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

15 _____ )	
16 TWITTER, INC., )	Case No. 14-cv-4480
17 Plaintiff, )	<b>SUPPLEMENTAL BRIEF</b>
18 )	<b>REGARDING THE</b>
19 v. )	<b>USA FREEDOM ACT</b>
20 )	
21 LORETTA E. LYNCH, <sup>1</sup> United States )	
22 Attorney General, <i>et al.</i> , )	
23 _____ )	

27 \_\_\_\_\_  
 28 <sup>1</sup> 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**

1  
2 The USA FREEDOM Act of 2015 enacted changes in law that directly impact plaintiff  
3 Twitter, Inc.'s claims in this case. *See* Pub. L. No. 114-23, 129 Stat. 268 ("the USA FREEDOM  
4 Act" or "the Act"). Specifically, the Act amended the Foreign Intelligence Surveillance Act  
5 ("FISA"), as well as statutes governing the FBI's issuance of National Security Letters  
6 ("NSLs"), to, first, permit the disclosure by recipients of national security legal process of certain  
7 aggregate data concerning such process; and, second, to expressly conform statutory provisions  
8 governing the issuance and judicial review of NSLs to procedures that courts have recognized as  
9 constitutional. These amendments have a significant impact on the two broad categories of  
10 claims raised in this litigation: (i) plaintiff's challenge to restrictions on the disclosure of data on  
11 national security process; and (ii) plaintiff's challenge to aspects of the statutory authority  
12 governing issuance and judicial review of NSLs.

13 First, the legislation moots plaintiff's purported Administrative Procedure Act ("APA")  
14 challenge to a letter by the Deputy Attorney General. *See* January 27, 2014 Letter from James  
15 M. Cole to General Counsels of Facebook, et al. ("DAG Letter"), Compl., Exh. 1. The DAG  
16 Letter described ways in which recipients of national security legal process could report data  
17 consistent with a classification determination by the Director of National Intelligence ("DNI").  
18 Plaintiff's APA challenge to the DAG Letter description of what it could disclose in a  
19 "Transparency Report" is moot because the reporting options described in the DAG Letter have  
20 been superseded by the statutory framework in the USA FREEDOM Act and a subsequent,  
21 corresponding declassification decision by the DNI. Plaintiff has not challenged the relevant  
22 provisions of the USA FREEDOM Act. However, the draft "Transparency Report" that plaintiff  
23 wishes to publish (previously submitted as an exhibit to the Complaint) does not conform to the  
24 new permissible reporting options available under the Act. The report also contains information  
25 that remains properly classified. The classified portions of plaintiff's draft Report therefore  
26 cannot be lawfully disclosed under the Act, and their disclosure is prohibited by any applicable  
27 orders of the Foreign Intelligence Surveillance Court ("FISC") or directives supervised by that  
28

1 Court,<sup>2</sup> statute, or nondisclosure agreements. The DAG Letter is therefore immaterial and  
2 plaintiff's APA challenge should be dismissed as moot.

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

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

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

## 17 **STATUTORY BACKGROUND: THE USA FREEDOM ACT**

### 18 **A. Section 603 of the Act Provides for Disclosure of Aggregate Data Concerning** 19 **National Security Legal Process.**

20 Section 603(a) of the USA FREEDOM Act establishes a statutory mechanism for  
21 recipients of national security legal process, including orders of the FISC, directives supervised  
22 by that court pursuant to the FISA, and NSLs, to make public disclosures of aggregated data  
23 about such process. *See* USA FREEDOM Act § 603(a). This section is modeled on the  
24 reporting options that were described in the January 27, 2014 DAG Letter and DNI  
25

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26  
27 <sup>2</sup> Defendant's discussion of FISA orders or directives that plaintiff could have received, and that  
28 could require plaintiff not to disclose the existence of the orders or directives, is not intended to  
confirm or deny that plaintiff has, in fact, received any such national security legal process.

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

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

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

26  
27  
28 <sup>3</sup> 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.

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

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

13 While Section 603 of the USA FREEDOM Act amended FISA to provide recipients of  
14 national security legal process with these reporting options, the Act's terms are permissive; and it  
15 does not, itself, prohibit other forms of reporting. *See* USA FREEDOM Act § 603(c), *codified at*  
16 50 U.S.C. § 1874(c) ("Nothing in this section prohibits the Government and any person from  
17 jointly agreeing to the publication of information referred to in this subsection in a time, form, or  
18 manner other than as described in this section.").

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

20 The USA FREEDOM Act amended the statutes that govern the FBI's issuance of NSLs,  
21 including nondisclosure requirements pursuant to a certification of need, as well as judicial  
22 review of NSLs, including those that plaintiff challenges in its Complaint, 18 U.S.C. §§ 2709 and  
23 3511.

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

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

1 Government has been following since 2009. As amended by the Act, 18 U.S.C. § 3511(b)(1)(A)  
2 provides an NSL recipient with two alternative means to obtain judicial review of a  
3 nondisclosure requirement: by filing a petition for judicial review or by notifying the  
4 Government. 18 U.S.C. § 3511(b)(1)(A). If the recipient notifies the Government that it wishes  
5 to have a court review a nondisclosure requirement, the Government must apply for a  
6 nondisclosure order within thirty days thereafter. *Id.* § 3511(b)(1)(B). The Act calls on the  
7 district court to “rule expeditiously,” and if the court determines that the requirements for  
8 nondisclosure are met, it shall “issue a nondisclosure order that includes conditions appropriate  
9 to the circumstances.” *Id.* § 3511(b)(1)(C).

10 The House Committee Report states that Section 502 of the Act “corrects the  
11 constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit  
12 Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d. Cir. 2008), and adopts the concepts  
13 suggested by that court for a constitutionally sound process.” H.R. Rep. No. 114-109, at 24. The  
14 option for the recipient to notify the Government “is intended to ease the burden on the recipient  
15 in challenging the nondisclosure order.” *Id.*

16 Under the amended terms of § 3511(b), the Government’s application for a nondisclosure  
17 order must include a certification from a specified Government official that contains “a statement  
18 of specific facts indicating that the absence of a prohibition [on] disclosure” may result in  
19 enumerated harms. 18 U.S.C. § 3511(b)(2). Consistent with the statutory interpretation adopted  
20 by the Second Circuit at the Government’s suggestion in *Doe*, 549 F.3d at 875-76, the Act  
21 expressly places the burden of persuasion on the Government, stating that the district court shall  
22 issue a nondisclosure order if it determines “that there is reason to believe” that the absence of a  
23 nondisclosure order may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(3).

24 In further accordance with *Doe*, 549 F.3d at 884, the Act modifies § 3511(b) by repealing  
25 the provision (formerly in § 3511(b)(2)-(3)) that gave conclusive effect to good-faith  
26 certifications by specified officials of certain harms. *See* H.R. Rep. No. 114-109, at 24 (“This  
27 section repeals a provision stating that a conclusive presumption in favor of the Government  
28 shall apply where a high-level official certifies that disclosure of the NSL would endanger

1 national security or interfere with diplomatic relations.”). The Act also repeals the provision  
 2 (formerly in § 3511(b)(3)) under which an NSL recipient who unsuccessfully challenged a  
 3 nondisclosure requirement a year or more after the issuance of the NSL was obligated to wait  
 4 one year before again seeking judicial relief.

## 5 **2. The Act’s Amendments To 18 U.S.C. § 2709**

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

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

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

## 16 **ARGUMENT**

17 The USA FREEDOM Act’s amendments moot plaintiff’s Administrative Procedure Act  
 18 challenge to alleged disclosure restrictions on data concerning national security process  
 19 described in the January 2014 DAG Letter. And, for the reasons described in the Government’s  
 20 partial Motion to Dismiss, any remaining challenges to nondisclosure obligations stemming from  
 21 FISA process should be dismissed in favor of resolution in the FISC. The USA FREEDOM  
 22 Act’s amendments also moot any First Amendment facial overbreadth challenges to FISA and  
 23 the NSL statutes, and moreover strengthen the amended NSL nondisclosure and judicial review  
 24

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25 <sup>4</sup> Section 501(a) of the Act also amends 18 U.S.C. § 2709(b)(1) to authorize NSLs only when a  
 26 specified FBI official “us[es] a term that specifically identifies a person, entity, telephone  
 27 number, or account as the basis for [the NSL].” As the House Report explains, this section  
 28 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.



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

3 **I. Plaintiff’s Administrative Procedure Act Challenge to the January 2014 DAG**  
4 **Letter Is Moot.**

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

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

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

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

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

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

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25  
26 <sup>5</sup> On November 17, 2014, the Government provided plaintiff with an unclassified version of the  
27 draft Report, with all classified information redacted. *See* Unclassified Draft Report, ECF No.  
28 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.

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

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

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

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

17 The versions of FISA and the NSL statutes that the plaintiff challenged are no longer in  
18 effect, and so they will not chill anyone's future First Amendment rights. For example, the  
19 "FISA secrecy provision[]" plaintiff identified in its Complaint (Compl. ¶ 45), 50 U.S.C.  
20 § 1805(c)(2)(B), and any others it chose not to identify, must now be construed in light of the  
21 new aggregate data disclosure provisions of FISA, *id.* § 1874(a). There is therefore no reason to  
22 permit an overbreadth challenge to the prior provisions of FISA that, for example, authorized or  
23 instructed the FISC to require secrecy concerning its orders under certain circumstances. *See*  
24 *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031-32 (9th Cir. 2006)  
25 (amendments to city ordinances had rendered facial challenges to those ordinances moot); *Reyes*  
26 *v. City of Lynchburg*, 300 F.3d 449, 452-53 (4th Cir. 2002) (district court properly dismissed as

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

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

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

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

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

19 \_\_\_\_\_  
 20 <sup>7</sup> Like this Court, the Ninth Circuit directed the parties in the pending NSL-related appeals to  
 21 brief the impact of the USA FREEDOM Act. The Government’s brief is available on the Court  
 22 of Appeals’ website. See “Supplemental Briefing by government in 13-15957 & 13-16731 and  
 23 13-16732 (made public by 07/15/15 order),” *available at*  
[http://cdn.ca9.uscourts.gov/datastore/general/2015/07/15/13-](http://cdn.ca9.uscourts.gov/datastore/general/2015/07/15/13-15957%20dkt%2097%20Supp%20Brief.pdf)  
[15957%20dkt%2097%20Supp%20Brief.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2015/07/15/13-15957%20dkt%2097%20Supp%20Brief.pdf) (last visited July 17, 2015).

24 <sup>8</sup> See *In re Matter of NSLs*, Order Denying Petition to Set Aside and Granting Cross-Petition to  
 25 Enforce, No. 13cv1165-SI (N.D. Cal. August 12, 2013) (enforcing 2 NSLs), *appeal docketed*,  
 26 No. 13-16732 (9th Cir.); *In re Matter of NSLs*, Order Denying Petition to Set Aside, Denying  
 27 Motion to Stay, and Granting Cross-Petition to Enforce, No. 13mc80089-SI (N.D. Cal. August  
 28 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).

1 380 U.S. 51 (1965), and they have now been codified by the USA FREEDOM Act. As  
2 discussed below, the statutory amendments also clarify the standard of judicial review, which  
3 likewise conforms to constitutional requirements.

#### 4 **A. The Amended Standard of Review is Constitutional**

5 The USA FREEDOM Act amended the NSL statute’s standard of judicial review,  
6 rendering even more clear that this challenged provision is constitutional. As the Government  
7 explained in its initial briefing, the Second Circuit in *Doe* properly interpreted the standard of  
8 review in the prior § 3511(b) as requiring the Government “to persuade a district court that there  
9 is a *good* reason to believe that disclosure may risk one of the enumerated harms, and that a  
10 district court, in order to maintain a nondisclosure order, must find that such a good reason  
11 exists.” *Doe*, 549 F.3d at 875-76 (emphasis added).

12 Congress left *Doe*’s interpretation of the “standard of proof” (*Microsoft Corp. v. i4i Ltd.*  
13 *Partnership*, 131 S. Ct. 2238, 2245 (2011)) undisturbed when it revised § 3511(b), changing the  
14 statutory language only by bringing it into closer alignment with *Doe*’s holding regarding the  
15 burden of persuasion. “Congress is presumed to be aware of an administrative or judicial  
16 interpretation of a statute and to adopt that interpretation when it re-enacts a statute without  
17 change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). For example, in *United States v. Lincoln*,  
18 the Ninth Circuit observed that it had previously interpreted a statutory definition of “victim” as  
19 including the United States, so when Congress amended that definition and did not exclude the  
20 United States, the Court of Appeals “inferred that Congress adopted the judiciary’s  
21 interpretation.” 277 F.3d 1112, 1114 (9th Cir. 2002). So too here. By not changing the standard  
22 of proof, Congress implicitly ratified *Doe*’s interpretation of it. Further underscoring the  
23 evidentiary showing the Government must make, 18 U.S.C. § 3511(b)(2) now explicitly requires  
24 the Government’s application for a nondisclosure order to include a certification from a specified  
25 Government official that contains “a statement of specific facts” showing that the absence of a  
26 prohibition on disclosure may result in an enumerated harm.

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

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

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

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

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

14 First, the administrative restraint that precedes judicial review is brief. The Government  
15 must notify the NSL recipient of the availability of judicial review when it issues the NSL. *See*  
16 18 U.S.C. § 2709(d)(2). The NSL recipient may initiate judicial review immediately upon  
17 receipt of the NSL by filing a petition for review. *Id.* § 3511(b)(1)(A). Alternatively, the  
18 recipient may immediately notify the FBI that it wishes to challenge the nondisclosure  
19 requirement, in which case the Government must initiate judicial review within thirty days. *Id.*  
20 § 3511(b)(1)(A)-(B).

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

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



1 *Doe*. See 549 F.3d at 875. But the USA FREEDOM Act amends the relevant statutory language  
 2 to further clarify the allocation of the burden. Previously, the statute provided that a court could  
 3 set aside or modify a nondisclosure requirement when the court found that “there is no reason to  
 4 believe” that disclosure may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(2)-(3)  
 5 (2012). As amended, the statute provides that a court shall issue a nondisclosure order or  
 6 extension thereof if the court finds that “there *is* reason to believe” that disclosure may result in  
 7 one of the enumerated harms. 18 U.S.C. § 3511(b)(3) (emphasis added). This new language  
 8 places the onus on the Government to make the requisite showing. And as the Government  
 9 explained in its earlier briefing, the “reason to believe” is properly read, as the Second Circuit  
 10 read it, as a *good* reason to believe. See Def. Mem. in Support of Mot. to Dismiss (ECF No. 28)  
 11 at 21-24.

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

### 16 **C. NSL Nondisclosure Requirements Satisfy Strict Scrutiny**

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

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

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24 <sup>9</sup> The Government has not yet moved for summary judgment on or dismissal of plaintiff’s  
 25 challenge to NSL nondisclosure requirements under 18 U.S.C. § 2709, and so the parties have  
 26 not briefed the appropriate standard of review. However, because the Court directed the parties  
 27 to address the effect of the USA FREEDOM Act “both as to the pending partial motion to  
 28 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..

1 had received an NSL without risking any of the statutory harms. 930 F. Supp. 2d at 1076. The  
2 statutory amendments alleviate this concern by codifying and expanding the procedure by which  
3 NSL recipients may publicly disclose aggregated band data about the number of NSLs and other  
4 national security process they have received. *See* USA FREEDOM Act § 603(a); 50 U.S.C.  
5 § 1874(a). Furthermore, the amendments allow the Government to agree to other disclosures in  
6 certain circumstances. *See* 50 U.S.C. § 1874(c); 18 U.S.C. § 2709(c)(2)(A)(iii).

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

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



1 **CONCLUSION**

2 For all of the foregoing reasons, the USA FREEDOM Act moots plaintiff’s challenge to  
3 alleged restrictions on the disclosure of data concerning national security process as described in  
4 the DAG Letter of January 2014, likewise moots plaintiff’s facial challenges to the FISA and the  
5 NSL statutes, and, moreover, reinforces their lawfulness.  
6

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