

1 BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

2 MELINDA HAAG
United States Attorney

3 ANTHONY J. COPPOLINO
Deputy Branch Director

4 STEVEN Y. BRESSLER
Senior Trial Counsel

5 JULIA A. BERMAN
6 Trial Attorney
7 United States Department of Justice
Civil Division, Federal Programs Branch

8
9 P.O. Box 883
Washington, D.C. 20044
10 Telephone: (202) 616-8480
Facsimile: (202) 616-8470
11 Email: julia.berman@usdoj.gov

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

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

15 _____)
16 TWITTER, INC.,)
17 Plaintiff,)
18 v.)
19 LORETTA E. LYNCH, United States)
20 Attorney General, *et al.*,)
21 _____)
22

Case No. 14-cv-4480

DEFENDANTS' REPLY
ADDRESSING PLAINTIFF'S
SUPPLEMENTAL BRIEF
REGARDING THE
USA FREEDOM ACT

INTRODUCTION

1
2 The Government explained in its Supplemental Brief Regarding the USA FREEDOM
3 Act, ECF No. 74 (“Suppl. Br.”), that the Act¹ establishes a permissive regime that allows
4 recipients of national security legal process to disclose more information than ever before
5 regarding their receipt of such process. Rather than accept the new reporting options, however—
6 or challenge any perceived deficiencies in the new regime—plaintiff insists that this Court and
7 the parties should continue to devote resources to the adjudication of its claims that the January
8 27, 2014 Letter from then-Deputy Attorney General James M. Cole to the General Counsels of
9 Facebook, *et al.* (“DAG Letter”), Compl. Exh. 1 at 3, impermissibly restricts its speech. *See*
10 Opening Supplemental Brief on Effect of Recent Legislation, ECF No. 75 (“Plaintiff’s
11 Supplemental Brief” or “Pl’s Br.”). As defendants have explained, the DAG Letter never
12 restricted plaintiff’s speech. But even assuming *arguendo* it had, plaintiff fails to explain how
13 the DAG Letter could be said to restrict its speech *now*, when the USA FREEDOM Act
14 unmistakably permits the plaintiff to disclose more detailed information than the options
15 described by the DAG Letter. The new, statutory disclosure regime moots the plaintiff’s claims
16 directed at the DAG Letter. And, as previously explained, *see* Suppl. Br. 8-9, any remaining
17 challenges to restrictions relating to orders or directives received pursuant the Foreign
18 Intelligence Surveillance Act should be dismissed and adjudicated in the Foreign Intelligence
19 Surveillance Court.

20 The USA FREEDOM Act also has a significant impact on the balance of plaintiff’s
21 claims, as defendants explained in their Supplemental Brief. *See* Suppl. Br. at 10–14. Plaintiff’s
22 argument to the contrary (*e.g.* Pl. Br. at 7–11) ignores the USA FREEDOM Act’s substantial
23 new procedural protections and amendments to statutes that plaintiff purported to challenge on
24 their face.

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28 ¹ The USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (“the USA
FREEDOM Act” or “the Act”)

1 **I. Any Claims Challenging the DAG Letter Must Be Dismissed for Lack of**
2 **Jurisdiction Because the DAG Letter Causes Plaintiff No Ongoing Injury.**

3 The Government explained in its Supplemental Brief that the plaintiff's claims
4 challenging the DAG Letter do not present a live case or controversy at this time. *See* Suppl. Br.
5 at 7 (citing *Diffenderfer v. Cent. Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (court
6 must consider the “law as it now stands, not as it stood” previously)). Whatever the prior effect
7 of the DAG Letter,² it has no further relevance to plaintiff—and certainly cannot be said to cause
8 plaintiff any continuing injury—now that statutory law offers reporting options more permissive
9 and detailed than those previously declassified by the Director of National Intelligence and
10 described in the DAG Letter. *See* Suppl. Br. at 2–4, 7 (detailing the reporting options provided
11 by the Act and explaining that those options “are modeled on the DAG Letter but provide
12 additional options for more detailed reporting”).

13 Plaintiff does not address its lack of any present or prospective injury from the DAG
14 Letter. *See generally* Pl's Br. Instead, plaintiff presents two ways in which it contends that the
15 DAG Letter currently has legal effect: (1) plaintiff asserts that the DAG Letter “remains” the
16 “only stated basis” on which the Government denied the plaintiff's request to publish its draft
17 transparency report, *see* Pl's Br. at 6; and (2) plaintiff insists that providers may choose to
18 disclose data consistent with the options described in the DAG Letter notwithstanding the new
19 legislation. The former is factually incorrect, and the latter is simply inapposite. Neither gives
20 plaintiff standing to continue to litigate these now-mooted claims.

21 Finally, as discussed below, plaintiff's apparent claim that its challenge is not moot solely
22 because the USA FREEDOM Act introduced a *more* permissive (rather than a more restrictive)
23 disclosure regime has no basis in law or logic. Precisely because the USA FREEDOM Act
24 expressly permits more detailed reporting than the options described in the DAG Letter, it is

25
26 ² As the Government has repeatedly explained, the DAG Letter itself did not prescribe
27 any restrictions on disclosures by the recipients of that letter or by anyone else, including
28 plaintiff. Rather, it was a permissive document that explained how recipients of national security
 legal process could describe any such process they had received without running afoul of entirely
 separate legal restrictions on disclosure.

1 (even more) clear that the DAG Letter does not restrict or injure the plaintiff in any way, and
2 plaintiff cannot establish Article III standing to challenge it.

3 **1.** Plaintiff baldly states that “the DAG Letter . . . remains Defendants’ *only* stated
4 basis for denying Twitter’s request to publish its transparency report.” Pl’s Br. at 6 (emphasis in
5 original), adding, in a particularly revealing averment, that it does not challenge the USA
6 FREEDOM Act because “[u]pon information and belief, Defendants consider the USAFA to be
7 permissive, not to be or represent a prohibition on Twitter’s publication of its transparency
8 report, and therefore not an additional basis for prohibiting Twitter’s speech.” Pl’s Br. at 6 n.5.
9 Of course, that precisely describes the DAG Letter, as the Government has been telling plaintiff
10 for months: the letter was permissive, and does not itself restrict plaintiff or anyone in any way.
11 *See, e.g.*, Defs’ Partial Mot. to Dismiss, ECF No. 28, at 8 (“By its terms . . . the DAG Letter is
12 permissive, not restrictive. . . It does not purport to classify any previously unclassified
13 information, but rather provides guidance for reporting aggregate data . . . consistent with a
14 declassification decision issued by the DNI the same day.”).³

15 Indeed, plaintiff’s discussion of Section 603 of the USA FREEDOM Act highlights why
16 plaintiff’s now-moot challenge to the DAG Letter was never viable. Plaintiff states that the new
17 legislation does not affect its challenge to FISA reporting under the First Amendment because
18 “[w]hile the USA FREEDOM Act establishes four additional reporting options, it does not
19 amend any of the speech-related restrictions in FISA from which Twitter is seeking relief in this
20 proceeding.” Pl’s Br. at 7. But, again as defendants have repeatedly explained, the same is true
21 of the DAG Letter. The restrictions on plaintiff’s disclosure of this classified information
22 stem—and have always stemmed—not from the DAG Letter, but from any applicable orders of
23 the Foreign Intelligence Surveillance Court (“FISC”), Foreign Intelligence Surveillance Act
24 (“FISA”) directives supervised by that coordinate court, nondisclosure agreements, and/or

25 ³ Nor, as this Court has noted, *see* Tr. 14:17–18, did the FBI refer to the DAG Letter as
26 the reason why plaintiff could not lawfully publish its draft “Transparency Report”; rather, the
27 FBI’s letter stated that the FBI had “carefully reviewed Twitter’s proposed transparency report
28 and [had] concluded that information contained in the report is classified and cannot be publicly
released.” *See* September 9, 2014 Letter from James A. Baker to counsel for plaintiff, Compl.
Exh. 3 (“FBI Letter”) at 1.

1 statutes. Plaintiff’s puzzling, contrary claim that “Defendants’ *only* stated basis for denying
2 Twitter’s request to publish its transparency report” is the DAG Letter (Pl’s Br. at 6) is thus
3 plainly wrong. *See, e.g.*, Reply Mem. in Support of Defs’ Partial Motion to Dismiss, ECF No.
4 57 at 5 (explaining that DAG letter had no more legal effect on plaintiff’s rights and obligations
5 “than a legal brief that summarizes applicable law”); Partial Mot. to Dismiss at 8, 10–13; Tr.
6 10:3–12:7. The DAG Letter is not now—and never was—a basis for denying plaintiff’s request.

7 **2.** Moreover, and in any event, Congress has now enacted a statutory framework
8 that is more permissive than, and thus plainly would supersede, any purported “restrictions”
9 plaintiff attributes to the DAG Letter. Section 603 of the USA FREEDOM Act delineates four
10 reporting options through which a recipient of national security legal process may disclose
11 aggregate data concerning such process. *See* Suppl. Br. at 7–9 (describing the new reporting
12 regime). As defendants have explained, those provisions expand on and add to the two options
13 that had been described in the DAG Letter. *See id.* Thus, while Plaintiff could *choose* to
14 follow the 2014 framework described in the DAG Letter—notwithstanding that the law now
15 permits plaintiff to disclose more—no possible injury could result from it. The *prior* reporting
16 options that Plaintiff claims a provider might use (described in a table listing the options
17 available in 2013, those described in the DAG letter, and those set forth in the Act), *see* Pl’s
18 Br., Ex. A, are entirely subsumed in the new, statutory options.⁴ Each of these reporting
19 regimes addressed the same universe of information, and allowed progressively more
20 disclosure than the last. Thus, Plaintiff’s contention that, following the enactment of the USA
21 FREEDOM Act, “a communications provider can avail itself of one of the Summer 2013
22 Options, one of the options in the DAG Letter, or one of the [USA FREEDOM Act] options[,]”
23 Pl’s Br. at 4 n.3, is true but irrelevant: the prior reporting regimes do not impose *restrictions*
24 on Plaintiff in the face of the new, more permissive statutory framework. In any conceivably
25 relevant respect, Section 603 replaced previously-described reporting options.⁵

26 ⁴ Defendants submit their own chart, attached hereto as Exhibit 1, which illustrates how
27 each set of options expanded on those that preceded it.

28 ⁵ Nor, even had the DAG Letter injured plaintiff in the first place, would the voluntary
cessation exception to the mootness doctrine apply here. *E.g., Clarke v. United States*, 915 F.2d

1 **3.** Plaintiff presents no credible argument as to how it could suffer any continuing
2 injury from the superseded options discussed in the DAG Letter. Rather, plaintiff seems to claim
3 that its challenge to the DAG Letter is not moot because the USA FREEDOM Act is more
4 permissive (and not more restrictive) than the framework described in the DAG Letter. Plaintiff
5 asserts that:

6 The [USA FREEDOM Act] in no way purports to re-classify or otherwise
7 prohibit the speech approved by the government in 2013 and 2014. The
8 government thus has no basis to say now, in essence: “That speech you were
9 allowed to speak the day *before* passage of the [USA FREEDOM Act] you can no
10 longer lawfully speak *after* passage of the [USA FREEDOM Act].”

11 Pl Br. at 3–4. Immediately thereafter, plaintiff concludes: “Since the DAG Letter was not
12 superseded by the [USA FREEDOM Act], passage of the [USA FREEDOM Act] likewise did
13 not moot Twitter’s challenge to the DAG Letter.” *Id.* at 4.

14 This argument is a non-sequitur and simply wrong. The USA FREEDOM Act clearly
15 establishes new law on the permissible disclosure of aggregate data concerning national
16 security process. And there is no support in the law for plaintiff’s apparent assumption that
17 Congress could only act more restrictively or that a more permissive regime cannot
18 supersede—and thereby moot a challenge to—a prior regime. *See, e.g., Princeton Univ. v.*
19 *Schmidt*, 455 U.S. 100, 101, 103 (1982) (per curiam) (challenge to prior set of university
20 regulations governing on-campus speech by members of the public mooted when the university
21 substantially amended those regulations to create a more permissive scheme). In fact, that is
22 precisely the circumstance now before the Court, and plaintiff does not dispute that it can
23 disclose information consistent with the more-detailed options of the Act, regardless of what
24 the DAG Letter said. Moreover, the *Government* itself has made clear that the USA
25 FREEDOM Act reporting options set forth the new benchmark on what information may be
26 permissibly disclosed.

27 699, 705 (D.C. Cir. 1990) (en banc) (refusing to apply voluntary cessation doctrine against the
28 government; stating “it would seem inappropriate for the courts either to impute such
manipulative conduct to a coordinate branch of government or to apply against that branch a
doctrine that appears to rest on the likelihood of a manipulative purpose.”)

1 Perhaps most tellingly, plaintiff is still unable to point to any conceivable way in which it
2 would be better off if the DAG Letter were somehow rendered null and void. Plaintiff at one
3 point describes the nature of its challenge as “based on [the Government’s] failure to follow the
4 procedural requirements for promulgating substantive rules.” Pl.’s Br. at 3. But—again
5 assuming *arguendo* that the DAG Letter was ever a final agency action—Federal Courts do not
6 sit as advisory boards to render judgments on actions that have no legal effect on the party
7 bringing the challenge.

8 *****

9 For all of these reasons, plaintiff’s claims addressing the DAG Letter are moot and the
10 Court should dismiss them for lack of subject matter jurisdiction.

11 **II. Plaintiff’s Argument Concerning the USA FREEDOM Act Underscores**
12 **Why its FISA-Based Claims Should be Dismissed and Heard by the FISC in**
13 **the First Instance.**

14 Plaintiff’s assessment of the USA FREEDOM Act effectively concedes a key point
15 defendants raised in their partial motion to dismiss: to the extent plaintiff is subject to any
16 nondisclosure obligations related to FISA process, those obligations would arise by operation of
17 a FISC order or a directive issued under a FISC-supervised program and should therefore be
18 addressed by the FISC in the first instance.⁶ *See, e.g.*, Partial Mot. to Dismiss at 16–19. As
19 noted, plaintiff acknowledges that the reporting options in the USA FREEDOM Act are
20 “permissive” and “[do] not amend any of the speech-related restrictions in FISA from which
21 Twitter is seeking relief in this proceeding.” Pl’s Br. at 6 n.5, 7. But that has been precisely
22 defendants’ point: any restrictions plaintiff wishes to challenge result not from the DAG Letter
23 but from any underlying FISA orders, directives or statutory requirements to which plaintiff may
24 be subject, and challenges to any such restrictions should properly be heard in the FISC.

25 Plaintiff’s argument to the contrary emphasizes the FISC’s recent decision in *In re*
26 *Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. No.

27 ⁶ As before, this discussion of potential nondisclosure obligations stemming from FISC
28 orders or directives is not meant to confirm or deny whether plaintiff has in fact received any
such national security legal process.

1 BR15-75, Op. and Order (F.I.S.C. June 29, 2015) (“June 29, 2015 FISC Opinion” or “June 29,
2 2015 Opinion”). In that decision, the FISC denied a motion to intervene in its proceedings,
3 citing to another case that the putative interveners had filed in the district court for District of
4 Columbia. *Id.* at 4–5. Plaintiff thus argues that the FISC “rejected an opportunity to assert itself
5 as the preferred forum for the interpretation of FISA.” PI’s Br. at 5.

6 But in that opinion, the request under review did not come—as in this case—from a party
7 (potentially) subject to the FISC’s orders or FISA directives under a program it supervises.
8 Rather, in that decision, the FISC addressed the Government’s application to continue its bulk
9 telephony metadata program for the duration of the transition period provided by USA
10 FREEDOM Act Section 109(a), *see* June 29, 2015 FISC Opinion at 1, and the movants seeking
11 to intervene were non-parties who asked the FISC, *inter alia*, to deny the Government’s
12 application and declare that program illegal. *Id.* at 4. Moreover, while the FISC denied a motion
13 to intervene in that case, it most certainly did not “decline[] to assert itself as the preferred forum
14 for the interpretation of FISA,” as plaintiff contends. PI’s Brief at 5. In fact, the decision to
15 which plaintiff cites constitutes the FISC’s reauthorization of the bulk telephony metadata
16 program for the duration of the transition period provided by USA FREEDOM Act Section
17 109(a). The court moved expeditiously in the matter as required by statute, *see* FISA § 103(c),
18 and issued a public decision less than one month after the movants’ June 5, 2015 motion to
19 intervene was filed.

20 Moreover, rather than denying the movants the ability to participate in the proceedings
21 altogether, the FISC granted their alternative request to participate as amici curiae. *Id.* In doing
22 so, the FISC emphasized that “Congress, through the USA FREEDOM Act, has expressed a
23 clear preference for greater amicus curiae involvement in certain types of FISC proceedings.”
24 *Id.* at 7. Thus, far from demonstrating the FISC is a “nonpublic court . . . that offers no ability
25 for the public or any nonparty to view FISC proceedings,” PI’s Br. at 4–5, this decision shows
26 the FISC accommodating participation by a non-party, and, just three days after its decision was
27
28

1 rendered, posting its opinion, without redaction, on its public website.⁷ *See* U.S. Foreign
2 Intelligence Surveillance Court Website, [http://www.fisc.uscourts.gov/public-](http://www.fisc.uscourts.gov/public-filings?field_case_reference_nid=476&=Apply)
3 [filings?field_case_reference_nid=476&=Apply](http://www.fisc.uscourts.gov/public-filings?field_case_reference_nid=476&=Apply) (reflecting that the June 29, 2015 FISC Opinion
4 was posted on that court’s public website on July 2, 2015). In short, the situation before the
5 FISC in that case did not raise the same considerations raised here as to whether the FISC should
6 review any restrictions that may be imposed on plaintiff, and in any event underscore that the
7 FISC is the appropriate forum to address matters within its purview.

8 **III. Plaintiff’s First Amendment Analysis Largely Overlooks the Impact of the** 9 **USA FREEDOM Act.**

10 Plaintiff contends that its facial and as-applied First Amendment claims are essentially
11 unaffected by amendments that changed the very portions of the statutes at the heart of its
12 complaint. *See* Pl’s Br. at 7. But plaintiff simply overlooks the importance of these amendments
13 under established First Amendment doctrine, as well as the extent to which these changes
14 reinforce the constitutionality of the statutes.

15 To begin with, insofar as plaintiff asserts facial challenges to the statutes based on
16 overbreadth, Compl. ¶¶ 46, 49, plaintiff ignores the “limited” nature of the overbreadth doctrine,
17 which renders overbreadth analysis “strong medicine,” to be employed “only as a last resort.”
18 *New York v. Ferber*, 458 U.S. 747, 769 (1982). As defendants explained in their supplemental
19 brief, plaintiff cannot maintain a facial overbreadth challenge to the now-superseded versions of
20 FISA and the NSL statutes; the overbreadth doctrine is unavailable where, as here, “the statute
21 being challenged has been amended.” *See Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989);
22 Suppl. Br. at 9–10 (discussing case law).

23 Furthermore, plaintiff’s claim that “many” of the alleged “failings” that it identified in 18
24 U.S.C. § 3511 “remain unchanged following the amendment,” Pl’s Br. at 8, ignores that the USA
25 FREEDOM Act amended the statute with respect to every one of the five alleged constitutional
26 problems that plaintiff identified in its complaint, *see id.* (quoting Compl. ¶¶ 46, 48). For

27 ⁷ Citing the requirement that it proceed “expeditiously as possible,” however, and the
28 “substantial briefing” already submitting by the movants, the FISC denied the movants’ request
for additional briefing and oral argument. *Id.*

1 example, with respect to the first issue plaintiff names—that the statute “places the burden of
2 seeking to modify or set aside a nondisclosure order on the recipient of an NSL,” *id.*—plaintiff
3 acknowledges that the new legislation “may make it easier for an NSL recipient” but complains
4 that the legislation allows the nondisclosure orders “to be of uncertain and, potentially, unlimited
5 duration” and requires the recipient to “bear[] the obligation of notifying the government.” *Id.*

6 In reality, multiple provisions in the legislation ensure that the nondisclosure orders will
7 not be of uncertain or unlimited duration. To begin with, once an NSL recipient notifies the
8 Government of its objection, the Government must initiate judicial review within thirty days, 18
9 U.S.C. § 3511(b)(1)(A)–(B). The district court must then “rule expeditiously” on that challenge.
10 *Id.* at § 3511(b)(1)(C). Furthermore, the USA FREEDOM Act now requires the Attorney
11 General to adopt procedures for periodically reviewing nondisclosure requirements issued under
12 the amended NSL statute to assess whether the facts supporting nondisclosure continue to exist.
13 USA FREEDOM Act § 502(f)(1). Finally, in the same provision, the new legislation removed
14 the prior language that had prevented certain NSL recipients from challenging nondisclosure
15 requirements more than once per year. *Id.* These four new safeguards all help to ensure that
16 NSL nondisclosure requirements will not be of “uncertain . . . [or] potentially, unlimited
17 duration,” Pl’s Br. at 8, and the obligation associated with “notifying” the Government of an
18 objection—so that the Government may bear the burden of initiating judicial review—is
19 minimal at most.

20 So, too, with the second issue identified by the plaintiff—namely, that the legislation fails
21 to ensure that “nondisclosure orders imposed prior to judicial review [are] limited to a specified
22 brief period.” *Id.* The provisions described above, requiring the Government to initiate judicial
23 review within thirty days of being notified of an objection, 18 U.S.C. § 3511(b)(1)(A)–(B), and
24 the district court to then “rule expeditiously” on that challenge, *id.* § 3511(b)(1)(C), specifically
25 address that concern and, at the least, must be taken into account in any assessment of plaintiff’s
26 claim. Indeed, although plaintiff acknowledges that this new language “affect[s]” “one aspect of
27 Twitter’s NSL-related claims,” plaintiff’s insistence that this provision may fail to pass
28 constitutional muster because it is not yet clear how the provision will be interpreted, Pl’s Br. at

1 8, n.7, is difficult to square with plaintiff’s Complaint, which alleged that the statute’s previous
 2 failure to provide for expeditious review rendered it “facially unconstitutional,” Compl. ¶ 46.⁸

3 In short, for each of the alleged constitutional defects that plaintiff identified, the USA
 4 FREEDOM Act amended the NSL statutes and reinforced the constitutionality of the provision
 5 in question. *See* Suppl. Brief at 10–14 (describing how the changes to the legislation remove any
 6 doubt that these provisions comport with the requirements of the First Amendment). The
 7 statutes plaintiff challenged on their face no longer apply or exist, so those facial challenges must
 8 fail.

9 CONCLUSION

10 For the foregoing reasons, and the reasons set forth in defendants’ Supplemental Brief,
 11 the USA FREEDOM Act moots plaintiff’s challenge to the DAG Letter; moots plaintiff’s facial
 12 challenges to the FISA and the NSL statutes; and, moreover, reinforces their lawfulness.

13 Dated: August 7, 2015

Respectfully submitted,

14 BENJAMIN C. MIZER
 15 Principal Deputy Assistant Attorney General

16 MELINDA HAAG
 17 United States Attorney

18 ANTHONY J. COPPOLINO
 19 Deputy Branch Director

20 /s/ Steven Y. Bressler
 21 STEVEN Y. BRESSLER
 22 Senior Trial Counsel

23 /s/ Julia A. Berman
 24 JULIA A. BERMAN
 25 Trial Attorney
 U.S. Department of Justice
 Civil Division, Federal Programs Branch
Attorneys for Defendants

26 ⁸ To maintain that challenge, plaintiff would need to establish that this provision “is
 27 unconstitutional in all of its applications” or that it will suppress a substantial amount of
 28 protected speech, “in relation to the statute’s plainly legitimate sweep.” *See, e.g., Wash. State*
Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008).