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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TWITTER, INC.,

Plaintiff,

v.

LORETTA E. LYNCH, Attorney General of the United States, *et al.*,

Defendants.

Case No. 14-cv-04480-YGR

TWITTER'S OPENING SUPPLEMENTAL BRIEF ON EFFECT OF RECENT LEGISLATION

No hearing scheduled.

Contents

I. INTRODUCTION

In this action, Twitter seeks declaratory and injunctive relief from Defendants' unconstitutional restrictions on Twitter's speech. (Dkt. No. 1.) Defendants have filed a Partial Motion to Dismiss, and on May 5, 2015, this Court heard arguments on that motion. On June 2, 2015, President Obama signed into law the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act" or "USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). Defendants and Twitter separately filed Notices Regarding Enactment of the USA Freedom Act. (Dkt. Nos. 67, 68.) On June 11, 2015, this Court directed the parties to "file supplemental briefing on the effect of this legislation, both as to the pending partial motion to dismiss and as to the ultimate claims for relief in Plaintiff's Complaint." (Dkt. No. 69.) As explained below, the USA Freedom Act has no effect on the appropriate disposition of Defendants' Partial Motion to Dismiss, and, while it is relevant to the merits of Twitter's constitutional claims, it does not alter the ultimate conclusion that the Defendants' conduct and the challenged statutory provisions violate the First Amendment.

II. SUMMARY OF RELEVANT CHANGES IN USA FREEDOM ACT

The USAFA contains two provisions that are relevant to this case. First, Section 603 of the USAFA amends Title VI of the Foreign Intelligence Surveillance Act of 1978 ("FISA") (50 U.S.C. §§ 1871 *et seq*.), by adding at the end the following new section: "Sec. 604. Public Reporting by Persons Subject to Orders." This section provides four additional options that a "person subject to a nondisclosure requirement accompanying [a FISA] order or directive . . . or a national security letter may, with respect to such order, directive, or national security letter, publicly report." USAFA § 604(a). Exhibit A contains a table that summarizes these four new options and compares them with the four preexisting options announced by the Defendants as available to a "person" subject to a national security legal process-related nondisclosure requirement. *See* Letter from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to General Counsels for Facebook, Inc., Google, Inc., LinkedIn

Corp., Microsoft Corp., and Yahoo! Inc. (Jan. 27, 2014), *available at* http://www.justice.gov/iso/opa/resources/366201412716018407143.pdf ("DAG Letter").

Second, Section 502(g) of the USAFA amends the judicial review procedures at 18 U.S.C. § 3511(b) by allowing for judicial review of an NSL nondisclosure requirement if a recipient who wishes to have a court review the requirement notifies the government of that wish.[1] 18 U.S.C. § 3511(b)(1)(A). If a recipient chooses to follow this new procedure and notify the government, the government must then apply for an order prohibiting disclosure in federal court. *Id.* § 3511(b)(1)(B). Regardless of how the case is commenced, the government must file a certification from one of various officials presenting specific facts showing that in the absence of a prohibition, the disclosure would result in a danger to national security, a criminal investigation, diplomatic relations, or safety. *Id.* § 3511(b)(2). As amended, Section 3511 differs from prior law in that it does not require that a good-faith certification be given conclusive effect. As was the case before passage of the USAFA, the recipient of a national security letter remains bound by the nondisclosure requirement for the pendency of that challenge. *Id.* § 3511(b)(1)(B). In addition, Section 3511 now directs district courts to rule "expeditiously" and "issue a nondisclosure order that includes conditions appropriate to the circumstances" if it determines "there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result" in any of the conditions in the government's certification. *Id.* § 3511(b)(1)(C), (3).

III. ARGUMENT

This Court directed supplemental briefing with regard to two related issues: "the effect of [the USAFA], both as to [1] the pending partial motion to dismiss and [2] as to the ultimate claims for relief in Plaintiff's Complaint." (Dkt. No. 69.) Twitter addresses these two issues in turn.

[1] Under the pre-USAFA judicial review procedures, a recipient did not have the option to commence a challenge by notifying the government, and was instead obligated to petition for relief directly with a federal district court. *See* former 18 U.S.C. § 3511(a) (describing procedures for challenging NSL nondisclosure obligation) (amended 2015).

A. Effect of the USA FREEDOM Act on the Pending Partial Motion to Dismiss

The USAFA has no impact on the issues before the Court in Defendants' pending motion to dismiss "pertaining to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. [("APA")], transfer of FISA-related claims to the Foreign Intelligence Surveillance Court, and deferring consideration of certain issues pertaining to national security letters." (Dkt. No. 68.)

1. The USA FREEDOM Act Does Not Affect Defendants' Pending Partial Motion to Dismiss With Regard to Twitter's APA Challenge to the DAG Letter

Twitter's APA challenge to the DAG Letter is based on Defendants' failure to follow the procedural requirements for promulgating substantive rules in issuing the DAG Letter. In their Partial Motion to Dismiss, Defendants argue that the DAG Letter does not represent final agency action because it does not impose any legal obligations. As explained in Twitter's prior briefing, that is incorrect. The government has informed the FISC that the DAG Letter "define[s] the limits of permissible reporting," Twitter Compl. Ex. 2, and the government relied *exclusively* on the DAG Letter in its September 9, 2014 letter to Twitter denying Twitter's request to publish in full its transparency report. Twitter Compl. Ex. 5 ("Baker-Sussmann Letter") (noting Defendants' position that Twitter's draft transparency report is "inconsistent with the January 27th framework [DAG Letter]") (Dkt. No. 1-1, at 15).

With passage of the USAFA, there currently are *eight* different lawful options for communications providers such as Twitter to publicly report information about national security legal process they have received (if any). In the summer of 2013, the government declassified and thereby, of its own accord, made permissible two options for approved speech ("Summer 2013 Options"). *See* DAG Letter, at 1-2. In January 2014, as part of its settlement of litigation with Facebook, Google, LinkedIn, Microsoft and Yahoo!, the government declassified and made permissible two more options (i.e., Options One and Two of the DAG Letter). *See id*., at 2-3.[2] The USAFA in no way purports to re-classify or

[2] Each of the four options created under the USAFA are distinct from the Summer 2013 Options and the options in the DAG Letter. *See* Ex. A.

otherwise prohibit the speech approved by the government in 2013 and 2014. The government thus has no basis now to say, in essence: "That speech you were allowed to speak the day *before* passage of the USAFA you can no longer lawfully speak *after* passage of the USAFA."[3]

Since the DAG Letter was not superseded by the USAFA, passage of the USAFA likewise did not moot Twitter's challenge to the DAG Letter. If, as Twitter argues, the DAG Letter was a substantive rule before the enactment of the USAFA, it is no less of a rule now. To the extent that the USAFA allows reporting options that the DAG Letter does not, that is not a basis for concluding that the DAG Letter is not a rule under the APA. Therefore, Twitter's allegation in the complaint that the DAG Letter violates the APA is not impacted by passage of the USAFA, nor is Defendants' argument for dismissing that allegation. The parties' dispute about the DAG Letter should continue to receive this Court's attention.

2. The USA FREEDOM Act Does Not Affect Defendants' Pending Partial Motion to Dismiss With Regard to Defendants' Request to Have Twitter's FISA-related Claims Transferred to the FISC

In their Partial Motion to Dismiss, Defendants argue that the FISC is a better forum to address Twitter's claims regarding nondisclosure provisions in FISA, arguing that "settled principle[s] of comity and orderly judicial administration" require the FISC to determine the scope and legality of its orders. (Dkt. No. 28, at 23-29.) Twitter responded that the United States District Court for the Northern District of California is the correct and preferred venue because judicial economy would not favor splitting this case, the FISC offers a severe asymmetry in practice and access to information in its proceedings, and the American legal system strongly disfavors closed courtrooms without compelling justification and abhors unequal treatment of parties by a decision-maker. (Dkt. No. 34, at 15-19; May 5, 2015 Hearing Tr., at 36-37.) As Twitter noted in its Opposition to Defendants' Partial Motion to Dismiss, the FISC is "a nonpublic court, with certain recent exceptions for public filing of

[3] Put another way, today a communications provider can avail itself of one of the Summer 2013 Options, one of the options in the DAG Letter, or one of the USAFA options, and the government has no basis to say that it is no longer lawful to use one of the Summer 2013 Options or DAG Letter options.

pleadings and other documents, that offers no ability for the public or any nonparty to view FISC proceedings. The FISC offers far greater opportunity than a district court for *ex parte* and classified hearings that are closed to any party but the government." (Dkt. No. 34, at 17.) Defendants cited no provision of the USAFA allegedly affecting these claims in their Notice Regarding Enactment of the USA FREEDOM Act, and there is no reason why passage of the USAFA should impact this Court's decision on this issue.[4]

Furthermore, the FISC recently rejected an opportunity to assert itself as the preferred forum for the interpretation of FISA, considering a U.S. District Court to be a suitable and appropriate venue for adjudicating constitutional questions implicated by FISA. In an opinion released subsequent to argument on Defendants' Partial Motion to Dismiss (and subsequent to passage of the USAFA), the FISC *sua sponte* dismissed a motion to intervene from parties seeking to bring a "challenge on Fourth Amendment grounds [to] the lawfulness of the bulk production of telephone metadata under Section 501 of FISA" because "[t]he parties and issues involved . . . extensively overlap with a suit previously commenced in the United States District Court for the District of Columbia." *In re Application of Fed. Bureau of Investigation for Order Requiring Prod. of Tangible Things*, No. BR 15-75, *In re Motion in Opp. to Gov't's Request to Resume Bulk Data Collection Under Patriot Act Section 215*, No. Misc. 15-01, combined slip. op., at 4-5 (filed FISA Ct. June 29, 2015). The FISC dismissed the motion based on comity, "in order to conserve judicial resources and avoid inconsistent judgments," and in accordance with the "first-to-file" rule, and it did not raise in its decision *any* of the factors relied upon by Defendants in their Partial Motion to Dismiss to argue that Twitter's FISA-related claims are best considered by the FISC. *Id*. at 5-6.

[4] Twitter notes that Section 401 of the USAFA provides for participation of amicus in FISC proceedings under certain circumstances. 50 U.S.C. § 1803(i). However, that change in FISC practice does not affect Defendants' Partial Motion to Dismiss because the possibility of an amicus participant will not lessen the burdens and restrictions on a communications provider that is litigating in the FISC.

3. The USA FREEDOM Act Does Not Affect Defendants' Pending Partial Motion to Dismiss With Regard to Defendants' Request for the Court to Defer Consideration of Certain NSL-related Issues

In their Partial Motion to Dismiss, Defendants argue that this Court should defer any decision on Twitter's challenge to the statutory standard of review applicable to an NSL nondisclosure order until the Ninth Circuit Court of Appeals rules on this issue, (Dkt. No. 28, at 30), thereby effectively bifurcating this case. Twitter responded that the balance of interests do not favor deferral when Twitter's First Amendment rights are being suppressed and it is by no means certain that the Ninth Circuit will resolve its cases in a way that is dispositive of this controversy. Defendants cited no provision of the USAFA in their Notice Regarding Enactment of the USA FREEDOM Act that affects their request for deferral of decision-making, and there is no reason why passage of the USAFA should impact this Court's decision on this issue.

B. Effect of the USA FREEDOM Act on the Ultimate Claims for Relief in Twitter's Complaint

1. The USA FREEDOM Act Should Not Impact Twitter's Challenge to the DAG Letter Under the APA

As discussed in Section III.A.1, *infra*, the DAG Letter remains operative after passage of the USAFA, inasmuch as it continues to set forth available options for provider reporting regarding receipt of national security legal process and it remains Defendants' *only* stated basis for denying Twitter's request to publish its transparency report.[5] Moreover, passage of the USAFA has not diminished the need for a judicial determination regarding the circumstances under which Defendants can lawfully announce restrictions regarding acceptable speech on national security-related issues.

[5] *See* Baker-Sussmann Letter, at 1 ("As you know, on January 27, 2014, the Department of Justice provided multiple frameworks for certain providers and others similarly situated to report aggregated data . . . . Twitter's proposed transparency report seeks to publish data . . . that go beyond what the government has permitted other companies to report. . . . This is inconsistent with the January 27th framework . . . ."). Upon information and belief, Defendants consider the USAFA to be permissive, not to be or represent a prohibition on Twitter's publication of its transparency report, and therefore not an additional basis for prohibiting Twitter's speech.

2. The USA FREEDOM Act Does Not Impact Twitter's Challenge to FISA Reporting Under the First Amendment

While the USA FREEDOM Act establishes four additional reporting options, it does not amend any of the speech-related restrictions in FISA from which Twitter is seeking relief in this proceeding. In its complaint, Twitter alleged that:

1) The FISA statute and Espionage Act, along with other nondisclosure authorities, do not prohibit providers like Twitter from disclosing aggregate reporting statistics;

2) To the extent that Defendants read provisions of the FISA statute as prohibiting Twitter from publishing aggregate reporting statistics, those provisions are unconstitutional because:

   a) They constitute a prior restraint and content-based restriction on speech in violation of Twitter's right to speak truthfully about matters of public concern; and

   b) The restriction is not narrowly tailored to serve a compelling governmental interest, and no such interest exists; and

3) The FISA secrecy provisions are unconstitutional as applied to Twitter because:

   a) Defendants have imposed an unconstitutional prior restraint, content-based restriction, and viewpoint discrimination in violation of Twitter's right to speak truthfully about matters of public concern; and

   b) This prohibition imposed by Defendants on Twitter's speech is not narrowly tailored to serve a compelling governmental interest.

(Dkt. No. 1, ¶¶ 49-50.) While the USAFA provides four additional reporting options, *see* Ex. A, those additional options do not alter Twitter's First Amendment claims. Indeed, the USAFA amendments allow only for the publication of wide bands of aggregate data, and provide no assurance to Twitter that it can publish its draft transparency report. (Dkt. No. 1-1, Ex. 4.) The USAFA thus leaves Twitter in the same position it was in prior to the legislation, and it is therefore insufficient to remedy Twitter's constitutional grievances.

3. The USA FREEDOM Act Changes, But Does Not Significantly Impact or Moot, Twitter's Challenge to Section 2709 Under the First Amendment and the Principle of Separation of Powers

In its complaint, Twitter alleged that the NSL nondisclosure provisions of 18 U.S.C. § 2709 are unconstitutional for a number of reasons, including (but not limited to) the fact

that the judicial review procedures for NSL nondisclosure orders, codified at 18 U.S.C. § 3511:

> 1) do not meet the procedural safeguards required by the First Amendment because they:
>
> a) place the burden of seeking to modify or set aside a nondisclosure order on the recipient of an NSL;
>
> b) do not guarantee that nondisclosure orders imposed prior to judicial review are limited to a specified brief period;
>
> c) do not guarantee expeditious review of a request to modify or set aside a nondisclosure order;
>
> d) require the reviewing court to apply a level of deference that conflicts with strict scrutiny; and
>
> 2) restrict a court's power to review the necessity of a nondisclosure provision in violation of separation of powers principles.

(Dkt. No. 1, ¶¶ 46, 48). Unfortunately, many of these failings remain unchanged following amendment, and the revised version of Section 3511 still falls short of what the First Amendment and separation of powers principles require.

Although the USAFA may make it easier for an NSL recipient to challenge a nondisclosure order, the recipient still bears the obligation of initiating proceedings by lodging an objection with the government,[6] which means that Section 3511 maintains the (unconstitutional) status quo of allowing nondisclosure orders to be of uncertain and, potentially, unlimited duration. *Id.*[7]

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[6] *See* 18 U.S.C. § 3511(b)(1).

[7] One aspect of Twitter's NSL-related claims that is affected by the USAFA's revisions to Section 3511 is Twitter's assertion in the complaint that the NSL nondisclosure judicial review procedures "do not guarantee expeditious review of a request to modify or set aside a nondisclosure order." (Dkt. No. 1, ¶ 46.) As explained in Section II, *infra*, Section 3511 now requires a court that is considering such a challenge to rule "expeditiously." However, Section 3511 does not contain any elaboration as to how "expeditiously" should be interpreted. Moreover, in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the Supreme Court held that "[a]ny restraint [on speech] imposed in advance of a final judicial determination on the merits must similarly be . . . *for the shortest fixed period* compatible with sound judicial resolution," 380 U.S. at 59 (emphasis added), and Twitter does not concede at this juncture that "expeditiously" in the context of a post-USAFA Section 3511 review is sufficient to meet the *Freedman* standard.

Moreover, Twitter's complaint alleged that Section 3511 requires the reviewing court to apply a level of deference that does not comport with, and is much more lenient than, strict scrutiny. As Twitter noted in its Opposition to Defendants' Partial Motion to Dismiss:

> [A] party who receives such an NSL containing a nondisclosure requirement and who wishes to speak about an NSL must litigate the validity of the nondisclosure requirement before speaking. 18 U.S.C. § 3511(b)(1). In other words, while the prior-restraint doctrine recognizes that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), Section 2709(c) does the exact opposite.

(Dkt. No. 34, at 22.) This remains fundamentally true under the USAFA-revised scheme. As explained above, the most meaningful change to the judicial review procedure is that a court is no longer required to give conclusive effect to the government's good-faith certification. *See* Section II, *infra*. However, Twitter did not explicitly or exclusively rely on that provision when it asserted that the overall scheme was unconstitutional. Moreover, a court is still required to uphold a nondisclosure order if it finds "reason to believe" that disclosure "may result in" a danger to national security, 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. § 3511(b)(3). In other words, a court is still required to uphold the government's nondisclosure order if it believes the government's certification.

This revised scheme is similar to what the Second Circuit envisioned in *Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). As Twitter argued in its Opposition to Defendants' Partial Motion to Dismiss, even that process is insufficient to satisfy strict scrutiny:

> [E]ven assuming that the broad statutory language [of Section 3511] could be read in such a limited way, the Second Circuit's standard, which appears to be akin to the reasonable-suspicion standard of the Fourth Amendment, is not sufficient when strict scrutiny is applicable. To be sure, a prohibition on speech might satisfy strict scrutiny if there were "a good reason . . . reasonably to apprehend a risk" of a very serious harm from the speech. But even as rewritten by the Second Circuit, the statute does not require that the harm be serious—or even more than *de minimis*—only that it be somehow related to a terrorism investigation. That is, it permits speech to be

> suppressed upon a determination that there is a risk that it might lead to some kind of "interference with [an] investigation" that is in some way related to terrorism, no matter how minimal the interference may be. The statute is not narrowly tailored to promote the interest of national security.

(Dkt. No. 34, at 25-26.) The USAFA fails for similar reasons, as it directs courts to uphold nondisclosure requirements when they find "reason to believe" that disclosure will have some impact on national security, public safety, criminal investigations, or diplomatic relations.

Because the USAFA did not address key bases in the complaint for Twitter's challenge to 18 U.S.C. § 2709, and the USAFA continues to prescribe a standard of review for orders under Section 2709 that is not meaningfully different from the one challenged in Twitter's complaint, Twitter's NSL-related claims remain valid. Indeed, it remains the case that: (1) the judicial review procedure in Section 3511 violates the First Amendment because it "require[s] the reviewing court to apply a level of deference that conflicts with strict scrutiny," (Dkt. No. 1, ¶ 46); and (2) the judicial review procedure violates principles of separation of powers because it "impermissibly requires the reviewing court to apply a level of deference to the government's nondisclosure decisions that conflicts with the constitutionally mandated level of review, which is strict scrutiny." (Dkt. No. 1, ¶ 48.) These essential constitutional violations are unchanged by the USAFA, and thus Twitter's claim, although perhaps impacted by the USAFA, is not moot.

Twitter also alleged in its complaint numerous challenges to Section 2709 for reasons unrelated to Section 3511's review procedures,[8] and these challenges are not affected by

[8] *See* Dkt. No. 1, ¶¶ 46-47 ("The nondisclosure and judicial review provisions of 18 U.S.C. § 2709(c) are facially unconstitutional under the First Amendment, including for at least the following reasons: the nondisclosure orders authorized by § 2709(c) constitute a prior restraint and content-based restriction on speech in violation of Twitter's First Amendment right to speak about truthful matters of public concern (e.g., the existence of and numbers of NSLs received); the nondisclosure orders authorized by § 2709(c) are not narrowly tailored to serve a compelling governmental interest, including because they apply not only to the content of the request but to the fact of receiving an NSL and additionally are unlimited in duration . . . . The nondisclosure provisions of 18 U.S.C. § 2709(c) are also unconstitutional as applied to Twitter, including because Defendants' interpretation of the nondisclosure provision of 18 U.S.C. § 2709(c), and their application of the same to Twitter via the DAG Letter, is an unconstitutional prior restraint, content-based restriction, and viewpoint discrimination in violation of Twitter's right to speak about truthful matters of public concern. This prohibition on Twitter's speech is not narrowly tailored to serve a compelling governmental interest,

passage of the USAFA. Therefore, there is no reason why passage of the USAFA should impact this Court's decision on the larger set of claims challenging Section 2709.

IV. CONCLUSION

The USA FREEDOM Act does not affect the claims in Defendants' Partial Motion to Dismiss currently pending before this Court, and does not significantly alter the claims raised by Twitter in the complaint.

DATED: July 17, 2015

Respectfully Submitted,

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and no such interest exists that justifies prohibiting Twitter from disclosing its receipt (or non-receipt) of an NSL or the unlimited duration or scope of the prohibition.").

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TWITTER, INC., Plaintiff, v. LORETTA E. LYNCH,[1] United States Attorney General, *et al.*,	Case No. 14-cv-4480 **SUPPLEMENTAL BRIEF REGARDING THE USA FREEDOM ACT**

[1] Loretta E. Lynch, the Attorney General of the United States, is substituted as defendant in this action for her predecessor, Eric H. Holder, pursuant to Fed. R. Civ. P. 25(d).

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PRELIMINARY STATEMENT

The USA FREEDOM Act of 2015 enacted changes in law that directly impact plaintiff Twitter, Inc.'s claims in this case. *See* Pub. L. No. 114-23, 129 Stat. 268 ("the USA FREEDOM Act" or "the Act"). Specifically, the Act amended the Foreign Intelligence Surveillance Act ("FISA"), as well as statutes governing the FBI's issuance of National Security Letters ("NSLs"), to, first, permit the disclosure by recipients of national security legal process of certain aggregate data concerning such process; and, second, to expressly conform statutory provisions governing the issuance and judicial review of NSLs to procedures that courts have recognized as constitutional. These amendments have a significant impact on the two broad categories of claims raised in this litigation: (i) plaintiff's challenge to restrictions on the disclosure of data on national security process; and (ii) plaintiff's challenge to aspects of the statutory authority governing issuance and judicial review of NSLs.

First, the legislation moots plaintiff's purported Administrative Procedure Act ("APA") challenge to a letter by the Deputy Attorney General. *See* January 27, 2014 Letter from James M. Cole to General Counsels of Facebook, et al. ("DAG Letter"), Compl., Exh. 1. The DAG Letter described ways in which recipients of national security legal process could report data consistent with a classification determination by the Director of National Intelligence ("DNI"). Plaintiff's APA challenge to the DAG Letter description of what it could disclose in a "Transparency Report" is moot because the reporting options described in the DAG Letter have been superseded by the statutory framework in the USA FREEDOM Act and a subsequent, corresponding declassification decision by the DNI. Plaintiff has not challenged the relevant provisions of the USA FREEDOM Act. However, the draft "Transparency Report" that plaintiff wishes to publish (previously submitted as an exhibit to the Complaint) does not conform to the new permissible reporting options available under the Act. The report also contains information that remains properly classified. The classified portions of plaintiff's draft Report therefore cannot be lawfully disclosed under the Act, and their disclosure is prohibited by any applicable orders of the Foreign Intelligence Surveillance Court ("FISC") or directives supervised by that

Court,[2] statute, or nondisclosure agreements. The DAG Letter is therefore immaterial and plaintiff's APA challenge should be dismissed as moot.

The mootness of plaintiff's APA challenge further supports the Government's argument to dismiss the FISA-related claims for comity reasons. As the Government explained in its Motion to Dismiss briefing, to the extent plaintiff continues to challenge the scope or constitutionality of FISA nondisclosure obligations, plaintiff's challenge puts at issue orders, warrants, and directives issued by the FISC or under its supervision. Under settled principles of comity, the Court should defer to the FISC with respect to these FISA-based claims so that the FISC may determine the meaning of the statute that it is entrusted to administer, and any directives issued pursuant to that statute, and any of the FISC's own orders.

Second, the USA FREEDOM Act materially amended the NSL statutes that plaintiff challenged in its Complaint. Plaintiff's facial challenge to prior statutory provisions is therefore moot. Moreover, those amendments reinforce the constitutionality of the now-amended provisions.

For all of these reasons, set forth further below, the USA FREEDOM Act moots several of plaintiff's claims and strengthens the Government's pending Motion to Dismiss.

STATUTORY BACKGROUND: THE USA FREEDOM ACT

A. Section 603 of the Act Provides for Disclosure of Aggregate Data Concerning National Security Legal Process.

Section 603(a) of the USA FREEDOM Act establishes a statutory mechanism for recipients of national security legal process, including orders of the FISC, directives supervised by that court pursuant to the FISA, and NSLs, to make public disclosures of aggregated data about such process. *See* USA FREEDOM Act § 603(a). This section is modeled on the reporting options that were described in the January 27, 2014 DAG Letter and DNI

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

declassification decision but provides additional and more detailed reporting options.[3] *Compare* DAG Letter, Compl., Exh. 1, *with* USA FREEDOM Act § 603(a); *see also* H.R. Rep. No. 114-109, at 26-27 (2015) (noting that this provision was modeled on the DAG Letter framework).

First, the Act provides that a person who has received national security legal process such as an NSL or FISA order may publicly release a semiannual report that aggregates in separate bands of 1000, starting with 0-999: the number of NSLs the person was required to comply with; the number of customer selectors (*e.g.*, user accounts) targeted by NSLs; the combined number of FISA orders or directives received requiring the person to provide communication contents; the number of customer selectors targeted by orders or directives for contents; the number of FISA orders received for non-content information; and the number of customer selectors targeted under FISA orders for certain types of non-content information. USA FREEDOM Act § 603(a)(1), *codified at* 50 U.S.C. § 1874(a)(1). This reporting option was modeled on the first option in the previously described DAG Letter, but alters that option to expressly permit slightly more detailed reporting with respect to non-content requests, and alters the timing of reporting. *See id*; DAG Letter at 2-3. Thus, whereas the declassification framework described in the DAG Letter required providers to wait for 180 days before reporting and to wait 24 months before reporting on any FISA orders or directives received with respect to a new platform, product, or service, the Act shortened the period applicable to new platforms, products, or services to 18 months. 50 U.S.C. § 1874(a)(1).

Second, the Act provides the option to report data consistent with the provisions described above but in bands of 500, starting with 0-499, so long as non-content FISA data is not broken out by authority. USA FREEDOM Act § 603(a)(2), *codified at* 50 U.S.C. § 1874(a)(2). As with the option available under § 603(a)(1) and discussed *supra*, this provision is modeled on option 1 in the DAG Letter, but it provides for narrower bands and shortens the delay period with respect to new platforms, products, or services to 18 months from 24 months.

[3] Pursuant to Executive Order 13,526, 75 Fed. Reg. 1013 (Dec. 29, 2009), the DNI subsequently declassified such aggregate data when reported consistent with the USA FREEDOM Act.

Third, the Act provides that a recipient of national security legal process may publicly release a semiannual report that aggregates in bands of 250, starting with 0-249, the total number of all national security legal process received (including NSLs and FISA orders and directives), and the total number of customer selectors targeted by such national security legal process. USA FREEDOM Act § 603(a)(3), *codified at* § 1874(a)(3). This option is the same as option 2 in the DAG Letter but makes clear that the delayed reporting provisions for new platforms, products, or services do not apply. *Id.*; DAG Letter at 3.

Fourth, the Act provides an option for more detailed reporting not previously described in the DAG Letter: a recipient of national security legal process may publicly release an annual report of the total number of all national security process received and the number of customer selectors targeted under all such legal process received in bands of 100, starting with 0-99. USA FREEDOM Act § 603(a)(4), *codified at* 50 U.S.C. § 1874(a)(4).

While Section 603 of the USA FREEDOM Act amended FISA to provide recipients of national security legal process with these reporting options, the Act's terms are permissive; and it does not, itself, prohibit other forms of reporting. *See* USA FREEDOM Act § 603(c), *codified at* 50 U.S.C. § 1874(c) ("Nothing in this section prohibits the Government and any person from jointly agreeing to the publication of information referred to in this subsection in a time, form, or manner other than as described in this section.").

B. Section 502 of the Act Amending National Security Letter Statutes

The USA FREEDOM Act amended the statutes that govern the FBI's issuance of NSLs, including nondisclosure requirements pursuant to a certification of need, as well as judicial review of NSLs, including those that plaintiff challenges in its Complaint, 18 U.S.C. §§ 2709 and 3511.

1. The Act's Amendments To 18 U.S.C. § 3511(b)

Section 502(g) of the USA FREEDOM Act revises the terms of 18 U.S.C. § 3511(b) – the prior version of which plaintiff challenged in its Complaint (¶ 46) – to codify the reciprocal notice procedure for NSL nondisclosure requirements that the Second Circuit found constitutional in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and that the

Government has been following since 2009. As amended by the Act, 18 U.S.C. § 3511(b)(1)(A) provides an NSL recipient with two alternative means to obtain judicial review of a nondisclosure requirement: by filing a petition for judicial review or by notifying the Government. 18 U.S.C. § 3511(b)(1)(A). If the recipient notifies the Government that it wishes to have a court review a nondisclosure requirement, the Government must apply for a nondisclosure order within thirty days thereafter. *Id.* § 3511(b)(1)(B). The Act calls on 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).

The House Committee Report states that Section 502 of the Act "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. The option for the recipient to notify the Government "is intended to ease the burden on the recipient in challenging the nondisclosure order." *Id.*

Under the amended terms of § 3511(b), the Government's application for a nondisclosure order must 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 enumerated harms. 18 U.S.C. § 3511(b)(2). Consistent with the statutory interpretation adopted by the Second Circuit at the Government's suggestion in *Doe*, 549 F.3d at 875-76, the Act expressly places the burden of persuasion on the Government, stating that the district court shall issue a nondisclosure order if it determines "that there is reason to believe" that the absence of a nondisclosure order may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(3).

In further accordance with *Doe*, 549 F.3d at 884, the Act modifies § 3511(b) by repealing the provision (formerly in § 3511(b)(2)-(3)) that gave conclusive effect to good-faith certifications by specified officials of certain harms. *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 Act also repeals the provision (formerly in § 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 obligated to wait one year before again seeking judicial relief.

2. The Act's Amendments To 18 U.S.C. § 2709

The USA FREEDOM Act also amends 18 U.S.C. § 2709(b) and (c) – the prior versions of which, again, plaintiff challenged on their face – and adds new subsection (d).

Section 502(a) of the Act replaces the former provisions of 18 U.S.C. § 2709(c). As revised by the Act, § 2709(c) now expressly requires the Government to provide the NSL recipient with notice of the right to judicial review in order for the prohibition on disclosure to apply, thus further codifying *Doe*'s reciprocal notice procedure. 18 U.S.C. § 2709(c)(1)(A).[4]

The Act also adds § 2709(d), which provides that an NSL or a nondisclosure requirement accompanying an NSL shall be subject to judicial review under § 3511 and that an NSL shall include notice of the availability of judicial review. 18 U.S.C. § 2709(d)(1), (2); *see* H.R. Rep. No.14-109, at 25.

ARGUMENT

The USA FREEDOM Act's amendments moot plaintiff's Administrative Procedure Act challenge to alleged disclosure restrictions on data concerning national security process described in the January 2014 DAG Letter. And, for the reasons described in the Government's partial Motion to Dismiss, any remaining challenges to nondisclosure obligations stemming from FISA process should be dismissed in favor of resolution in the FISC. The USA FREEDOM Act's amendments also moot any First Amendment facial overbreadth challenges to FISA and the NSL statutes, and moreover strengthen the amended NSL nondisclosure and judicial review

[4] Section 501(a) of the Act also amends 18 U.S.C. § 2709(b)(1) to authorize NSLs only when a specified FBI official "us[es] a term that specifically identifies a person, entity, telephone number, or account as the basis for [the NSL]." As the House Report explains, this section prohibits the use of NSL authorities "without the use of a specific selection term as the basis for the NSL request," and "specifies that for each NSL authority, the government must specifically identify the target or account." H.R. Rep. No. 114-109, at 24.

provisions in 18 U.S.C. §§ 2709 and 3511 against any facial challenge. These issues are discussed in turn below.

I. Plaintiff's Administrative Procedure Act Challenge to the January 2014 DAG Letter Is Moot.

Plaintiff purports to challenge the DAG Letter under the APA. *See* Compl. ¶ 44; *see also* Hr'g Tr. at 16:15-16, ECF No. 64 (plaintiff's counsel: "We are questioning the validity of the DAG Letter."). But even if the DAG Letter were properly subject to APA challenge (which defendants have explained it is not), the letter has now been superseded by provisions of the USA FREEDOM Act that set forth bands of aggregate data that may lawfully be disclosed by recipients of national security legal process. The DAG Letter therefore has no further relevance to Twitter, and certainly cannot be said to cause Twitter any continuing injury (assuming, that it caused injury, which it did not; *see* Defendants Mem. of Law in Support of its Motion to Dismiss, ECF No. 28, 10-13; Reply, ECF No. 57, 4-7). Plaintiff's APA claim therefore does not present a live case or controversy at this time. *See Diffenderfer v. Cent. Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (court must consider the "law as it now stands, not as it stood" previously).

The DAG Letter described two options for public reporting by recipients of national security legal process. The USA FREEDOM Act includes four reporting options, which are modeled on the DAG Letter but provide additional options for more detailed reporting by recipients of FISA orders, NSLs, and other such process, and contain different provisions relating to the timing of reporting certain data. These statutory options displace any legal effect plaintiff (incorrectly) attributed to the DAG Letter; plaintiff's challenge to that letter is therefore moot. *Cf. Bullfrog Films v. Wick*, 959 F.2d 778, 780-91 (9th Cir. 1992) ("Because the legislation has supplanted [the challenged] parts of the regulations, we dismiss the appeal on these issues as moot."); *Stratman v. Leisnoi*, 545 F.3d 1161, 1172 (9th Cir. 2008) (in public lands case, holding "the subsequent action of Congress makes the propriety of the underlying decision irrelevant, *even if* the underlying decision might have transgressed the intent of Congress."); *NRDC v. U.S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 813-14 & n.8 (D.C. Cir. 1982) (challenge to interim

rule for failure to abide by notice and comment requirements mooted by issuance of final rule with notice and comment).

In short, even if one assumes that the DAG Letter ever set forth any affirmative constraints on disclosures – which it did not – the DAG Letter has plainly been superseded by the statutory provisions of the Act. Any action by this Court to invalidate, rescind, or amend the DAG Letter would afford no relief to plaintiff.

As noted above, the draft Report that plaintiff wishes to publish (previously submitted as an exhibit to the Complaint) does not conform to the new reporting options as described under the Act (and subsequently declassified by the DNI). The proposed Report still contains information that remains properly classified SECRET pursuant to Executive Order 13,526, because disclosure of portions of the Report reasonably could be expected to cause serious damage to national security. *See* Executive Order 13,526; September 9, 2014 Letter from James A. Baker to counsel for plaintiff, Compl., Exh. 5.[5] Because the draft Report not consistent with the options set out in the Act and contains still-classified information, that classified information cannot be lawfully disclosed pursuant to the USA FREEDOM Act, and its disclosure is further prohibited by any applicable orders of the FISC or directives supervised by that Court, any other applicable statute, or any applicable nondisclosure agreements.

The mootness of the DAG Letter further supports the Government's argument that this Court should dismiss plaintiff's claims related to any orders of the FISC and FISA. For the reasons described in the Government's partial Motion to Dismiss memoranda (Defs.' Mem., ECF No. 28, at 13-20; Defs.' Reply, ECF No. 57, at 9-14), to the extent plaintiff challenges any nondisclosure requirements that may have accompanied orders issued by the FISC or directives issued in accordance with FISA and under the FISC's supervision, plaintiff's challenge puts at issue the scope, meaning, and legality of matters that a coordinate court of Article III judges is

[5] On November 17, 2014, the Government provided plaintiff with an unclassified version of the draft Report, with all classified information redacted. *See* Unclassified Draft Report, ECF No. 21-1. Disclosure of some of the redacted information may be prohibited by any applicable orders of the FISC, any directives issued pursuant to the FISA, by statute, and/or by applicable nondisclosure agreements.

entrusted to administer. The Government thus explained in its Motion to Dismiss briefs why this Court should decline to exercise jurisdiction over plaintiff's Declaratory Judgment Act claim related to such FISC orders, FISA directives, or the FISA itself, and should instead defer to the FISC to consider those questions in the first instance. This basis for dismissal in the Government's pending motion has not changed.

II. Plaintiff's Facial First Amendment Overbreadth Challenges to FISA and the NSL Statutes Are Moot.

Plaintiff's apparent claims that restrictions on its disclosures drawn from FISA[6] or the NSL statutes are facially unconstitutional as overbroad (Compl. ¶¶ 46, 49) are now also moot because, as discussed above, the USA FREEDOM Act amended both of those statutes in relevant part.

"The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). However, the rule is limited, and "overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed." *Id*. at 582.

The versions of FISA and the NSL statutes that the plaintiff challenged are no longer in effect, and so they will not chill anyone's future First Amendment rights. For example, the "FISA secrecy provision[]" plaintiff identified in its Complaint (Compl. ¶ 45), 50 U.S.C. § 1805(c)(2)(B), and any others it chose not to identify, must now be construed in light of the new aggregate data disclosure provisions of FISA, *id.* § 1874(a). There is therefore no reason to permit an overbreadth challenge to the prior provisions of FISA that, for example, authorized or instructed the FISC to require secrecy concerning its orders under certain circumstances. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031-32 (9th Cir. 2006) (amendments to city ordinances had rendered facial challenges to those ordinances moot); *Reyes v. City of Lynchburg*, 300 F.3d 449, 452-53 (4th Cir. 2002) (district court properly dismissed as

[6] To the extent plaintiff challenges FISA as applied, as discussed *supra* and in defendants' prior briefing, the Court should decline to exercise jurisdiction over such claims so that they may be considered by the FISC in the first instance.

moot overbreadth challenge to ordinance since ordinance had been repealed); *Stephenson v. Davenport Comty. Sch. Dist.*, 110 F.3d 1303, 1312 (8th Cir. 1997) (facial overbreadth challenge to school district's regulation prohibiting gang symbols moot where district amended regulation).

III. The USA FREEDOM Act Reinforces the Constitutionality of the NSL Statutes.

The USA FREEDOM Act's amendments not only moot plaintiff's challenges to the prior statutory provisions challenged in the Complaint, but even if those challenges were to proceed, the Act removes any doubt about the facial constitutionality of the NSL nondisclosure provisions and standards of judicial review in 18 U.S.C. §§ 2709 and 3511, as they now stand. The new law makes clear that the NSL provisions incorporate a constitutionally adequate standard of judicial review, and the amended NSL nondisclosure requirements satisfy even strict scrutiny.

In *In re NSL*, 930 F. Supp. 2d 1064, 1077-78 (N.D. Cal. 2013) (Illston, J.), *appeal docketed*, No. 13-15957 (9th Cir.), the district court faulted the NSL statutes because they did not include the procedures prescribed by the Second Circuit in *Doe* (and the court did not believe it could impose those procedures, *id.* at 1080-81). The Government respectfully disagrees with and has appealed that ruling.[7] Regardless, Congress has now corrected any constitutional deficiency by codifying the *Doe* procedures. Indeed, the same judge of this Court who held the statute unconstitutional found the *Doe* procedures to be constitutional as applied in subsequent cases.[8] The *Doe* procedures satisfy even the stringent procedural safeguards in *Freedman v. Maryland*,

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[7] Like this Court, the Ninth Circuit directed the parties in the pending NSL-related appeals to brief the impact of the USA FREEDOM Act. The Government's brief is available on the Court of Appeals' website. *See* "Supplemental Briefing by government in 13-15957 & 13-16731 and 13-16732 (made public by 07/15/15 order)," *available at* http://cdn.ca9.uscourts.gov/datastore/general/2015/07/15/13-15957%20dkt%2097%20Supp%20Brief.pdf (last visited July 17, 2015).

[8] *See In re Matter of NSLs*, Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce, No. 13cv1165-SI (N.D. Cal. August 12, 2013) (enforcing 2 NSLs), *appeal docketed*, No. 13-16732 (9th Cir.); *In re Matter of NSLs*, Order Denying Petition to Set Aside, Denying Motion to Stay, and Granting Cross-Petition to Enforce, No. 13mc80089-SI (N.D. Cal. August 12, 2013) (enforcing 2 NSLs), *appeal docketed*, No. 13-16731 (9th Cir.); *In re NSLs*, Order Denying Petition to Set Aside and Granting Cross-Petition to Enforce, No. 13mc80063-SI (N.D. Cal. May 28, 2013) (Amended Order for Public Release enforcing 17 NSLs); *In re NSLs*, Order, No. 13mc80063-SI (N.D. Cal. May 23, 2013) (enforcing 2 NSLs).

380 U.S. 51 (1965), and they have now been codified by the USA FREEDOM Act. As discussed below, the statutory amendments also clarify the standard of judicial review, which likewise conforms to constitutional requirements.

A. The Amended Standard of Review is Constitutional

The USA FREEDOM Act amended the NSL statute's standard of judicial review, rendering even more clear that this challenged provision is constitutional. As the Government explained in its initial briefing, the Second Circuit in *Doe* properly interpreted the standard of review in the prior § 3511(b) as requiring the Government "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." *Doe*, 549 F.3d at 875-76 (emphasis added).

Congress left *Doe*'s interpretation of the "standard of proof" (*Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2245 (2011)) undisturbed when it revised § 3511(b), changing the statutory language only by bringing it into closer alignment with *Doe*'s holding regarding the burden of persuasion. "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." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). For example, in *United States v. Lincoln*, the Ninth Circuit observed that it had previously interpreted a statutory definition of "victim" as including the United States, so when Congress amended that definition and did not exclude the United States, the Court of Appeals "inferred that Congress adopted the judiciary's interpretation." 277 F.3d 1112, 1114 (9th Cir. 2002). So too here. By not changing the standard of proof, Congress implicitly ratified *Doe*'s interpretation of it. Further underscoring the evidentiary showing the Government must make, 18 U.S.C. § 3511(b)(2) now explicitly requires the Government's application for a nondisclosure order to include a certification from a specified Government official that contains "a statement of specific facts" showing that the absence of a prohibition on disclosure may result in an enumerated harm.

With the USA FREEDOM Act, Congress also eliminated a provision of the NSL statute that allowed certain certifications by certain senior officials to be "conclusive" in judicial

proceedings in the absence of bad faith. *See* 18 U.S.C. § 3511(b)(2)-(3) (2012). The amended statute eliminates this provision, *see* 18 U.S.C. § 3511(b)(3); H.R. Rep. No. 114-109, at 24, and thereby eliminates any related constitutional concern.

Thus, if plaintiff's facial challenge to the pre-USA FREEDOM Act standard of judicial review of NSLs at 18 U.S.C. § 3511 is not dismissed as moot, the recent amendments reinforce the constitutionality of the challenged provision.

B. The Amended Statute Satisfies the Procedural Requirements of *Freedman v. Maryland*

As amended by the USA FREEDOM Act, 18 U.S.C. §§ 2709(c) and 3511(b) satisfy each of the three procedural requirements outlined in *Freedman*: (1) any administrative restraint that precedes judicial review must be brief; (2) expeditious judicial review must be available; and (3) the Government must bear the burden of initiating judicial review and the burden of proof in court. 380 U.S. at 58-60; *see Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002).

First, the administrative restraint that precedes judicial review is brief. The Government must notify the NSL recipient of the availability of judicial review when it issues the NSL. *See* 18 U.S.C. § 2709(d)(2). The NSL recipient may initiate judicial review immediately upon receipt of the NSL by filing a petition for review. *Id.* § 3511(b)(1)(A). Alternatively, the recipient may immediately notify the FBI that it wishes to challenge the nondisclosure requirement, in which case the Government must initiate judicial review within thirty days. *Id.* § 3511(b)(1)(A)-(B).

Second, the amended terms of § 3511(b) make expeditious judicial review available. Amended § 3511(b) specifies that the district court must "rule expeditiously" on a petition by an NSL recipient or an application by the Government. *Id.* § 3511(b)(1)(C).

Third, amended § 3511(b) assigns the Government the burden of initiating judicial review as well as the burden of persuasion in court. As just noted, the Government must initiate judicial review upon the NSL recipient's request. 18 U.S.C. § 3511(b)(1)(A)-(B). The amended statute also places the burden of persuasion in court on the Government. Even before the recent amendments, the burden of persuasion rested with the Government, as the Second Circuit held in

Doe. *See* 549 F.3d at 875. But the USA FREEDOM Act amends the relevant statutory language to further clarify the allocation of the burden. Previously, the statute provided that a court could set aside or modify a nondisclosure requirement when the court found that "there is no reason to believe" that disclosure may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(2)-(3) (2012). As amended, the statute provides that a court shall issue a nondisclosure order or extension thereof if the court finds that "there *is* reason to believe" that disclosure may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(3) (emphasis added). This new language places the onus on the Government to make the requisite showing. And as the Government explained in its earlier briefing, the "reason to believe" is properly read, as the Second Circuit read it, as a *good* reason to believe. *See* Def. Mem. in Support of Mot. to Dismiss (ECF No. 28) at 21-24.

Accordingly, and again assuming that plaintiff's facial challenge to the pre-USA FREEDOM Act provisions of 18 U.S.C. §§ 2709 & 3511 authorizing issuance and judicial review of NSLs is not dismissed as moot, the recent amendments reinforce the constitutionality of those provisions as they read today.

C. NSL Nondisclosure Requirements Satisfy Strict Scrutiny

Finally, the recent amendments in the USA FREEDOM Act to the NSL nondisclosure requirements under 18 U.S.C. § 2709 underscore that these provisions are narrowly tailored to serve a compelling government interest. Thus, even if strict scrutiny applies to the nondisclosure requirement, it passes muster.[9]

First, plaintiff complains that an NSL nondisclosure requirement applies "not only to the content of the request but to the fact of receiving an NSL." Compl. ¶ 46. Similarly, the *In re NSL* district court stated that in some instances a recipient may be able to disclose the fact that it

[9] The Government has not yet moved for summary judgment on or dismissal of plaintiff's challenge to NSL nondisclosure requirements under 18 U.S.C. § 2709, and so the parties have not briefed the appropriate standard of review. However, because the Court directed the parties to address the effect of the USA FREEDOM Act "both as to the pending partial motion to dismiss and as to the ultimate claims for relief in Plaintiff's Complaint," Order at 2, ECF No. 69, the Government discusses the Act's effect on plaintiff's claim for relief against § 2709 though that provision was not discussed in defendants' pending Motion to Dismiss..

had received an NSL without risking any of the statutory harms. 930 F. Supp. 2d at 1076. The statutory amendments alleviate this concern by codifying and expanding the procedure by which NSL recipients may publicly disclose aggregated band data about the number of NSLs and other national security process they have received. *See* USA FREEDOM Act § 603(a); 50 U.S.C. § 1874(a). Furthermore, the amendments allow the Government to agree to other disclosures in certain circumstances. *See* 50 U.S.C. § 1874(c); 18 U.S.C. § 2709(c)(2)(A)(iii).

Second, plaintiff alleges that an NSL nondisclosure requirement is "unlimited in duration." Compl. ¶ 46. *See also In re NSL*, 930 F. Supp. 2d at 1076-77 (stating that in some instances the prior statute could result in NSL nondisclosure requirements that continue in force "longer than necessary to serve the national security interests at stake."). The Second Circuit noted in *Doe* that the judicial review provisions in § 3511(b) already enabled courts to modify or set aside a nondisclosure requirement that is no longer necessary. 549 F.3d at 884 n.16. Congress has now gone further by directing the Attorney General to adopt procedures for periodically reviewing nondisclosure requirements issued pursuant to amended § 2709 to assess whether the facts supporting nondisclosure continue to exist. *See* USA FREEDOM Act § 502(f)(1). Moreover, Congress has removed the provision that precluded certain NSL recipients from challenging a nondisclosure requirement more than once per year. *See id.* These changes minimize the possibility that NSL nondisclosure requirements will remain in effect after the need for them has lapsed.

Here again, the USA FREEDOM Act enacted changes that reinforce the lawfulness of the NSL requirements in the face of plaintiff's challenge in this case, to the extent it is not dismissed as moot.

CONCLUSION

For all of the foregoing reasons, the USA FREEDOM Act moots plaintiff's challenge to alleged restrictions on the disclosure of data concerning national security process as described in the DAG Letter of January 2014, likewise moots plaintiff's facial challenges to the FISA and the NSL statutes, and, moreover, reinforces their lawfulness.

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