UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: NATIONAL SECURITY LETTERS,

Case No. 11-cv-02173-SI ; Case No. 3:11-cv-2667 SI; Case No. 3:13-mc-80089 SI; Case No. 3:13-cv-1165 SI
SEALED

ORDER RE: RENEWED PETITIONS TO SET ASIDE NATIONAL SECURITY LETTERS AND MOTIONS FOR PRELIMINARY INJUNCTION AND CROSS-PETITIONS FOR ENFORCEMENT OF NATIONAL SECURITY LETTERS

United States District Court
Northern District of California

These related cases involve two electronic communication service providers who received National Security Letters ("NSLs"), a type of administrative subpoena, issued by the Federal Bureau of Investigation. The NSLs sought subscriber information, and were issued by an FBI Special Agent in Charge who certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *See* 18 U.S.C. § 2709(b) (2014). The NSLs also informed the providers that they were prohibited from disclosing the contents of the subpoenas or the fact that they had received the subpoenas, based upon a certification from the FBI that such disclosure may result in "a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1) (2014).

In 2011 and 2013, the electronic communication service providers filed these lawsuits seeking to set aside the NSLs as unconstitutional. In 2013, this Court reviewed the 2013 versions

of the NSL statutes and held that the nondisclosure requirements and related provisions regarding judicial review of those requirements suffered from significant constitutional infirmities that could not be cured absent legislative action. While these cases were on appeal to the Ninth Circuit Court of Appeals, Congress amended the NSL statutes through the passage of the USA Freedom Act of 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). The Ninth Circuit remanded these cases to this Court to reexamine the providers' challenges to the NSL statutes in light of the amendments.

Now before the Court are petitioners' motions for a preliminary injunction and renewed petitions to set aside the NSLs, and the government's cross-petitions to enforce the NSLs. The Court held a hearing on these matters on December 18, 2015. After careful consideration of the parties' papers and arguments, the Court concludes that the 2015 amendments to the NSL statutes cure the deficiencies previously identified by this Court, and that as amended, the NSL statutes satisfy constitutional requirements. This Court has also considered the appropriateness of continued nondisclosure of the four specific NSL applications which gave rise to these cases. As to three of the certifications (two in case 3:13-cv-1165 SI and one in case 3:11-cv-2173 SI), the Court finds that the declarant has shown that that there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would result in a danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations or danger to a person's life or physical safety. As to the fourth (in case 3:13-mc-80089 SI), the Court finds that the declarant has not made such a showing.

BACKGROUND

I. 2013 Decisions of this Court and Prior Cases Testing Constitutionality of the NSL Provisions

On [redacted] 2011, pursuant to the National Security Letter Statute, 18 U.S.C. § 2709, the FBI issued an NSL to petitioner A, an electronic communication service provider ("ECSP"),

seeking "all subscriber information, limited to name, address, and length of service, for all services provided to or accounts held by the named subscriber and/or subscriber of the named account." Dkt. No. 7, Ex. A in 3:11-cv-2173 SI. By certifying, under section 2709(c)(1), that disclosure of the existence of the NSL may result in "(i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person," the FBI was able to prohibit petitioner from disclosing the existence of the NSL. 18 U.S.C. § 3511(b)(2-(3) (2014). On May 2, 2011, petitioner filed a Petition to Set Aside the National Security Letter and Nondisclosure Requirement, pursuant to 18 U.S.C. § 3511(a) and (b). *In re National Security Letter*, 3:11-cv-2173 SI. The government opposed the petition, filed a separate lawsuit seeking a declaration that petitioner was required to comply with the NSL, *United States Department of Justice v. Under Seal*, 3:11-cv-2667 SI, and filed a motion to compel compliance with the NSL.

Petitioner challenged the constitutionality – both facially and as applied – of the nondisclosure provision of 18 U.S.C. § 2709(c) and the judicial review provisions of 18 U.S.C. § 3511(b) (collectively "NSL nondisclosure provisions").[1] Petitioner argued that the

[1] The version of the NSL statutes in effect at the time these lawsuits were filed in 2011 provided as follows. 18 U.S.C. §§ 2709(a) and (b) stated that a wire or electronic communication service provider was required to comply with a request for specified categories of subscriber information if the Director of the FBI or his designee certified that the records sought were relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person was not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States. 18 U.S.C. §§ 2709(a)-(b) (2011). Section 2709(c)(1) provided that if the Director of the FBI or his designee certified that "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person," the recipient of the NSL was prohibited from disclosing to anyone (other than to an attorney to obtain legal advice or legal assistance with respect to the request) that the FBI sought or obtained access to information or records sought in the NSL. 18 U.S.C. § 2709(c)(1) (2011). Section (c)(2) required the FBI to inform the recipient of the NSL of the nondisclosure requirement. 18 U.S.C. § 2709(c)(2) (2011).

Section 3511 governed judicial review of NSLs and nondisclosure orders issued under section 2709 and other NSL statutes. Under 3511(a), the recipient of an NSL could petition a district court for an order modifying or setting aside the NSL. The court could modify the NSL, or set it aside, only "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a) (2011). Under 3511(b)(2), an NSL recipient subject to a nondisclosure order could petition a district court to modify or set aside the nondisclosure order. If the NSL was

nondisclosure provision of the statute was an unconstitutional prior restraint and content-based restriction on speech. More specifically, petitioner contended that the NSL provisions lacked the necessary procedural safeguards required under the First Amendment because the government did not bear the burden to seek judicial review of the nondisclosure order, and the government did not bear the burden of demonstrating that the nondisclosure order was necessary to protect specific, identified interests. Petitioner also argued that the NSL nondisclosure provisions violated the First Amendment because they acted as a licensing scheme providing unfettered discretion to the FBI, and that the judicial review provisions violated separation of powers principles because the statute dictated an impermissibly restrictive standard of review for courts adjudicating challenges to nondisclosure orders. Petitioner also attacked the substantive provisions of the NSL statute itself, both separately and in conjunction with the nondisclosure provisions, arguing that the statute was a content-based restriction on speech that failed strict scrutiny.

In its opposition to the petition, the government argued that the NSL statute satisfied strict scrutiny and did not impinge on the anonymous speech or associational rights of the subscriber whose information was sought in the NSL. The government also asserted that the nondisclosure provisions were appropriately applied to petitioner because the nondisclosure order was not a

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issued within a year of the time a challenge to the nondisclosure order was made, a court could "modify or set aside such a nondisclosure requirement if it finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. § 3511(b) (2011). However, if a specified high ranking government official (i.e., the Attorney General, Deputy or Assistant Attorney Generals, the Director of the Federal Bureau of Investigation, or agency heads) certified that disclosure "may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. § 3511 (b)(2) (2011).

Under 3511(b)(3), if the petition to modify or set aside the nondisclosure order was filed more than one year after the NSL issued, a specified government official, within ninety days of the filing of the petition, was required to either terminate the nondisclosure requirement or re-certify that disclosure may result in an enumerated harm. 18 U.S.C. § 3511(b)(3) (2011). If the government provided that re-certification, the Court could again only alter or modify the NSL if there was "no reason to believe that disclosure may" result in an enumerated harm, and the court was required to treat the certification as "conclusive unless the court f[ound] that the recertification was made in bad faith." 18 U.S.C. § 3511(b)(3) (2011). Finally, if the court denied a petition for an order modifying or setting aside a nondisclosure order, "the recipient shall be precluded for a period of one year from filing another petition to modify or set aside such nondisclosure requirement." 18 U.S.C. § 3511(b)(3) (2011).

"classic prior restraint" warranting the most rigorous scrutiny and because it was issued after an adequate certification from the FBI. Finally, the government argued that the statutory standard of judicial review of NSLs and nondisclosure orders was constitutional.

In a decision filed on March 14, 2013, this Court found that the NSL nondisclosure and judicial review provisions suffered from significant constitutional infirmities. *In re National Security Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013). The Court first reviewed prior cases testing the constitutionality of the NSL provisions at issue. In *John Doe, Inc. v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), affirmed in part and reversed in part and remanded by *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the district court found that the nondisclosure provision was a prior restraint and a content-based restriction on speech that violated the First Amendment because the government did not bear the burden to seek prompt judicial review of the nondisclosure order. *John Doe, Inc.*, 500 F. Supp. 2d at 406 (relying on *Freedman v. Maryland*, 380 U.S. 51 (1965)).[2] The district court approved allowing the FBI to determine whether disclosure would jeopardize national security, finding that the FBI's discretion in certifying a need for nondisclosure of an NSL "is broad but not inappropriately so under the circumstances" of protecting national security. *Id.* at 408-09. However, the district court determined that section 3511(b)'s restriction on when a court may alter or set aside an NSL – only if there was "no reason to believe" that disclosure would result in one of the enumerated harms – in combination with the statute's direction that a court must accept the FBI's certification of harm as "conclusive unless the court finds that the certification was made in bad faith," were impermissible attempts to restrict judicial review in violation of separation of powers principles. *Id.* at 411-13. The district court

[2] In *Freedman*, the Supreme Court evaluated a motion picture censorship statute that required an owner or lessee of a film to submit the film to the Maryland State Board of Censors and obtain its approval prior to showing the film. 380 U.S. at 52. The Court held that such a review process "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. "*Freedman* identified three procedural requirements: (1) any restraint imposed prior to judicial review must be limited to 'a specified brief period'; (2) any further 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." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (quoting *Freedman*, 380 U.S. at 58–59) (numbering and ordering follows Supreme Court's discussion of *Freedman* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990)).

found that the unconstitutional nondisclosure provisions were not severable from the substantive provisions of the NSL statute, and declined to address whether the unconstitutional judicial review provision – which implicated review of other NSLs, not just NSLs to electronic communication service providers at issue – was severable.

The district court's decision was affirmed in part, reversed in part, and remanded by the Second Circuit Court of Appeals in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). In that case, the Second Circuit found that while not a "classic prior restraint" or a "broad" content-based prohibition on speech necessitating the "most rigorous First Amendment scrutiny," the nondisclosure requirement was sufficiently analogous to them to justify the application of the procedural safeguards announced in *Freedman v. Maryland*, 380 U.S. 51, particularly the third *Freedman* prong requiring the government to initiate judicial review. *Id.* at 881. However, in order to avoid the constitutional deficiencies, the Second Circuit read into the statute a "reciprocal notice" requirement that the government inform each NSL recipient that the recipient could object to the nondisclosure requirements, and if contested, the government would initiate judicial review within 30 days, and that such review would conclude within 60 days. The Second Circuit held that by "conforming" section 2709(c) in this manner, the *Freedman* concerns were met.

The Second Circuit also found problematic the statutory restrictions on the district court's review of the adequacy of the FBI's justification for nondisclosure orders. In order to avoid some of the problems, the Second Circuit accepted three concessions by the government that narrowed the operation of sections 2709(c) and 3511(b) in significant respects. First, the Second Circuit accepted the government's position – offered in litigation – that the section 2709(c) nondisclosure requirement applied only if the FBI certified that an enumerated harm related to an authorized investigation to protect against international terrorism or clandestine intelligence activity may occur. *Id.* at 875. Second, the Second Circuit accepted the government's litigation position that section 3511(b)(2)'s requirement that a court may alter or modify the nondisclosure agreement only if there "is no reason to believe that disclosure may" risk one of the enumerated harms, should be read to mean that a court may alter or modify the nondisclosure agreement unless there is "some reasonable likelihood" that the enumerated harm will occur. Third, the Second Circuit

accepted the government's agreement that it would bear the burden of proof to persuade a district court – through evidence submitted in camera as necessary – that there was a good reason to believe that disclosure may risk one of the enumerated harms, and that the district court must find that such a good reason exists. *Id.* at 875-76.

In interpreting section 3511(b) to require the government to show a "good" reason that an enumerated harm related to international terrorism or clandestine intelligence activity may result, and requiring the government to submit proof to the district court to support its certification, the Second Circuit found that a court would have – consistent with its duty independently to assess First Amendment restraints in light of national security concerns – "a basis to assure itself (based on in camera presentations where appropriate) that the link between the disclosure and risk of harm is substantial." *Id.* at 881. After implying these limitations – based on the government's litigation concessions – the Second Circuit found that most of the significant constitutional deficiencies found by the district court could be avoided. However, the Second Circuit affirmed the lower court's holding that section 3511(b)(2) and (b)(3)'s provision that government certifications must be treated as "conclusive" is not "meaningful judicial review" as required by the First Amendment. *Id.* at 882. In conclusion, the Second Circuit severed the conclusive presumption provision of section 3511(b), but left intact the remainder of section 3511(b) and the entirety of section 2709, with the added imposed limitations and "with government-initiated review as required." *Id.* at 885.

In this Court's March 13, 2013 decision, the Court largely agreed with the analysis of the Second Circuit in *John Doe, Inc. v. Mukasey*, and held that although section 2709(c) did not need to satisfy the "extraordinarily rigorous" *Pentagon Papers* test,[3] section 2709(c) must still meet the

[3] In *New York Times v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam), the Supreme Court denied the United States' request for an injunction enjoining the *New York Times* and the *Washington Post* from publishing a classified government study. Citing Justice Stewart's concurrence, petitioners have contended throughout this litigation that the nondisclosure provisions are constitutional only if the government can show that disclosure of the information will "surely result in direct, immediate, and irreparable harm to our Nation or its people." *Id.* at 730 (Stewart, J., joined by White, J., concurring). As explained in the Court's 2013 decision and this decision, the Court concludes that the *Pentagon Papers* test does not apply to the NSL nondisclosure requirements.

heightened justifications for sustaining prior-restraints announced in *Freedman v. Maryland*, and must be narrowly tailored to serve a compelling government interest.

This Court found that section 2709 did not satisfy the *Freedman* procedural safeguards because the NSL provisions did not require the government to initiate judicial review of NSL disclosure orders. This Court also found that the NSL nondisclosure provisions were not narrowly tailored on their face, since they applied without distinction to prohibiting disclosures regarding the content of the NSLs as well as to the very fact of having received an NSL. This Court also held that section 3511(b) violated the First Amendment and separation of powers principles because the statute impermissibly attempted to circumscribe a court's ability to review the necessity of nondisclosure orders. This Court found that it was not within its power to "conform" the NSL nondisclosure provisions as the Second Circuit had. This Court therefore held the NSL statutes unconstitutional, denied the government's request to enforce the NSL at issue in 3:11-cv-2173 SI, and enjoined the government from issuing NSLs. This Court stayed enforcement of its decision pending appeal to the Ninth Circuit.

In 2013, petitioner A received two additional NSLs and on April 23, 2013, petitioner A filed another petition to set aside those NSLs on same constitutional grounds raised in the 2011 petition. *In re NSLs*, 3:13-mc-80089 SI. In addition, two other recipients of NSLs filed lawsuits in this Court seeking to set aside the NSLs on the basis of the First Amendment and separation of powers. *See In re NSLs*, 3:13-cv-1165 SI (petition challenging 2 NSLs) and *In re NSLs*, 3:13-mc-80063 SI (petition challenging 19 NSLs).[4]

In three separate orders filed on May 21, 2013, August 12, 2013, and August 13, 2013, this Court found that in light of the pending appeal and stay of the judgment in *In re NSLs*, 3:11-cv-2173 SI, it was appropriate to review the arguments and evidence on an NSL-by-NSL basis. In determining whether to enforce the challenged NSLs, the Court reviewed classified and unclassified evidence submitted by the government. The Court found that the government demonstrated that the NSLs were issued in full compliance with the procedural and substantive

[4] The Court will refer to the petitioner in *In re NSLs*, 3:13-cv-1165 SI as petitioner B and the petitioner in *In re NSLs*, 3:13-mc-80063 SI as petitioner C.

requirements imposed by the Second Circuit in *John Doe, Inc. v. Mukasey*. Specifically, the Court found that the government had: (1) notified the NSL recipients that the government would initiate judicial review of the nondisclosure order and the underlying NSL if the recipient objected to compliance; (2) certified that the nondisclosure orders were necessary to prevent interference with an authorized investigation to protect against international terrorism or clandestine intelligence agencies; and (3) submitted evidence to showing there was a "good reason" to believe that absent nondisclosure, some reasonable likelihood of harm to an authorized investigation to protect against international terrorism or clandestine intelligence agencies would result. The Court also found that the Court was not expected to treat the FBI's certification as to the necessity of the nondisclosure as conclusive, but to conduct a searching review of the evidence submitted. *See* Dkt. No. 27 in 3:13-mc-80063 SI (May 21, 2013 Order); Dkt. No. 13 in 3:13-cv-1165 SI (August 12, 2013 Order); Dkt. No. 20 in 3:13-mc-80089 SI (August 13, 2013 Order). The Court denied the petitioners' petitions to set aside the NSLs challenged in 3:13-mc-80089 SI, 3:13-mc-80063 SI, and 3:13-cv-1165 SI, and granted the government's motions to enforce those NSLs. The petitioners in those cases unsuccessfully sought stays of the enforcement orders, and thereafter complied with the information requests and the nondisclosure requirements of all of the NSLs.[5] The petitioner in 3:13-mc-80063 SI did not file an appeal. The parties in 3:11-cv-2173 SI, 3:13-mc-80089 SI and 3:13-cv-1165 SI filed appeals, and those appeals were consolidated before the Ninth Circuit.

The consolidated appeals were submitted for decision following oral argument on October 8, 2014. On June 2, 2015, while the consolidated appeals were pending before the Ninth Circuit, Congress amended 18 U.S.C. §§ 2709 and 3511 through the passage of the USA Freedom Act of 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). In June 2015, the Ninth Circuit ordered the parties to file supplemental briefing regarding the impact of the amendments on the appeals. On August 24, 2015, the Ninth Circuit issued an order stating "[i]n light of the significant

[5] In a few instances, the government withdrew the information requests for particular NSLs, but the government did not withdraw any of the nondisclosure requirements for any of the NSLs.

changes to the statutes, we conclude that a remand to the district court is appropriate since the district court may address the recipients' challenges to the revised statutes." The Ninth Circuit vacated the judgments in the consolidated appeals and remanded to this Court for further proceedings.

II. 2015 Amendments to NSL Statutes

The legislative history of the USAFA states that section 502, titled "Limitations on Disclosure of National Security Letters," "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015).

A. Section 2709

The USAFA amended sections 2709(b) and (c), and added new subsection (d). As amended, section 2709(b)(1) provides that an NSL is authorized only when a specified FBI official provides a certification that "us[es] a term that specifically identifies a person, entity, telephone number, or account as the basis for [the NSL]," 18 U.S.C. § 2709(b) (2016).[6] Section 2709(c) now requires the government to provide the NSL recipient with notice of the right to judicial review as a condition of prohibiting disclosure of the receipt of the NSL. *See* 18 U.S.C. § 2709(c)(1)(A) (2016). Similarly, new subsection (d) requires that an NSL notify the recipient that judicial review is available pursuant to 18 U.S.C. § 3511. *See* 18 U.S.C. § 2709(d) (2016). Second, the amended statute now permits the government to modify or rescind a nondisclosure requirement after an NSL is issued. *See* 18 U.S.C. § 2709(c)(2)(A)(iii) (2016). Finally, under the

[6] The legislative history regarding this amendment states, "This section prohibits the use of various national security letter (NSL) authorities (contained in the Electronic Communications Privacy Act, Right to Financial Privacy Act, and Fair Credit Reporting Act) without the use of a specific selection term as the basis for the NSL request. It specifies that for each NSL authority, the government must specifically identify the target or account." H.R. Rep. No. 114-109, at 24 (discussing § 501 of USAFA).

amended section 2709(c), the recipient of an NSL containing a nondisclosure requirement "may disclose information . . . to . . . other persons as permitted by the Director of the [FBI] or the designee of the Director." 18 U.S.C. §§ 2709(c)(2)(A)(iii); 2709(c)(2)(D) (2016).

As amended by the USAFA, section 2709, titled "Counterintelligence access to telephone toll and transactional records," now states in full:

> (a) Duty to provide.--A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.
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> (b) Required certification.--The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request--
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> (1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and
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> (2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.
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> (c) Prohibition of certain disclosure.--
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> (1) Prohibition.--
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> (A) In general.--If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.
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> (B) Certification.--The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in

Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in--

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception.--

(A) In general.--A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to--

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(B) Application.--A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

(C) Notice.--Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients.--At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review.--

(1) In general.--A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

(2) Notice.--A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).

18 U.S.C. § 2709 (2016).

B. Section 3511

Section 502(g) of the USAFA amends section 3511(d) to codify a version of the reciprocal notice procedure for NSL disclosure requirements that the Second Circuit held in *John Doe, Inc. v. Mukasey* would be constitutional. As amended, section 3511(b) provides that "[i]f a recipient of [an NSL] wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court . . . ." 18 U.S.C. § 3511(b)(1)(A) (2016). If the recipient notifies the government that it objects to or wishes to have a court review the nondisclosure requirement, the government must apply for a nondisclosure order within 30 days. *Id.* § 3511(b)(1)(B) (2016). The amended statute requires the district court to "rule expeditiously," and if the court determines that the requirements for nondisclosure are met, it shall "issue a nondisclosure order that includes conditions appropriate to the circumstances." *Id.* § 3511(b)(1)(C) (2016).[7] The amended statute also provides that a recipient of an NSL "may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request[,]" and that "[t]he court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* at § 3511(a) (2016).

In addition, amended section 3511(b) requires that in the event of judicial review, the government's application for a nondisclosure order must be accompanied by a certification from a specified government official "containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in-- (A) a danger to the national

[7] As discussed *infra*, the statutory requirement of "expeditious" judicial review differs from the reciprocal notice procedure discussed in *John Doe, Inc. v. Mukasey*, in that in *Doe*, the Second Circuit stated its view that if the government used a reciprocal notice procedure as a means of initiating judicial review and judicial review was sought, a court would have 60 days to adjudicate the merits, unless special circumstances warranted additional time. *See John Doe, Inc.*, 549 F.3d at 883. Petitioners contend that the amended statute is deficient because it does not mandate a specific time period for the conclusion of judicial review.

security of the United States; (B) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person." 18 U.S.C. § 3511(b)(2) (2016). The statute provides that the district court "shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in" one of the enumerated harms. *Id.* § 3511(b)(3) (2016). The USAFA repealed the provision formerly contained in section 3511(b)(2)-(3) that gave conclusive effect to good faith certifications by specified government officials. *See* H.R. Rep. No. 114-109, at 24 ("This section repeals a provision stating that a conclusive presumption in favor of the government shall apply where a high-level official certifies that disclosure of the NSL would endanger national security or interfere with diplomatic relations."). The USAFA also repealed the provision formerly set forth in section 3511(b)(3) under which an NSL recipient who unsuccessfully challenged a nondisclosure requirement a year or more after the issuance of the NSL was required to wait one year before seeking further judicial relief.

As amended by the USAFA, 18 U.S.C. § 3511, titled "Judicial review of requests for information," now provides,

> (a) The recipient of a request for records, a report, or other information under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947 may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.
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> (b) Nondisclosure.--
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> (1) In general.--
>
> (A) Notice.--If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), wishes to have a court review a nondisclosure requirement imposed in connection with the request

or order, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a).

(B) Application.--Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(C) Consideration.--A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) should rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(2) Application contents.--An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in--

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

(3) Standard.--A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in--

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

18 U.S.C. 3511(a)-(b) (2016).

C. Other Provisions of USAFA

The USAFA includes two other provisions that are relevant to this litigation. First, section 502(f) requires the Attorney General to adopt procedures to require "the review at appropriate intervals" of nondisclosure requirements issued pursuant to amended section 2709 "to assess whether the facts supporting nondisclosure continue to exist." USAFA § 502(f)(1)(A), Pub. L. No. 114-23, 129 Stat 268, at 288 (2015). On November 24, 2015, the Attorney General adopted "Termination Procedures for National Security Letter Nondisclosure Requirement."[8] Those procedures provide:

> **III. Review Procedures**
>
> **A. Timeframe for Review**
>
> Under these NSL Procedures, the nondisclosure requirement of an NSL shall terminate upon the closing of any investigation in which an NSL containing a nondisclosure provision was issued except where the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied. The FBI also will review all NSL nondisclosure determinations on the three-year anniversary of the initiation of the full investigation and terminate nondisclosure at that time, unless the FBI determines that one of the statutory standards for nondisclosure is satisfied. When, after the effective date of these procedures, an investigation closes and/or reaches the three-year anniversary of the initiation of the full investigation, the agent assigned to the investigation will receive notification, automatically generated by FBI's case management system, indicating that a review is required of the continued need for nondisclosure for all NSLs issued in the case that included a nondisclosure requirement. Thus, for cases that close after the three-year anniversary of the full investigation, the NSLs that continue to have nondisclosure requirements will be reviewed on two separate occasions; cases that close before the three-year anniversary of the full investigation will be reviewed on one occasion. Moreover, NSL nondisclosure requirements will be reviewed only if they are associated with investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures.
>
> **B. Review Requirements**
>
> The assessment of the need for continued nondisclosure of an NSL is an individualized one; that is, each NSL issued in an investigation will need to be individually reviewed to determine if the facts no longer support nondisclosure

[8] The procedures are available at https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1. The procedures became effective 90 days after they were adopted by the Attorney General, or February 22, 2016.

under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., where there is good reason to believe disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Every determination to continue or terminate the nondisclosure requirement will be subject to the same review and approval process that NSLs containing a nondisclosure requirement are subject to at the time of their issuance. Thus, (i) the case agent will review the NSL, the original written justification for nondisclosure, and any investigative developments to determine whether nondisclosure should continue; (ii) the case agent will document the reason for continuing or terminating the nondisclosure requirement; (iii) the case agent's immediate supervisor will review and approve the case agent's written justification for continuing or terminating nondisclosure; (iv) an attorney—either the Chief Division Counsel or Associate Division Counsel in the relevant field office or an attorney with the National Security Law Branch at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; (v) higher-level supervisors—either the Assistant Special Agent in Charge in the field or the Unit Chief or Section Chief at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; and (vi) a Special Agent in Charge or a Deputy Assistant Director at FBIHQ will review and make the final determination regarding the case agent's written justification for continuing or terminating nondisclosure. In addition, those NSLs for which the nondisclosure requirement is being terminated will undergo an additional review at FBIHQ for consistency across field offices and programs. This review process must be completed within 30 days from the date of the review notice given by the FBI's case management system.

C. Notification of Termination

Upon a decision that nondisclosure of an NSL is no longer necessary, written notice will be given to the recipient of the NSL, or officer, employee, or agent thereof, as well as to any applicable court, as appropriate, that the nondisclosure requirement has been terminated and the information contained in the NSL may be disclosed. Any continuing restrictions on disclosure will be noted in the written notice. If such a termination notice is to be provided to a court, the FBI field office or FBIHQ Division that issued the NSL, in conjunction with FBI's Office of General Counsel, shall coordinate with the Department of Justice to ensure that notice concerning termination of the NSL nondisclosure requirement is provided to the court and any other appropriate parties.

. . .

Second, section 604 of the USAFA, titled "Public Reporting by Persons Subject to Orders," sets forth a structure by which persons subject to nondisclosure orders or requirements accompanying an NSL may make public disclosures regarding the national security process. A

recipient may publicly report, semi-annually, the number of national security letters received in bands of 100 starting with 0-99, in bands of 250 starting with 0-249, in bands of 500 starting with 0-499, or in bands of 1000, starting with 0-999. *See* USAFA § 604(a), Pub. L. No. 114-23, 129 Stat. 268 (2015); 50 U.S.C. § 1874(a) (2016).

DISCUSSION

I. Level of Scrutiny

The parties dispute what level of scrutiny the Court should apply when analyzing the NSL statutes.[9] The Court notes that the parties largely repeat the same arguments that they advanced to this Court in prior briefing on this issue. Petitioners again contend that the nondisclosure orders amount to a classic prior restraint on speech because they prohibit recipients of an NSL from speaking not just about the NSL's contents and target, but even about the existence or receipt of the NSL. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984))). Petitioners argue that, as a "classic" prior restraint, the statute can only be saved if disclosure of the information from NSLs will "surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J.

[9] The parties also dispute whether the Court should engage in a facial analysis of the amended statutes, or limit its review to an as-applied challenge. At the hearing on this matter, the Court asked the parties to articulate the practical difference between these two approaches in light of the Ninth Circuit's instruction to this Court to address petitioners' "challenges to the revised statutes." The principal difference the parties identified was whether the Court would review the Attorney General's recently promulgated "Termination Procedures for National Security Letter Nondisclosure Requirement," because it was unclear (until the hearing) whether those procedures applied to petitioners' NSLs, since those NSLs were issued in 2011 and 2013. The government stated that because the investigations associated with petitioners' NSLs are still ongoing, the procedures would apply upon the termination of the investigations. Based upon that representation, the Court will review the Termination Procedures as applied to petitioners. At the hearing, petitioners asserted that there may be NSLs with current nondisclosure requirements that were issued under the prior NSL statutes and that may not be subject to the Termination Procedures. The Court declines to speculate about the existence of any such NSLs, and limits its consideration to the NSLs issued in these cases.

concurring).

Petitioners also contend that the NSL nondisclosure orders are a content-based restriction on speech because they target a specific category of speech – speech regarding the NSL. As a content-based restriction, the nondisclosure provision is "presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and can only be sustained if it is "narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (citation omitted).

The government contends that the amended nondisclosure provisions are akin to grand jury secrecy requirements and therefore do not warrant the most rigorous First Amendment scrutiny. The government also contends that the *Freedman* procedural safeguards do not apply to the amended NSL statutes because "the USAFA . . . has transformed the procedural and substantive protections for NSL recipients from governmental promises of voluntary, nationwide compliance, to statutory protections." Dkt. No. 92 in 3:11-cv-2173 SI at 19 n.15 (internal citation and quotation marks omitted).[10] The government argues that the NSL statutory system is similar to the statute challenged in *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978), which prohibited the disclosure of information about the proceedings of a judicial investigative body and imposed criminal penalties for violation. *See Landmark Comm.*, 435 U.S. at 830. The government asserts that, as in *Landmark*, the NSL statutes do not constitute a prior restraint or attempt to censor the news media or public debate.

The Court finds no reason to deviate from its prior analysis regarding the standard of review. As the Court held in 2013, the Court finds that given the text and function of the NSL

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[10] Petitioners A and B are represented by the same counsel, and filed virtually identical briefs in the briefing on remand. The main difference in the briefing is that the petitioner's motion in 3:11-cv-2173 SI additionally challenged the "compelled production" provision of section 2709(b) as unconstitutional. (In the Court's 2013 decision, the Court denied the government's motion to enforce the 2011 NSL, and thus on remand, petitioner A challenged both the nondisclosure provisions as well as the statutory authority to request information pursuant to an NSL.) [redacted] the FBI withdrew the information demand accompanying the 2011 NSL, thus mooting those arguments. In the Court's August 12, 2013 order in 3:13-cv-1165 SI, the Court granted the government's motion to enforce the NSLs at issue, and after this Court and the Ninth Circuit denied a stay of that order, petitioner B complied with the NSLs.

statute, petitioners' proposed standards are too exacting. Rather, this Court agrees with the Second Circuit's analysis in *John Doe, Inc. v. Mukasey*:

> Although the nondisclosure requirement is in some sense a prior restraint, . . . it is not a typical example of such a restriction for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies. And although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of the receipt of an NSL and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions.

John Doe, Inc., 549 F.3d at 876 (internal citations omitted). The Court also agrees with the Second Circuit's statement that "[t]he national security context in which NSLs are authorized imposes on courts a significant obligation to defer to judgments of Executive Branch officials." *Id.* at 871; *see also Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs.")

However, the nondisclosure provision clearly restrains speech of a particular content – significantly, speech about government conduct. *John Doe, Inc.*, 549 F.3d at 876, 878. Under section 2709(c), the FBI has been given the power to determine, on a case-by-case basis, whether to allow NSL recipients to speak about the NSLs. As a result, the recipients are prevented from speaking about their receipt of NSLs and from disclosing, as part of the public debate on the appropriate use of NSLs or other intelligence devices, their own experiences. *See* Dkt. No. 91-2 in 3:11-cv-2173 SI (declaration of [redacted]); Dkt. No. 73 in 3:13-cv-1165 SI (corrected declaration of [redacted]). In these circumstances, the Court finds that while section 2709(c) does not need to satisfy the extraordinarily rigorous *Pentagon Papers* test, section 2709(c) must still meet the heightened justifications for sustaining prior-restraints announced in *Freedman v. Maryland* and must be narrowly tailored to serve a compelling governmental interest. *See John Doe, Inc.*, 549 F.3d at 878 (noting government conceded strict scrutiny applied in that case).

The Court is not persuaded by the government's attempt to avoid application of the *Freedman* procedural safeguards by analogizing to cases which have upheld restrictions on disclosures of information by individuals involved in civil litigation, grand jury proceedings and judicial misconduct investigations. The concerns that justified restrictions on a civil litigant's pre-

trial right to disseminate confidential business information obtained in discovery – a restriction that was upheld by the Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) – are manifestly not the same as the concerns raised in this case. Here, the concern is the government's ability to prevent individuals from speaking out about the government's use of NSLs, a subject that has engendered extensive public and academic debate.

The government's reliance on cases upholding restrictions on witnesses in grand jury or judicial misconduct proceedings from disclosing information regarding those proceedings is similarly misplaced. With respect to grand jury proceedings, the Court notes that the basic presumption in federal court is that grand jury witnesses are not bound by secrecy with respect to the content of their testimony. *See, e.g., In re Grand Jury*, 490 F.3d 978, 985 (D.C. Cir. 2007) ("The witnesses themselves are not under an obligation of secrecy."). While courts have upheld state law restrictions on grand jury witnesses' disclosure of information learned only through participation in grand jury proceedings, those restrictions were either limited in duration or allowed for broad judicial review. *See, e.g., Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) (agreeing state court grand jury witness could be precluded from disclosing information learned through giving testimony, but noting state law provides a mechanism for judicial determination of whether secrecy still required); *cf. Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (interests in grand jury secrecy do not "warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged.").

Importantly, as the Second Circuit recognized, the interests of secrecy inherent in grand jury proceedings arise from the nature of the proceedings themselves, including "enhancing the willingness of witnesses to come forward, promoting truthful testimony, lessening the risk of flight or attempts to influence grand jurors by those about to be indicted, and avoiding public ridicule of those whom the grand jury declines to indict." *John Doe, Inc.*, 549 F.3d at 876. In the context of NSLs, however, the nondisclosure requirements are imposed at the demand of the Executive Branch "under circumstances where the secrecy might or might not be warranted." *Id.* at 877. Similarly, the secrecy concerns which inhere in the nature of judicial misconduct proceedings, as well as the temporal limitations on a witness's disclosure regarding those

proceedings, distinguish those proceedings from section 2709(c). *Id.*

The Court is also not persuaded by the government's contention that *Freedman* should not apply to the revised NSL statutes because the USAFA "has transformed the procedural and substantive protections for NSL recipients from 'governmental promises' of 'voluntary, nationwide compliance,' [quoting *In re NSL*, 930 F. Supp. 2d at 1073-74], to statutory protections." Dkt. No. 92 in 3:11-cv-2173 SI at 19 n.15 (internal citation and quotation marks omitted). *Freedman* holds that where expression is conditioned on governmental permission, the First Amendment generally requires procedural safeguards to protect against censorship. While the USAFA changed the procedures for judicial review and the circumstances under which nondisclosure requirements could be lifted or amended, expression nevertheless remains conditioned on governmental permission.[11] Under the amended statutes, the government is still permitted to impose a nondisclosure requirement on an NSL recipient to prevent the recipient from disclosing the fact that it has received an NSL, as well as from disclosing anything about the information sought by the NSL.

The government also asserts that the amended NSL statutory scheme is akin to the criminal statute challenged in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978). *Landmark Communications* is inapposite. In that case, the question was "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission." *Id.* at 837. Here, rather than imposing criminal sanctions based on disclosure of information, the statute permits the government to impose a nondisclosure requirement prohibiting speech.

[11] The Court does, however, recognize the differences between licensing schemes such as those at issue in *Freedman*, which always act as a restraint because such systems are applied to all prospective speakers at the time the speaker wishes to speak, and the NSL nondisclosure requirements, which apply at the time the government requests information as part of an investigation and at a time when there is no certainty that a NSL recipient wishes to engage in speech.

II. Procedural Safeguards

Having concluded that the procedural safeguards mandated by *Freedman* should apply to the amended NSL statutes, the question becomes whether those standards are satisfied. *Freedman* requires that "'(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'" *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (O'Connor, J., joined by Stevens, and Kennedy, JJ.)).

A. Time Prior to Judicial Review

Under *Freedman*'s first prong, any restraint prior to judicial review can be imposed only for "a specified brief period." *Freedman*, 380 U.S. at 59. Previously, the NSL provisions did not provide any limit to the period of time the nondisclosure order can be in place prior to judicial review. The Second Circuit held that this *Freedman* factor would be satisfied if the government were to notify NSL recipients that if they objected to the nondisclosure order within ten days, the government would seek judicial review of the nondisclosure restriction within thirty days. *John Doe, Inc.*, 549 F.3d at 883.

The amended statute largely incorporates the Second Circuit's suggestions on this point. Section 2709(d)(2) requires that an NSL "include notice of the availability of judicial review," and section 3511(b)(2) provides that if a recipient notifies the government that it wishes to have a court review a nondisclosure requirement, within 30 days "the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order." 18 U.S.C. § 2709(d)(2) (2016); 18 U.S.C. § 3511(b)(2) (2016).

Petitioners contend that the amended statute violates the first prong of the *Freedman* test because the statute authorizes gags of indefinite duration unless the recipient takes action by initiating judicial review or by notifying the government of its desire for judicial review. Petitioners argue that the amended statute violates *Freedman*'s admonition that a potential speaker

must be "assured" by the statute that a censor "will, within a specified brief period, either issue a license or go to a court to restrain" the speech at issue. *Freedman*, 380 U.S. at 58-59. As discussed *supra*, because the NSL nondisclosure requirements are not a typical prior restraint, the Court concludes the Constitution does not require automatic judicial review in every instance, provided that NSL recipients are notified that judicial review is available and the *Freedman* procedural safeguards are otherwise met. *See John Doe, Inc.*, 549 F.3d at 879-80 (discussing reciprocal notice procedure and how use of that procedure obviates need for automatic judicial review of every NSL).

The Court further finds that although the amended statute does not include the initial ten day period discussed by the Second Circuit, the amended statute satisfies *Freedman*'s first requirement that any restraint prior to judicial review can be imposed only for "a specified brief period." Under the amended statute, a recipient of an NSL is notified of the availability of judicial review at the same time the recipient receives the NSL. If a recipient wishes to seek prompt review of a nondisclosure order, the recipient can either file a petition or promptly notify the government of its objection, thereby triggering the thirty day period for the government to initiate judicial review. As such, the Court finds that the amended statute complies with *Freedman*'s first requirement.

B. "Expeditious" Judicial Review

Freedman next requires "a prompt final judicial decision" regarding the nondisclosure requirement. *Freedman*, 380 U.S. at 59. Amended section 3511(B)(1)(C) states that a court reviewing nondisclosure requirements "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(C) (2016).

Petitioners contend that the amended statute does not meet the second *Freedman* requirement because there is no specified time period in which a final determination must be made. Petitioners rely on the Second Circuit's holding in *John Doe, Inc.*, that if the government used the Second Circuit's suggested reciprocal notice procedure as a means of initiating judicial review, "time limits on the nondisclosure requirement pending judicial review, as reflected in

Freedman, would have to be applied to make the review procedure constitutional." *John Doe, Inc.*, 549 F.3d at 883. The Second Circuit held, "[w]e would deem it to be within our judicial authority to conform subsection 2709(c) to First Amendment requirements, by limiting the duration of the nondisclosure requirement . . . and a further period of 60 days in which a court must adjudicate the merits, unless special circumstances warrant additional time." *Id.*

Petitioners' arguments about prescribing time limits for the completion of judicial review are not without force. However, although the Second Circuit held that a 60 day time limit for judicial review would meet constitutional standards, the *John Doe, Inc.* court was reviewing the prior version of section 3511 which did not contain the directive that "courts should rule expeditiously." As the government notes, *Freedman* and other Supreme Court cases applying or discussing *Freedman* have held the Constitution requires "prompt" or "expeditious" judicial review. *Freedman*, 380 U.S. at 59; *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (stating *Freedman*'s second prong as requiring "expeditious judicial review of [prior restraint] decision"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975) (stating under *Freedman* "a prompt final judicial determination must be assured."). In *Freedman*, the Supreme Court held that the Maryland censorship scheme did not satisfy this requirement because the statute only stated that a person could seek judicial review of an adverse decision, without "any assurance of prompt judicial review." 380 U.S. at 54, 59. Here, in contrast, the amended statute directs that courts "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(C) (2016). The Court concludes that the amended statute satisfies the second *Freedman* procedural prong.

C. Government Must Initiate Judicial Review and Bear Burden of Proof

The third *Freedman* safeguard requires the government to bear the burden of seeking judicial review and to bear the burden of proof once in court. *Freedman*, 380 U.S. at 59-60. The Second Circuit found that the absence of a reciprocal notice procedure in the prior version of the NSL statutes rendered them unconstitutional, but suggested that if the government were to inform recipients that they could object to the nondisclosure order, and that if they objected, the government would seek judicial review, then the constitutional problem could be avoided. *John*

Doe, Inc., 549 F.3d at 879-80. The amended statutes now incorporate this reciprocal notice procedure. *See* 18 U.S.C. §§ 2709(c)(1)(A); 2709(d)(2) (2016) (requiring notice of the availability of judicial review); 18 U.S.C. § 3511(b)(1)(A)-(C) (2016) (initiating judicial review through reciprocal notice and imposing 30-day requirement on government).

Petitioners argue that the amended statute places an impermissible burden on invoking judicial review because recipients need to notify the FBI of an objection in order to trigger judicial review. Petitioners' principal complaint is that the amended statute does not require automatic judicial review of every NSL, a contention that the Court has already addressed. *See also John Doe, Inc.*, 549 F.3d at 879-80. The Court also finds that notifying the government of an objection is not a substantial burden, and that the relevant burden is "the burden of instituting judicial proceedings," which is placed on the government. *See Freedman*, 380 U.S. at 59; *see also Southeastern Promotions, Ltd.*, 420 U.S. at 560; *see also id.* at 561 (holding municipal board's rejection of application to use public theater for showing of rock musical "Hair" did not meet *Freedman*'s procedural requirements because, *inter alia*, "[t]hroughout [the process], it was petitioner, not the board, that bore the burden of obtaining judicial review."). Here, if a recipient notifies the government of an objection, the burden of seeking judicial review is upon the government. Petitioners also assert that the amended statute is deficient because the government can choose to ignore its obligation to initiate judicial review. However, petitioners' assertion is speculative, and the record before the Court shows that the government promptly sought judicial review with respect to the NSLs at issue.[12]

III. Judicial Review

The prior version of section 3511(b) provided that a court could modify or set aside a nondisclosure requirement only if the court found there was "no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or

[12] The question of which party bears the burden of proof is related to the issue of judicial review, and thus the Court discusses the two issues together *infra*.

endanger the life or physical safety of any person." 18 U.S.C. § 3511(b)(2-(3) (2014). If the FBI certified that such a harm "may" occur, the district court was required to accept that certification as "conclusive." *Id.*

This Court found that the prior version of section 3511(b) impermissibly restricted the scope of judicial review. The Court held that "[t]he statute's intent – to circumscribe a court's ability to modify or set aside nondisclosure NSLs unless the essentially insurmountable 'no reason to believe' that a harm 'may' result is satisfied – is incompatible with the court's duty to searchingly test restrictions on speech." *In re National Sec. Letter*, 930 F. Supp. 2d at 1077-78. The Court agreed with the government that "in light of the national security context in which NSLs are issued, a highly deferential standard of review is not only appropriate but necessary." *Id.* at 1078. However, the Court found that deference to the government's national security determinations "must be based on a reasoned explanation from an official that directly supports the assertion of national security interests." *Id.* The Court also agreed with the Second Circuit that the statute's direction that courts treat the government's certification as "conclusive" was also unconstitutional.

The amended statute now states, "A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in-- (A) a danger to the national security of the United States; (B) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person." 18 U.S.C. § 3511(b)(3) (2016). Section 3511(b)(2) now requires the government's application for nondisclosure order to include a certification from a specified government official that contains "a statement of specific facts indicating that the absence of a prohibition on disclosure may result in" an enumerated harm. In addition, through the USAFA Congress eliminated the "conclusive" nature of certain certifications by certain senior officials.

The Court concludes that as amended, section 3511 complies with constitutional requirements and cures the deficiencies previously identified by this Court. Section 3511 no longer contains the "essentially insurmountable" standard providing that a court could modify or

set aside a nondisclosure requirement only if the court found there was "no reason to believe" that disclosure may result in an enumerated harm. The government argues, and the Court agrees, that in the USAFA, Congress implicitly ratified the Second Circuit's interpretation of section 3511 as "plac[ing] on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may risk one of the enumerated harms, and that a district court, in order to maintain a nondisclosure order, must find that such a good reason exists." *John Doe, Inc.*, 549 F.3d at 875-76.[13] This conclusion is supported by the legislative history of the USAFA, which states that section 502 of the USAFA (which amended section 3511 as well as section 2709), "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015); *see also Midatlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986) (citing the "normal rule of statutory construction" that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."); *United States v. Lincoln*, 277 F.3d 1112, 1114 (9th Cir. 2002) (where Ninth Circuit had previously interpreted statutory definition of "victim" to include the United States and Congress amended that definition without excluding the United States, the court "inferred that Congress adopted the judiciary's interpretation.").[14]

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[13] In so interpreting the pre-USAFA version of section 3511, the Second Circuit accepted the government's concessions that (1) "'reason' in the quoted phrase means 'good reason'"; and (2) "the statutory requirement of a finding that an enumerated harm 'may result' to mean more than a conceivable possibility. The upholding of nondisclosure does not require the certainty, or even the imminence of, an enumerated harm, but some reasonable likelihood must be shown." *Id.* at 875.

[14] The Court notes that the "good reason" standard is also discussed in the Attorney General's recently promulgated "Termination Procedures for National Security Letter Nondisclosure Requirement." Those procedures state, *inter alia*, "The FBI may impose a nondisclosure requirement on the recipient of an NSL only after certification by the head of an authorized investigative agency, or an appropriate designee, that one of the statutory standards for nondisclosure is satisfied; that is, *where there is good reason to believe* disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or

Petitioners contend that even if the amended statute could be interpreted as requiring the government to demonstrate that there is a "good reason" to believe that disclosure of the information may result in an enumerated harm, the standard of review is "excessively deferential" because the "may result" standard in section 3511(b)(3) is incompatible with the First Amendment's requirement that restrictions on speech be "necessary." However, as the Second Circuit held, "[t]he upholding of nondisclosure does not require the certainty, or even the imminence of, an enumerated harm, but some reasonable likelihood must be shown." *John Doe, Inc.*, 549 F.3d at 875. This reasonable likelihood standard is incorporated by the USAFA, *see* H.R. Rep. No. 114-109, at 24 (2015), and the Court concludes that this standard is sufficient. Further, a court will be able to engage in meaningful review of a nondisclosure requirement because under the amended statute, the government is required to provide "a statement of specific facts indicating that the absence of a prohibition on disclosure may result in" an enumerated harm, and courts are no longer required to treat the government's certification as "conclusive." 18 U.S.C. § 3511(b)(2) (2016).

V. Narrowly Tailored to Serve a Compelling Governmental Interest

As content-based restrictions on speech, the NSL nondisclosure provisions must be narrowly tailored to serve a compelling governmental interest. It is undisputed that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The question is whether the NSL nondisclosure provisions are sufficiently narrowly tailored to serve that compelling interest without unduly burdening speech.

The Court previously found that the NSL nondisclosure provisions were not narrowly tailored on their face, since they applied, without distinction, to both the content of the NSLs and to the very fact of having received one. The Court found it problematic that the statute did not distinguish – or allow the FBI to distinguish – between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The Court was also concerned about the fact that

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physical safety of any person." https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1.

nothing in the prior statute required or even allowed the government to rescind the non-disclosure order once the impetus for it had passed. Instead, the review provisions required the recipient to file a petition asking the Court to modify or set aside the nondisclosure order. *See* 18 U.S.C. § 3511(b) (2014). The Court also found problematic the fact that if a recipient sought review, and the court declined to modify or set aside the nondisclosure order, a recipient was precluded from filing another petition to modify or set aside for a year, even if the need for nondisclosure would cease within that year. 18 U.S.C. § 3511(b)(3) (2014).

The Court concludes that the amendments to section 3511 addressed the Court's concerns. 18 U.S.C. § 3511(b)(1)(C) now provides that upon review, a district court may "issue a nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C) (2016). At the hearing, the government stated that "conditions appropriate to the circumstances" could include a temporal limitation on nondisclosure, as well as substantive conditions regarding what information, such as the identity of the recipient or the contents of the subpoena, is subject to the nondisclosure order. The amended statutes also now authorize the Director of the FBI to permit additional disclosures concerning NSLs. *See* 18 U.S.C. §§ 2709(c)(2)(A)(iii) (2016) (recipient of NSL "may disclose information otherwise subject to any applicable nondisclosure requirement to . . . other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.")[15]; 18 U.S.C. § 2709(c)(2)(D) ("At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request."). In addition, Congress eliminated the provision that precluded certain NSL recipients from challenging a nondisclosure requirement more than once per year. USAFA § 502(f)(1), Pub. L. No. 114-23, 129 Stat. 268 (2015).

[15] The prior version of section 2709(c) permitted NSL recipients to disclose that they had received an information request to (1) parties necessary to comply with the request and (2) an attorney to obtain legal advice or legal assistance regarding the request. 18 U.S.C. § 2709(c) (2014).

In addition, on November 24, 2015, pursuant to section 502(f) of the USAFA, the Attorney General adopted "Termination Procedures for National Security Letter Nondisclosure Requirement." https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1. The procedures require the FBI to re-review the need for the nondisclosure requirement of an NSL three years after the initiation of a full investigation and at the closure of the investigation, and to terminate the nondisclosure requirement when the facts no longer support nondisclosure. These procedures apply to investigations that close or reach their three year anniversary on or after the effective date of the procedures. At the hearing in this case, the government stated that the investigations related to the NSLs issued to petitioners all remain open, and thus the procedures would apply when (and if) the investigations are closed.[16] The procedures state, *inter alia*,

> The assessment of the need for continued nondisclosure of an NSL is an individualized one; that is, each NSL issued in an investigation will need to be individually reviewed to determine if the facts no longer support nondisclosure under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., where there is good reason to believe disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Id.

Petitioners do not raise any specific challenge to these procedures (and they were adopted during the course of briefing the instant motions), other than to assert that there may be some NSLs that were issued prior to 2015 that will not be subject to the new procedures based on when the underlying investigations began and ended. However, the government stated that the investigations related to the NSLs in these cases are all open, and thus the procedures will apply to these NSLs if and when those investigations close. Further, the Court finds that these procedures

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[16] The FBI has also re-reviewed the need for the nondisclosure requirements for these particulars NSLs in connection with the current briefing, and has submitted the classified declarations in support of the government's position that the nondisclosure requirements remain necessary.

provide a further mechanism for review of nondisclosure requirements.

Finally, the Court finds that section 604 of the USAFA, which permits recipients of NSLs to make semi-annual public disclosures of aggregated data in "bands" about the number of NSLs they have received, supports a conclusion that the NSL statutes are narrowly tailored because this section permits recipients to engage in some speech about NSLs, even when the nondisclosure requirements are still in place.

V. 18 USC § 3551(b) Review of Pending Nondisclosure Requests

In addition to the parties' combined challenge to the constitutionality of the statutes and regulations now governing NSL requests, this Court is presented with consideration of the appropriateness of continued nondisclosure of the four specific NSL applications which gave rise to these cases. The Court has reviewed, *in camera* and subject to complex security restrictions, the certifications drafted pursuant to amended 18 U.S.C. § 3511(b)(2), supporting the government's request for continued nondisclosure of the existence of the NSLs. The regulations and the case law then require that this Court determine whether there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would result in a danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations or danger to a person's life or physical safety.

As to three of the certifications (in cases c:13-cv-1165 SI and 3:11-cv-2173 SI), the Court finds that the declarant has made such a showing. As to the fourth (in case 3:13-mc-80089 SI), the Court finds that the declarant has not. Nothing in the certification suggests that there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would result in a danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations or danger to a person's life or physical safety.

CONCLUSION

For the foregoing reasons and for good cause shown, in cases c:13-cv-1165 SI and 3:11-cv-2173 SI the Court hereby DENIES petitioners' motions and GRANTS the government's motions. In case 3:13-mc-80089 SI, the Court hereby GRANTS in part and DENIES in part petitioner's motion and GRANTS in part and DENIES in part the government's motion. The Government is therefore enjoined from enforcing the nondisclosure provision in case 3:13-mc-80089 SI. However, given the significant constitutional and national security issues at stake, enforcement of the Court's order will be stayed pending appeal, or if no appeal is filed, for 90 days.

The Court sets a status conference for April 15, 2016 at 3:00 p.m. to address what matters, if any, remain to be decided in these cases prior to the entry of judgment, as well as whether any portions of this order can be unsealed.

IT IS SO ORDERED.

Dated: March 29, 2016

Susan Illston

SUSAN ILLSTON
United States District Judge

United States District Court
Northern District of California