

NO. 13-16732

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNDER SEAL,

PETITIONER-APPELLANT,

v.

ERIC H. HOLDER, JR., Attorney General; UNITED STATES DEPARTMENT
OF JUSTICE; and FEDERAL BUREAU OF INVESTIGATION,

RESPONDENT-APPELLEES

On Appeal from the United States District Court
for the Northern District of California
Case No. 13-cv-1165 SI
Honorable Susan Illston, District Judge

**APPELLANT UNDER SEAL'S REPLY BRIEF
FILED UNDER SEAL**

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18 U.S.C. § 2709 *passim*
18 U.S.C. § 3511 *passim*

Constitutional Provisions

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I. INTRODUCTION

Nothing in the Government's Answering Brief successfully refutes the multiple grounds on which the gag order provision of the statutes covering National Security Letter Letters ("NSLs"), 18 U.S.C. §§ 2709, 3511 (collectively the "NSL statute") is unconstitutional:

- The NSL statute's gag order provision is unconstitutional because it lacks the First Amendment procedural protections required by *Freedman v. Maryland*, 380 U.S. 51 (1965), for content-based prior restraints: the statute does not require judicial review of the gag and does not limit the duration of any pre-review gag; the statute does not mandate a prompt final judicial determination of whether the gag is justified; and the statute does not put the burden of going to court and the burden of proof on the Government.
- The rewriting of the NSL statute suggested by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) and partially followed by the FBI is an unreasonable construction of the statute (as the Second Circuit itself recognized) and also does not fully comply with the *Freedman* requirements.

- As a content-based speech prohibition, the NSL statute is subject to strict scrutiny, which it cannot meet because it is not narrowly tailored.
- The NSL statute is additionally unconstitutional under the First Amendment because it vests unbridled discretion with the Executive to decide whether to gag an NSL recipient.
- The gag order issued here is an unconstitutional prior restraint because the Government did not show that it is necessary to further a governmental interest of the highest magnitude.
- The NSL statute's excessively deferential standard of judicial review violates the separation of powers.

The Government fails to address many of the arguments made in Appellant's Opening Brief ("AOB").¹ Appellant's Opening Brief in this appeal was prepared with the Government's Opening Brief in the related appeals in Nos. 13-15957 and 13-16731 in mind and preemptively addressed the principal arguments that the Government made in that brief. Rather than respond to the rebuttal of those arguments in Appellant's Opening Brief, the Government elected to simply copy and paste its earlier arguments from its Opening Brief in Nos. 13-15957 and 13-

¹ The Government's failure to address these points is ironic in light of its position that ignoring an argument in an earlier brief constitutes waiver, filed in the related case. *See* Gov't Reply Brief in Nos. 13-15957 and 13-16731 at 30-31.

16731, almost verbatim—which is effectively no response at all. To avoid burdening the Court with duplicative briefing, Appellant will briefly identify the portions of its opening brief addressing the Government’s arguments and while addressing the few new points raised by the Government’s brief.

II. ARGUMENT

A. The NSL Statute Violates *Freedman*’s Requirements

The Government’s varied responses to Appellant’s *Freedman* challenge do not save the statute. AOB, 22-32. None of the Government’s arguments against this conclusion has merit.

The Government’s argument that Appellant’s *Freedman* challenge is necessarily an overbreadth challenge lacks merit. Govt. Br., 41-45. As the Opening Brief explained and as *Freedman* itself makes clear (380 U.S. at 56), *Freedman* challenges are a recognized category of facial challenges distinct from overbreadth challenges. AOB, 23-25. The Government does not address, much less refute, any of the argument or authority presented in the Opening Brief on this point.

The Government’s argument that the NSL statute’s gag order provision is not a censorship scheme, and thus *Freedman* does not apply, also fails. Govt. Br., 45-48. A censorship scheme is any determination by an Executive official that prohibits the speaker from speaking, made before the speaker has spoken and before there has been any judicial determination of whether the speech in question

may be proscribed consistent with the First Amendment. This is exactly what the NSL statute authorizes, and exactly what occurred here. The Government has nothing to say about the argument and authority in the opening brief on this point. AOB, 20-22, 25-26.

The Government's argument that, even if *Freedman* applies, the NSL statute complies with the *Freedman* requirements (Govt. Br., 49-53) lacks merit for all of the reasons explained in the opening brief (AOB, 26-32) and all the reasons explained by the district court in *In re National Security Letter*, 930 F. Supp. 2d 1064, 1073 (N.D. Cal. 2013) and the Second Circuit in *Mukasey*.

It is important to recognize that the district court here did not retreat from its holding of unconstitutionality in *In re National Security Letter*. Rather, consistent with its stay of its injunction in that case and acting with caution, it left the ultimate determination of constitutionality to this Court. As the district court explained, the “judgment – as to the enforcement of the particular NSL at issue in [*In re NSL*] – was stayed pending appeal. Whether the challenged nondisclosure provisions are, in fact, facially unconstitutional will be determined in due course by the Ninth Circuit.” ER 12:7-9; *see also id.* at 12:15-16. (Decision made “in light of the pending appeal and stay of the judgment in *In re NSL*”); 13:14 (“given that the constitutionality of the statute as written is under review at the Ninth Circuit.”)

The Government also argues that procedures the Executive has voluntarily implemented post-*Mukasey* satisfy *Freedman* even if the NSL statute does not. That, but this is incorrect both as a general matter and on the facts here.² In *Freedman*, the Supreme Court found that a final judicial resolution was required faster than six months. *Freedman*, 380 U.S. at 55 (discussing with disapproval the six month delay to a final appellate decision in *United Artists Corp. v. Maryland State Board of Censors*, 210 Md. 586, 124 A. 2d 292 (Md. Ct. of App. 1956)).

While *Freedman* did not set an exact maximum time, *Freedman*, 380 U.S. at 61, the Second Circuit in *Mukasey* suggested that judicial review be completed within 60 days. Yet, in this case, a ruling by the district court took nearly five

² The government, citing the district court, maintains that Appellant “does not dispute that the FBI has complied with the strictures imposed by the Second Circuit [in *Mukasey*].” Gov. Brief at 31 (citing ER 13). This is incorrect. In Petitioner’s Opposition to Motion to Compel and Reply in Support of Petition to Set Aside NSL (Supplemental Excerpts of Record at SER 2-3, n.4), Appellant explained that *Mukasey*’s suggested procedures required a prompt judicial resolution, and noted that “the government cannot voluntarily conform such limitations into being.” Appellant has never conceded that the Government has, or even could, provide a prompt judicial resolution, nor that a policy that ignores this *Freedman* requirement passes constitutional muster.

In any event, this Court is not bound by the legal conclusion that the FBI’s actions comply with *Mukasey*. “Where ... the question is ‘the legal effect of admitted facts,’ the court cannot be controlled by a concession of counsel.” *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987) (appeals court not bound by party’s erroneous view of the law). “The policy is longstanding and applied whether it is the government or a private party which has made the erroneous concession.” *Id.* (citing *Avila v. INS*, 731 F.2d 616, 620-21 (9th Cir.1984)).

months. Moreover, judicial review was not initiated by the Government as required under *Freedman* but by Appellant.

City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004), does not excuse the NSL statute from complying with *Freedman*'s requirement of a prompt judicial decision. *Littleton* involved a content-neutral zoning scheme, not a content-based censorship scheme as here. As the Supreme Court emphasized, "the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display." *Littleton*, 541 U.S. at 783 (italics original).

The other case relied upon by the Government, *Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004), also involved a zoning ordinance that had objective, non-content-based criteria, not a discretionary censorship scheme like the NSL statute. *Id.* at 1002 ("the licensor 'does not exercise discretion by passing judgment on the content of any protected speech'"). Here, by contrast to *Littleton* and *Dream Palace*, the decision whether to proscribe a particular NSL recipient's speech is a content-based censorship scheme.

The Government's argument that *Freedman* cannot apply because the Executive lacks the ability to compel a speedy decision by the district court must be rejected. As this Court explained in *Dream Palace*, "[w]hen the First

Amendment requires certain safeguards before a system of prior restraint may be enforced, a local government cannot evade that requirement by pointing to its lack of legal authority to ensure such safeguards exist.” *Id.* at 1004.

The Government’s ad hoc procedures, which are untethered to the language of the NSL statute, cannot in any event cure the invalidity of the statute even if they did conform to *Freedman’s* requirements. AOB, 32-42. Courts are not free to amend statutes to cure their unconstitutionality, and neither is the Executive.

B. The Excessively Deferential Judicial Review Standards of the NSL Statute Violate the Separation of Powers

The Government’s contention that the NSL statute’s extremely deferential standard of judicial review is constitutional (Govt. Br., 53-57) also lacks merit. The Government fails to address the separation of powers argument made in the opening brief. AOB, 42-43. Instead, the Government attacks the district court’s determination that Congress had unconstitutionally limited the power of the courts to review an NSL gag order, accusing the district court of presuming the statute unconstitutional. Govt. Br., 53-55. The district court did no such thing. Instead, it respected the will of Congress and gave the statutory language—requiring the district court to uphold a gag order unless it found there was “no reason to believe” (18 U.S.C. § 3511(b)(2)) that disclosure would cause harm—its plain and only possible meaning.

C. The NSL Statute Fails Strict Scrutiny

As set forth in Appellant's Opening Brief, the NSL statute's gag order provision is content-based censorship that cannot survive the strict scrutiny such restrictions receive. AOB, 46-49. The Government does not attempt to explain how the NSL *statute* satisfies strict scrutiny. It instead argues that the specific gag order imposed on Appellant is narrowly tailored to serve a compelling governmental interest. Govt. Br., 25-27.

That analysis is not necessary to decide this case. In applying strict scrutiny to a legislative restriction on speech, courts look at the statute. "If a *statute* regulates speech based on its content, *it* must be narrowly tailored to promote a compelling government interest." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (emphasis added) (*citing Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). "If a less restrictive alternative would serve the Government's purpose, the *legislature* must use that alternative." *Id.* (emphasis added) (*citing Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997)).

While courts will sometimes narrowly construe a statute, they will only impose a "limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397 (1988). Courts "will not rewrite a . . . law to conform it to constitutional

requirements.” *Id.*; *see also Reno*, 521 U.S. at 885, n.50 (“judicial rewriting of statutes would derogate Congress’ ‘incentive to draft a narrowly tailored law in the first place.’”) (quoting *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)). As Appellants have explained, the NSL statute is not readily susceptible to a narrowing construction. AOB, 31-32; *see also Mukasey*, 549 F.3d at 883 (“[w]e deem it beyond the authority of a court to ‘interpret’ or ‘revise’ the NSL statutes to create the constitutionally required obligation of the Government to initiate judicial review of a nondisclosure requirement.”).

D. The Government Fails to Address the Other Reasons Why the NSL Statute Is Unconstitutional

The Government also fails to address two other arguments presented in the opening brief: the argument that the NSL statute is unconstitutional under the First Amendment because it lacks narrow, objective, and definite standards to limit official discretion in deciding whether to gag an NSL recipient, and the argument that the gag order issued here is unconstitutional under First Amendment prior restraint doctrine because the Government did not show that it is necessary to further a governmental interest of the highest magnitude. AOB, 44-45, 50-51.

Finally, the Government contends that the unconstitutional gag provisions are severable from the rest of the NSL statute. Govt. Br., 57-60. Although the Government acknowledges the question is one of legislative intent, its argument lacks merit because it fails to address the legislative history presented by Appellant

showing that Congress intended the gag order provision to be an essential element of the NSL statute. AOB, 53-56.

III. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, the NSL statute is unconstitutional because it fails to require the Government to initiate judicial proceedings, because its judicial review standards are excessively deferential, and because it is a prior restraint that is not narrowly tailored. Accordingly, the district court's judgment in No. 13-16732 should be reversed.

Dated: June 16, 2014

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
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PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. Appellant's Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 for Mac, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: June 16, 2014

By: /s/ Kurt Opsahl
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Counsel for UNDER SEAL

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2014.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 16, 2014

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