recipient of a FISA order from disclosing
22 information about that order. These include requirements in FISA that recipients of court orders
23 provide the government with “all information, facilities, or technical assistance necessary to
24 accomplish the electronic surveillance in such a manner as will protect its secrecy,” 50 U.S.C. §
25 1805(c)(2)(B); the Espionage Act, 18 U.S.C. § 793 (criminalizing unauthorized disclosures of
26

1 national defense information under certain circumstances); nondisclosure agreements signed by
2 representatives of communications providers who receive FISA orders; and court-imposed
3 nondisclosure obligations in FISA court orders themselves.

4 **B. The Government's Restrictions on Other Communication Providers' Ability to**
5 **Discuss Their Receipt of National Security Legal Process**

6 19. On June 5, 2013, the British newspaper *The Guardian* reported the first of several
7 "leaks" of classified material from Edward Snowden, a former government contractor, which
8 have revealed—and continue to reveal—multiple U.S. government intelligence collection and
9 surveillance programs.

10 20. The Snowden disclosures have deepened public concern regarding the scope of
11 governmental national security surveillance. This concern is shared by members of Congress,
12 industry leaders, world leaders, and the media. In response to this concern, a number of executive
13 branch officials have made public statements about the Snowden disclosures and revealed select
14 details regarding specific U.S. surveillance programs. For example, the Director of National
15 Intelligence has selectively declassified and publicly released information about U.S. government
16 surveillance programs.

17 21. While engaging in their own carefully crafted speech on the issue of U.S.
18 government surveillance, U.S. government officials have relied on statutory and other authorities
19 to preclude communication providers from responding to leaks, inaccurate information reported
20 in the media, statements of public officials, and related public concerns regarding the providers'
21 involvement with and exposure to U.S. surveillance efforts. These authorities—and the
22 government's interpretation of and reliance on them—constitute facial and as-applied violations
23 of the First Amendment right to engage in speech regarding a matter of extensively debated and
24 significant public concern.

1 22. In response to these restrictions on speech, on June 18, 2013, Google filed in the
2 Foreign Intelligence Surveillance Court (“FISC”) a Motion for Declaratory Judgment of Google’s
3 First Amendment Right to Publish Aggregate Data About FISA Orders. Google then filed an
4 Amended Motion on September 9, 2013. Google’s Amended Motion sought a declaratory
5 judgment that it had a right under the First Amendment to publish, and that no applicable law or
6 regulation prohibited it from publishing, two aggregate unclassified numbers: (1) the total number
7 of requests it receives under various national security authorities, if any, and (2) the total number
8 of users or accounts encompassed within such requests. Similar motions were subsequently filed
9 by four other U.S. communications providers: Microsoft (June 19, 2013), Facebook (September
10 9, 2013), Yahoo! (September 9, 2013), and LinkedIn (September 17, 2013). Apple also
11 submitted an amicus brief in support of the motions (November 5, 2013).

12 23. In January 2014, the DOJ and the five petitioner companies reached an agreement
13 that the companies would dismiss the FISC actions without prejudice in return for the DOJ’s
14 agreement that the companies could publish information about U.S. government surveillance of
15 their networks in one of two preapproved disclosure formats. President Obama previewed this
16 agreement in a public speech that he delivered at the DOJ on January 17, 2014, saying, “We will
17 also enable communications providers to make public more information than ever before about
18 the orders that they have received to provide data to the government.” President Barack Obama,
19 *Remarks by the President on Review of Signals Intelligence*, The White House Blog (Jan. 17,
20 2014, 11:15 AM), available at [http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-](http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence)
21 [president-review-signals-intelligence](http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence).

22 24. The two preapproved disclosure formats were set forth in a letter dated January 27,
23 2014, from Deputy Attorney General James M. Cole to the General Counsels for Facebook,
24 Google, LinkedIn, Microsoft and Yahoo!. A copy of the DAG Letter is attached hereto as Exhibit
25 1. Under Option One in the DAG Letter,

1 A provider may report aggregate data in the following separate categories:

- 2 1. Criminal process, subject to no restrictions.
- 3 2. The number of NSLs received, reported in bands of 1000 starting
4 with 0-999.
- 5 3. The number of customer accounts affected by NSLs, reported in
6 bands of 1000 starting with 0-999.
- 7 4. The number of FISA orders for content, reported in bands of 1000
8 starting with 0-999.
- 9 5. The number of customer selectors targeted under FISA content
10 orders, in bands of 1000 starting with 0-999.
- 11 6. The number of FISA orders for non-content, reported in bands of
12 1000 starting with 0-999.
- 13 7. The number of customer selectors targeted under FISA non-
14 content orders, in bands of 1000 starting with 0-999.

15 Exhibit 1 at 2.

16 25. For FISA-related information, the DOJ imposed a six-month delay between the
17 publication date and the period covered by the report. In addition, it imposed

18 a delay of two years for data relating to the first order that is served on a company
19 for a platform, product, or service (whether developed or acquired) for which the
20 company has not previously received such an order, and that is designated by the
21 government as a “New Capability Order” because disclosing it would reveal that
22 the platform, product, or service is subject to previously undisclosed collection
23 through FISA orders.

24 *Id.* at 3.

25 26. Under Option Two,

26 [A] provider may report aggregate data in the following separate categories:

- 27 1. Criminal process, subject to no restrictions.
- 28 2. The total number of all national security process received,
including all NSLs and FISA orders, reported as a single number in
the following bands: 0-249 and thereafter in bands of 250.
3. The total number of customer selectors targeted under all national
security process, including all NSLs and FISA orders, reported as a

1 single number in the following bands, 0-249, and thereafter in
2 bands of 250.”

3 *Id.*

4 27. Under either option, since the permitted ranges begin with zero, service providers
5 who have never received an NSL or FISA order apparently are prohibited from reporting that
6 fact. Likewise, a communications provider that, for example, has received FISA orders under
7 Titles I, III, V and VII of FISA, but not under Title IV, may not reveal that it has never received a
8 Title IV FISC order.

9 28. The DAG Letter cites to no authority for these restrictions on service providers’
10 speech.

11 29. In a Notice filed with the FISC simultaneously with transmission of the DAG
12 Letter, the DOJ informed the court of the agreement, the new disclosure options detailed in the
13 DAG Letter, and the stipulated dismissal of the FISC action by all parties. A copy of the Notice
14 is attached hereto as Exhibit 2. The Notice concluded by stating: “It is the Government’s position
15 that the terms outlined in the Deputy Attorney General’s letter define the limits of permissible
16 reporting for the parties *and other similarly situated companies.*” Exhibit 2 at 2 (emphasis
17 added). In other words, according to the DOJ, the negotiated agreement reached to end litigation
18 by five petitioner companies is not limited to the five petitioner companies as a settlement of
19 private litigation, but instead serves as a disclosure format imposed on a much broader—yet
20 undefined—group of companies. No further guidance has been offered by the DOJ regarding
21 what it considers to be a “similarly situated” company. Further, the Notice cites no authority for
22 extending these restrictions on speech to companies that were not party to the negotiated
23 agreement.

24 30. Notwithstanding the fact that the DAG Letter purportedly prohibits a provider
25 from disclosing that it has received “zero” NSLs or FISA orders, or “zero” of a certain kind of
26

1 FISA order, subsequent to January 27, 2014, certain communications providers have publicly
2 disclosed either that they have never received any FISA orders or NSLs, or any of a certain kind
3 of FISA order.

4 **C. The DOJ and FBI Deny Twitter's Request to Be More Transparent**

5 31. Twitter is a unique service built on trust and transparency. Twitter users are
6 permitted to post under their real names or pseudonymously. Twitter is used by world leaders,
7 political activists, journalists, and millions of other people to disseminate information and ideas,
8 engage in public debate about matters of national and global concern, seek justice, and reveal
9 government corruption and other wrongdoing. The ability of Twitter users to share information
10 depends, in part, on their ability to do so without undue fear of government surveillance.

11 32. Twitter is an ECS as that term is defined at 18 U.S.C. § 2510(15) since it provides
12 its users the ability to send and receive electronic communications. As an ECS and, more
13 generally, as a third-party provider of communications to the public, Twitter is subject to the
14 receipt of civil, criminal, and national security legal process, including administrative, grand jury,
15 and trial subpoenas; NSLs; court orders under the federal Wiretap Act, Stored Communications
16 Act, Pen Register and Trap and Trace Act, and FISA; and search warrants. Compliance with such
17 legal process can be compelled through the aid of a court.

18 33. The ability to engage in speech concerning the nature and extent of government
19 surveillance of Twitter users' activities is critical to Twitter. In July 2012, Twitter released its
20 first Transparency Report. Release of this Transparency Report was motivated by Twitter's
21 recognition that citizens must "hold governments accountable, especially on behalf of those who
22 may not have a chance to do so themselves." Jeremy Kessel, *Twitter Transparency Report*,
23 Twitter Blog (July 2, 2012 20:17 UTC), <https://blog.twitter.com/2012/twitter-transparency-report>.
24 This Transparency Report listed the number of civil and criminal government requests for
25 account information and content removal, broken down by country, and takedown notices
26

1 pursuant to the Digital Millennium Copyright Act received from third parties. The report also
2 provided information about how Twitter responded to these requests. The report did not contain
3 information regarding government national security requests Twitter may have received.
4 Subsequent biennial transparency reports have been released since then, including the most recent
5 on July 31, 2014.

6 34. In January 2014, Twitter requested to meet with DOJ and FBI officials to discuss
7 Twitter's desire to provide greater transparency into the extent of U.S. government surveillance of
8 Twitter's users through NSLs and court orders issued under FISA.

9 35. On January 29, 2014, representatives of the DOJ, FBI, and Twitter met at the
10 Department of Justice. At the meeting, Twitter explained why its services are unique and distinct
11 from the services provided by the companies who were recipients of the DAG Letter and why the
12 DAG Letter should not apply to Twitter, which was not a party to the proceedings that resulted in
13 the DAG Letter. Twitter also sought confirmation that it is not "similarly situated" to those
14 companies and that the limits imposed in the DAG Letter should not apply to Twitter. In
15 response, the DOJ and FBI told Twitter that the DAG Letter sets forth the limits of permissible
16 transparency-related speech for Twitter and that the letter would not be amended or supplemented
17 with additional options of preapproved speech.

18 36. In February 2014, Twitter released its Transparency Report for the second half of
19 2013, which included two years of data covering global government requests for account
20 information. In light of the government's admonition regarding more expansive transparency
21 reporting than that set forth in the DAG Letter, Twitter's February 2014 Transparency Report did
22 not include information about U.S. government national security requests at the level of
23 granularity Twitter wished to disclose.

24 37. In a blog post, Twitter explained the importance of reporting more specific
25 information to users about government surveillance. Twitter also explained how the U.S.

1 government was unconstitutionally prohibiting Twitter from providing a meaningful level of
2 detail regarding U.S. government national security requests Twitter had or may have received:

3 We think the government's restriction on our speech not only unfairly
4 impacts our users' privacy, but also violates our First Amendment right to
5 free expression and open discussion of government affairs. We believe
6 there are far less restrictive ways to permit discussion in this area while
7 also respecting national security concerns. Therefore, we have pressed the
8 U.S. Department of Justice to allow greater transparency, and proposed
9 future disclosures concerning national security requests that would be
10 more meaningful to Twitter's users.

11 Jeremy Kessel, *Fighting for more #transparency*, Twitter Blog (Feb. 6, 2014 14:58
12 UTC), <https://blog.twitter.com/2014/fighting-for-more-transparency>.

13 38. On or about April 1, 2014, Twitter submitted a draft July 2014 Transparency
14 Report to the FBI, seeking prepublication review. In its transmittal letter to the FBI, Twitter
15 explained:

16 We are sending this to you so that Twitter may receive a
17 determination as to exactly which, if any, parts of its Transparency
18 Report are classified or, in the Department's view, otherwise may
19 not lawfully be published online.

20 A copy of Twitter's letter dated April 1, 2014 is attached as Exhibit 3. Twitter's draft
21 Transparency Report, which will be submitted separately, is Exhibit 4.

22 39. Through its draft Transparency Report, Twitter seeks to disclose certain categories
23 of information to its users, for the period July 1 to December 31, 2013, including:

- 24 a. The number of NSLs and FISA orders Twitter received, if any, in actual
25 aggregate numbers (including "zero," to the extent that that number was
26 applicable to an aggregate number of NSLs or FISA orders, or to specific
27 *kinds* of FISA orders that Twitter may have received);
- 28 b. The number of NSLs and FISA orders received, if any, reported
separately, in ranges of one hundred, beginning with 1-99;
- c. The combined number of NSLs and FISA orders received, if any, in
ranges of twenty-five, beginning with 1-24;

- 1 d. A comparison of Twitter's proposed (i.e., smaller) ranges with those
2 authorized by the DAG Letter;
- 3 e. A comparison of the aggregate numbers of NSLs and FISA orders
4 received, if any, by Twitter and the five providers to whom the DAG
5 Letter was addressed; and
- 6 f. A descriptive statement about Twitter's exposure to national security
7 surveillance, if any, to express the overall degree of government
8 surveillance it is or may be subject to.

9 40. For five months, the FBI considered Twitter's written request for review of the
10 draft Transparency Report. By letter dated September 9, 2014, the FBI denied Twitter's request.
11 A copy of the FBI's letter dated September 9, 2014 is attached as Exhibit 5. The FBI's letter did
12 not, as requested, identify exactly which parts of the draft Transparency Report may not lawfully
13 be published. Instead, the letter stated vaguely that "information contained in the report" cannot
14 be publicly released; it provided examples of such information in the draft Transparency Report;
15 and it relied on a general assertion of national security classification and on the pronouncements
16 in the DAG Letter as its bases for denying publication:

17 We have carefully reviewed Twitter's proposed transparency report
18 and have concluded that information contained in the report is
19 classified and cannot be publicly released.

20 . . . Twitter's proposed transparency report seeks to publish data . . .
21 in ways that would reveal classified details about [government
22 surveillance] that go beyond what the government has permitted
23 other companies to report. . . . This is inconsistent with the January
24 27th framework [set forth in the DAG Letter] and discloses
25 properly classified information.

26 Exhibit 5 at 1. The FBI reiterated that Twitter could engage only in speech that did not exceed
27 the preapproved speech set forth in the DAG Letter. It noted, for example, that Twitter could

28 explain that only an infinitesimally small percentage of its total
number of active users was affected by [government surveillance
by] highlighting that less than 250 accounts were subject to all
combined national security legal process. . . . That would allow
Twitter to explain that all national security legal process received
from the United States affected, at maximum, only 0.0000919
percent (calculated by dividing 249 by 271 million) of Twitter's

1 total users. In other words, Twitter is permitted to *qualify* its
2 description of the total number of accounts affected by all national
3 security legal process it has received but it cannot *quantify* that
4 description with the specific detail that goes well beyond what is
allowed under the January 27th framework and that discloses
properly classified information.

5 *Id.* at 1–2.

6 41. Since the FBI’s response does not identify the exact information in the draft
7 Transparency Report that can and cannot be published, Twitter cannot at this time publish any
8 part of the report. When the government intrudes on speech, the First Amendment requires that it
9 do so in the most limited way possible. The government has failed to meet this obligation.
10 Instead, Defendants simply impose the DAG Letter framework upon Twitter as Twitter’s sole
11 means of communicating with the public about national security surveillance.

12 **COUNT I**

13 **(Request for Declaratory Judgment under 28 U.S.C. §§ 2201 and 2202 and Injunctive Relief)**

14 42. Twitter incorporates the allegations contained in paragraphs 1 through 41, above.

15 43. Defendants have impermissibly infringed upon Twitter’s right to publish
16 information contained in Twitter’s draft Transparency Report, and Twitter therefore seeks a
17 declaration that Defendants have violated Twitter’s First Amendment rights. A case of actual
18 controversy exists regarding Twitter’s right to engage in First Amendment protected speech
19 following Defendants’ refusal to allow Twitter to publish information about its exposure to
20 national security surveillance that does not conform to either of the two preapproved formats set
21 forth in the DAG Letter. The fact that Defendants have prohibited Twitter from publishing facts
22 that reveal whether and the extent to which it may have received either one or more NSLs or
23 court orders pursuant to FISA, along with the other facts alleged herein, establish that a
24 substantial controversy exists between the adverse parties of sufficient immediacy and reality as
25 to warrant a declaratory judgment in Twitter’s favor. Twitter has suffered actual adverse and
26 harmful effects, including but not limited to, a prohibition on publishing information in the draft

1 Transparency Report to make it available to the public and Twitter's users, the chilling effect
2 from Defendants' failure to address specific content, and the threat of possible civil or criminal
3 penalties for publication.

4 44. The imposition of the requirements of the DAG Letter on Twitter violates the
5 Administrative Procedure Act because the DAG Letter represents a final agency action not in
6 accordance with law; the imposition of the DAG Letter on Twitter is contrary to Twitter's
7 constitutional rights (namely the First Amendment) as alleged more specifically herein; the
8 imposition of the DAG Letter on Twitter is in excess of statutory jurisdiction, authority, or
9 limitations as alleged more specifically herein; and the requirements set forth in the DAG Letter
10 were imposed on Twitter without the observance of procedure required by law. Twitter is not
11 "similarly situated" to the parties addressed in the DAG Letter.

12 45. Upon information and belief, the restrictions in the DAG letter are based in part
13 upon the nondisclosure provision of 18 U.S.C. § 2709; FISA secrecy provisions, such as 50
14 U.S.C. § 1805(c)(2)(B); the Espionage Act, 18 U.S.C. § 793; nondisclosure agreements signed by
15 Twitter representatives, if any; and nondisclosure provisions in FISA court orders issued to
16 Twitter, if any.

17 46. The nondisclosure and judicial review provisions of 18 U.S.C. § 2709(c) are
18 facially unconstitutional under the First Amendment, including for at least the following reasons:
19 the nondisclosure orders authorized by § 2709(c) constitute a prior restraint and content-based
20 restriction on speech in violation of Twitter's First Amendment right to speak about truthful
21 matters of public concern (e.g., the existence of and numbers of NSLs received); the
22 nondisclosure orders authorized by § 2709(c) are not narrowly tailored to serve a compelling
23 governmental interest, including because they apply not only to the content of the request but to
24 the fact of receiving an NSL and additionally are unlimited in duration; and the NSL
25 nondisclosure provisions are facially unconstitutional because the judicial review procedures do
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1 not meet procedural safeguards required by the First Amendment because they place the burden
2 of seeking to modify or set aside a nondisclosure order on the recipient of an NSL, do not
3 guarantee that nondisclosure orders imposed prior to judicial review are limited to a specified
4 brief period, do not guarantee expeditious review of a request to modify or set aside a
5 nondisclosure order, and require the reviewing court to apply a level of deference that conflicts
6 with strict scrutiny.

7 47. The nondisclosure provisions of 18 U.S.C. § 2709(c) are also unconstitutional as
8 applied to Twitter, including because Defendants' interpretation of the nondisclosure provision of
9 18 U.S.C. § 2709(c), and their application of the same to Twitter via the DAG Letter, is an
10 unconstitutional prior restraint, content-based restriction, and viewpoint discrimination in
11 violation of Twitter's right to speak about truthful matters of public concern. This prohibition on
12 Twitter's speech is not narrowly tailored to serve a compelling governmental interest, and no such
13 interest exists that justifies prohibiting Twitter from disclosing its receipt (or non-receipt) of an
14 NSL or the unlimited duration or scope of the prohibition.

15 48. Section 2709 is also unconstitutional because 18 U.S.C. § 3511, which sets forth
16 the standard of review for seeking to modify or set aside a nondisclosure order under 18 U.S.C. §
17 2709, restricts a court's power to review the necessity of a nondisclosure provision in violation of
18 separation of powers principles. The statute expressly limits a court's ability to set aside or
19 modify a nondisclosure provision unless the court finds that "there is no reason to believe that
20 disclosure may endanger . . . national security." 18 U.S.C. § 3511(b)(2), (3). This restriction
21 impermissibly requires the reviewing court to apply a level of deference to the government's
22 nondisclosure decisions that conflicts with the constitutionally mandated level of review, which is
23 strict scrutiny.

24 49. The FISA statute, the Espionage Act, and other nondisclosure authorities do not
25 prohibit service providers like Twitter from disclosing aggregate information about the number of
26

1 FISA orders they receive. Instead, these authorities protect the secrecy of particular *targets* and
2 ongoing investigations, and do not impose an obligation on service providers such as Twitter to
3 remain silent about the receipt or non-receipt of FISA orders generally, nor do they impose an
4 obligation on service providers not to disclose the aggregate numbers of specific ranges of FISA
5 orders received. To the extent that the Defendants read FISA secrecy provisions, such as 50
6 U.S.C. § 1805(c)(2)(B), as prohibiting Twitter from publishing information about the aggregate
7 number of FISA orders it receives, however, the FISA secrecy provisions are unconstitutional
8 including because they constitute a prior restraint and content-based restriction on speech in
9 violation of Twitter's First Amendment right to speak about truthful matters of public concern.
10 Moreover, this restriction on Twitter's speech is not narrowly tailored to serve a compelling
11 governmental interest, and no such interest exists that justifies prohibiting Twitter from disclosing
12 its receipt (or non-receipt) of a FISA order.

13 50. The FISA secrecy provisions are also unconstitutional as applied to Twitter,
14 including because Defendants' interpretation of the FISA secrecy provisions and their application
15 with respect to Twitter is an unconstitutional prior restraint, content-based restriction, and
16 viewpoint discrimination in violation of Twitter's right to speak about truthful matters of public
17 concern. Moreover, this prohibition imposed by Defendants on Twitter's speech is not narrowly
18 tailored to serve a compelling governmental interest.

19 PRAYER FOR RELIEF

20 WHEREFORE, Twitter prays for the following relief:

- 21 A. A declaratory judgment that:
- 22 i. The draft Transparency Report that Twitter submitted to the FBI may be
23 lawfully published in its entirety or, alternatively, certain identified
portions may be lawfully published;
 - 24 ii. Imposition of the requirements set forth in the DAG Letter on Twitter
violate the Administrative Procedure Act;
 - 25 iii. The nondisclosure provisions of 18 U.S.C. § 2709 and the review
26 mechanisms of 18 U.S.C. § 3511 are facially unconstitutional under the
First Amendment;

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- iv. The nondisclosure provisions of 18 U.S.C. § 2709 are unconstitutional under the First Amendment as applied to Twitter;
- v. The review mechanisms established under 18 U.S.C. § 3511 are facially unconstitutional because they violate separation of powers principles;
- vi. The FISA secrecy provisions are facially unconstitutional under the First Amendment;
- vii. The FISA secrecy provisions are unconstitutional under the First Amendment as applied to Twitter;
- viii. The DAG Letter’s prohibition on reporting receipt of zero of a particular kind of national security process is unconstitutional under the First Amendment;
- ix. The DAG Letter’s prohibition on reporting receipt of zero aggregate NSLs or FISA orders is unconstitutional under the First Amendment; and
- x. The DAG Letter’s restrictions on reporting ranges of national security process received are unconstitutional under the First Amendment.

B. A preliminary and permanent injunction prohibiting Defendants, their affiliates, agents, employees, and attorneys, and any and all other persons in active concert or participation with them, from seeking to enforce the terms contained in the DAG Letter on Twitter, or to prosecute or otherwise seek redress from Twitter for transparency reporting that is inconsistent with the terms contained in the DAG Letter.

C. An award of attorneys’ fees and costs to Twitter to the extent permitted by law.

D. Such further and other relief as this Court deems just and proper.

1 DATED: October 7, 2014

PERKINS COIE LLP

2
3 By: /s/ Eric D. Miller

Eric D. Miller, Bar No. 218416

EMiller@perkinscoie.com

4 Michael A. Sussmann, D.C. Bar No.
5 433100

(pro hac vice to follow)

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JSnell@perkinscoie.com

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8 HBerlin@perkinscoie.com

9 PERKINS COIE LLP

3150 Porter Drive

10 Palo Alto, CA 94304-1212

11 Telephone: 650.838.4300

Facsimile: 650.838.4350

12
13 Attorneys for Plaintiff
14 Twitter, Inc.

Exhibit 1



Office of the Deputy Attorney General
Washington, D.C. 20530

January 27, 2014

Sent via Email

Colin Stretch, Esquire
Vice President and General Counsel
Facebook Corporate Office
1601 Willow Road
Menlo Park, CA 94025

Kent Walker, Esquire
Senior Vice President and General Counsel
Google Corporate Office Headquarters
1600 Amphitheater Parkway
Mountain View, CA 94043

Erika Rottenberg, Esquire
Vice President, General Counsel/Secretary
LinkedIn Corporation
2029 Stierlin Court
Mountain View, CA 94043

Brad Smith, Esquire
Executive Vice President and General Counsel
Microsoft Corporate Office Headquarters
One Microsoft Way
Redmond, WA 98052-7329

Ronald Bell, Esquire
General Counsel
Yahoo Inc. Corporate Office and Headquarters
701 First Avenue
Sunnyvale, CA 94089

Dear General Counsels:

Pursuant to my discussions with you over the last month, this letter memorializes the new and additional ways in which the government will permit your company to report data concerning requests for customer information. We are sending this in connection with the Notice we filed with the Foreign Intelligence Surveillance Court today.

In the summer of 2013, the government agreed that providers could report in aggregate the total number of all requests received for customer data, including all criminal process, NSLs,

Letter to Colin Stretch, Kent Walker, Erika Rottenberg, Brad Smith and Ronald Bell
Page 2

and FISA orders, and the total number of accounts targeted by those requests, in bands of 1000. In the alternative, the provider could separately report precise numbers of criminal process received and number of accounts affected thereby, as well as the number of NSLs received and the number of accounts affected thereby in bands of 1000. Under this latter option, however, a provider could not include in its reporting any data about FISA process received.

The government is now providing two alternative ways in which companies may inform their customers about requests for data. Consistent with the President's direction in his speech on January 17, 2014, these new reporting methods enable communications providers to make public more information than ever before about the orders that they have received to provide data to the government.

Option One.

A provider may report aggregate data in the following separate categories:

1. Criminal process, subject to no restrictions.
2. The number of NSLs received, reported in bands of 1000 starting with 0-999.
3. The number of customer accounts affected by NSLs, reported in bands of 1000 starting with 0-999.
4. The number of FISA orders for content, reported in bands of 1000 starting with 0-999.
5. The number of customer selectors targeted under FISA content orders, in bands of 1000 starting with 0-999.
6. The number of FISA orders for non-content, reported in bands of 1000 starting with 0-999.¹
7. The number of customer selectors targeted under FISA non-content orders, in bands of 1000 starting with 0-999.

A provider may publish the FISA and NSL numbers every six months. For FISA information, there will be a six-month delay between the publication date and the period covered

¹ As the Director of National Intelligence stated on November 18, 2013, the Government several years ago discontinued a program under which it collected bulk internet metadata, and no longer issues FISA orders for such information in bulk. See <http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence>. With regard to the bulk collection of telephone metadata, the President has ordered a transition that will end the Section 215 bulk metadata program as it currently exists and has requested recommendations about how the program should be restructured. The result of that transition will determine the manner in which data about any continued collection of that kind is most appropriately reported.

Letter to Colin Stretch, Kent Walker, Erika Rottenberg, Brad Smith and Ronald Bell
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by the report. For example, a report published on July 1, 2015, will reflect the FISA data for the period ending December 31, 2014.

In addition, there will be a delay of two years for data relating to the first order that is served on a company for a platform, product, or service (whether developed or acquired) for which the company has not previously received such an order, and that is designated by the government as a "New Capability Order" because disclosing it would reveal that the platform, product, or service is subject to previously undisclosed collection through FISA orders. For example, a report published on July 1, 2015, will not reflect data relating to any New Capability Order received during the period ending December 31, 2014. Such data will be reflected in a report published on January 1, 2017. After data about a New Capability Order has been published, that type of order will no longer be considered a New Capability Order, and the ordinary six-month delay will apply.

The two-year delay described above does not apply to a FISA order directed at an enhancement to or iteration of an existing, already publicly available platform, product, or service when the company has received previously disclosed FISA orders of the same type for that platform, product, or service.

A provider may include in its transparency report general qualifying language regarding the existence of this additional delay mechanism to ensure the accuracy of its reported data, to the effect that the transparency report may or may not include orders subject to such additional delay (but without specifically confirming or denying that it has received such new capability orders).

Option Two.

In the alternative, a provider may report aggregate data in the following separate categories:

1. Criminal process, subject to no restrictions.
2. The total number of all national security process received, including all NSLs and FISA orders, reported as a single number in the following bands: 0-249 and thereafter in bands of 250.
3. The total number of customer selectors targeted under all national security process, including all NSLs and FISA orders, reported as a single number in the following bands, 0-249, and thereafter in bands of 250.

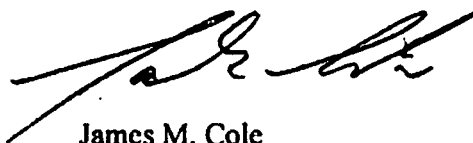
* * *

I have appreciated the opportunity to discuss these issues with you, and I am grateful for the time, effort, and input of your companies in reaching a result that we believe strikes an appropriate balance between the competing interests of protecting national security and furthering transparency. We look forward to continuing to discuss with you ways in which the

Letter to Colin Stretch, Kent Walker, Erika Rottenberg, Brad Smith and Ronald Bell
Page 4

government and industry can similarly find common ground on other issues raised by the surveillance debates of recent months.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. M. Cole', with a long horizontal stroke extending to the left.

James M. Cole
Deputy Attorney General

Exhibit 2

**UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.**

IN RE MOTION FOR DECLARATORY)
JUDGMENT OF A FIRST AMENDMENT) Docket No. Misc. 13-03
RIGHT TO PUBLISH AGGREGATE)
INFORMATION ABOUT FISA ORDERS)
_____)

IN RE MOTION TO DISCLOSE AGGREGATE)
DATA REGARDING FISA ORDERS) Docket No. Misc. 13-04
_____)

IN RE MOTION FOR DECLARATORY)
JUDGMENT TO DISCLOSE AGGREGATE) Docket No. Misc. 13-05
DATA REGARDING FISA ORDERS)
AND DIRECTIVES)
_____)

IN RE MOTION FOR DECLARATORY)
JUDGMENT TO DISCLOSE AGGREGATE) Docket No. Misc. 13-06
DATA REGARDING FISA ORDERS)
AND DIRECTIVES)
_____)

IN RE MOTION FOR DECLARATORY)
JUDGMENT TO REPORT AGGREGATED) Docket No. Misc. 13-07
DATA REGARDING FISA ORDERS)
_____)

NOTICE

The Government hereby informs the Court that, pursuant to the terms of the attached letter from the Deputy Attorney General, the Government will permit the petitioners to publish the aggregate data at issue in the above-captioned actions relating to any orders issued pursuant to the Foreign Intelligence Surveillance Act (FISA). The parties are separately stipulating to the

dismissal of these actions without prejudice. The Director of National Intelligence has declassified the aggregate data consistent with the terms of the attached letter from the Deputy Attorney General, in the exercise of the Director of National Intelligence's discretion pursuant to Executive Order 13526, § 3.1(c). The Government will therefore treat such disclosures as no longer prohibited under any legal provision that would otherwise prohibit the disclosure of classified data, including data relating to FISA surveillance. It is the Government's position that the terms outlined in the Deputy Attorney General's letter define the limits of permissible reporting for the parties and other similarly situated companies.

Dated: January 27, 2014

Respectfully submitted,

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

TASHINA GAUHAR
Deputy Assistant Attorney General
National Security Division

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General
National Security Division

CHRISTOPHER HARDEE
Chief Counsel for Policy
National Security Division

/s/ Alex Iftimie

ALEX IFTIMIE
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
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Fax: (202) 514-8053

Attorneys for the United States of America

Exhibit 3

UNCLASSIFIED



Michael A. Sussmann
PHONE (202) 654-6333
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700 Thirteenth Street, N.W., Suite 600
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FAX 202.654.6211
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April 1, 2014

VIA HAND DELIVERY

Mr. Richard McNally
Section Chief, NSLB
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Room 7947
Washington, DC 20525-0001

Re: Classification Review of Twitter 2014 Transparency Report

Dear Mr. McNally:

In a recent meeting with representatives of the Department of Justice, Dave O'Neil offered that the FBI would review proposed communication provider transparency reports for classified information (in conformity with the Deputy Attorney General's letter of January 27, 2014 to the general counsels of Facebook, Google, LinkedIn, Microsoft and Yahoo!), and that it had already conducted such reviews for certain providers. Twitter has prepared a Transparency Report (enclosed) and has asked me to deliver it to you for review.

As Twitter has expressed in person to Mr. O'Neil and others at the Department, it does not see itself as "similarly situated" to the five communications providers who were recipients of the DAG's letter—notwithstanding the Department's view that it is—for purposes of transparency reporting. Therefore, in the attached Transparency Report, Twitter has expressed its uniqueness, both in terms of the nature of its platform and service and regarding the relative amount of government surveillance it has been compelled to provide, in a number of different ways.

We are sending this to you so that Twitter may receive a determination as to exactly which, if any, parts of its Transparency Report are classified or, in the Department's view, otherwise may not lawfully be published online.

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ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DALLAS • DENVER • LOS ANGELES • MADISON • NEW YORK
PALO ALTO • PHOENIX • PORTLAND • SAN DIEGO • SAN FRANCISCO • SEATTLE • SHANGHAI • TAIPEI • WASHINGTON, D.C.

Perkins Coie LLP

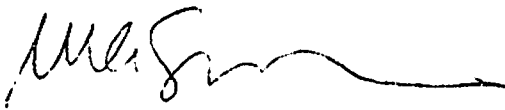
UNCLASSIFIED

Mr. Richard McNally
April 1, 2014
Page 2

Please note that, in an abundance of caution, I have marked the attached Transparency Report "SECRET" pending your classification review, but by that marking (and related handling), Twitter is not taking a position regarding the appropriateness of national security classification as to the whole or any part of the Transparency Report.

Thank you for taking the time for this review. We hope to receive the results of your review on or before April 22, 2014.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Sussmann", with a long horizontal flourish extending to the right.

Michael A. Sussmann

Enclosure

cc: David O'Neil, Chief of Staff, Office of the Deputy Attorney General
Tashina Gauhar, Deputy Assistant Attorney General, National Security Division
Steven Hugie, Deputy Section Chief, National Security Division

UNCLASSIFIED

Exhibit 4 is Twitter's draft Transparency Report, which will be submitted separately

Exhibit 4

Exhibit 5



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

September 9, 2014

Michael A. Sussmann
Perkins Coie, L.L.P.
700 13th Street, N.W. – Suite 600
Washington, D.C. 20005

Dear Michael:

Thank you for your letter dated April 1, 2014, and for the opportunity to review Twitter's proposed transparency report. We thought our discussion with Twitter on August 21, 2014, was very productive and we want to thank you and Ms. Gadde and her team for meeting with us. We have carefully reviewed Twitter's proposed transparency report and have concluded that information contained in the report is classified and cannot be publicly released.

As you know, on January 27, 2014, the Department of Justice provided multiple frameworks for certain providers and others similarly situated to report aggregated data under the Foreign Intelligence Surveillance Act, as amended (FISA), and the National Security Letter (NSL) statutes in bands. Twitter's proposed transparency report seeks to publish data regarding any process it may have received under FISA in ways that would reveal classified details about the surveillance and that go beyond what the government has permitted other companies to report. More specifically, it would disclose specific numbers of orders received, including characterizing the numbers in fractions or percentages, and would break out particular types of process received. This is inconsistent with the January 27th framework and discloses properly classified information. The aggregation of FISA numbers, the requirement to report in bands, and the prohibition on breaking out the numbers by type of authority are important ways the framework mitigates the risks to sources and methods posed by disclosing FISA statistics.

As we have discussed, we believe there is significant room for Twitter to place the numbers in context, consistent with the terms of the January 27th framework. For example, we believe Twitter can explain that only an infinitesimally small percentage of its total number of active users was affected by highlighting that less than 250 accounts were subject to all combined national security legal process – including process pertaining to U.S. persons and non-U.S. persons as well as for content and non-content. That would allow Twitter to explain that

Mr. Michael A. Sussmann

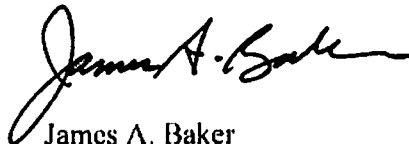
September 9, 2014

Page 2

all national security legal process received from the United States affected, at maximum, only 0.0000919 percent (calculated by dividing 249 by 271 million) of Twitter's total users. In other words, Twitter is permitted to *qualify* its description of the total number of accounts affected by all national security legal process it has received but it cannot *quantify* that description with the specific detail that goes well beyond what is allowed under the January 27th framework and that discloses properly classified information.

We appreciate Twitter's willingness to work with us to ensure that Twitter's proposed report provides transparency to its customers and the public in a manner that also protects national security, consistent with applicable law.

Sincerely,

A handwritten signature in black ink, appearing to read "James A. Baker". The signature is fluid and cursive, with a large initial "J" and "B".

James A. Baker
General Counsel
Federal Bureau of Investigation

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Twitter, Inc.
(b) County of Residence of First Listed Plaintiff San Francisco
(c) Attorneys (Firm Name, Address, and Telephone Number)
Eric D. Miller, Michael A. Sussmann, James G. Snell, Hayley L. Berlin, Perkins Coie LLP, 3150 Porter Drive, Palo Alto, CA 94304 (650) 838-4300

DEFENDANTS
Eric Holder, Attorney General of the United States; the United States Department of Justice; James Comey, Director of the Federal Bureau of Investigation, the Federal Bureau of Investigation
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
110 Insurance
120 Marine
130 Miller Act
140 Negotiable Instrument
150 Recovery of Overpayment & Enforcement of Judgment
151 Medicare Act
152 Recovery of Defaulted Student Loans (Excludes Veterans)
153 Recovery of Overpayment of Veteran's Benefits
160 Stockholders' Suits
190 Other Contract
195 Contract Product Liability
196 Franchise
TORTS
PERSONAL INJURY
310 Airplane
315 Airplane Product Liability
320 Assault, Libel & Slander
330 Federal Employers' Liability
340 Marine
345 Marine Product Liability
350 Motor Vehicle
355 Motor Vehicle Product Liability
360 Other Personal Injury
362 Personal Injury - Medical Malpractice
PERSONAL INJURY
365 Personal Injury - Product Liability
367 Health Care/Pharmaceutical Personal Injury Product Liability
368 Asbestos Personal Injury Product Liability
PERSONAL PROPERTY
370 Other Fraud
371 Truth in Lending
380 Other Personal Property Damage
385 Property Damage Product Liability
FORFEITURE/PENALTY
625 Drug Related Seizure of Property 21 USC 881
690 Other
LABOR
710 Fair Labor Standards Act
720 Labor/Management Relations
740 Railway Labor Act
751 Family and Medical Leave Act
790 Other Labor Litigation
791 Employee Retirement Income Security Act
BANKRUPTCY
422 Appeal 28 USC 158
423 Withdrawal 28 USC 157
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820 Copyrights
830 Patent
840 Trademark
SOCIAL SECURITY
861 HIA (1395ff)
862 Black Lung (923)
863 DIWC/DIWW (405(g))
864 SSID Title XVI
865 RSI (405(g))
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870 Taxes (U.S. Plaintiff or Defendant)
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375 False Claims Act
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410 Antitrust
430 Banks and Banking
450 Commerce
460 Deportation
470 Racketeer Influenced and Corrupt Organizations
480 Consumer Credit
490 Cable/Sat TV
850 Securities/Commodities/Exchange
890 Other Statutory Actions
891 Agricultural Acts
893 Environmental Matters
895 Freedom of Information Act
896 Arbitration
899 Administrative Procedure Act/Review or Appeal of Agency Decision
950 Constitutionality of State Statutes
REAL PROPERTY
210 Land Condemnation
220 Foreclosure
230 Rent Lease & Ejectment
240 Torts to Land
245 Tort Product Liability
290 All Other Real Property
CIVIL RIGHTS
440 Other Civil Rights
441 Voting
442 Employment
443 Housing/Accommodations
445 Amer. w/Disabilities - Employment
446 Amer. w/Disabilities - Other
448 Education
PRISONER PETITIONS
Habeas Corpus:
463 Alien Detainee
510 Motions to Vacate Sentence
530 General
535 Death Penalty
Other:
540 Mandamus & Other
550 Civil Rights
555 Prison Condition
560 Civil Detainee - Conditions of Confinement

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. §§ 2201 and 2202
Brief description of cause:
First Amendment protected speech

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE October 7, 2014 SIGNATURE OF ATTORNEY OF RECORD /s/ Eric D. Miller

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)
(Place an "X" in One Box Only)
SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

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Acting Assistant Attorney General
2 MELINDA HAAG
United States Attorney
3 ANTHONY J. COPPOLINO
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11 Facsimile: (202) 616-8470
12 Email: Steven.Bressler@usdoj.gov

13 Attorneys for Defendants the Attorney General, *et al.*

14 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

15	_____)	
16	TWITTER, INC.,)	Case No. 14-cv-4480
17	Plaintiff,)	
18	v.)	DEFENDANTS' NOTICE
19	ERIC H. HOLDER, United States)	OF MOTION AND PARTIAL
20	Attorney General, <i>et al.</i> ,)	MOTION TO DISMISS
21	Defendants.)	Date: March 10, 2015
22	_____)	Time: 2:00 p.m.
		Courtroom 1, Fourth Floor
		Hon. Yvonne Gonzalez Rogers

23 PLEASE TAKE NOTICE that, on March 10, 2015, at 2:00 p.m., before Judge
24 Yvonne Gonzalez Rogers, the defendants will move to dismiss several aspects of plaintiff's
25 Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and the
26 Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, and for the reasons more fully set forth in
27 defendants' accompany Memorandum of Points and Authorities. Specifically, defendants will
28 seek dismissal of: 1) plaintiff's challenge to a January 2014 letter from the Deputy Attorney

1 JOYCE R. BRANDA
Acting Assistant Attorney General
2 MELINDA HAAG
United States Attorney
3 ANTHONY J. COPPOLINO
Deputy Branch Director
4 STEVEN Y. BRESSLER
5 JULIA A. BERMAN
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11 Attorneys for Defendants the Attorney General, *et al.*

12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14
15 TWITTER, INC.,)

Case No. 14-cv-4480

16 Plaintiff,)

17)
18 v.)

**DEFENDANTS' PARTIAL
MOTION TO DISMISS**

19 ERIC H. HOLDER, United States)
Attorney General, *et al.*,)

20 Defendants.)
21)
22)
23)
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PRELIMINARY STATEMENT

1
2 Plaintiff Twitter, Inc., an electronic communication service provider, seeks a declaratory
3 judgment that alleged restrictions on its ability to publish information concerning national
4 security legal process it has received from the United States Government are unlawful.
5 Specifically, Twitter alleges that it seeks to publish a “Transparency Report” with certain data
6 about legal process it has received from the Government, including pursuant to the Foreign
7 Intelligence Surveillance Act (“FISA”) and National Security Letters (“NSLs”). Twitter claims
8 that certain alleged restrictions on publication imposed by statutory provisions, judicial orders,
9 Government directives, and nondisclosure agreements violate the First Amendment. It also
10 seeks to challenge under the Administrative Procedure Act (“APA”) guidance provided in a
11 January 2014 letter from the Deputy Attorney General of the United States (“DAG Letter”) to
12 certain electronic communication providers (not including Twitter) that described new and
13 additional ways that providers can publicly disclose properly declassified data concerning
14 requests for customer information without releasing classified information.

15 Contrary to plaintiff’s allegations, the United States Government firmly supports a policy
16 of appropriate transparency with respect to its intelligence activities. Indeed, the letter Twitter
17 purports to challenge is based on a determination by the Director of National Intelligence
18 (“DNI”) to *declassify* significant information in order to *increase* transparency by *permitting*
19 companies like Twitter to report to their users and to the public information about national
20 security legal process in a manner that mitigates harm to national security. But the Government
21 must balance the goal of providing information concerning national security investigations with
22 the need to maintain the secrecy of information that could reveal sensitive investigative
23 techniques and sources and methods of intelligence collection. The additional material that
24 Twitter seeks to publish is information that the Government has judged is properly protected
25 classified national security information, the disclosure of which would risk serious harm to
26 national security. The law is clear that the First Amendment does not permit such publication,
27 and any restrictions imposed by statutory authority or judicial order on the publication of
28

1 classified information are lawful under the First Amendment, both on their face and as they may
2 have been applied to Twitter.

3 Before the Court considers the merits of plaintiff's constitutional claims, however, it
4 should dismiss several aspects of Twitter's complaint on threshold grounds.

5 First as explained below, the Court should dismiss plaintiff's claim that the DAG letter
6 violates the APA. The letter is permissive, advisory guidance; as such, it does not constitute
7 "final agency action" reviewable under the APA, nor does it restrict plaintiff's speech in any
8 way. Rather, any such restrictions stem from other authority, including statutory law such as
9 FISA, applicable orders and directives issued through the Foreign Intelligence Surveillance
10 Court ("FISC"), and from any applicable nondisclosure agreements. Likewise, for those reasons,
11 the DAG Letter does not cause Twitter any injury-in-fact sufficient to confer standing, and any
12 alleged injury would not be redressable through relief directed against the DAG Letter.

13 Second, under settled principles of comity, the Court should dismiss plaintiff's
14 Declaratory Judgment Act claims related to the FISA and any orders and directives issued
15 through the FISC. Specifically, the Court should dismiss plaintiff's claims that any FISC orders
16 or FISA-related directives by their terms do not prevent the disclosure of aggregate data, and
17 claims that restrictions on disclosing FISA-related material would violate the First Amendment.¹
18 Instead, this Court should defer to the FISC to determine the scope, meaning, and legality of its
19 own orders, as well as of the statute that is given effect through those orders.

20 Third, the Court should dismiss plaintiff's separation-of-powers challenge to the statutory
21 standards of review of an NSL. Twitter, raising an issue currently under consideration in the
22 Ninth Circuit, alleges that the standard of review is too deferential, but its challenge fails as a
23 matter of law. The statutory standard of review for NSL nondisclosure requirements is
24 substantially the same as those that courts have developed in related contexts to review
25 government restrictions on the disclosure of national security information. Deference to the

26
27 ¹ Defendant's discussion of FISA orders or directives that plaintiff could have received, and that
28 could require plaintiff not to disclose the existence of the orders or directives, is not intended to
confirm or deny that plaintiff has, in fact, received any such national security legal process.

1 Executive Branch is entirely appropriate in this context. As courts have repeatedly recognized,
2 the Executive Branch is best situated to assess the risks to national security posed by the
3 disclosure of sensitive information. Accordingly, the separation-of-powers doctrine does not
4 prevent Congress from prescribing the appropriate standard of review for assessing risks to
5 national security, even where that standard is deferential. Thus, if the Court does not await a
6 ruling by the Ninth Circuit, it should proceed to dismiss the claim because the NSL statutory
7 standard of review complies with the Constitution.

8 For these reasons, as set forth further below, the Court should dismiss plaintiff's claims
9 challenging the DAG Letter, FISA itself, nondisclosure requirements issued or supervised by the
10 FISC, and the standard of review under the NSL statute.

11 **BACKGROUND**

12 **A. Statutory Background**

13 The President has charged the FBI with primary authority for conducting
14 counterintelligence and counterterrorism investigations in the United States. *See* Exec. Order
15 No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg. 59941 (Dec. 4, 1981). Today, the FBI is engaged in
16 extensive investigations into threats, conspiracies, and attempts to perpetrate terrorist acts and
17 foreign intelligence operations against the United States. These investigations are typically long-
18 range, forward-looking, and preventive in nature in order to anticipate and disrupt clandestine
19 intelligence activities or terrorist attacks on the United States before they occur.

20 The FBI's experience with counterintelligence and counterterrorism investigations has
21 shown that electronic communications play a vital role in advancing terrorist and foreign
22 intelligence activities and operations. Accordingly, pursuing and disrupting terrorist plots and
23 foreign intelligence operations often require the FBI to seek information relating to the use of
24 electronic communications, including from electronic communication service providers. *E.g.*,
25 James B. Comey, Remarks at International Conference on Cyber Security, Fordham University
26 (January 7, 2015), available at [http://www.fbi.gov/news/speeches/addressing-the-cyber-security-](http://www.fbi.gov/news/speeches/addressing-the-cyber-security-threat)
27 [threat](http://www.fbi.gov/news/speeches/addressing-the-cyber-security-threat).

1 Congress has authorized the FBI to collect such information with a variety of legal tools,
2 including through various authorities under the FISA and pursuant to FISC supervision, as well
3 as National Security Letters. Because the targets of national security investigations and others
4 who seek to harm the United States will take countermeasures to avoid detection by the FBI and
5 other members of the U.S. Intelligence Community, secrecy is often essential to effective
6 counterterrorism and counterintelligence investigations. The Government therefore protects the
7 confidentiality of information concerning national security legal process, including pursuant to
8 statutory requirements and judicial orders.

9 1. FISA

10 Pursuant to multiple provisions of FISA, the FISC may issue orders that “direct”
11 recipients to provide certain information “in a manner that will protect the secrecy of the
12 acquisition.” *E.g.*, 50 U.S.C. §§ 1805(c)(2)(B), 1881a(h)(1)(A). For example, Titles I and VII of
13 FISA provide that FISA orders “shall direct,” and FISA directives issued by the Attorney
14 General and Director of National Intelligence (“DNI”) after FISC approval of an underlying
15 certification “may direct,” recipients to provide the Government with “all information, facilities,
16 or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of
17 the acquisition.” 50 U.S.C. § 1881a(h)(1)(A) (Title VII); *see also* 50 U.S.C. § 1805(c)(2)(B)
18 (similar language for Title I). Additionally, the orders “shall direct” and the directives “may
19 direct” that recipients “maintain under security procedures approved by the Attorney General and
20 the DNI any records concerning the acquisition or the aid furnished” that such electronic
21 communication service provider maintains. 50 U.S.C. § 1881a(h)(1)(B) (Title VII); *see also* 50
22 U.S.C. § 1805(c)(2)(C) (similar language for Title I). Consistent with the Executive Branch’s
23 authority to control classified information, these provisions explicitly provide for Executive
24 Branch approval of the companies’ procedures for maintaining all records associated with FISA
25 surveillance.

26 Other FISA titles that provide search or surveillance authorities also provide for secrecy
27 under those authorities. *See* 50 U.S.C. § 1824(c)(2)(B)-(C) (requiring Title III orders to require
28 the recipient to assist in the physical search “in such a manner as will protect its secrecy” and to

1 provide that “any records concerning the search or the aid furnished” that the recipient retains be
2 maintained under appropriate security procedures); 50 U.S.C. § 1842(d)(2)(B) (requiring Title IV
3 orders to direct that recipients “furnish any information, facilities, or technical assistance
4 necessary to accomplish the installation and operation of the pen register or trap and trace device
5 in such a manner as will protect its secrecy,” and to provide that “any records concerning the pen
6 register or trap and trace device or the aid furnished” that the recipient retains shall be
7 maintained under appropriate security procedures); 50 U.S.C. § 1861(d)(1) (providing that “[n]o
8 person shall disclose to any other person that the [FBI] has sought or obtained tangible things
9 pursuant to an order under” Title V of FISA).

10 Accordingly, to the extent that plaintiff has received process pursuant to Titles I and VII
11 of FISA, the Title VII directives would contain the statutorily permitted nondisclosure
12 provisions, while the Title I orders would contain nondisclosure requirements that track the
13 statutory provision.² Likewise, Title III, IV, or V orders would be accompanied by the statutory
14 requirements described above.³

15 **2. National Security Letters**

16 In 1986, Congress enacted 18 U.S.C. § 2709 to assist the FBI in obtaining information for
17 national security investigations. Section 2709 empowers the FBI to issue an NSL, a type of
18 administrative subpoena. Subsections (a) and (b) of Section 2709 authorize the FBI to request
19 “subscriber information” and “toll billing records information,” or “electronic communication
20 transactional records,” from wire or electronic communication service providers. In order to
21 issue an NSL, the Director of the FBI, or a senior-level designee, must certify that the
22

23 ² Title I orders typically contain language such as: “This order and warrant is sealed and the
24 specified person and its agents and employees shall not disclose to the targets or to any other
25 person the existence of the order and warrant or this investigation or the fact of any of the
26 activities authorized herein or the means used to accomplish them, except as otherwise may be
27 required by legal process and then only after prior notification to the Attorney General.” Of
course, disclosing the number of Title I orders received would violate such a provision as it
would “disclose . . . the existence” of each of the orders.

28 ³ Electronic communications service providers that receive legal process under FISA typically
receive such process through employees who have executed nondisclosure agreements.

1 information sought is “relevant to an authorized investigation to protect against international
2 terrorism or clandestine intelligence activities.” *Id.* § 2709(b)(1)-(2).

3 The secrecy necessary to successful national security investigations can be compromised
4 if a wire or electronic communication service provider discloses that it has received or provided
5 information pursuant to an NSL. To avoid that result, Congress has enabled restrictions on
6 disclosures by NSL recipients pursuant to 18 U.S.C. § 2709(c). A nondisclosure requirement
7 must be based on a case-by-case determination of need by the FBI and thus may be issued only if
8 the Director of the FBI or another designated senior FBI official certifies that “otherwise there
9 may result a danger to the national security of the United States, interference with a criminal,
10 counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or
11 danger to the life or physical safety of any person.” *Id.* § 2709(c)(1). If such a certification is
12 made, the NSL itself notifies the recipient of the nondisclosure obligation. *Id.* § 2709(c)(2). An
13 NSL recipient may petition a district court “for an order modifying or setting aside a
14 nondisclosure requirement imposed in connection with” the NSL. 18 U.S.C. § 3511(b)(1). If the
15 petition is filed more than a year after the NSL was issued, the FBI or Department of Justice
16 must either re-certify the need for nondisclosure or terminate the nondisclosure requirement. *Id.*
17 § 3511(b)(3). A district court “may modify or set aside” the nondisclosure requirement if the
18 court finds “no reason to believe” that disclosure may cause any of the statutorily enumerated
19 harms. *Id.* § 3511(b)(2) & (3). The U.S. Court of Appeals for the Second Circuit has interpreted
20 this provision to mean a court may modify or set aside a nondisclosure requirement where it is
21 not supported by “good reason.” *Doe v. Mukasey*, 549 F.3d 861, 883 (2d Cir. 2008).

22 **B. Factual Background**

23 As set forth above, the existence of a FISA order or directive imposing obligations on a
24 particular electronic communication service provider may be subject to nondisclosure or sealing
25 obligations and, moreover, is classified national security information. Likewise, the existence of
26 a request for information by NSL is typically subject to a nondisclosure requirement pursuant to
27 the NSL statute. *See* 18 U.S.C. § 2709(c).

1 On January 27, 2014, the Director of National Intelligence declassified certain aggregate
2 data concerning national security legal process so that recipients of such process could reveal
3 aggregate data, not with specific numbers but in ranges, about the orders and other process they
4 had received. *See* “Joint Statement by Director of National Intelligence James Clapper and
5 Attorney General Eric Holder on New Reporting Methods for National Security Orders”
6 (January 27, 2014) (“While this aggregate data was properly classified until today, the Office of
7 the Director of National Intelligence, in consultation with other departments and agencies, has
8 determined that the public interest in disclosing this information now outweighs the national
9 security concerns that required its classification.”), *available at*
10 <http://icontherecord.tumblr.com/post/74761658869/joint-statement-by-director-of-national>.⁴

11 The Deputy Attorney General (“DAG”) described that declassification, and the types of
12 information that an electronic communication service provider can provide pursuant to that
13 declassification, in a January 27, 2014 letter to the general counsels for five other companies.
14 *See* January 27, 2014 Letter from DAG James M. Cole to General Counsels of Facebook, *et al.*
15 (“DAG Letter”), Exhibit 1 to Compl. *See also* Compl. ¶¶ 24-26 (plaintiff’s allegations regarding
16 the DAG Letter). The Government also informed the FISC that

17 [t]he Director of National Intelligence has declassified the aggregate data
18 consistent with the terms of the attached letter from the Deputy Attorney General,
19 in the exercise of the Director of National Intelligence’s discretion pursuant to
20 Executive Order 13526, § 3.1(c). The Government will therefore treat such
21 disclosures as no longer prohibited under any legal provision that would
22 otherwise prohibit the disclosure of classified data, including data relating to
23 FISA surveillance.

24 *See* Notice, Exhibit 2 to Compl. (“FISC Notice”), *also available at*
25 <http://www.justice.gov/iso/opa/resources/422201412716042240387.pdf>. *See also* DAG Letter
26 at 1 (noting the letter was sent “in connection with the Notice we filed with the [FISC] today”);

27 ⁴ The DNI has also, for the first time, publicly provided statistical information regarding the use
28 of national security legal authorities including FISA and NSLs, and will continue to do so
annually. *See* “Annual Statistics for Calendar Year 2013 Regarding Use of Certain National
Security Legal Authorities,” *available at*
http://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2013.

1 Exec. Ord. 13526, § 3.1(d) (providing for discretionary declassification by the Executive Branch
2 in extraordinary circumstances in the public interest).

3 The Notice also stated the Government's view that "the terms outlined in the Deputy
4 Attorney General's letter define the limits of permissible reporting for the parties and other
5 similarly situated companies." See FISC Notice. By its terms, however, the DAG Letter is
6 permissive, not restrictive. See DAG Letter. It does not purport to classify any previously
7 unclassified information, but rather provides guidance for reporting aggregate data regarding
8 national security legal process received by a particular company consistent with a
9 declassification decision issued by the DNI the same day under Executive Order 13526. The
10 letter and FISC notice informed the parties that the Government considered reporting the data, as
11 declassified, not to violate FISC orders and nondisclosure provisions. Any affirmative non-
12 disclosure obligations arise not from the letter but from the orders and authorities discussed
13 above.

14 The plaintiff in this case, Twitter, Inc., sought review of a draft "Transparency Report"
15 containing specific details regarding any national security legal process received by plaintiff
16 during, *inter alia*, the second half of 2013. See Compl. ¶ 39 (characterizing draft Report); ECF
17 No. 21-1 (unclassified, redacted version of draft Report). By letter dated September 9, 2014,
18 following further discussions between defendants and plaintiff, the FBI's General Counsel
19 informed counsel for plaintiff that the draft Report contains information that is properly
20 classified and, therefore, cannot lawfully be publicly disclosed. See September 9, 2014 Letter
21 from James A. Baker to counsel for plaintiff, Exhibit 3 to Compl. ("FBI Letter"); *see also*
22 Compl. ¶ 40 (plaintiff's allegations characterizing the letter).

23 The FBI Letter notes that the law does not permit plaintiff to reveal "specific detail that
24 goes well beyond what is allowed under the January 27th framework [*i.e.*, the declassification
25 described in the DAG Letter] and that discloses properly classified information." *Id.* Defendants
26 have informed plaintiff which portions of the draft Report cannot lawfully be published and have
27 provided plaintiff and the Court with a redacted, unclassified copy of the draft Report. See ECF
28 No. 21-1.

1 In its Complaint, Twitter challenges any applicable nondisclosure requirements that stem
2 from statutes, directives and judicial orders issued pursuant to FISA, and nondisclosure
3 agreements.

4 STANDARD OF REVIEW

5 Federal Rule of Civil Procedure 12(b)(1) requires dismissal when the plaintiff fails to
6 meet its burden of establishing subject-matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d
7 199, 201 (9th Cir. 1989). Rule 12(b)(1) dismissal is proper when the plaintiff fails to establish
8 the elements of standing, *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009), and,
9 in a suit purportedly brought under the Administrative Procedure Act, when it fails to identify a
10 “final agency action” under the terms of that Act. *ONRC Action v. BLM*, 150 F.3d 1132, 1135
11 (9th Cir. 1998). The Court may consider evidence outside the pleadings and resolve factual
12 disputes, if necessary, to determine whether jurisdiction is present. *See Ass’n of Am. Med. Colls.*
13 *v. United States*, 217 F.3d 770, 778 (9th Cir. 2000).

14 The Court should grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) if a plaintiff
15 fails to plead enough facts to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*
16 *v. Twombly*, 550 U.S. 544, 570 (2007); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981,
17 989 (9th Cir. 2009). “Dismissal can be based on the lack of a cognizable legal theory or the
18 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
19 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A Rule 12(b)(6) motion thus tests the legal sufficiency
20 of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir.
21 2003). All allegations of material fact are taken as true and construed in the light most favorable
22 to the plaintiff. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011).

23 Plaintiff brings its FISA-related claims under the Declaratory Judgment Act, and a
24 district court may dismiss claims pursuant to that Act based on prudential considerations such as
25 comity with other courts. *See* 28 U.S.C. § 2201(a); *accord e.g., Wilton v. Seven Falls Co.*, 515
26 U.S. 277, 288 (1995) (recognizing discretionary nature of declaratory relief); *NRDC v. EPA*, 966
27 F.2d 1292, 1299 (9th Cir. 1992) (same). That is because “[i]n the declaratory judgment context,
28 the normal principle that federal courts should adjudicate claims within their jurisdiction yields

1 to considerations of practicality and wise judicial administration.” *Wilton*, 515 U.S. at 288. In
 2 particular, a court should decline to exercise its jurisdiction based on considerations of comity
 3 and orderly judicial administration, where, as here, a plaintiff is seeking review of the orders of
 4 another court of competent jurisdiction. *See, e.g., Principal Life Ins. Co. v. Robinson*, 394 F.3d
 5 665, 672 (9th Cir. 2005) (highlighting comity and judicial administration as factors informing a
 6 court’s discretion); *Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964) (holding these
 7 considerations should lead the non-rendering court to decline jurisdiction over another court’s
 8 orders).

9 ARGUMENT

10 I. The Court Should Dismiss Plaintiff’s Challenge to the DAG Letter for Lack 11 of Subject Matter Jurisdiction.

12 Plaintiff’s APA claim against the DAG Letter fails because the DAG Letter is not subject
 13 to APA challenge, and because plaintiff has failed to establish its standing to challenge the letter
 14 in any event.

15 A. The DAG Letter is Not “Final Agency Action” Subject to Review Under 16 the Administrative Procedure Act.

17 The APA permits judicial review of “final agency action” for which there is “no other
 18 adequate remedy in a court.” 5 U.S.C. § 704. Absent these elements, the Court lacks subject
 19 matter jurisdiction over an APA claim. *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 163-64
 20 (9th Cir. 1990). If an agency action is subject to review, a court may “set aside agency actions”
 21 found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
 22 law.” 5 U.S.C. § 706.

23 Plaintiff, in challenging the Deputy Attorney General’s January 27, 2014 letter, alleges
 24 that letter is “final agency action not in accordance with law” with respect to plaintiff. Compl.
 25 ¶ 44. Plaintiff also argues that the letter’s “imposition . . . on Twitter” thus violates various
 26 provisions of law. *Id.* The DAG Letter is not “final agency action” subject to challenge under
 27 the APA, however. Moreover, it has not been “imposed” on Twitter; rather, any obligations of
 28 plaintiff are to avoid disclosing information that is properly classified, prohibited from disclosure
 by a FISA order or directive, and/or subject to lawful nondisclosure requirements. Such

1 obligations stem from other authority including Orders of the FISC, FISA directives, and
2 statutes. They do not stem from the DAG Letter, and plaintiff cannot establish subject matter
3 jurisdiction over its purported claim against that letter in this Court.

4 To qualify as “final” under the APA, an action must mark the “consummation” of an
5 agency decision-making process, and must be one by which “rights or obligations have been
6 determined” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-
7 78 (1997). Agency actions that have no effect on a party’s rights or obligations are not
8 reviewable final actions. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d
9 586, 593-94 (9th Cir. 2008) (action not cognizable under APA where “rights and obligations
10 remain unchanged.”); *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005)
11 (“[I]f the practical effect of the agency action is not a certain change in the legal obligations of a
12 party, the action is non-final for the purpose of judicial review.”).

13 The DAG Letter is not final agency action as to plaintiff or otherwise. Plaintiff’s “rights
14 or obligations” were not determined, and “legal consequences” do not flow, from the DAG’s
15 letter. *Bennett*, 520 U.S. 177-78. As noted, those obligations stem from statutes, FISC orders,
16 FISA directives, and nondisclosure agreements. Moreover, the DAG Letter does not purport to
17 restrain plaintiff’s behavior in any way. Rather, as noted, it provides guidelines as to *permissible*
18 disclosures that will not reveal classified information, consistent with the DNI’s declassification
19 decision. The DAG Letter does not instruct plaintiff to take or refrain from any particular action,
20 and it does not threaten any enforcement proceeding. Therefore, it neither imposes new rights or
21 obligations on plaintiff, nor results in new legal consequences for plaintiff.

22 In circumstances like these, courts have consistently held that advisory statements by an
23 agency interpreting other, underlying sources of authority are not final agency action subject to
24 APA challenge. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101-02 (9th Cir. 2001)
25 (letter indicating that a particular statute would apply to a city’s application to renew its permit
26 was not a final action); *Independent Equipment Dealers Ass’n v. EPA*, 372 F.3d 420, 426-28
27 (D.C. Cir. 2004) (letter providing EPA’s interpretation of emissions regulations is not final
28 action); *General Motors Corp. v. EPA*, 363 F.3d 442, 449 (D.C. Cir. 2004) (letter stating that

1 used paint solvents are hazardous waste is not final action); *Dow Chem. v. EPA*, 832 F.2d 319,
2 323-25 (5th Cir. 1987) (letter attaching EPA’s interpretation of a regulation is not final action).

3 Moreover, there is no final action where a document only “impose[s] upon [a party] the
4 already-existing burden of complying with” applicable law, such as a statute or implementing
5 regulations. *Acker v. EPA*, 290 F.3d 892, 894 (7th Cir. 2002); *see Indep. Equip. Dealers Ass’n v.*
6 *EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (no final action where ““an agency merely
7 expresses its view of what the law requires of a party, even if that view is adverse to the party””)
8 (quoting *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)). The DAG Letter does not
9 even go that far – as noted, it is a permissive document, clarifying what aggregate data
10 disclosures may be made without revealing classified information. *See Ctr. for Auto Safety v.*
11 *NHTSA*, 452 F.3d 798, 806-08 (D.C. Cir. 2006) (holding agency guidance letters not to be final
12 agency action based on factors including the permissive language of the document, the agency’s
13 “own characterization of the action,” and the lack of publication in the Federal Register or Code
14 of Federal Regulations); *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 14, 16 (D.C. Cir.
15 2005) (holding that there was no final agency action where the language of challenged Protocols
16 was permissive and “the scope of a [regulated party’s] liability . . . remains exactly as it was
17 before the Protocols’ publication”).

18 **B. Plaintiff Has Not Established Article III Standing for its Challenge to the**
19 **DAG Letter.**

20 Because the DAG Letter is permissive guidance that informs companies what has been
21 declassified without altering the “already-existing burden of complying with” applicable law,
22 *Acker*, 290 F.3d at 894, Twitter has also failed to sufficiently allege Article III standing for its
23 APA claim against that letter. Plaintiff’s alleged injury is not fairly traceable to the DAG Letter
24 or redressable by any relief against the DAG Letter. *Allen v. Wright*, 468 U.S. 737, 754 n.19,
25 757 (1984); *Wash. Env’tl Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013); *Nat’l Ass’n of*
26 *Home Builders v. U.S. Army Corps of Eng’rs*, 663 F.3d 470, 473-74 (D.C. Cir. 2011). If the
27 DAG Letter were somehow “invalidated” by a court, the result would be only that plaintiff and
28 other companies would lack guidance as to what types of information the Government has

1 declassified. The scope of the DNI's declassification decision (set forth in the DAG Letter), and
2 more specifically the extent to which information *remains* classified, along with relevant
3 statutory provisions, FISA orders and directives, would still prohibit the disclosures.

4 A declaratory judgment directed at the DAG Letter would therefore not redress any
5 injury allegedly suffered by plaintiff because it would not alter the fact that plaintiff cannot
6 lawfully disclose properly classified information. *See, e.g., Stillman v. CIA*, 319 F.3d 546, 548
7 (D.C. Cir. 2003) (in prepublication review case, holding there is no First Amendment right to
8 publish properly classified information) (citing *Snepp v. United States*, 444 U.S. 507, 509 n.3
9 (1980)). Accordingly, while a plaintiff may challenge the application of relevant restrictions on
10 the disclosure of classified information, including through FISA and orders of the FISC, the
11 plaintiff here lacks standing to challenge the DAG Letter under the APA. Indeed, plaintiff
12 alleges, upon information and belief, that what it characterizes as the "restrictions of the DAG
13 Letter" are based on those other authorities. *See* Compl. ¶ 45. The Court should therefore
14 dismiss plaintiff's APA claim pursuant to Fed. R. Civ. P 12(b)(1).

15 **II. FISA Nondisclosure Obligations Arise Through FISC Orders or Directives**
16 **Issued Under a FISC-Approved Program, and Any Challenge Thereto**
17 **Should Be Considered by the FISC.**

18 It is a settled principle of comity and orderly judicial administration that a challenge to an
19 order of a coordinate court should be heard by that court – especially where, as here, there is a
20 court of specialized jurisdiction and competence. Here, plaintiff seeks to challenge any
21 applicable orders issued under authority of the FISA, as well as provisions of the FISA itself,
22 both of which should be subject to review under the FISC's specialized jurisdiction.
23 Specifically, plaintiff asks this Court to determine that "[t]he FISA statute . . . and other
24 nondisclosure authorities do not prohibit providers like Twitter from disclosing aggregate
25 information about the number of FISA orders they receive." Compl. ¶ 49. Plaintiff further
26 purports to challenge "FISA secrecy provisions" and "requirements in FISA" as unconstitutional
27 both facially and as-applied, *see* Compl. ¶ 18 & Prayer for Relief A(vi) & A(vii).⁵ But, as

28 ⁵ Consistent with the Supreme Court's instructions that a court must focus on the application of
a statute before considering a facial challenge, *see Bd. of Trustees of the State Univ. of NY v.*

1 detailed below, with one exception, FISA’s statutory provisions do not operate directly on the
2 recipients of FISA legal process. Instead, recipients of FISA legal process are subject to
3 nondisclosure obligations because of orders issued by the FISC or through directives issued
4 pursuant to a program approved by the FISC and subject to FISC oversight. Thus, a challenge to
5 “FISA secrecy provisions” amounts to a challenge to FISC orders and to directives issued
6 pursuant to a FISC-approved program. This Court should decline to exercise its jurisdiction over
7 such claims, because they should properly be brought before the FISC.

8 Plaintiff brings its claims under the Declaratory Judgment Act, *see* Compl. ¶¶ 1, 12, and
9 as discussed above, “[t]he Declaratory Judgment Act embraces both constitutional and prudential
10 concerns.” *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998). “If [a] suit
11 passes constitutional and statutory muster, the district court must also be satisfied that
12 entertaining the action is appropriate.” *Id.* at 1223. The Supreme Court has explained that, “[i]n
13 the declaratory judgment context, the normal principle that federal courts should adjudicate
14 claims within their jurisdiction yields to considerations of practicality and wise judicial
15 administration.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

16 Thus, a district court has discretion to decline to exercise jurisdiction over Declaratory
17 Judgment Act claims based on prudential considerations. *See* 28 U.S.C. § 2201(a). This

18
19 *Fox*, 492 U.S. 469, 485 (1989), the application of the challenged provisions should be
20 adjudicated by the FISC before the facial constitutional challenge is considered. Furthermore,
21 even if a court were to reach plaintiff’s facial challenge to provisions of FISA, it would be
22 necessary to examine how the challenged provisions operate in practice under the supervision of
23 the FISC. Plaintiff appears to allege overbreadth – that “the statute seeks to prohibit such a
24 broad range of protected conduct that it is unconstitutionally ‘overbroad.’” *Members of City
25 Council of LA v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). To succeed in such a
26 challenge, plaintiff would need to establish that the challenged provisions “will have [a] different
27 impact on any third parties’ interests in free speech than [they have] on” the plaintiff. *Id.* at 801.
28 Moreover, plaintiff would need to establish that “a ‘substantial number’ of [the FISA secrecy
provisions] applications are unconstitutional, ‘judged in relation to the [provisions]’ plainly
legitimate sweep.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6
(2008) (quoting *New York v. Ferber*, 484 U.S. 747, 769-71 (1982) (internal citations, quotations
omitted)). Thus, even the instant facial challenge to requirements of the FISA should be heard in
the FISC because the adjudication of that challenge would turn on an interpretation of the scope
of nondisclosure provisions in any FISC orders or directives issued pursuant to a FISC-approved
program that may be at issue.

1 determination is discretionary because “the Declaratory Judgment Act is deliberately cast in
2 terms of permissive, rather than mandatory, authority.” *Dizol*, 133 F.3d at 1223 (internal
3 quotation omitted). “The Act ‘gave the federal courts competence to make a declaration of
4 rights; it did not impose a duty to do so.’” *Id.* (quoting *Public Affairs Assocs. v. Rickover*, 369
5 U.S. 111, 112 (1962)); *accord, e.g., Wilton*, 515 U.S. 277 (recognizing discretionary nature of
6 declaratory relief); *NRDC v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992) (same). The Supreme
7 Court explained in *Wilton* that “a district court is authorized, in the sound exercise of its
8 discretion, to stay or to dismiss an action seeking a declaratory judgment. . . .” 515 U.S. at 288.
9 In doing so, “the district court must balance concerns of judicial administration, comity, and
10 fairness to the litigants.” *Principal Life Ins. Co. v. Robinson*, 394 F.3d at 672 (quoting *Am.*
11 *States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994)) (internal quotations omitted).

12 Here, the Court should exercise its discretion to decline jurisdiction over plaintiff’s FISA-
13 based claims. While either forum would be equally fair to the litigants, considerations of comity
14 and orderly judicial administration weigh in favor of dismissing those claims and requiring
15 plaintiff to bring its challenge to the constitutionality of any orders or directives that may have
16 been issued through the FISC’s legal process before the FISC itself. Proceeding in this manner
17 would be consistent with that statutory framework established by Congress and would provide
18 the litigants the benefit of the FISC’s expertise as a court of specialized jurisdiction.

19 Actions challenging the orders of another court are “disfavored.” *FDIC v. Aaronian*, 93
20 F.3d 636, 639 (9th Cir. 1996). Indeed, the Court of Appeals has instructed that “considerations
21 of comity and orderly administration of justice demand that the nonrendering court should
22 decline jurisdiction of such an action and remand the parties for their relief to the rendering
23 court.” *Lapin*, 333 F.2d at 172; *see also Treadaway v. Academy of Motion Picture Arts &*
24 *Sciences*, 783 F.2d 1418, 1422 (9th Cir. 1986) (“When a court entertains an independent action
25 for relief from the final order of another court, it interferes with and usurps the power of the
26 rendering court just as much as it would if it were reviewing that court’s equitable decree.”).
27 Thus, in *Lapin*, the Court of Appeals affirmed the California district court’s refusal to hear a
28 challenge to an injunction issued by a district court in Minnesota. *See* 333 F.2d at 169. The

1 Court of Appeals concluded that “sound reasons of policy support the proposition that relief
2 should be sought from the issuing court . . . so long as it is apparent that a remedy is available
3 there,” *id.* at 172, and emphasized its agreement that “it is clear, as a matter of comity and of the
4 orderly administration of justice, that [a] court should refuse to exercise its jurisdiction to
5 interfere with the operation of a decree of another federal court” *id.* (quoting *Torquay Corp. v.*
6 *Radio Corp. of Am.*, 2 F. Supp. 841, 844 (S.D.N.Y. 1932)).⁶ *See also Delson Group, Inc. v. GSM*
7 *Ass’n*, 570 Fed. Appx. 690 (9th Cir. Apr. 21, 2014) (relying on *Aaronian, Treadaway, & Lapin*;
8 upholding California district court’s dismissal of a challenge to the judgment of a Georgia
9 district court).

10 The same principles would apply here to any challenge to the alleged application of FISA
11 secrecy obligations. As noted above, although the Complaint refers to “FISA secrecy
12 provisions,” and “requirements in FISA,” *see* Compl. ¶ 18 & Prayer for Relief A(vi) & A(vii), it
13 is most often the FISC itself – or government directives issued through programs approved by
14 the FISC – that impose nondisclosure obligations on recipients of legal process. FISA
15 establishes the contours of such orders and directives, and it is primarily through such orders or
16 directives that plaintiff may be bound to protect the secrecy of surveillance conducted pursuant
17 to FISA authority.

18 For example, the section of FISA that plaintiff highlights in the Complaint, *see* Compl.
19 ¶ 18 (quoting Section 1805(c)(2)(B)), addresses electronic surveillance orders issued under Title
20 I. That provision, in Section 1805(a), enumerates the findings a FISC judge must make before
21 issuing such an order, while Section 1805(c) lists “specifications and directions” for such an
22

23 ⁶ *See also, e.g., Ord v. United States*, 8 Fed. Appx. 852, 854 (9th Cir. May 8, 2001) (affirming
24 the California district court’s refusal to hear a challenge to a District of Columbia district court’s
25 order, and its holding that “if Ord wants to take the D.C. court’s order to task, he should seek
26 relief in the D.C. court. He may not upset the principles of judicial comity, fairness and
27 efficiency that underlie the basic rule against horizontal appeals.”); *Hernandez v. United States*,
28 No. CV 14-00146, 2014 U.S. Dist. LEXIS 116921, at *5–7 (C.D. Cal. Aug. 20, 2014) (declining
jurisdiction, as a matter of comity, over a challenge to a Texas district court’s order); *Zdorek v. V*
Secret Catalogue Inc., No. CV 01-4113, 2001 U.S. Dist. LEXIS 26120, at *17–*18 (C.D. Cal.
Aug. 1, 2001) (declining jurisdiction, as a matter of comity, over a challenge to an Ohio court’s
order).

1 order. As part of that list, Section 1805(c)(2) states that “[a]n order approving an electronic
2 surveillance under this section shall direct”:

3 that, upon the request of the applicant, a specified communication or other
4 common carrier . . . furnish the applicant forthwith all information, facilities, or
5 technical assistance necessary to accomplish the electronic surveillance in such a
6 manner as will protect its secrecy.

7 50 U.S.C. § 1805(c)(2)(B). Thus, if the nondisclosure obligations described by this section apply
8 to plaintiff, they apply through an order that would have been issued to the plaintiff by the FISC.

9 FISA Title IV also requires orders authorizing pen registers and trap and trace devices –
10 like orders issued under Title I – to incorporate requirements that the recipients of such orders
11 “furnish any information, facilities, or technical assistance necessary to accomplish the
12 installation and operation of the pen register or trap and trace device in such a manner as will
13 protect its secrecy.” 50 U.S.C. § 1842(d)(2)(B)(i). Such orders must also require that recipients
14 “not disclose the existence of the investigation or of the pen register or trap and trace device to
15 any person unless or until ordered by the court.” 50 U.S.C. §1842(d)(2)(B)(ii). As with Title I,
16 these nondisclosure obligations, to the extent they are applicable in this case, would also be
17 imposed by the FISC orders, rather than by the statute directly.

18 FISA Title VII – under which the Government may acquire communications of non-U.S.
19 persons located abroad – likewise does not impose a nondisclosure requirement directly on the
20 telecommunications providers from which such communications are acquired. *See* 50 U.S.C. §
21 1881a. Under Section 702’s framework, the Attorney General and the DNI may submit to the
22 FISC a certification that the Government’s proposed procedures fulfill certain enumerated
23 statutory requirements. *See* 50 U.S.C. §1881a(g) & (i). If the FISC approves that certification,⁷
24 the Attorney General and DNI may authorize jointly, for up to one year, the “targeting of persons
25 reasonably believed to be located outside the United States to acquire foreign intelligence
26 information,” *id.* at §1881a(a), and “may direct . . . an electronic communication service provider

27 ⁷ If the Attorney General and DNI determine that exigent circumstances exist, they may authorize
28 collection prior to the FISC’s certification of approval; that authorization must be submitted to
the FISC for its approval within seven days. *See* 50 U.S.C. §1881(g)(1)(B).

1 to” facilitate such acquisition “in a manner that will protect the secrecy of the acquisition.” *Id.* at
2 §1881a(h)(1). Like the FISC orders discussed above, these directives, rather than the statute
3 itself, impose the nondisclosure obligations on the providers that receive them. The FISC’s
4 review of these directives, if they are challenged or if the government moves to compel
5 compliance, is integral to the statute’s structure; indeed, the same section of FISA that introduces
6 Section 702 directives sets forth the framework for the FISC’s review. *See id.* at §1881a(h)
7 (“Directives and judicial review of directives”).

8 In Section 501 of FISA Title V (sometimes referred to as “Section 215”), which sets forth
9 the procedures for obtaining “access to certain business records for foreign intelligence and
10 international terrorism investigations,” *see* 50 U.S.C. §1861, Congress chose to directly impose a
11 nondisclosure obligation. Unlike the other provisions discussed above – where nondisclosure
12 obligations are imposed through the content of the orders or directives – Title V imposes a
13 nondisclosure requirement on the recipients of such orders. *See id.* at §1861(d). But this
14 provision also implicates the FISC’s expertise, and provides specific procedures for the FISC’s
15 expeditious review of its nondisclosure requirements where such review is requested by the
16 recipient of an order. *See id.* at §1861(f). Moreover, such nondisclosure obligations do not arise
17 unless and until the FISC issues an order requiring production, and notifying its recipient of,
18 *inter alia*, the nondisclosure obligations imposed by Section 1861(d). *See id.* at §1861(c).

19 In sum, “FISA secrecy provisions” largely do not impose nondisclosure obligations
20 through their text as the Complaint suggests. Rather, they operate through FISC orders and
21 directives subject to the FISC’s oversight. Accordingly, plaintiff’s challenge to FISA
22 nondisclosure obligations amounts to a challenge of any FISC orders and directives that plaintiff
23 has received. A recipient of FISA legal process, in other words, is enjoined by the FISC (or
24 barred by the government through a process supervised by the FISC) from disclosing
25 information. And just as a party under an injunction in one court cannot normally challenge that
26 injunction elsewhere, *see Lapin*, 333 F.2d at 172, this Court should not permit plaintiff to
27 challenge legal obligations incurred in the FISC. Rather, “as a matter of comity and of the
28

1 orderly administration of justice,” *id.*, plaintiff’s challenge to orders issued by the FISC or
2 directives issued under a FISC-approved program should be brought before the FISC.

3 This approach would be consistent with the framework established by Congress, which
4 created the FISC as a court of specialized jurisdiction to administer the provisions of FISA. *See*
5 50 U.S.C. § 1803. Indeed, for certain provisions, FISA addresses the particular circumstances
6 and proceedings under which such challenges may be brought. A party receiving a production
7 order under Title V’s business records provision, for example, “may challenge the legality of that
8 order by filing a petition with” the FISC. 50 U.S.C. §1861(f)(2)(A)(i). Review of such
9 proceedings must be expeditious, and records must be maintained pursuant to special security
10 measures. 50 U.S.C. §1861(f)(2)(A)(i)-(ii), (f)(4). Likewise, a provider receiving directives
11 from the Government pursuant to section 702 may “file a petition to modify or set aside such
12 directive with the [FISC], which shall have jurisdiction to review such petition.” 50 U.S.C.
13 §1881a(h)(4)(A). A judge on the FISC must conduct an initial review within five days and
14 render a ruling within thirty days. 50 U.S.C. §1881a(h)(4)(D)-(E). Moreover, the FISC, like any
15 other federal court, has “inherent authority . . . to determine or enforce compliance with” its
16 “order[s]” and “rule[s],” and with “procedure[s] approved by [the] court.” 50 U.S.C. § 1803(h).
17 As part of this authority, the FISC can determine the scope of the obligations imposed by its
18 orders or by directives issued pursuant to FISC process, as well as the constitutionality of those
19 orders or directives. *See, e.g., In re Motion for Release of Court Records*, 526 F. Supp. 2d 484,
20 491–97 (F.I.S.C. 2007) (considering whether there is a First Amendment right of access to FISC
21 records).⁸

22 Furthermore, requiring plaintiff to bring its FISA-based claims to the FISC would give
23 the parties the benefit of the FISC’s expertise, both as to the interpretation of its own orders, and
24

25 ⁸ Courts in other contexts have noted that the existence of such alternative proceedings renders
26 deference to an alternative forum with competent jurisdiction particularly appropriate. *See*
27 *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964) (Declaratory relief ordinarily “should not be
28 attack a criminal conviction; rather, the habeas procedures delineated in 28 U.S.C. §§ 2254, 2255
are specifically designed for that purpose).

1 as to the structure of FISA itself. As a general matter, the issuing court “is the best judge of its
2 own orders.” *Avila v. Willits Env'tl. Remediation Trust*, 633 F.3d 828, 836 (9th Cir. 2011).
3 Moreover, as the FISC has observed, “FISA is a statute of unique character,” and, “as a statute
4 addressed entirely to specialists, it must . . . be read by judges with the minds of specialists.” *In*
5 *re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611,
6 615 (F.I.S.C. 2002), *abrogated on other grounds by In re Sealed Case* No. 02-001, 310 F.3d 717
7 (F.I.S.C.R. 2002). The FISC, along with the Foreign Intelligence Surveillance Court of Review,
8 “is the arbiter of FISA’s terms and requirements” and the members of that court develop
9 “specialized knowledge” in the course of their service. *Id.* The FISC’s expertise in the
10 interpretation of both any orders it may have issued and the statutory scheme it administers
11 presents an additional reason why this Court should decline jurisdiction over plaintiff’s FISA-
12 based claims.

13 **III. Plaintiff’s Challenge to the National Security Letter Statutory Standard of** 14 **Review Fails as a Matter of Law.**

15 Plaintiff also challenges the constitutionality of the NSL statute, including the standard of
16 review of an NSL nondisclosure requirement.⁹ Those questions are now before the Ninth Circuit
17 in cases argued in October 2014. *See* Appeal Nos. 13-16732, 13-16731, 13-15957 (9th Cir.).
18 Because the outcome of those cases (which are discussed below) is likely to impact, if not
19 control, the outcome of plaintiff’s NSL-related claims in this case, judicial economy would be
20 served by the Court’s considering those claims after the Court of Appeals has ruled.
21 Nonetheless, the Government is obligated to respond to plaintiff’s Complaint and thus now
22 moves to dismiss plaintiff’s challenge to the NSL statutory standard of review pursuant to Fed.
23 R. Civ. P. 12(b)(6).

24 A reviewing court may modify or set aside an NSL nondisclosure requirement “if it finds
25 that there is no reason to believe that disclosure may” lead to an enumerated harm. 18 U.S.C.
26 § 3511(b)(2). Plaintiff, challenging this provision under the separation-of-powers doctrine,

27 ⁹ Plaintiff’s Complaint does not challenge or contain allegations regarding any particular NSL it
28 may have received, but rather challenges restrictions on disclosure of aggregate data concerning
such NSLs.

1 claims it “impermissibly requires the reviewing court to apply a level of deference to the
2 government’s nondisclosure decisions that conflicts with the constitutionally mandated level of
3 review, which is strict scrutiny.” Compl. ¶ 48. Plaintiff is mistaken, and the Second Circuit has
4 held that this provision may be applied consistent with the Constitution. *See Doe*, 549 F.3d at
5 875-76.

6 Congress routinely and properly mandates deferential standards for judicial review of
7 Executive Branch decisions. The most well-known example is the deferential “arbitrary and
8 capricious” standard of review prescribed by the APA. *See* 5 U.S.C. § 706(2); *Ariz. Cattle*
9 *Growers’ Ass’n v. United States Fish & Wildlife*, 273 F.3d 1229, 1235-36 (9th Cir. 2001) (“The
10 arbitrary and capricious test is a narrow scope of review. . . . The court is not empowered to
11 substitute its judgment for that of the agency.”). *See also, e.g.*, 2 U.S.C. § 1407(d); 7 U.S.C.
12 § 1508(3)(B)(iii)(II); 12 U.S.C. §§ 203(b)(1), 1817(j)(5); 15 U.S.C. § 78l(k)(5). As long as the
13 standard of review is not inconsistent with some substantive constitutional limitation, such as the
14 First Amendment, Congress has plenary authority to decide what standard of judicial review
15 should be employed. And the standard here is consistent with the First Amendment: the federal
16 courts have consistently given deference to reasoned judgments by the Executive Branch
17 regarding the potential harms to national security that may result from disclosures of classified
18 (and even non-classified) information about counterintelligence and counterterrorism programs.
19 *See, e.g., Dep’t of Navy v. Egan*, 484 U.S. 518, 529 (1988); *CIA v. Sims*, 471 U.S. 159, 179
20 (1985); *Center for Nat’l Security Studies v. Dep’t of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003);
21 *McGehee v. Casey*, 718 F.2d 1137, 1147-49 (D.C. Cir. 1983).

22 Nor would the application of strict scrutiny (assuming, *arguendo*, that it applies)
23 preclude judicial deference to executive assessments of national security harms. Indeed, a Court
24 could apply strict scrutiny while complying with the NSL statute. That is what the U.S. Court of
25 Appeals for the Second Circuit did when it applied strict scrutiny to the NSL statute (assuming
26 without deciding that strict scrutiny was the appropriate level of review) and properly avoided
27 any possible constitutional question by interpreting § 3511(b)(2) as requiring the Government “to
28 persuade a district court that there is a good reason to believe that disclosure may risk one of the

1 enumerated harms, and that a district court, in order to maintain a nondisclosure order, must find
 2 that such a good reason exists.” *Doe*, 549 F.3d at 875-76. This Court should follow the Second
 3 Circuit’s reasonable reading of the statutory language, which gives effect to that language while
 4 eliminating constitutional concerns. *See, e.g., United States v. Diaz*, 491 F.3d 1074, 1077 (9th
 5 Cir. 2007) (“reason to believe,” “reasonable belief,” and “reasonable grounds for believing”
 6 bear the same meaning); *United States v. Gorman*, 314 F.3d 1105, 1111 n.4 (9th Cir. 2002)
 7 (same). *Accord Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707 (6th Cir. 2002) (holding
 8 national security-related deportation rule was subject to strict scrutiny while deferring to
 9 Executive Branch judgments about the potential for public disclosures to harm national security:
 10 “we defer to [the government’s] judgment. These agents are certainly in a better position [than
 11 the court] to understand the contours of the investigation and the intelligence capabilities of
 12 terrorist organizations.”).¹⁰

13 In a decision now on appeal, another judge of this Court ruled that the “reason to believe”
 14 standard was not the “searching standard of review” required by the First Amendment, but
 15 provided no authority for that conclusion. *In re NSL*, 930 F. Supp. 2d 1064, 1077 (N.D. Cal.
 16 2013) (Illston, J.), *appeal docketed*, No. 13-15957 (9th Cir.).¹¹ The *In re NSL* Court

17 _____
 18 ¹⁰ Indeed, it bears noting that adherence to a deferential standard of review like the one Congress
 19 prescribed in § 3511(b) does not compel courts to abdicate their institutional responsibilities
 under Article III:

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

24 *Center for Nat’l Security Studies*, 331 F.3d at 932. The same reasoning applies here.

25 ¹¹ Judge Illston subsequently found the statute to be lawfully applied and issued orders to enforce
 26 multiple NSLs issued to multiple electronic communications service providers. *See In re Matter*
 27 *of NSLs*, Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce, No.
 13cv1165-SI (N.D. Cal. August 12, 2013) (enforcing 2 NSLs), *appeal docketed*, No. 13-16732
 28 (9th Cir.); *In re Matter of NSLs*, Order Denying Petition to Set Aside, Denying Motion to Stay,
 and Granting Cross-Petition to Enforce, No. 13mc80089-SI (N.D. Cal. August 12, 2013)

1 acknowledged that the Second Circuit’s construction of the judicial review provision “might be
 2 less objectionable,” 930 F. Supp. 2d at 1078, but nonetheless adopted a reading of the provision
 3 which, in its view, rendered the statute unconstitutional.¹² It did so by assuming that Congress
 4 had an unconstitutional intent in enacting the statute, namely “to circumscribe a court’s ability to
 5 modify or set aside nondisclosure NSLs unless the essentially insurmountable standard ‘no
 6 reason to believe’ that a harm ‘may’ result is satisfied.” *Id.* at 1077.

7 The Government respectfully submits that the *In re NSL* Court erred in starting with that
 8 premise. The doctrine of constitutional avoidance “assumes that Congress, no less than the
 9 Judicial Branch, seeks to act within constitutional bounds, and thereby diminishes the friction
 10 between the branches that judicial holdings of unconstitutionality might otherwise generate.”
 11 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 565-66 (2009); *accord Jones v. United*
 12 *States*, 526 U.S. 227, 240 (1999) (courts assume that Congress legislates in light of constitutional
 13 limitations). This doctrine is particularly apt here because it would have been unreasonable for

14
 15 (enforcing 2 NSLs), *appeal docketed*, No. 13-16731 (9th Cir.); *In re NSLs*, Order Denying
 16 Petition to Set Aside and Granting Cross-Petition to Enforce, No. 13mc80063-SI (N.D. Cal. May
 17 28, 2013) (Amended Order for Public Release enforcing 17 NSLs); *In re NSLs*, Order, No.
 18 13mc80063-SI (N.D. Cal. May 23, 2013) (enforcing 2 NSLs).

19 ¹² The *In re NSL* Court also faulted § 3511(b)(2) (as did the Second Circuit in *Doe*) for making
 20 certifications by senior officials regarding certain potential harms “conclusive” in judicial
 21 proceedings in the absence of bad faith. 930 F. Supp. 2d at 1077. The *In re NSL* Court
 22 mischaracterized the statute, however, as making *any* FBI certification regarding any of the
 23 statutorily enumerated harms conclusive, and therefore assumed that the certifications at issue
 24 there were conclusive under the statute. *See id.* But, in fact, the statute provides that
 25 certifications for FBI-issued NSLs are conclusive *only* if made by “the Attorney General, Deputy
 26 Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of
 27 Investigation” and only if they state “that disclosure may endanger the national security of the
 28 United States or interfere with diplomatic relations.” 18 U.S.C. § 3511(b)(2). Certifications by
 other Government officials, and certifications relating to other statutorily enumerated harms
 (such as “interference with a criminal, counterterrorism, or counterintelligence investigation,” 18
 U.S.C. § 2709(c)(1)), are not “conclusive” under the statute. There is no allegation that such a
 certification is at issue here, or even that there has ever been such a certification. Accordingly,
 the validity of this statutory provision is irrelevant to this case. Twitter does not appear to have
 challenged it by its Complaint and, in any event, would lack standing to do so. *See, e.g., Get*
Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 892 (9th Cir. 2007) (overbreadth standing
 requires that party challenging statute be subject to the specific statutory provision being
 challenged); *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 554 (9th Cir. 2003) (same).

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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 _____)
TWITTER, INC.,) Case No. 14-cv-4480
16)
Plaintiff,)
17)
v.)
18)
ERIC H. HOLDER, United States)
19 Attorney General, *et al.*,) **[PROPOSED] ORDER**
20)
Defendants.)
21 _____)

22
23
24
25 The Court, having considered the defendants' Partial Motion to Dismiss, the plaintiff's
26 opposition, and any reply thereto, IT IS HEREBY ORDERED, that the defendants' Partial
27
28

1 Motion to Dismiss is GRANTED. The plaintiff's claims contained in Paragraphs 44, 48, 49 and
2 50 of the Complaint shall be and hereby are dismissed.

3

4 **AND IT IS SO ORDERED.**

5

6

7 Dated: _____

HON. YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

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18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN FRANCISCO DIVISION

21 TWITTER, INC.,

22 Plaintiff,

23 v.

24 ERIC H. HOLDER, JR., Attorney General
 25 of the United States, *et al.*,

26 Defendants.

Case No. 14-cv-04480-YGR

**PLAINTIFF’S OPPOSITION TO
 PARTIAL MOTION TO DISMISS**

Date: March 10, 2015
 Time: 2:00 p.m.
 Courtroom 1, Fourth Floor
 Hon. Yvonne Gonzalez Rogers

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INTRODUCTION

1
2 In this lawsuit, Twitter challenges the rules that the government has imposed on Twitter's
3 ability to speak about the number and various kinds of national security related demands for
4 information it may have received. The terms of government-approved speech are set out in a
5 January 27, 2014, letter from Deputy Attorney General James M. Cole to five Internet companies
6 (not including Twitter) that was offered to settle claims brought by those companies (the "DAG
7 Letter"). Twitter seeks a declaration that the DAG Letter is invalid under the Administrative
8 Procedure Act ("APA") and the First Amendment, as well as a declaration that the statutes
9 defendants contend restrict Twitter's speech about national security process violate the First
10 Amendment both on their face and as applied to Twitter. The First Amendment violation is
11 particularly significant with regard to restrictions on Twitter's ability to say "zero," that is, to
12 truthfully deny receipt of *any* national security legal process, or of specific *kinds* of national
13 security legal process. In addition, Twitter seeks an injunction prohibiting the government from
14 enforcing the terms of the DAG Letter against Twitter.

15 The government has now filed a partial motion to dismiss. That motion is noteworthy for
16 what it does *not* say as much as for what it says.

17 *First*, the government does not argue that the promulgation of the DAG Letter satisfied the
18 procedural requirements of the APA; rather, it argues only that the Court should not consider
19 Twitter's APA challenge because, it says, the DAG Letter does not constitute final agency action.
20 In fact, the DAG Letter is final, and therefore reviewable, because the government has repeatedly
21 treated it—including in this case—and described it as prescribing binding legal norms. At a
22 minimum, there are serious factual questions as to exactly what sort of legal directive the DAG
23 Letter is and how the government has treated it, and those questions preclude dismissal at this
24 stage, before Twitter has had an opportunity to take any discovery.

25 *Second*, the government does not argue that the nondisclosure provisions of the Foreign
26 Intelligence Surveillance Act ("FISA") are constitutional facially or as applied; rather, it argues
27 that the Court should decline to rule on that question, and that Twitter should pursue that part of
28 its claim in the Foreign Intelligence Surveillance Court ("FISC"). But the FISC does not have

1 exclusive jurisdiction to consider constitutional issues arising from FISA; such issues are
2 routinely considered in district courts; the FISC cannot afford the same relief as Twitter seeks
3 here; and the uneven playing field in the FISC would give the government enormous advantages
4 over Twitter that, at the same time, would serve to further limit Twitter's ability to speak. Further,
5 the interests of judicial economy and comity would not be served by splitting closely related
6 claims and having them proceed, on separate tracks, in this Court and in the FISC.

7 *Third*, the government does not argue that the nondisclosure provisions in the national
8 security letter ("NSL") statute are constitutional as applied to Twitter, or even that Twitter's facial
9 challenge to that statute should be rejected; rather, it urges the Court to defer the portion of
10 Twitter's facial challenge that is based on the standard of review prescribed in the statute or to
11 dismiss this portion of Twitter's case. But there is no reason to rule on one part of Twitter's facial
12 challenge now while leaving the rest of it to be litigated later, and in any event, the government
13 fails to show that the statute can be reconciled with the First Amendment.

14 *Fourth*, the government does not even mention Twitter's claims that it is unlawfully and
15 unconstitutionally restricted from reporting receipt of "zero" aggregate NSLs or FISA orders, or
16 zero of a particular kind of FISA order. Rather, the government limits its argument to restrictions
17 that relate to actual national security legal process.

18 The partial motion to dismiss should be denied in its entirety.

19 **STATEMENT**

20 **A. Statutory background**

21 This case involves two statutes that the government uses to conduct surveillance in
22 national security investigations.

23 FISA permits the government to seek court-ordered real-time surveillance or disclosure of
24 stored user records from a communications service provider. Several different statutes restrict the
25 ability of a provider to disclose information about a FISA order it has received. FISA itself
26 requires that a recipient of a court order provide the government with "all information, facilities,
27 or technical assistance necessary to accomplish the electronic surveillance *in such a manner as*
28 *will protect its secrecy.*" 50 U.S.C. § 1805(c)(2)(B) (emphasis added). In addition, the Espionage

1 Act, 18 U.S.C. § 793, criminalizes unauthorized disclosures of national defense information under
2 certain circumstances. Those statutes do not contain a prohibition on a company's disclosing that
3 it has *not* received a FISA order or a specific kind of FISA order.

4 Under 18 U.S.C. § 2709, the FBI Director may issue an NSL to a provider, compelling the
5 provider to disclose "subscriber information and toll billing records information" upon a
6 certification that the information sought "is relevant to an authorized investigation to protect
7 against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(a), (b)(1).
8 Section 2709(c) authorizes the FBI Director to prohibit the recipient of an NSL from "disclos[ing]
9 to any person (other than those to whom such disclosure is necessary to comply with the request
10 or an attorney to obtain legal advice or legal assistance with respect to the request) that the
11 Federal Bureau of Investigation has sought or obtained access to information or records" by
12 means of an NSL. 18 U.S.C. § 2709(c)(1). A person who violates an NSL nondisclosure order
13 may be subject to criminal penalties. 18 U.S.C. §§ 793, 1510(e). Section 2709 does not contain a
14 prohibition on a company's disclosing that it has *not* received an NSL.

15 **B. The DAG Letter**

16 The government's approved disclosure framework is set forth in the DAG Letter, which
17 was issued and filed with the FISC on January 27, 2014, contemporaneously with the stipulated
18 dismissal without prejudice of a lawsuit brought by five Internet companies (not including
19 Twitter) seeking to disclose more information about the total number of FISA- and NSL-related
20 requests they receive. In return for the companies' dismissal of the FISC action, the government
21 agreed that the companies could publish information about national security surveillance of their
22 networks in one of two preapproved disclosure formats set out in the DAG Letter. When it
23 informed the FISC of this deal, the government stated that the DAG Letter "define[s] the limits of
24 permissible reporting for the parties and other similarly situated companies." Compl., Ex. 2.

25 Under option one, a provider may report, in bands of 1000 starting with 0-999, the
26 numbers of NSLs received, customer accounts affected by those NSLs, FISA orders for content,
27 customer selectors targeted under those orders, FISA orders for non-content, and customer
28 selectors targeted under those non-content orders. Compl., Ex. 1. The starting point of zero, rather

1 than one, is significant because it means that a provider may not disclose that it has *not* received
2 any of the specified kinds of process, nor may it disclose that it has received at least one of those
3 kinds of process (unless it has received 1000 or more).

4 Under option two, a provider may use smaller reporting bands of 250, again starting at
5 zero (*e.g.*, 0-249). Compl., Ex. 1. But if it chooses option two, a provider may report only the total
6 number of all national security process received, without distinguishing among NSLs, FISA
7 orders for content, and FISA orders for non-content. It may similarly report the total number of
8 all customer selectors targeted under national security process, again without distinguishing
9 among the different types of process.

10 **C. Twitter’s efforts to provide transparency**

11 Twitter seeks to give its users meaningful information—beyond that permitted by the
12 DAG Letter—about the degree of government surveillance on its network. On April 1, 2014,
13 Twitter submitted to the government a draft transparency report containing information and
14 discussion about the aggregate numbers of NSLs and FISA orders it received in the second half of
15 2013.¹ Twitter requested “a determination as to exactly which, if any, parts of its Transparency
16 Report are classified or, in the [government’s] view, may not lawfully be published online.”
17 Compl., Ex. 3. Five months later, on September 9, 2014, the government informed Twitter that
18 “information contained in the report is classified and cannot be publicly released” because it does
19 not comply with the government’s approved framework for reporting data about FISA orders and
20 NSLs. Compl., Ex. 5. The government refused to identify what specific language in the draft
21 transparency report could or could not be disclosed. Twitter filed this lawsuit on October 7, 2014.
22 Six weeks later, on November 17, 2014, the government prepared a redacted version of the draft
23 transparency report that it said could be publicly released. Dkt. No. 21.

24 The government filed its Partial Motion to Dismiss on January 9, 2015, arguing that
25 Twitter failed to state a claim upon which relief can be granted for its (1) APA claim and (2)
26 facial challenge to the NSL statute concerning the statutory standard of review. The government
27

28 ¹ References in this brief to NSLs and FISA orders should not be taken to confirm (or deny) that
Twitter has received any NSLs or FISA orders.

1 did not argue that Twitter failed to state a claim with regard to its facial and as-applied challenges
2 to FISA (the government is merely asking the Court to transfer those claims to the FISC), its
3 facial challenge to the NSL statute as a prior restraint on speech, or its as-applied challenge to the
4 NSL statute. The government asked the Court to delay adjudication of Twitter’s facial challenges
5 to the NSL statute until the Ninth Circuit ruled on unrelated NSL cases currently on appeal.

6 STANDARD OF REVIEW

7 On a motion to dismiss, the Court must “accept as true the factual allegations in the
8 complaint and construe those allegations in the light most favorable to the nonmoving party.” *Ctr.*
9 *for Cmty. Action & Env’tl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1022-23 (9th Cir. 2014). “To
10 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,
11 to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
12 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The grant of a motion to
13 dismiss is appropriate only “where there is either a lack of a cognizable legal theory or the
14 absence of sufficient facts alleged under a cognizable legal claim.” *Hinds Invs., L.P. v. Angioli*,
15 654 F.3d 846, 850 (9th Cir. 2011).

16 ARGUMENT

17 A. The complaint states a claim under the APA

18 A major issue in this case is whether the DAG Letter constitutes a substantive “rule”
19 under the APA. If it does, it is invalid: the APA imposes procedural requirements on agencies
20 seeking to adopt rules, and there is no dispute that the government did not follow those
21 procedures in promulgating the DAG Letter. *See* 5 U.S.C. § 553. The government does not
22 address that issue but instead argues (PMTD 10-13) that the DAG Letter is not subject to judicial
23 review because it is not “final agency action.” That argument lacks merit.

24 There is no dispute that the DAG Letter constitutes an “agency action” as that term is
25 defined in the APA, so the only question here is whether that action is “final.” *See* 5 U.S.C.
26 § 551(13); *Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012). An agency action is “final” if (1) it
27 “mark[s] the consummation of the agency’s decisionmaking process” and (2) it is “one by which
28 rights or obligations have been determined, or from which legal consequences will flow.” *Bennett*

1 v. *Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). The
2 government does not appear to question that the first requirement is satisfied—that is, it does not
3 suggest that the DAG Letter is “of a merely tentative or interlocutory nature.” *Id.* at 178. Instead,
4 it focuses on the second requirement, arguing (PMTD 11) that the DAG Letter is purely an
5 “advisory statement[]” that does not “impose[] new rights or obligations.” That argument is
6 contradicted by the government’s own statements about the DAG Letter, which demonstrate that
7 the government views the DAG Letter as legally binding.

8 “[T]he finality inquiry is a pragmatic and flexible one,” and the label that an agency
9 chooses to attach to its action is not determinative. *Nat’l Ass’n of Home Builders v. U.S. Army*
10 *Corps of Eng’rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (internal quotation marks and citation
11 omitted). The government emphasizes (PMTD 11) that, on its face, the DAG Letter “does not
12 purport to restrain plaintiff’s behavior in any way” but merely “provides guidelines as to
13 *permissible* disclosures.” Not so. By its terms, the DAG Letter “memorializes the new and
14 additional ways in which the government will permit [providers] to report data concerning
15 requests for customer information.” Compl., Ex. 5. The necessary implication is that the
16 government does *not* permit other ways of reporting data; it would make no sense to say that
17 providers “may” say some things if there were no prohibition on saying other things. That
18 implication is made explicit in the body of the DAG Letter, which sets out “two”—and only
19 two—“alternative ways in which companies may inform their customers about requests for data.”
20 *Id.* If a provider selects option one, which allows reporting the numbers of various different types
21 of process in bands of 1000, it must wait two years before including data relating to a platform or
22 service that has not previously been subject to process, and it is expressly prohibited from
23 “confirming or denying that it has received such new capability orders.” *Id.* In short, the DAG
24 Letter reads like a binding rule— “[i]t commands, it requires, it orders, it dictates.” *Appalachian*
25 *Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

26 Even if the binding nature of the DAG Letter were not apparent on its face, “an agency
27 pronouncement will be considered binding as a practical matter if it . . . is applied by the agency
28 in a way that indicates it is binding.” *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002);

1 *see Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Courts have “looked to
2 post-guidance events to determine whether the agency has applied the guidance as if it were
3 binding on regulated parties.”). The government’s actions have made clear that the government
4 regards the DAG Letter as setting out the limits of permissible disclosure. Significantly, those
5 limits are prescribed nowhere else (such as in a statute, executive order, or regulation). In this
6 case, for example, the government informed Twitter that “the information contained in” Twitter’s
7 draft transparency report “is classified and cannot be publicly released.” Compl., Ex. 5. That
8 conclusion—that the speech in which Twitter wishes to engage “cannot be publicly released”—is
9 based entirely on the DAG Letter. The government cited no other legal authority, evidently
10 deeming it sufficient to point out that the draft transparency report would “go beyond what the
11 government has permitted other companies to report” under the DAG Letter. *Id.* That reasoning
12 demonstrates that the DAG Letter is not merely a general statement of policy, for as the D.C.
13 Circuit has explained, when the government applies a policy statement ““in a particular situation,
14 it must be prepared to support the policy just as if the policy statement had never been issued,””
15 something it evidently is not prepared to do here. *Nat'l Mining Ass'n*, 758 F.3d at 253 (quoting
16 *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

17 Similarly, in a letter the government submitted to the Ninth Circuit in *In re National*
18 *Security Letter*, the government relied on the DAG Letter to explain what disclosures a provider
19 may and may not make about NSLs. Letter from Jonathan H. Levy, U.S. Dep’t of Justice, Civil
20 Div., Appellate Staff, to Molly C. Dwyer, Clerk of Court, *In re Nat'l Sec. Letter*, No. 13-15957
21 (9th Cir. Nov. 6, 2014). In that letter, the government explained that “[t]he fact that a company
22 may disclose that it has received 0-249 national security processes or 0-999 NSLs in a given
23 period does not, by itself, allow that company to disclose that it has actually received one or more
24 NSLs; the lower end of these bands was set at 0, rather than 1, in order to avoid such disclosures.”
25 *Id.* at 2. But the DAG Letter would not “avoid such disclosures” unless it prohibited those
26 disclosures that it does not allow.

27 The government’s treatment of providers who have received zero NSLs or FISA orders or
28 zero of a particular *kind* of FISA order is particularly significant evidence that the government

1 treats the DAG Letter as prescribing a binding legal rule. If a provider of email service has *never*
2 received an NSL or FISA order, under the DAG Letter, that provider is prohibited from stating
3 publicly, “We have never received an NSL or FISA order.” The government has never explained
4 how the NSL and FISA statutes or any order of the FISC could be construed to prohibit a
5 provider that has *not* received an NSL or FISA order, or a particular kind of FISA order, from
6 publicly revealing that fact. Yet the government takes the position that providers are prohibited
7 from revealing that they have received zero such orders. That prohibition is stated explicitly in the
8 DAG Letter, which sets the lower ends of the permissible reporting bands at zero, not one, but it
9 is found nowhere else.

10 The DAG Letter and the government’s public statements about it sufficiently support
11 Twitter’s view that the DAG Letter is a “final agency action” that this Court may properly review
12 in connection with Twitter’s APA claim. But even if that were not the case, at a minimum, there
13 is a serious question whether the government is treating the DAG Letter as prescribing binding
14 legal norms, rather than merely setting out advisory guidance. In answering that question, the
15 Court will have to examine the circumstances under which the DAG Letter was adopted—that the
16 DAG Letter was promulgated to settle litigation aimed at clarifying the legal rights of providers is
17 at least some evidence that the government views it as prescribing binding legal norms. In
18 addition, the Court will have to examine “post-guidance events,” such as the government’s
19 application of the DAG Letter to Twitter and other providers and the government’s treatment of
20 the DAG Letter in other contexts. *Nat’l Mining Ass’n*, 758 F.3d at 253. The Court should not
21 decide the issue on a motion to dismiss before Twitter has had any opportunity for discovery into
22 those factual questions. *See Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at *17
23 (N.D. Cal. Mar. 2, 2005) (examining “[f]actual information yielded through discovery” in
24 assessing the finality of agency action).

25 For similar reasons, the Court should reject the government’s suggestion (PMTD 12-13)
26 that Twitter lacks standing, a suggestion that is largely derivative of the government’s argument
27 that the DAG Letter lacks legal effect. The government’s reliance on the DAG Letter in its refusal
28 to allow Twitter to publish its draft transparency report makes clear that Twitter’s injury is

1 directly traceable to the DAG Letter. Nor is it correct, as the government argues (PMTD 13), that
2 the prohibition on publication of classified information means that “[a] declaratory judgment
3 directed at the DAG Letter would . . . not redress any injury.” The classification decision on
4 which the government relies is itself a product of the DAG Letter, so a determination that the
5 government violated the APA in issuing the DAG Letter would provide meaningful relief.

6 **B. This Court should adjudicate Twitter’s claims based on FISA**

7 The government does not dispute that this Court has subject-matter jurisdiction over
8 Twitter’s FISA claims. *See* 28 U.S.C. § 1331. Nor does it dispute that the Northern District of
9 California is an appropriate venue for this action. *See* 28 U.S.C. § 1391(b). Nor does it argue that
10 this Court could not fairly adjudicate these claims. Instead, it argues (PMTD 14) that “this Court
11 should decline to exercise its jurisdiction over” Twitter’s challenge to the prohibition on
12 disclosing aggregate information about the number of FISA orders it receives, if any, because that
13 challenge “should properly be brought before the FISC.” That argument lacks merit.

14 **1. Twitter’s challenge to FISA is not limited to orders issued by the FISC**

15 The premise of the government’s argument (PMTD 14) is that Twitter’s “challenge to
16 ‘FISA secrecy provisions’ amounts to a challenge to FISC orders and to directives issued
17 pursuant to a FISC-approved program.” That premise is incorrect.

18 Twitter’s complaint challenges “Defendants’ refusal to allow Twitter to publish
19 information about its exposure to national security surveillance that does not conform to either of
20 the two preapproved formats set forth in the DAG Letter.” Compl. ¶ 43. It alleges that “[t]he
21 FISA statute, the Espionage Act, and other nondisclosure authorities do not prohibit service
22 providers like Twitter from disclosing aggregate information about the number of FISA orders
23 they receive.” Compl. ¶ 49. And it argues that, “[t]o the extent that the Defendants read FISA
24 secrecy provisions, such as 50 U.S.C. § 1805(c)(2)(B), as prohibiting Twitter from publishing
25 information about the aggregate number of FISA orders it receives, . . . the FISA secrecy
26 provisions are unconstitutional.” *Id.*

27 As the complaint thus makes clear, this case is about the government’s position that the
28 DAG Letter and related national security statutes restrict the disclosure of aggregate information

1 about FISA orders; it is not about secrecy provisions in FISA orders themselves. In the portion of
2 its motion addressing NSLs (PMTD 20 n.9), the government appears to understand that fact,
3 noting that the complaint “does not challenge or contain allegations regarding any particular NSL
4 it may have received, but rather challenges restrictions on disclosure of aggregate data concerning
5 such NSLs.” That is equally true of the complaint’s treatment of FISA orders, so the
6 government’s premise that Twitter is challenging FISC orders and directives issued as part of a
7 FISC-approved program is wrong. Indeed, the complaint does not even allege that Twitter has
8 received any FISA orders. *See* Compl. ¶ 43 (noting that Twitter is prohibited “from publishing
9 facts that reveal *whether* and the extent to which *it may have received* one or more . . . court
10 orders pursuant to FISA”) (emphasis added).

11 Although the government argues that all FISA nondisclosure obligations are the product
12 of FISC orders, it concedes (PMTD 18) that FISA itself imposes nondisclosure obligations
13 directly on the recipients of an important class of FISA orders—those requiring “[a]ccess to
14 certain business records for foreign intelligence and international terrorism investigations.” 50
15 U.S.C. § 1861. And the government does not deny that it construes the Espionage Act to bar at
16 least some FISA-related disclosures, independent of anything in a FISC order. Nor does the
17 government dispute that the DAG Letter categorically prohibits the disclosure of aggregate
18 information about FISC orders except under the two approved disclosure methods. In short, this
19 case involves a challenge to disclosure prohibitions that are not the product of any single FISC
20 order.

21 **2. The FISC is not an appropriate forum for considering Twitter’s claims**

22 The government does not suggest that this Court is prohibited from or incapable of
23 adjudicating Twitter’s claims related to FISA. To the contrary, it concedes (PMTD 15) that
24 “either forum”—that is, this Court or the FISC—“would be equally fair to the litigants.” But it
25 suggests (PMTD 19-20) that the FISC would be a superior forum because of its “expertise” and
26 “specialized knowledge.” In fact, the FISC is not an appropriate forum for hearing this case.

27 The FISC was created by statute in 1978 and afforded limited jurisdiction to issue orders
28 authorizing surveillance or searches under FISA. *See* 50 U.S.C. § 1803; David S. Kris & J.

1 Douglas Wilson, 1 *National Security Investigations & Prosecutions* § 5:2, at 128 (2d ed. 2012). It
2 does not have authority to issue a declaratory order or an injunction such as that sought here. The
3 government cites no authority suggesting otherwise. Accordingly, the relief that Twitter seeks,
4 and that this Court is authorized to grant, is not available in the FISC.

5 The government neglects to mention a number of advantages that the FISC would afford
6 the government. The FISC is a nonpublic court, with certain recent exceptions for public filing of
7 pleadings and other documents, that offers no ability for the public or any nonparty to view FISC
8 proceedings. The FISC offers far greater opportunity than a district court for *ex parte* and
9 classified hearings that are closed to any party but the government. And the government would
10 enjoy significant advantage from its familiarity with the court, judges, and procedures that could
11 not be reproduced by private litigants and their counsel.

12 Of course, the FISC does have an inherent “supervisory power over its own records and
13 files.” *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (F.I.S.C. 2007)
14 (internal quotation marks and citation omitted). But that authority would not allow the FISC to
15 enter the relief Twitter seeks in this case because, as explained above, the challenged prohibition
16 on Twitter’s speech comes from the DAG Letter and federal statutes, not just FISA orders. More
17 importantly, that aspect of the FISC’s authority is not exclusive. To the contrary, in *In re Orders*
18 *of this Court Interpreting Section 215 of the PATRIOT Act* (“*In re Orders*”), No. Misc. 13-02
19 (F.I.S.C. Sept. 13, 2013), the FISC held that *a federal district court* was the appropriate forum to
20 decide whether to disclose FISC opinions. In that case, the ACLU had previously filed a Freedom
21 of Information Act (“FOIA”) lawsuit in the United States District Court for the Southern District
22 of New York, seeking disclosure of FISC opinions relating to Section 215 of the USA PATRIOT
23 Act. *ACLU v. FBI*, No. 11 Civ. 7562 (S.D.N.Y.). When the ACLU subsequently filed a motion in
24 the FISC for the release of the opinions, the FISC held that “as a matter of comity, and in order to
25 conserve judicial resources and avoid inconsistent judgments,” it would defer to the District Court
26 for the Southern District of New York. *In re Orders*, No. Misc. 13-02, slip op. at 13. Specifically,
27 the FISC noted that “[t]he present motion . . . asks the FISC to do the same thing that the ACLU
28 is asking the District Court in New York to do in the FOIA litigation: ensure that the opinions are

1 disclosed, with only properly classified information withheld. Having both courts proceed poses
2 the risks of duplication of effort and inconsistent outcomes that the first-to-file rule is intended to
3 avoid.” *Id.* at 15. Nowhere in its opinion did the FISC suggest that it was better suited, because of
4 its “expertise” or “specialized knowledge,” to handle the issue.

5 Similarly, in *In re Motion for Consent to Disclosure of Court Records or, in the*
6 *Alternative, a Determination of the Effect of the Court’s Rules on Statutory Access Rights*, No.
7 Misc. 13-01 (F.I.S.C. June 12, 2013), a FOIA requestor had sought the disclosure of FISC records
8 in the government’s possession. In litigation in the United States District Court for the District of
9 Columbia, the government argued that the rules of the FISC prohibited the disclosure of a certain
10 FISC opinion. The requestor then sought relief from the FISC, which held that its rules would not
11 prohibit the government’s disclosure of the subject FISC opinion in the event it was determined
12 by the district court to be subject to disclosure under FOIA. Again, nowhere in the opinion did the
13 FISC intimate that the FISC would be better suited, because of its expertise or specialized
14 knowledge, to handle any request for the disclosure of FISC records.

15 Conversely, district courts routinely review the legality of orders entered by the FISC as
16 well as the government’s compliance with those orders. For example, whenever the government
17 uses FISA-derived evidence in a criminal proceeding, 50 U.S.C. § 1806(e) permits the target of
18 the surveillance to “move to suppress the evidence obtained or derived from such electronic
19 surveillance [in a district court] on the grounds that . . . (1) the information was unlawfully
20 acquired; or (2) the surveillance was not made in conformity with an order of authorization or
21 approval.” And outside the suppression context, district courts have heard challenges to FISA and
22 to orders issued under it. *See, e.g., Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013)
23 (declaratory judgment action filed in federal district court challenging constitutionality of FISA
24 Amendments Act of 2008); *ACLU v. Clapper*, No. 14-42 (2d Cir. argued Sept. 2, 2014)
25 (declaratory judgment action arguing that National Security Agency telephony metadata program
26 exceeds statutory authority under FISA and violates the Fourth Amendment); *Klayman v. Obama*,
27 No. 14-5004 (D.C. Cir. argued Nov. 4, 2014); *cf. Elec. Frontier Found. v. Dep’t of Justice*, No.
28

1 4:11-cv-05221-YGR (N.D. Cal. Aug. 11, 2014) (FOIA litigation involving FISC orders and
2 related documents). There is no reason for a different result here.

3 **3. The interests of judicial economy would not be served by splitting Twitter's**
4 **claims between this Court and the FISC**

5 Ordinarily, a litigant who believes that a case has been brought in the wrong forum will
6 seek a transfer under 28 U.S.C. § 1404 or 1631. The government has not sought a transfer here,
7 and with good reason: it concedes that many of the issues in this case are appropriate for
8 resolution in this Court. The government does not seek to have this *entire* case heard by the FISC;
9 instead, it seeks to bifurcate the case, so that part of it is heard in this Court and part of it is heard
10 by the FISC. Given the close relationship between the issues the government seeks to have sent to
11 the FISC and those it seeks to have resolved here, such bifurcation would create the possibility of
12 inconsistent adjudication, and it would ill-serve the interests of judicial economy.

13 The government argues (PMTD 14-15) that the Declaratory Judgment Act confers
14 discretion on this Court. That is true, but the government cites no authority for the proposition
15 that it would be appropriate to exercise that discretion by hearing part of a case while leaving
16 another part to be heard in a different forum. Nor does the government address the portion of the
17 complaint that seeks an injunction against the enforcement of the DAG Letter and related statutes
18 against Twitter. Compl. at 17. The Court does not have discretion simply to ignore an allegation
19 that ongoing governmental activity violates the Constitution and justifies an injunction, and none
20 of the cases cited by the government establishes otherwise.

21 **C. The complaint states a claim that the NSL statute is facially unconstitutional**

22 The government asks the Court (PMTD 20) “to dismiss plaintiff’s challenge to the NSL
23 statutory standard of review.” It does not take issue with Twitter’s as-applied challenge to NSL
24 nondisclosure requirements, nor does it seek dismissal of the entirety of Twitter’s facial challenge
25 to the statute. Instead, it invites the Court to rule that the statute satisfies the standard of review
26 required by the First Amendment. The Court should decline the invitation.

1 **1. The Court should not stay this litigation to await the Ninth Circuit’s decision**
2 **in *In re National Security Letter***

3 The government suggests—but does not quite say explicitly—that the Court should
4 decline to consider Twitter’s claims related to NSLs while it waits for the Ninth Circuit to rule on
5 *In re National Security Letter*, 930 F. Supp. 2d 1064, 1077 (N.D. Cal. 2013), *appeal pending*, No.
6 13-15957 (9th Cir. argued Oct. 8, 2014), in which Judge Illston concluded that the NSL statute
7 violates the First Amendment. The government does not expressly ask this Court for a stay
8 pending the Ninth Circuit’s decision, but it suggests (PMTD 20) that “[b]ecause the outcome of
9 those cases . . . is likely to impact, if not control, the outcome of plaintiff’s NSL-related claims in
10 this case, judicial economy would be served by the Court’s considering those claims after the
11 Court of Appeals has ruled.” It is unclear precisely what relief the government is seeking, but
12 staying this litigation or otherwise deferring consideration of Twitter’s claims is unwarranted.

13 Although the Ninth Circuit is indeed considering issues similar to some of those presented
14 here, the Supreme Court has observed that “[o]nly in rare circumstances will a litigant in one
15 cause be compelled to stand aside while a litigant in another settles the rule of law that will define
16 the rights of both.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Instead, before district
17 courts may exercise their “discretionary power to stay proceedings,” they must consider “the
18 possible damage which may result from the granting of a stay, the hardship or inequity which a
19 party may suffer in being required to go forward, and the orderly course of justice measured in
20 terms of the simplifying or complicating of issues, proof, and questions of law which could be
21 expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109-10 (9th Cir. 2005)
22 (internal quotation marks and citation omitted).

23 Here, deferring consideration of all or part of Twitter’s First Amendment claim would
24 result in significant harm because the complaint alleges an ongoing deprivation of Twitter’s First
25 Amendment rights, and it seeks declaratory and injunctive relief to remedy that deprivation. *See,*
26 *e.g., Lockyer*, 398 F.3d at 1112 (recognizing that delay is particularly harmful to a party
27 “seek[ing] injunctive relief against ongoing and future harm”). And the potential for delay is
28 significant: *In re National Security Letter* is a complex case presenting novel constitutional

1 issues, and the losing party may well file petitions for rehearing en banc and for certiorari once
2 the panel issues its decision. Most importantly, the government has offered no reason beyond
3 judicial economy for why this claim should not move forward. The Ninth Circuit will not
4 necessarily decide *In re National Security Letter* in a way that resolves this case, so the benefits to
5 judicial economy from waiting are doubtful. But in any event, “while it is the prerogative of the
6 district court to manage its workload, case management standing alone is not necessarily a
7 sufficient ground to stay proceedings.” *Dependable Highway Express, Inc. v. Navigators Ins. Co.*,
8 498 F.3d 1059, 1066 (9th Cir. 2007). Nor has the government identified any harm it will suffer
9 from litigating this issue while awaiting the Ninth Circuit’s decision. *See Lockyer*, 398 F.3d at
10 1112.

11 **2. The Court should not evaluate Twitter’s challenge to the NSL statute in the**
12 **piecemeal fashion that the government suggests**

13 As noted, the government has not sought dismissal of all of Twitter’s challenges to the
14 NSL statute. It does not, for example, seek dismissal of as-applied challenges to NSL
15 nondisclosure requirements. PMTD 24 n.13. And it does not even seek dismissal of all facial
16 challenges to that statute, focusing only on the argument that the statute calls for overly
17 deferential review of a nondisclosure requirement in an NSL. But that is just one of the arguments
18 that Twitter intends to present. The statute is also unconstitutional because it imposes a prior
19 restraint on speech and does not provide the procedural safeguards required for prior restraints. It
20 makes little sense to disaggregate the standard-of-review argument from those other closely
21 related arguments. For example, because the procedural requirements for a prior restraint include
22 the availability of expeditious judicial review, *see Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321
23 (2002), the Court could reasonably conclude that the statute is invalid based on some combination
24 of its procedural infirmities and the overly deferential review that it prescribes. Since the
25 government concedes that at least some components of the facial challenge to the statute should
26 go forward, there is nothing to be gained from ruling certain arguments in support of that
27 challenge out of bounds at this early stage of the litigation.
28

1 **3. The NSL statute violates the First Amendment because it fails to satisfy strict**
2 **scrutiny**

3 Under 18 U.S.C. § 2709, the FBI Director has the authority to issue an NSL that not only
4 orders a communications service provider to turn over information about its customers but also
5 prohibits the provider from speaking about the NSL. The government errs in arguing that the
6 statute can survive First Amendment scrutiny.

7 a. Section 2709 is invalid on its face because an NSL nondisclosure requirement is a prior
8 restraint, and the government cannot satisfy the demanding substantive standards for a prior
9 restraint. In *Alexander v. United States*, 509 U.S. 544, 550 (1993), the Supreme Court explained
10 that “[t]he term prior restraint is used to describe administrative and judicial orders forbidding
11 certain communications when issued in advance of the time that such communications are to
12 occur.” (Emphasis, internal quotation marks, and citation omitted). Section 2709(c) provides for
13 just such administrative orders. Specifically, the statute authorizes the FBI Director or his
14 designee to prohibit the recipient of an NSL from “disclos[ing] to any person (other than those to
15 whom such disclosure is necessary to comply with the request or an attorney to obtain legal
16 advice or legal assistance with respect to the request) that the Federal Bureau of Investigation has
17 sought or obtained access to information or records” by means of an NSL. 18 U.S.C.
18 § 2709(c)(1). Under the statute, a party who receives such an NSL containing a nondisclosure
19 requirement and who wishes to speak about an NSL must litigate the validity of the nondisclosure
20 requirement before speaking. 18 U.S.C. § 3511(b)(1). In other words, while the prior-restraint
21 doctrine recognizes that “a free society prefers to punish the few who abuse rights of speech *after*
22 they break the law than to throttle them and all others beforehand,” *Se. Promotions, Ltd. v.*
23 *Conrad*, 420 U.S. 546, 559 (1975) (emphasis added), Section 2709(c) does the exact opposite.

24 The prior-restraint regime created by Section 2709(c) is particularly troubling because the
25 restraints on speech are issued by an Executive Branch official, not by a court. The Supreme
26 Court has observed that “[b]ecause the censor’s business is to censor, there inheres the danger
27 that he may well be less responsive than a court—part of an independent branch of government—
28 to the constitutionally protected interests in free expression.” *Freedman v. Maryland*, 380 U.S.

1 51, 57-58 (1965). That danger is especially acute in this context because the official who decides
2 whether to restrain speech is the same official whose conduct—that is, the issuance of an NSL—
3 would be the subject of the speech, creating the risk that a gag order will be used to conceal
4 government overreaching.

5 The nature of Section 2709(c)'s prior-restraint regime is illustrated by the government's
6 conduct leading to this litigation. When several large providers sought to be more transparent
7 with their users in describing government requests for data, they had to engage in extensive
8 negotiations with the government *before* they could speak; ultimately, the government directed
9 them to disclose only the information permitted by the DAG Letter. When Twitter sought to
10 provide additional information, the government decreed that the information in Twitter's draft
11 transparency report "cannot be publicly released"—again, *before* Twitter could speak. A regime
12 in which parties who wish to speak about government surveillance requests must first obtain the
13 government's permission, or file a complaint challenging the government's conduct, cannot
14 plausibly be described as anything other than a regime of prior restraint.

15 "Any system of prior restraints of expression," the Supreme Court has held, is subject to
16 "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372
17 U.S. 58, 70 (1963); *see New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart,
18 J., concurring); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). The government
19 makes no effort to show that the statute could survive the substantive scrutiny accompanying
20 prior restraints, and it cannot.

21 b. Even if the statute is not viewed as a prior-restraint regime, it at least imposes a content-
22 based restriction on speech and is therefore subject to strict scrutiny, which it cannot survive.
23 Section 2709(c)(1) prohibits the recipient of an NSL from disclosing "that the Federal Bureau of
24 Investigation has sought or obtained access to information or records." Determining whether
25 speech by the recipient falls within the statute's prohibition requires examining the content of that
26 speech. If the speech is about the fact "that the Federal Bureau of Investigation has sought or
27 obtained access to information or records," it is unlawful; if it is about something else, it is not. In
28 other words, the applicability of the prohibition turns on the content of the speech. *In re Nat'l Sec.*

1 Letter, 930 F. Supp. 2d at 1071. Because “it is the content of the speech that determines whether
2 it is” prohibited, the statute is content-based. *Carey v. Brown*, 447 U.S. 455, 462 (1980).

3 As a content-based restriction on speech, Section 2709 is invalid unless the government
4 “can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling
5 government interest and is narrowly drawn to serve that interest.” *Brown v. Entm’t Merchants*
6 *Ass’n*, 131 S. Ct. 2729, 2738 (2011). The narrow-tailoring component of the test requires the
7 government to show that there are no “less restrictive alternatives [that] would be at least as
8 effective in achieving the legitimate purpose that the statute was enacted to serve.” *Reno v.*
9 *ACLU*, 521 U.S. 844, 874 (1997).

10 There is no doubt that the government has a compelling interest in protecting national
11 security. *Haig v. Agee*, 453 U.S. 280, 307 (1981). Nor is there any dispute, as the government
12 points out (PMTD 21), that the government’s predictive judgments about potential harms to
13 national security are entitled to some measure of deference. Section 2709(c), however, is not
14 narrowly tailored to promote the government’s interest in national security. Moreover, because
15 NSLs are not ordinarily classified, the statute is not narrowly tailored to any interest the
16 government may have in preventing the dissemination of classified information to unauthorized
17 persons. The statute permits the FBI Director to prohibit disclosure whenever he finds that “there
18 may result a danger to the national security of the United States, interference with a criminal,
19 counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or
20 danger to the life or physical safety of any person.” 18 U.S.C. 2709(c)(1). That language falls
21 short of narrow tailoring in two respects.

22 First, the statute is satisfied whenever the FBI Director says that the specified harms
23 “may” occur. That imposes hardly any limit at all, as the word “may” requires only a mere
24 possibility. *See Black’s Law Dictionary* 1068 (9th ed. 2009) (defining “may” as “[t]o be a
25 possibility”). Narrow tailoring requires more. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988)
26 (narrow tailoring is satisfied “only if each activity within the proscription’s scope is an
27 appropriately targeted evil”); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“Broad prophylactic
28 rules in the area of free expression are suspect.”); *accord In re Nat’l Sec. Letter*, 930 F. Supp. 2d

1 at 1077-78.

2 Second, the enumerated harms in the statute cover far more than harm to national security.
3 For example, “interference with a criminal . . . investigation” could refer to even minor
4 interference with an investigation of a misdemeanor offense having nothing to do with national
5 security. Similarly, as the Second Circuit observed in *Doe, Inc. v. Mukasey*, 549 F.3d 861, 874
6 (2d Cir. 2008), the “danger to the . . . physical safety of any person” clause “could extend the
7 Government’s power to impose secrecy to a broad range of information relevant to such matters
8 as ordinary tortious conduct.”

9 c. The government relies heavily (PMTD 21-24) on the Second Circuit’s decision in *Doe*,
10 but its reliance is misplaced. Having correctly identified the constitutional problems posed by
11 Section 2709(c)’s broad language, the court in *Doe* mistakenly concluded that they could be
12 avoided by reading the statute to require that there be “an adequate demonstration that a good
13 reason exists reasonably to apprehend a risk of an enumerated harm,” 549 F.3d at 882, and that
14 the harm be “related to ‘an authorized investigation to protect against international terrorism or
15 clandestine intelligence activities,’” *id.* at 875 (quoting 18 U.S.C. § 2709(b)(1)). Although that
16 reading mitigates the First Amendment problems to some degree, it cannot be reconciled with the
17 statutory text. *See Miller v. French*, 530 U.S. 327, 341 (2000) (“We cannot press statutory
18 construction to the point of disingenuous evasion even to avoid a constitutional question.”)
19 (internal quotation marks and citation omitted).

20 In any event, even assuming that the broad statutory language could be read in such a
21 limited way, the Second Circuit’s standard, which appears to be akin to the reasonable-suspicion
22 standard of the Fourth Amendment, is not sufficient when strict scrutiny is applicable. To be sure,
23 a prohibition on speech might satisfy strict scrutiny if there were “a good reason . . . reasonably to
24 apprehend a risk” of a very serious harm from the speech. But even as rewritten by the Second
25 Circuit, the statute does not require that the harm be serious—or even more than *de minimis*—
26 only that it be somehow related to a terrorism investigation. That is, it permits speech to be
27 suppressed upon a determination that there is a risk that it might lead to some kind of
28 “interference with [an] investigation” that is in some way related to terrorism, no matter how

1 minimal the interference may be. The statute is not narrowly tailored to promote the interest of
2 national security.

3 d. The highly restrictive nature of Section 2709(c) provides additional reason to conclude
4 that it cannot be the least restrictive means of achieving the government’s asserted objective. *See*
5 *Reno*, 521 U.S. at 874. The statute prohibits speech on matters of vital public concern: the
6 government’s exercise of coercive authority against recipients—or potential recipients—of NSLs.
7 *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about
8 interpretations of the First Amendment, there is practically universal agreement that a major
9 purpose of that Amendment was to protect the free discussion of governmental affairs.”).

10 The public interest in the speech that Section 2709(c) prohibits is highlighted by the
11 government’s many disclosures about its use of NSLs. The government’s use of its authority
12 under the NSL statute is a matter of significant public debate, and the government has engaged in
13 that debate by defending its use of the statute. *See, e.g., Peter Baker & Charlie Savage, Obama*
14 *Seeks Balance in Plan for Spy Programs*, N.Y. Times, Jan. 9, 2014 (FBI Director James Comey
15 described the NSL statute as “a very important tool that is essential to the work we do”). Some
16 NSL recipients may agree that the government has used the statute appropriately; others may not.
17 Some, like Twitter, while not seeking to disclose individual NSLs they received, have a strong
18 commitment to transparency and want their users to know in the aggregate how many such
19 demands they receive and the number of accounts affected. Together with the DAG Letter, which
20 allows providers to engage only in speech approved by the government, the nondisclosure
21 provisions impermissibly suppress the speech of those who might be best positioned to offer an
22 informed perspective on the government’s position. The First Amendment does not permit the
23 government to engage in viewpoint discrimination by silencing key participants in a debate about
24 the government’s activities. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

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CONCLUSION

The partial motion to dismiss should be denied.

DATED: February 6, 2015

Respectfully submitted,

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18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN FRANCISCO DIVISION

21 TWITTER, INC.,

Case No. 14-cv-04480-YGR

22 Plaintiff,

**[PROPOSED] ORDER DENYING
 DEFENDANTS' PARTIAL MOTION TO
 DISMISS**

23 v.

24 ERIC H. HOLDER, JR., Attorney General
 of the United States, *et al.*,

25 Defendants.

26 The Court, having considered the defendants' Partial Motion to Dismiss, the plaintiff's
 27 opposition, any reply, and any other filing in support or opposition of the Partial Motion to
 28 Dismiss, IT IS HEREBY ORDERED that the defendants' Partial Motion to Dismiss is DENIED
 in its entirety.

IT IS SO ORDERED.

DATED: _____

 HON. YVONNE GONZALEZ ROGERS
 UNITED STATES DISTRICT JUDGE

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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 TWITTER, INC.,

13 Plaintiff,

14 v.

15 ERIC H. HOLDER, JR., Attorney General
16 of the United States, et al.,

17 Defendants.
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27
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CASE NO. 14-cv-04480-YGR

**REQUEST OF THE REPORTERS
COMMITTEE FOR FREEDOM OF THE
PRESS FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S PARTIAL MOTION TO
DISMISS AND BRIEF *AMICUS CURIAE***

Date: March 31, 2015
Time: 2:00 p.m.
Courtroom 1, Fourth Floor
Hon. Yvonne Gonzales Rogers

REQUEST FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1
2 The Reporters Committee for Freedom of the Press (“Reporters Committee”) hereby
3 requests permission to file the attached *amicus curiae* brief in support of Twitter, Inc.’s (“Twitter”)
4 Opposition to Defendants’ Partial Motion to Dismiss this action. The brief of the Reporters
5 Committee will assist the Court in resolving a key issue raised by Defendants (hereinafter the
6 “Government”): whether this Court should decline to exercise its jurisdiction over Twitter’s claims.
7

8 The Reporters Committee is a voluntary, unincorporated association of reporters and editors
9 dedicated to safeguarding the First Amendment rights and freedom of information interests of the
10 news media and the public. The Reporters Committee has provided assistance, guidance, and
11 research in First Amendment and freedom of information litigation since 1970. The Reporters
12 Committee writes separately to highlight the practical consequences for the public’s First
13 Amendment and common law rights of access to court proceedings and documents should this
14 Court decline to exercise its jurisdiction in this case. This issue, which is not fully addressed in the
15 parties’ briefs, is of critical importance to the press and the public, and will inform this Court’s
16 decision on the Government’s Motion. Accordingly, the Reporters Committee respectfully requests
17 leave to file the attached *amicus* brief. The Reporters Committee has informed the parties of its
18 intent to submit the attached *amicus* brief. Twitter has consented to its filing. The Government
19 takes no position on the Reporters Committee’s request for leave to file the attached *amicus* brief.
20

21 Dated: February 17, 2015

22 Respectfully submitted,

23 /s/ Katie Townsend

24 Katie Townsend

25 *Counsel for Amicus Curiae*

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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 TWITTER, INC.,

13 Plaintiff,

14 v.

15 ERIC H. HOLDER, JR., Attorney General
16 of the United States, et al.,

17 Defendants.
18
19
20

CASE NO. 14-cv-04480-YGR

**BRIEF *AMICUS CURIAE* OF THE
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT
OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S PARTIAL MOTION TO
DISMISS**

Date: March 31, 2015
Time: 2:00 p.m.
Courtroom 1, Fourth Floor
Hon. Yvonne Gonzales Rogers

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INTRODUCTION

1
2 The complaint filed by Twitter, Inc. (“Twitter”) does not seek to challenge a specific order
3 issued under the Foreign Intelligence Surveillance Act (“FISA”) or a specific National Security
4 Letter (“NSL”). Rather, Twitter contests governmental restrictions on its ability to disclose the
5 *number* of such orders or NSLs that it receives—even if that number is zero. Defendants
6 (hereinafter, the “Government”) have moved to dismiss in part for lack of subject matter jurisdiction
7 and argue that Twitter’s constitutional challenge to FISA nondisclosure obligations should be heard
8 before the Foreign Intelligence Surveillance Court (“FISC”). Defs.’ Partial Mot. to Dismiss at 13.

9
10 The Reporters Committee for Freedom of the Press (“Reporters Committee”) agrees with
11 the arguments asserted by Twitter in opposition to the Government’s motion. The Reporters
12 Committee writes separately to highlight the adverse practical impact that an order consigning
13 Twitter’s claim for declaratory relief to the FISC will have on the press and the public and to
14 emphasize the importance of ensuring that this case and others like it, which present issues of great
15 public interest and concern, are argued and decided in open judicial proceedings.

16
17 The public’s constitutional and common law rights of access to court proceedings and
18 documents serve as the foundation for public acceptance of the legitimacy and credibility of judicial
19 institutions. While these rights have long been recognized as belonging to the public at large, the
20 news media often necessarily acts as a proxy for the general public, playing an “indispensable
21 representative role in gathering and disseminating to the public current information on trials.”
22 *Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1292 (9th Cir. 1986); *see also*
23 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (stating that news media “enjoy
24 the same right of access as the general public”). The Government’s contention that this Court ought
25 to decline to exercise its jurisdiction over Twitter’s declaratory judgment cause of action should be
26 rejected, not only because exercising jurisdiction over this case is proper, but also because requiring
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1 Twitter’s claims to be adjudicated by the FISC would undercut the public’s rights of access to court
2 proceedings and documents.

3 Instead of recognizing the presumptive right of access to court proceedings and documents
4 under the First Amendment and the common law, the FISC has forced individual members of the
5 press and the public seeking access to its documents and proceedings to show that they have a
6 different, and greater, interest in access than the public at large in order to even have standing to
7 pursue a claim. *See, e.g.*, Op. and Order Granting Mot. for Reconsideration, *In re Orders of This*
8 *Court Interpreting Section 215 of the PATRIOT Act (“In re Section 215 Orders”)*, Misc. 13-02
9 (FISA Ct. Aug. 7, 2014), *available at* <http://perma.cc/X4U5-PUCC>. The Government is well aware
10 of the FISC’s refusal to recognize the full thrust of the public’s presumptive right of access, because
11 the Government has previously argued—in closed proceedings—that the public has no such right
12 with respect to FISC documents. *See* discussion *infra* at II.A. The public’s constitutional right of
13 access to proceedings and documents in this case—which is of substantial public interest and,
14 indeed, implicates the public’s First Amendment right to receive information from a willing
15 speaker—would be unacceptably harmed if only the FISC, which operates largely behind closed
16 doors and without public scrutiny, could hear Twitter’s claims.
17
18

19 **INTEREST OF AMICUS CURIAE¹**

20 The Reporters Committee is a voluntary, unincorporated association of reporters and editors
21 dedicated to safeguarding the First Amendment rights and freedom of information interests of the
22 news media and the public. The Reporters Committee has provided assistance, guidance, and
23 research in First Amendment and freedom of information litigation since 1970. The Reporters
24 Committee frequently represents the interests of the press and the public before Article III courts by
25 pressing for access and by educating the public about how the judicial system operates. The
26 _____
27

28 ¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

1 Reporters Committee is concerned that, should this Court decline to exercise jurisdiction to hear this
2 case, it would unacceptably restrict the ability of the press and the public to access court
3 proceedings and court documents in this case.

4 ARGUMENT

5 **I. The press and the public have a First Amendment and common law right to access** 6 **court proceedings and documents.**

7 It is well established that civil court proceedings are presumptively open to the public and
8 the press. Indeed, as the Supreme Court has stated, “[w]hat transpires in the courtroom is public
9 property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947). This presumption of access is grounded in
10 both tradition and necessity. “[H]istorically both civil and criminal trials have been presumptively
11 open.” *Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17. And such openness serves important
12 values. *See, e.g., Press-Enterprise Co. v. Superior Court of Cal., Riverside County* (“*Press-*
13 *Enterprise I*”), 464 U.S. 501, 508 (1984) (noting that access “gives assurance that established
14 procedures are being followed and that deviations will become known”). As a result, courts
15 considering access claims founded on the First Amendment must also consider “whether public
16 access plays a significant positive role in the functioning of the particular process in question.”
17 *Press-Enterprise Co. v. Superior Court of Cal., Riverside County* (“*Press-Enterprise II*”), 478 U.S.
18 1, 8 (1986). The Ninth Circuit recognizes that the public’s right of access to civil proceedings and
19 documents is of constitutional dimension. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 787
20 (9th Cir. 2014). (finding that plaintiff’s right of access claim to documents filed in civil cases
21 implicates “fundamental First Amendment interests”).

22 “Because courtroom space is inherently limited, and because the public is dispersed, the
23 media plays an indispensable representative role in gathering and disseminating to the public
24 current information on trials.” *Valley Broad. Co.*, 798 F.2d at 1292; *see also Richmond*
25 *Newspapers, Inc.*, 448 U.S. at 573 (stating that “while media representatives enjoy the same right of
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1 access as the public,” they often function as “surrogates” for public participation). Despite this
2 special role, “[t]he First Amendment generally grants the press no right to information about a trial
3 superior to that of the general public.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610
4 (1978) (emphasis added). Thus, although the news media often leads the fight for public access to
5 court proceedings and records, the right of access inheres in the public at large, and the interests at
6 stake can be vindicated by any member of the public.

8 Unsurprisingly, the leading Supreme Court authorities addressing the public’s right of
9 access to judicial proceedings and documents—*Nixon v. Warner Communications, Inc.*, 435 U.S.
10 589 (1978), *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), *Richmond Newspapers*, 448
11 U.S. 555, *Press-Enterprise I*, 464 U.S. 501 (1984), and *Press-Enterprise II*, 478 U.S. 1 (1986)—do
12 not limit that right to a certain type of claimant, but rather ground it in the historical importance of
13 open courts and the necessity of public scrutiny of the legal system. *See Globe Newspaper Co. v.*
14 *Superior Court*, 457 U.S. 596, 606 (1982) (“Public scrutiny of a criminal trial enhances the quality
15 and safeguards the integrity of the factfinding process.”).

17 Courts in the Ninth Circuit “start with a strong presumption in favor of access to court
18 records” and proceedings. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.
19 2003); *see also Leigh v. Salazar*, 677 F.3d 892, 900–901 (9th Cir. 2012) (remanding to district court
20 to analyze whether the First Amendment right of access applies to “horse gathers”). Although this
21 strong presumption may be overcome given “sufficiently compelling reasons,” a court is required to
22 take into account, among other things, “the public interest in understanding the judicial process”
23 when resolving an access claim. *Id.* The importance of considering the public interest in a judicial
24 record or document is rooted in the vital role that transparency and public oversight plays in
25 keeping government accountable. Thus, when CBS, Inc. sought access to judicial records in a post-
26 conviction criminal proceeding, the Ninth Circuit found that access was constitutionally required, in
27
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1 part, because “[t]he penal structure is the least visible, least understood, least effective part of the
2 justice system; and each such failure is consequent from the others.” *CBS, Inc. v. United States*
3 *Dist. Court*, 765 F.2d 823, 826 (9th Cir. 1985).

4 Open court proceedings date back “beyond reliable historical records.” *Richmond*
5 *Newspapers, Inc.*, 448 U.S. at 564. In *Richmond Newspapers*, the Supreme Court examined at
6 length the history of open trials and the importance of such openness to the public. As the Court
7 concluded, “People in an open society do not demand infallibility from their institutions, but it is
8 difficult for them to accept what they are prohibited from observing.” *Id.* at 572. Rather than being
9 based on some specialized interest belonging to the claimant before it—a newspaper company—the
10 Court in *Richmond Newspapers* grounded the First Amendment right of access to criminal
11 proceedings in the importance of public oversight as a larger democratic value and a check on
12 government power. Openness, the Court stated, gives “assurance that the proceedings were
13 conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and
14 decisions based on secret bias or partiality.” *Id.* at 569 (citations omitted).

17 Similarly, *Nixon v. Warner Communications*, the seminal Supreme Court case recognizing a
18 common law right of public access to court documents, makes clear that the right of access is not
19 conditional “on a proprietary interest in the document or upon a need for it as evidence in a
20 lawsuit.” *Nixon*, 435 U.S. at 598 (citations and footnotes omitted). At issue in *Nixon* was access to
21 audio tapes of President Nixon used during a trial of Watergate conspirators. Although Warner
22 Communications, the entity seeking access to the tapes, was a media organization, *Nixon*’s
23 recognition that a “citizen’s desire to keep a watchful eye on the workings of public agencies”
24 underlies the right of access makes clear that the right does not belong to the press alone, but rather
25 to all citizens. *Id.*

1 **II. In both its approach to standing and its substantive rulings on access, the FISC has**
2 **failed to follow the requirements of the First Amendment and common law.**

3 Against the backdrop of this long-recognized right of the public to observe the civil and
4 criminal cases that come before its courts, the Government’s argument that this Court should
5 decline to exercise jurisdiction over Twitter’s First Amendment claims is particularly concerning
6 because the FISC, unlike this Court, is largely shielded from public view. As set forth below, FISC
7 hearings are not open to the public, and the FISC generally moves slowly to release documents, if
8 indeed they are released at all.²

9 As Twitter and the other *amici* demonstrate, Twitter’s desire to disseminate the documents
10 and core information at issue in this case—namely, the number of national security requests Twitter
11 receives—is a matter of intense public interest. Twitter’s most recent Transparency Report, which
12 it was forced to release in redacted form and is at the center of this litigation, has garnered extensive
13 news coverage. *See, e.g., Twitter sees surge in government requests for data*, BBC.com (Feb. 10,
14 2015), www.bbc.com/news/technology-31358194; Mike Isaac, *Twitter Reports a Surge in*
15 *Government Data Requests*, N.Y. Times Bits Blog (Feb. 9, 2015, 10:00 AM),
16 <http://nyti.ms/1IDbXVe>. The fact that a company has *not* received national security requests is also
17 of public interest. A few weeks ago, Reddit, an internet company, issued its first transparency
18 report, stating that it had never received a national security request; that fact also captured public
19 attention and attracted news coverage. *See* Mike Isaac, *Reddit Issues First Transparency Report*,
20 N.Y. Times Bits Blog (Jan. 29, 2015, 1:00 P.M.), <http://nyti.ms/1CQ2Yeu>. While Twitter’s First
21 Amendment right to disseminate this information is violated by the restraints at issue in this case,
22 the First Amendment rights of the press and the public to “receive information and ideas” are also
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26 _____
27 ² Moreover, since Twitter is challenging the Government’s position that it may not disclose the number of FISA orders
28 it has issued, *even if that number is zero*, it is perverse for the Government to try to force Twitter to litigate— in the
secrecy of the FISC— a secrecy obligation that arises in the *absence* of a FISA order. *See* Pl.’s Opp. to Def.’s Partial
Mot. to Dismiss at 9–10.

1 implicated when Twitter is barred from disclosing this information. *Kleindienst v. Mandel*, 408
2 U.S. 753, 762–63 (1972) (summarizing cases in which the Supreme Court had referred to a
3 listener’s First Amendment right to “receive information”).

4
5 **A. The Government has repeatedly urged the FISC not to recognize the
6 presumption of public access to proceedings and documents.**

7 While the issues raised by Twitter in this case and the information it wishes to disclose are
8 of substantial public concern, FISC proceedings and documents remain, as a practical matter,
9 shrouded in secrecy. For example, when recipients of FISA directives dispute the constitutionality
10 of those directives or any secrecy obligations derived therefrom, the public and the press are barred
11 from attending those proceedings, and are often unaware that any dispute is taking place at all
12 because FISA requires FISC proceedings to occur *ex parte*. *See, e.g.*, 50 U.S.C. §§ 1805(a),
13 1824(a), 1842(d)(1) & 1861(c)(1) (providing for *ex parte* proceedings).

14 In November 2007, Yahoo! made a request to the FISC to declare unconstitutional directives
15 issued to it under the Protect America Act of 2007, the predecessor to the FISA Amendments Act of
16 2008. Yahoo! Inc.’s Mem. In Opp. to Mot. to Compel, *In re Directives to Yahoo! Inc. Pursuant to*
17 *Section 105B of the Foreign Intelligence Surveillance Act* (“*In re Directives*”), No. 105B(g) 07-01
18 (FISA Ct., Nov. 30, 2007), *available at* <http://bit.ly/1CiJw8J>. The directives compelled Yahoo! to
19 provide the government with the contents of communications of persons reasonably believed to be
20 outside the United States. *Id.* at 4. Yahoo! challenged the constitutionality of the directives under
21 the Fourth Amendment. *Id.* The FISC denied Yahoo!’s request to set aside the directives, and
22 granted the government’s motion to compel compliance. Mem. Op., *In re Directives*, No. 105B(g)
23 07-01 (FISA Ct., Apr. 25, 2008). Yahoo! then appealed to the Foreign Intelligence Surveillance
24 Court of Review (“FISCR”). Br. of Yahoo!, *Yahoo! v. United States*, No. 08-01, at 2–3 (FISA Ct.
25 Rev. May 29, 2008), *available at* <http://bit.ly/1AhmZKj>. In August 2008, the FISCR denied
26 Yahoo!’s appeal and found that the directives satisfied the Fourth Amendment. *In re Directives*,

1 551 F.3d 1004 (FISA Ct. Rev. 2008), *available at* <http://bit.ly/1DfANW8>. A redacted copy of that
2 appellate decision, which omitted Yahoo!’s name, was published later that year.

3 At the time, the Government strongly opposed the exercise of the right of public access to
4 FISC proceedings and filings. In 2007, according to a published FISC opinion, when the ACLU
5 filed a motion seeking release of documents related to electronic surveillance, the government
6 argued, in its sealed filing, that “there is no right of public access to these records.” *In re Mot. for*
7 *Release of Court Records*, 526 F. Supp. 484, 485–86 (FISA Ct. 2007) (citing the government’s
8 response to the ACLU’s motion). Indeed, the Government continued to take that position in later
9 litigation as well. In June 2013, the ACLU, this time along with the Media Freedom and
10 Information Access Clinic at Yale Law School (MFIAC), again sought access to FISC decisions.
11 *Mot. for Release of Court Records, In re Section 215 Orders*, Misc. 13-02 (FISA Ct. June 12,
12 2013). In its opposition to the motion, the Government argued that while it intended to unilaterally
13 declassify documents, that intention “does not suggest that this Court should recognize a broad-
14 based constitutional right” of public access to FISC decisions. *Opp. to Mot. for Release of Court*
15 *Records at 12, In re Section 215 Orders*, Misc. 13-02 (FISA Ct. July 5, 2013).

16 Also in June 2013, nearly five years after the FISC issued its decision in its case, Yahoo!
17 filed an unclassified motion for publication of the 2007 FISC decision finding that the directives did
18 not violate the Fourth Amendment. *Provider’s Unclassified Mot., In re Directives*, No. 105B(g) 07-
19 01 (June 14, 2013), *available at* <http://1.usa.gov/1DYhSO3>. In response to that motion, the
20 Government took a different tack than it did in the second ACLU case. Citing the “strong
21 presumption in favor of public access to judicial proceedings,” the Government agreed that the
22 decision should be published and that Yahoo!’s name was no longer classified “and may be released
23 immediately.” *Reply in Supp. of Yahoo!’s Mot., In re Directives*, No. 105B(g) 07-01 (July 9,
24 2013), *available at* <http://1.usa.gov/1vhlFkC>. To be clear, just four days after the Government
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1 opposed the mere recognition of the right of access in *In re Section 215 Orders*, it argued in favor of
2 a “strong presumption” in *In re Directives*. The Government then undertook a lengthy
3 declassification review of the docket in the Yahoo! case. The public became aware of Yahoo!’s
4 efforts only in 2014. *See Yahoo v. U.S. PRISM Documents*, Center for Democracy and Technology
5 (Sept. 12, 2014), <http://bit.ly/1r0KtyB> (providing documents from Yahoo!’s 2008 FISC litigation).
6

7 The Yahoo! litigation illustrates the ways that the public would suffer if Twitter were
8 permitted to pursue its First Amendment claims only before the FISC. The Government’s
9 willingness to take wholly inconsistent positions on the very *existence* of a presumptive right of
10 access to FISC proceedings and documents suggests that, in any case where the Government
11 perceives public scrutiny to be undesirable, it will view the FISC as a more attractive venue and
12 give public access rights the back of its hand. *Compare* Reply in Supp. of Yahoo!’s Mot., *In re*
13 *Directives*, No. 105B(g) 07-01 (July 9, 2013), *available at* <http://1.usa.gov/1vhlFkC> (citing a
14 “strong presumption in favor of public access”) *with* Opp. to Mot. for Release of Court Records at
15 12, *In re Section 215 Orders*, Misc. 13-02 (FISA Ct. July 5, 2013) (“[T]his Court should conclude
16 that there is no First Amendment right of access to the requested materials.”).
17

18 Indeed, while the FISC has a track record of maintaining complete secrecy during the
19 pendency of actions, as well as for years afterward, the efficacy of the public right of access as a
20 check on government depends in large part on it being a *contemporaneous* right,. *See In re Oliver*,
21 333 U.S. 257, 270 (1948) (“The knowledge that every criminal trial is subject to *contemporaneous*
22 review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”)
23 (emphasis added); *see also Associated Press v. United States Dist. Ct.*, 705 F.2d 1143, 1147 (9th
24 Cir. 1983) (holding that even a 48-hour delay in unsealing judicial records is a “total restraint on the
25 public's first amendment right of access”). Particularly in light of the Government’s fickle and
26 opportunistic treatment of the right of access when it comes to the FISC, the Government’s
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1 argument that only the FISC should hear Twitter's claims warrants close scrutiny from this Court.
2 The practical secrecy surrounding the FISC could effectively deny the press and public access to
3 information about this case.

4 **B. The FISC requires individuals to meet an unduly high threshold to establish**
5 **standing to assert a First Amendment right of access.**

6 If history is any guide, the litigation of constitutional rights in the FISC is no more open to
7 public access and participation than any of the other matters litigated before the FISC. Despite the
8 Government's eventual pivot in the Yahoo! litigation toward a broad presumption in favor of public
9 access, the FISC has embraced a shrunken standard for public claims of access that strays widely
10 from the high standard Article III courts apply to comport with the requirements of the First
11 Amendment.
12

13 The FISC requires claimants to establish that they have standing to make an access claim by
14 showing that they have "suffered an injury that is concrete, particularized, and actual or imminent;
15 fairly traceable to the challenged action; and redressable by a favorable ruling." Op. and Order
16 Granting Mot. for Reconsideration 2, *In re Section 215 Orders*, Misc. 13-02 (FISA Ct. Aug. 7,
17 2014), *available at* <http://perma.cc/X4U5-PUCC>. Yet, the Supreme Court does not demand a
18 showing of a particularized injury before determining a claim based on a public right of access, and
19 for good reason: the right belongs to the public, and any harm is suffered by the public as well as
20 the individual asserting the access right. As a result, the mere fact of exclusion is enough to
21 establish standing to assert a right of access. *See, e.g., Sacramento Bee v. United States Dist. Ct.*,
22 656 F.2d 477, 480 (9th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982) (finding that newspaper "has
23 standing because it was excluded from a criminal trial and was inhibited from reporting news").
24 Nevertheless, the FISC has adopted a narrower standard, impeding public access as a result.
25
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27 In 2013, the FISC *sua sponte* applied this narrower standard in *In re Section 215 Orders* to
28 find that the MFIAC lacked standing to pursue its access claim for release of selected opinions of

1 the FISC. The FISC found that “MFIAC has submitted no information as to how the release of the
2 opinions would aid its activities, or how the failure to release them would be detrimental.” Op. and
3 Order 9 n.13, *In re Section 215 Orders*, Misc. 13-02 (FISA Ct. Sept. 13, 2013), *available at*
4 <http://1.usa.gov/1mjrwx3>. MFIAC petitioned for reconsideration, which the FISC granted, though
5 it did not alter the applicable test. Op. and Order Granting Mot. for Reconsideration, *In re Section*
6 *215 Orders*, Misc. 13-02 (FISA Ct. Aug. 7, 2014).

8 On reconsideration, the FISC concluded that “the principles of Article III standing require
9 examination of whether a lack of public access to the opinion in question will actually have a
10 particular negative effect on MFIAC’s ongoing or planned activities, or whether in some other way
11 it had suffered (or imminently stood to suffer) a concrete and particularized injury in fact, beyond a
12 simple lack of access to the opinion.” Op. and Order Granting Mot. for Reconsideration, *In re*
13 *Section 215 Orders*, Misc. 13-02 (FISA Ct. Aug. 7, 2014). While the FISC ultimately decided to
14 “exercise its discretion” to accept additional evidence proffered by MFIAC attesting to its activities
15 and the harm it suffered through lack of access to the records in question, and granted standing to
16 MFIAC, this inquiry is a radical departure from the standing requirements in access cases.

18 The FISC’s determination that standing to assert a right of access to court proceedings and
19 documents depends on an individual, particularized injury that is distinct from the injury suffered by
20 the public more generally runs counter to the basic premise of the public access doctrine: that the
21 right of access inheres in the public at large. Because the right belongs to any and all members of
22 the public, requiring an individual to show an injury traceable to the harm of withholding access
23 that is distinct or different from the injury to the general public makes it difficult, if not impossible,
24 to establish standing. Yet the FISC has found the fact that “all members of the American public can
25 say that they are being denied access to the opinion at issue and assert the same claimed right of
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1 public access that MFIAC has” a stumbling block to finding that MFIAC had standing to assert the
2 right of public access to filings in the FISC. *Id.* at 7.

3 This reluctance to grant standing to citizens asserting a right of public access contravenes
4 basic First Amendment principles, which dictate that the denial of information at the heart of
5 democratic process is a sufficient harm to establish standing. *See Broadrick v. Oklahoma*, 413 U.S.
6 601, 611–12 (1973) (explaining that because the First Amendment requires “breathing space,”
7 standing rules are relaxed in constitutional challenges of state action, and litigants can sue for
8 violations of others’ rights). There is no question that denial or delay of the right of access is a
9 “cognizable injury” for the press as well as the public. *Planet*, 750 F.3d at 776. This initial harm
10 also results in additional First Amendment injuries to the public, which cannot discuss documents or
11 proceedings “about which it has no information.” *Id.* *Broadrick* and *Planet* show that because
12 access to court information is a public right, anyone who wants access has standing to pursue it.
13 Requiring groups to show that access would be of “concrete, particular assistance to them in their
14 own activities,” as the FISC does, would be akin to requiring an individual who is barred from the
15 courtroom to prove that his past actions show that he has a specific stake in attending a hearing.
16 Op. and Order Granting Mot. for Reconsideration, *In re Section 215 Orders*, Misc. 13-02 at 7–8.
17 The FISC’s requirement that individuals assert rights of access that are different and greater than
18 those of the general public in order to establish standing directly undercuts the *Broadrick* holding
19 that First Amendment litigants may sue for violations of others’ rights as well as their own.
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23 Even if the FISC recognizes that a claimant, like MFIAC, has standing, the FISC does not
24 embrace the “strong presumption in favor of access” that the Ninth Circuit and the Supreme Court
25 have recognized. *Id.* at 11; *see also Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17 (finding that
26 civil and criminal trials have long been “presumptively open”). The Constitution requires that this
27 presumption “may be overcome only by an overriding interest based on findings that closure is
28

1 essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise*
2 *II*, 478 U.S at 9.

3 The FISC’s unconstitutionally restrictive approach to public access makes it all the more
4 important that this Court not decline to exercise its jurisdiction over this case. Requiring Twitter to
5 bring its First Amendment claims before the FISC could severely hamper and delay public access to
6 the proceedings and documents in this case, causing the public’s First Amendment rights to suffer,
7 not only during the pendency of this litigation, but perhaps for years to come.

9 **CONCLUSION**

10 For the reasons stated above, this Court should deny the Government’s partial motion to
11 dismiss and exercise jurisdiction over Twitter’s claims.

13 Dated: February 17, 2015

Respectfully submitted,

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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 TWITTER, INC.,) Case No. 4:14-cv-04480-YGR
15)
Plaintiff,)
16 v.) **BRIEF OF *AMICI CURIAE* CORPS. 1 & 2**
ERIC HOLDER, United States Attorney) **IN SUPPORT OF PLAINTIFF'S**
General, *et al.*,) **OPPOSITION TO DEFENDANTS'**
17) **PARTIAL MOTION TO DISMISS**
18) Date: March 31, 2015
Defendants.) Time: 2:00 pm
19) Courtroom I, Fourth Floor
20) Hon. Yvonne Gonzalez Rogers
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STATEMENT OF INTEREST AND INTRODUCTION 1

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STATEMENT OF INTEREST AND INTRODUCTION

1
2 *Amici*¹ Corporations 1 & 2 bring unique insight to the issues before this court and seek to
3 correct several misstatements made by the government regarding other pending challenges to the
4 National Security Letter (NSL) scheme. *Amici* are two recipients of NSLs who brought
5 constitutional challenges to the National Security Letter statute, 18 U.S.C. §§ 2709, 3511. These
6 challenges have been consolidated into a single appeal and are currently under submission to the
7 Ninth Circuit. *See Under Seal v. Holder*, Nos. 13-15957, 13-16731, 13-16732 (9th Cir. argued
8 Oct. 8, 2014).

9 The first *amicus*, “a provider of long distance and mobile phone services,”² filed a
10 challenge to an NSL it received from the FBI in 2011. In 2013, the district court granted *amicus* 1’s
11 petition to set aside the NSL, holding that the statute violated the First Amendment on its face. *In*
12 *re NSL*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013). The district court stayed its order “for the
13 Ninth Circuit to consider the weighty questions of national security and First Amendment rights
14 presented in this case.” *Id.* at 1067.

15 The second *amicus*, an Internet company,³ filed a petition in 2013 to set aside two NSLs
16 that it received from the FBI and the nondisclosure requirements imposed in connection therewith.⁴
17 The district court then issued a stay of its ruling pending the *In re NSL* appeal and denied further
18 petitions, including Nos. 13-16731 and 13-16732, in order to preserve the status quo. *In re Matter*
19

20 ¹ The parties have stipulated to allow *amici* to proceed under the pseudonym “Corporations 1 & 2”
21 *See* Stipulation accompanying this filing.

22 ² Second [Redacted] Brief at 5, *Under Seal v. Holder*, Nos. 13-5957, 13-16731 (9th Cir. Feb. 28,
23 2014), available at <http://cdn.ca9.uscourts.gov/datastore/general/2014/03/20/NSL.13-15957.13-16731.SecondofFourBriefs.REDACTED.032014.pdf>.

24 ³ *See* Exs. A and B to Declaration in Support of Petition to Set Aside NSLs, *In re Matter of NSLs*,
25 No. 13-1165 (N.D. Cal. Mar. 14, 2013), available at https://www.eff.org/files/2014/01/16/003_-_r_131165_declr_iso_petition.pdf (NSLs requesting “electronic communications transactional
26 records” related to a list of “email/IP account holders”); Cross-Petition to Enforce NSL, *In re*
27 *Matter of NSLs*, No. 13-1165 (N.D. Cal. Mar. 26, 2013) (“petitioner offers electronic
28 communication services to its clients”).

29 ⁴ *See* Pet. to Set Aside NSLs and Nondisclosure Requirements Imposed in Connection Therewith,
30 *In re Matter of NSLs*, No. 13-01165 (N.D. Cal. Mar. 14, 2013),
31 available at https://www.eff.org/files/2014/01/16/001_-_r_131165_petition_to_set Aside_.pdf.

1 of NSLs, Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce,
2 No. 13cv1165-SI (N.D. Cal. August 12, 2013), appeal docketed, No. 13-16732 (9th Cir.); *In re*
3 *Matter of NSLs, Order Denying Petition to Set Aside, Denying Motion to Stay, and Granting*
4 *Cross-Petition to Enforce*, No. 13-mc-80089-SI (N.D. Cal. August 12, 2013), appeal docketed,
5 No. 13-16731 (9th Cir.).

6 Both *amici* support Twitter’s desire to publish a transparency report that provides more
7 specific information about the number of NSLs Twitter has received. As they explained to the
8 Ninth Circuit, “transparency is a core concern for both [*amici*] and their customers,” and it is
9 therefore “vital to [them] that government requests for data be disclosed to customers and
10 discussed in the public debate, and that in the rare situations where a gag may be appropriate, . . .
11 courts play their necessary and discerning oversight role to ensure that First Amendment and other
12 rights are adequately protected.” Appellant’s [Redacted] Opening Br. at 6, *Under Seal v. Holder*,
13 No. 13-16732 (9th Cir. Feb. 28, 2014).⁵

14 This brief will aid the court in understanding *amici*’s pending Ninth Circuit challenge to the
15 NSL statute’s gag provision, a proceeding the government characterizes as likely controlling of
16 Twitter’s claims.⁶ This brief corrects misstatements made by the government in this case regarding
17 *amici*’s cases and the appeal, and will otherwise provide insight to the court regarding *amici*’s
18 cases.

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26 ⁵ Available at <http://cdn.ca9.uscourts.gov/datastore/general/2014/03/20/NSL.13-16732.OpeningBrief.REDACTED.032014.pdf>.

27 ⁶ See Gov’t Mot. to Dismiss at 20:18-19. Indeed, the government asks the Court to abstain from
28 considering these claims until after the Ninth Circuit has ruled. *Id.*

ARGUMENT

I. THE GOVERNMENT FAILS TO ADDRESS THE NSL STATUTE’S MOST SIGNIFICANT CONSTITUTIONAL DEFECT—ITS LACK OF THE PROCEDURAL REQUIREMENTS REQUIRED BY *FREEDMAN* v. *MARYLAND*.

A. In Ruling on the Government’s Motion to Dismiss, This Court Must Consider That the NSL Scheme Is an Unconstitutional Prior Restraint.

In its motion, the government ignores the key issue at stake in Twitter’s case: whether the NSL gag order scheme is an unconstitutional prior restraint or otherwise violates the First Amendment. This was also the primary issue in the Second Circuit’s decision in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). In fact, every court that has considered the NSL statute has held that it must satisfy the procedural requirements for prior restraints in *Freedman v. Maryland*, 380 U.S. 51 (1965). *See, e.g., In re NSL*, 930 F. Supp. 2d at 1071; *Mukasey*, 549 F.3d at 871.

Thus, this court cannot rule upon the government’s motion to dismiss without considering one of the statute’s most significant constitutional defects.

This constitutional defect cannot be disregarded, as the government implicitly requests. Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) are challenges to claims, not theories. And Twitter’s separation of powers argument is simply one theory for arguing that the NSL’s gag provision is unconstitutional; it is not an independent claim for relief. *See Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (holding that “dismissal for failure to state a claim is ‘proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory’”) (citations omitted). The government thus cannot limit its motion to only seeking to dismiss Twitter’s separation of powers theory regarding § 3511. *See* Mot. to Dismiss at 24:25-28 n.13. The government may not avoid discussion of the core legal arguments intertwined within Twitter’s claim for declaratory relief as to both § 2709 and the § 3511 review process. As discussed in more detail below, the NSL gag order scheme encompasses both § 2709 and § 3511. Thus, the statute’s failure to meet the First Amendment’s procedural requirements for prior restraints is therefore fatal to both sections.

B. The NSL Gag Order Scheme Is an Unconstitutional Prior Restraint.

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Section 2709 authorizes the government to prevent NSL recipients from disclosing that they have received an NSL or anything about their interaction with the government, and Section 3511 imposes rules upon any challenge to that authority. Because the statute prevents recipients from speaking in the first instance rather than imposing a penalty after they have spoken, the gags are prior restraints. *Alexander v. United States*, 509 U.S. 544, 550 (1993).

A prior restraint is “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). The Supreme Court thus requires rigorous procedural protections in any statutory scheme authorizing prior restraints in order to “obviate the dangers of a censorship system”: (1) any restraint imposed prior to judicial review must be limited to “a specified brief period”; (2) any restraint prior to a final judicial determination must be limited to “the shortest fixed period compatible with sound judicial resolution”; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government. *Freedman*, 380 U.S. at 58-59; *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990); *Thomas v. Chicago Park District*, 534 U.S. 316, 321 (2002).

Contrary to the government’s suggestion that the statute can be “constitutionally applied,” every court that has evaluated the NSL statute has faulted it for failing to include the *Freedman* procedures in the statutory scheme itself. *See Mukasey*. 549 F.3d at 877-81; *In re NSL*, 930 F. Supp. 2d at 1073-74.

The statute fails to meet each of the *Freedman* requirements. Notably, each of the procedural safeguards mandated by *Freedman* emphasizes the necessity of judicial review. And judicial review is notably lacking from the NSL gag order scheme.

First, the NSL statute permits the imposition of a gag of indefinite duration, with no requirement in either § 2709 or § 3511 that the government ever seek court approval. This violates *Freedman*’s requirement that a potential speaker be “assured” by the statute that a censor “will, within a *specified brief period*, either issue a license or go to court to restrain” the speech at issue. *Freedman*, 380 U.S. at 59 (emphasis added); *see also In re NSL*, 930 F. Supp. 2d at 1073.

1 Second, the NSL gag order scheme does not “assure a prompt final judicial decision.”
2 *Freedman*, 380 U.S. at 59. This second requirement reflects the Supreme Court’s concern that
3 “unduly onerous” procedural requirements that drive up the time, cost, and uncertainty of judicial
4 review of speech licensing schemes will discourage the exercise of protected First Amendment
5 rights. *Id.* at 58. The Supreme Court has not specified precisely how quickly a final judicial
6 decision must be reached. But it did conclude that four months for initial judicial review and six
7 months for appellate review—the delay in *Freedman*—was too long. *See* 380 U.S. at 55, 61.

8 Indeed, *amici*’s own experiences challenging NSLs demonstrate the total failure of the
9 statute to ensure a prompt judicial opinion. In *amicus* 1’s first case, No. 13-15957, the district court
10 issued its opinion 15 months after a hearing, and the gag has remained in place pending the
11 appeal—now nearly four years after the initial petition was filed. In *amici* 1 & 2’s subsequent
12 petitions, Nos. 13-16731 and 13-16732, the gags have been in place for nearly two years and
13 counting.

14 Finally, the NSL statute violates the third *Freedman* prong—that “the burden of going to
15 court to suppress speech and the burden of proof in court must be placed on the government”—by
16 placing both of these burdens on the NSL recipient. *See Mukasey*, 549 F.3d at 871 (citing
17 *Freedman*, 380 U.S. at 58-59). Instead of requiring the government to go to court to seek
18 permission to suppress speech, Section 2709(c) requires the recipient of an NSL to initiate judicial
19 review by petitioning for an order modifying or setting aside the gag order. *See* 18 U.S.C.
20 § 3511(b)(1) (allowing recipient of an NSL under § 2709 to petition a court “for an order
21 modifying or setting aside a nondisclosure requirement imposed in connection with such a
22 request”). And the NSL statute fails to place the burden of justifying the need for the gag order on
23 the government when the matter is actually brought to court. As this Court held in *In re NSL*, these
24 attempts to shift the burden to the NSL recipient violate the third *Freedman* prong. 930 F. Supp. 2d
25 at 1077 (“[A]s written, the statute impermissibly attempts to circumscribe a court’s ability to
26 review the necessity of nondisclosure orders.”). The Second Circuit agreed. *Mukasey*, 549 F.3d at
27 883.

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1 That the statute allows for the recipient to initiate judicial review in some situations does
2 not cure this defect. It is, in fact, part of the problem. Indeed, one of the Supreme Court’s explicit
3 goals behind imposing the third *Freedman* factor was to counteract the self-censorship that occurs
4 when would-be speakers are unwilling or unable to initiate judicial review themselves. *See*
5 *Freedman*, 380 U.S. at 59 (“Without these safeguards, it may prove too burdensome to seek review
6 of the censor’s determination.”).

7 Indeed, the statute deprives that court of any meaningful authority to exercise its
8 constitutional oversight duties. Instead, the court may only modify the nondisclosure requirement if
9 it finds there is “no reason to believe that disclosure” may lead to a statutory harm. 18 U.S.C.
10 § 3511(b)(2). And where senior FBI or DOJ officials certify the need for the gag order, the court
11 has even less discretion: a court is not permitted to evaluate the facts, but instead is required to
12 blindly accept the FBI’s representations.⁷

13 In *amici*’s cases, the government contended that it cures the *Freedman* defects by following
14 a “reciprocal notice” scheme suggested by the Second Circuit in *Mukasey* that allows recipients of
15 an NSL to object to the government and then require the government to initiate judicial review.
16 This procedure would still not meet *Freedman*’s requirements, because it would still not put the
17 burden of initiating judicial review on the government. But even if it did, the Second Circuit
18 suggested a legislative fix to, not a permissible application of, the statute. *See Mukasey*, 549 F.3d at
19 883. The court was unequivocal that there was no possible construction of the NSL statute that
20 could save the nondisclosure provision: “We deem it beyond the authority of a court to ‘interpret’
21 or ‘revise’ the NSL statutes to create the constitutionally required obligation of the Government to
22 initiate judicial review of a nondisclosure requirement.” *Id.*

23 In any event, the government has not even attempted to follow all of the *Mukasey*
24 suggestions. In particular, the Second Circuit suggested time limits for judicial decision making of
25 “perhaps 60 days.” *Mukasey*, 549 F.3d at 879. The FBI does not request or require a final judicial

26 ⁷ Such certifications “shall be treated as conclusive unless the court finds that the certification was
27 made in bad faith.” 18 U.S.C. § 3511(b)(2). However, there is no procedure for factual review
28 whereby the court could determine whether the certification was made in bad faith.

1 decision within any set period of time, let alone 60 days. As discussed above, the proceedings in
2 those cases have taken years and are still without a final resolution.

3 Indeed, this is one of the areas where Twitter’s separation of powers and prior restraints
4 arguments intertwine. The prior restraint doctrine requires speedy judicial review. But the FBI
5 cannot require judicial review to be concluded on any sort of timeline—any such requirement must
6 come from Congress.

7 **II. ADDITIONALLY, THE NSL STATUTE IS A CONTENT-BASED RESTRICTION**
8 **ON SPEECH THAT MUST, BUT CANNOT, SATISFY STRICT SCRUTINY.**

9 Even if the NSL statute’s gag order scheme is not a prior restraint subject to the *Freedman*
10 requirements, it is nevertheless unconstitutional because as a content-based restriction on speech it
11 must, but cannot, survive strict scrutiny.

12 Importantly, strict scrutiny applies to the entire scheme—both Section 2709 and Section
13 3511. As Twitter’s complaint makes clear, the two sections are inextricably intertwined in the gag
14 order scheme: Section 2709 imposes a content-based restriction on speech, while Section 3511
15 directs a court reviewing such a restriction to apply a standard of review that is inconsistent with
16 strict scrutiny. Compl. ¶ 48.

17 Unlike it did in *Mukasey*,⁸ the government does not concede that strict scrutiny applies to
18 Sections 2709 and 3511. Gov’t Mot. to Dismiss at 21:22.

19 But strict scrutiny is appropriate because the entire gag order scheme is a content-based
20 restriction on speech. It targets a specific category of speech—speech regarding the NSL—that
21 Twitter, like *amici*, wishes to engage in. The scheme singles out this speech for differential
22 treatment precisely because it seeks to blunt the communicative impact of that speech. *See Texas v.*
23 *Johnson*, 491 U.S. 397, 412 (1989). As *In re NSL* held, the gag orders apply “without distinction, to
24 both the content of the NSLs and to the very fact of having received one.” 930 F. Supp. 2d at 1075.

25 _____
26 ⁸ In *Mukasey*, the government conceded “for purposes of the litigation . . . that strict scrutiny is the
27 applicable standard.” 549 F.3d at 861. The panel itself did not agree on whether strict scrutiny
28 should apply. But it found that the deferential review mandated in § 3511 was unconstitutional
under either strict scrutiny or a “less exacting standard.” *Id.* at 882.

1 Under the strict scrutiny standard, content-based restrictions, like the gag order scheme, are
2 “presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). To survive strict
3 scrutiny, the government must show that a restriction on free speech is “narrowly tailored to
4 promote a compelling Government interest.” *United States v. Playboy Entertainment Group, Inc.*,
5 529 U.S. 803, 813 (2000). This narrow tailoring requires that the restriction on speech directly
6 advance the governmental interest, that it be neither overinclusive nor underinclusive, and that
7 there be no less speech- restrictive alternatives to advancing the governmental interest. *Id.*; *see also*
8 *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

9 Both *Mukasey* and *In re NSL* concluded that the gag provision did not survive strict
10 scrutiny. *In re NSL*, 930 F. Supp. 2d at 1071; *Mukasey*, 549 F.3d at 878.

11 This Court must likewise find that the whole gag order scheme fails strict scrutiny. The
12 government cannot show that the scheme is narrowly tailored to its goal of preventing targets from
13 being alerted to the existence or progress of counterterrorism or counterespionage investigations.
14 The scheme is both (1) overinclusive and (2) not the least speech-restrictive means of advancing
15 the government’s interest. There are obvious alternatives that would be equally effective in
16 protecting the government’s national security interests. For example, the gag order could be
17 authorized only when the disclosure of the fact of the NSL would be reasonably likely to, as
18 opposed to potentially, endanger national security. As the *In re NSL* court explained:

19 [T]he government has not shown that it is generally necessary to prohibit
20 recipients from disclosing the mere fact of their receipt of NSLs. The statute does
21 not distinguish—or allow the FBI to distinguish—between a prohibition on
22 disclosing mere receipt of an NSL and disclosing the underlying contents. The
statute contains a blanket prohibition: when the FBI provides the required
certification, recipients cannot publicly disclose the receipt of an NSL.

23 *Id.* at 1076.

24 **III. UNDER EITHER STANDARD, SECTION 3511 DOES NOT PROVIDE THE**
25 **LEVEL OF REVIEW REQUIRED BY THE FIRST AMENDMENT.**

26 The NSL gag order scheme is unconstitutional under either standard set forth above
27 because each standard requires that judicial review of the NSL gag orders must be “searching.” *See*
28 *In re NSL*, 930 F. Supp. 2d at 1077. Rather than the required searching, independent review,

1 Sections 3511(b)(2) and (3) impose an extremely deferential standard of review, and in some cases
2 no substantive review at all. The statute allows the court to dissolve the agency’s gag order only if
3 the court “finds that there is *no reason to believe* that disclosure may endanger the national security
4 of the United States, interfere with a criminal, counterterrorism, or counterintelligence
5 investigation, interfere with diplomatic relations, or endanger the life or physical safety of any
6 person.” 18 U.S.C. §§ 3511(b)(2), (3) (emphasis added). The statute further requires that if any one
7 of a long list of government officials certifies that disclosure will harm national security or
8 interfere with diplomatic relations, “such certification shall be treated as *conclusive* unless the court
9 finds that the certification was made in bad faith.” *Id.* (emphasis added). As the Second Circuit
10 noted, “meaningful judicial review” would be required by the First Amendment even if strict
11 scrutiny or “classic” prior restraint scrutiny did not apply. *Mukasey*, 549 F.3d at 882. The cases
12 cited by the government such as *Center for Nat. Security Studies v. DOJ*, 331 F.3d 918, 922 (D.C.
13 Cir. 2003), which sanction more deferential standards of review in other contexts (such as FOIA
14 litigation), have little bearing here.

15 As the Supreme Court has noted, “deference to a legislative finding cannot limit judicial
16 inquiry when First Amendment rights are at stake.” *Landmark Communications v. Virginia*, 435
17 U.S. 829, 843 (1978). By limiting the reviewing court, the NSL statute “impermissibly threatens
18 the institutional integrity of the Judicial Branch” in violation of separation of powers. *Mistretta v.*
19 *United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Com. v. Schor*, 478
20 U.S. 833, 851 (1986)).

21 The *In re NSL* court thus rightly concluded that the applicable provisions of Sections
22 3511(b)(2) and (3) fail to afford this searching review. 930 F. Supp. 2d at 1077-78.

23 The government misleadingly states that *In re Matter of NSLs* “subsequently found the
24 statute to be lawfully applied[.]” Gov’t Mot. to Dismiss at 22:25-27 n.11. But that decision came
25 only after the Court decided that the statute was facially unconstitutional. The court explained that
26 in denying subsequent petitions, it was proceeding with caution pending appeal—hardly a ringing
27 endorsement of the application of the statute. *In re Matter of NSLs*, Order at 2, No. 13-civ-80089
28

1 (N.D. Cal. Aug. 12, 2013) (“Whether the challenged nondisclosure provisions are, in fact, facially
2 unconstitutional will be determined in due course by the Ninth Circuit.”).

3 The government is further mistaken in its assertion that the *In re NSL* court reached its
4 conclusion by “assuming that Congress had an unconstitutional intent in enacting the statute,” thus
5 ignoring the doctrine of constitutional avoidance. Gov’t Mot. to Dismiss at 23:3-4, 23:7-13.
6 However, far from simply assuming as much, the court began by looking at the text of the statute
7 and concluded that “as written, the statute impermissibly attempts to circumscribe a court’s ability
8 to review the necessity of nondisclosure orders.” 930 F. Supp. 2d at 1077. The court noted that the
9 Second Circuit in *Mukasey* had imposed a statutory construction on this language that would
10 require the government to show a “good reason” and “some reasonable likelihood” of harm, and it
11 explained that “the language relied on by the Second Circuit is *not* in the statute and, in this Court’s
12 view, expressly contradicts the level of deference Congress imposed under Section 3511(b)
13 and (c).” *Id.* at 1078.

14 The canon of constitutional avoidance applies only if there is a “reasonable interpretation”
15 of the statutory language that imputes a valid constitutional intent to Congress. But the court found
16 that no such reasonable interpretation was possible for § 3511. *Id.* at 1081; *see also Gonzales v.*
17 *Carhart*, 550 U.S. 124, 153 (2007). In short, the “multiple inferences required [by the Second
18 Circuit] to save the provisions at issue are not only contrary to evidence of Congressional intent,
19 but also contrary to the statutory language and structure of the statutory provisions actually enacted
20 by Congress.” *Id.* at 1080.

21 The government is also incorrect when it asserts that the *In re NSL* court treated *any* FBI
22 certification as to the statutorily enumerated harms as conclusive in judicial proceedings absent bad
23 faith. Gov’t Mot. to Dismiss at 23:19-23 n.12. In fact, the *In re NSL* court’s analysis of the “no
24 reason to believe” standard of review—which it described as “essentially insurmountable”—was
25 independent from its examination of the actually insurmountable “conclusive” certification by a
26 specified FBI official. 930 F. Supp. 2d at 1077-78.

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1 The government acknowledges, as it must, that both courts found the latter “conclusive”
 2 certification unconstitutional and that it must be struck down.⁹ Gov’t Mot. to Dismiss at 23:19-23
 3 n.12. Hence, the only daylight between the two courts’ approaches to the judicial review provision
 4 in § 3511 was, as discussed above, whether the “no reason to believe” language was subject to a
 5 reasonable constitutional statutory interpretation. It is not.

6 **IV. SECTION 3511 OFFENDS BOTH SEPARATION OF POWERS AND FIRST**
 7 **AMENDMENT PRINCIPLES BY VESTING EXCESSIVE DISCRETION IN**
 8 **EXECUTIVE OFFICIALS, AND COMMANDING THAT REVIEWING COURTS**
 9 **DEFER TO THE EXECUTIVE DETERMINATIONS.**

10 This dispute over the standard of review further highlights how the separation of powers
 11 and First Amendment arguments are inextricably intertwined legal theories and are components of
 12 the same claim. The strong deference granted the Executive in the gag order scheme violates both
 13 constitutional doctrines for interrelated reasons.

14 With respect to separation of powers, the Second Circuit explained in *Mukasey*: “The fiat of
 15 a governmental official, though senior in rank and doubtless honorable in the execution of official
 16 duties, cannot displace the judicial obligation to enforce constitutional requirements. ‘Under no
 17 circumstances should the Judiciary become the handmaiden of the Executive.’” *Mukasey*, 549 F.3d
 18 at 882-83 (quoting *United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990); see also *In re NSL*,
 930 F. Supp. 2d at 1078 (quoting same).

19 The First Amendment also disfavors unfettered executive discretion for related reasons.
 20 Indeed, “[t]he First Amendment prohibits placing such unfettered discretion in the hands of
 21 licensing officials[.]” *Seattle Coal. Stop Police Brutality v. City of Seattle*, 550 F.3d 788, 803 (9th
 22 Cir. 2008). Rather, the First Amendment requires “narrow, objective, and definite” standards to

23 ⁹ *Mukasey* correctly rejected the conclusive certification provision despite the fact that no
 24 certification was made in that case either, finding it unconstitutionally “inconsistent with strict
 25 scrutiny standards.” 549 F.3d at 882-83. Accordingly, the government’s contention that these
 26 certifications are irrelevant is meritless. Gov’t Mot. to Dismiss at 23:25-26 n.12. This is another
 27 way that the Government urges a standard significantly different from the *Mukasey* decision. In
 28 any event, even if the Government has not invoked this section, the possibility that it *might* play
 this trump card has an impermissible chilling effect. Any recipient considering whether to
 challenge an NSL must do so in the face of Section 3511(b)(2), knowing that the Government may
 choose to have a top level official certify at an impossible standard.

1 guide governmental action that restrains speech. *See Shuttlesworth v. City of Birmingham*, 394 U.S.
2 147, 150-51 (1969).

3 As the Supreme Court has held pursuant to “many decisions of this Court over the last 30
4 years, . . . a law subjecting the exercise of First Amendment freedoms to the prior restraint of a
5 license, without narrow, objective, and definite standards to guide the licensing authority, is
6 unconstitutional.” *Id.* (citations omitted) (rejecting a local ordinance that allowed city officials to
7 refuse a parade permit if “the public welfare, peace, safety, health, decency, good order, morals or
8 convenience” so required).

9 As the Supreme Court has reasoned, “if the permit scheme involves the appraisal of acts,
10 the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of
11 censorship and of abridgment of our precious First Amendment freedoms is too great to be
12 permitted.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citations omitted).

13 The NSL gag order scheme offends both of these constitutional principles. Section 2709(c)
14 gives government officials great discretion—and Section 3511 bars a court from meaningfully
15 questioning the exercise of such discretion.

16 One feature of the gag order scheme warrants special attention. To gag an NSL recipient,
17 the executive branch need only certify that disclosure “*may* result” in statutorily enumerated harms.
18 *See* §§ 2709(c); 3511(b)(3). “May” is used to express possibility—not probability—that something
19 might happen. *See* Oxford Dictionary Online, Oxford University Press;¹⁰ *see also* Black’s Law
20 Dictionary 1068 (9th ed. 2009) (defining “may” as “[t]o be a possibility”). The inclusion of the
21 word “may” in the statute is thus fundamentally at odds with the sort of certainty required by the
22 First Amendment. *See Nebraska Press Ass’n*, 427 U.S. at 569-70 (asserting likely harm did not
23 “possess the requisite degree of certainty to justify restraint”).

24 The mere *possibility* of harm occurring is insufficient to support a prior restraint on speech.
25 As Justice Stewart explained in his concurrence in the Pentagon Papers case, the prior restraint at

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27 ¹⁰ Available at http://www.oxforddictionaries.com/definition/american_english/may#may (last
28 visited February 13, 2015).

1 issue had to be reversed because the government could not prove that the disclosure of the
2 Pentagon Papers “will *surely* result in direct, immediate, and irreparable damage to our Nation or
3 its people.” *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J.,
4 concurring) (emphasis added).

5 A low standard of likelihood of harm is similarly improper under strict scrutiny. *See Brown*
6 *v. Entertainment Merchants Ass’n*, ___ U.S. ___, ___, 131 S. Ct. 2729, 2738-40 (2011) (under
7 strict scrutiny government “bears the risk of uncertainty” and cannot rely on “ambiguous” proof).
8 The Ninth Circuit’s decision in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), is instructive. In
9 that case, the court considered a policy to censor student speech under a test with the same critical
10 “may result” language as Section 2709: “When there is evidence that reasonably supports a
11 judgment that significant or substantial disruption of the normal operation of the school or injury or
12 damage to persons or property *may result*.” *Id.* at 1156 (emphasis added). The court held that the
13 mere possibility of injury or damage was not sufficient. *Id.* at 1158 (expression “cannot be
14 subjected to regulation on the basis of undifferentiated fears of possible disturbances or
15 embarrassment”).

16 The “may” standard vests in the government the precise type of expansive and unfettered
17 discretion that is not allowed for governmental action that directly restricts speech, which is one
18 reason why the *Freedman* factors are required. *See Talk of the Town v. Dep’t of Fin. & Bus. Servs.*,
19 343 F.3d 1063, 1070 (9th Cir. 2003) amended sub nom. *Talk of the Town v. Dep’t of Fin. & Bus.*
20 *Servs.*, 353 F.3d 650 (9th Cir. 2003) (noting that *Freedman*’s procedural safeguard were, in the
21 Court’s view, “essential to cabin the censors’s [sic] otherwise largely unfettered discretion to
22 determine what constitutes suitable, non-obscene expression and what does not”).

23 The unduly unfettered nature of this discretion is illustrated by the Deputy Attorney
24 General’s letter challenged by Twitter in this case, which licensed service providers to disclose
25 receipt of NSLs in bands of one thousand. The decision to allow service providers to vaguely
26 indicate which “band” they fall within—a decision that occurred after public pressure over the lack
27 of transparency—illustrates the arbitrariness of the government’s discretion and illustrates that the
28 government’s licensing scheme is not narrowly tailored. The DOJ has simply decided that some

1 service providers, who have received 1,000 or more NSLs, can participate—vaguely and
2 partially—in public debates as recipients of NSLs. Meanwhile, providers who receive fewer than
3 1,000 NSLs remain barred from saying definitively whether they have received any NSLs at all.¹¹

4 As discussed above, such measures are overbroad and intrinsically arbitrary, since they are
5 imposed without any consideration of the specific risks posed by providers’ reporting on NSLs
6 they have received. The First Amendment requires more.

7 **CONCLUSION**

8 For the foregoing reasons, the Court should deny the government’s motion to dismiss.

9
10 Dated: February 17, 2015

Respectfully submitted,

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16 *CORPORATIONS 1 & 2*
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25 _____
26 ¹¹ Some recipients have reached stipulations where they can speak publicly about receiving an
27 NSL. *See, e.g.,* Stipulation and Order of Dismissal, *John Doe, Inc. v. Holder*, Case No. 04-cv-2614
28 (S.D.N.Y. July 30, 2010); Order to Unseal Case, *Internet Archive v Mukasey*, Case No. 4:07-cv-
06346-CW (N.D Cal. May 2, 2008); Order, *In re National Security Letter*, Case No. 2:13-cv-
01048-RAJ (W.D. Wa. May 21, 2014) (allowing Microsoft to speak about receiving an NSL).