Nos. 13-15957 & 13-16731

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellee (No. 13-15957),
Petitioner-Appellant (No. 13-16731),

v.

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

Respondents-Appellants (No. 13-15957),
Respondents-Appellees (No. 13-16731).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOVERNMENT'S REPLY BRIEF
Filed Under Seal

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INTRODUCTION

1. The nondisclosure provision in 18 U.S.C. § 2709(c) was applied to the NSL recipient in this case in accordance with the Second Circuit's construction of the statute in Doe, and in full compliance with the binding injunction in that case. The recipient does not seriously dispute that, as construed by the Second Circuit

and implemented in accordance with the Doe injunction, 18 U.S.C. §§ 2709(c) and 3511 satisfy all substantive and procedural requirements of the First Amendment. Nor does the recipient seriously question that the Government has uniformly and consistently applied the statute in the same manner, and subject to the same interpretive and injunctive limitations, with respect to every one of the tens of thousands of NSLs issued since 2009.

These facts ought to mark the beginning and the end of the inquiry in this case. No constitutional violation or serious risk of a constitutional violation is alleged here. Should a recipient of an NSL in another case believe that the statute was applied unconstitutionally to it, judicial review is readily available, and a court could determine whether a constitutional violation occurred in that instance.

2. Presumably for these reasons, the NSL recipient here has abandoned its "as applied" challenge and instead relies exclusively on a challenge to the facial validity of the NSL statute as unconstitutionally overbroad. But in so doing, the recipient ignores two bedrock legal standards for determining the facial constitutionality of a statute.

First, the recipient rejects the Second Circuit's ameliorative construction of the statute, thereby ignoring the Supreme Court's admonition that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" Skilling v. United States, 130 S. Ct. 2896, 2929 (2010)

(quoting and adding emphasis to Hooper v. California, 155 U.S. 648, 657 (1895)). The district court's assumption that Congress was not "concerned about constitutional deficiencies," ER 28, is directly contrary to the prohibition on "lightly assum[ing] that Congress intended to infringe constitutionally protected liberties." INS v. St. Cyr, 533 U.S. 289, 300 n.12 (2001) (quotation marks omitted, collecting cases). The district court's refusal to follow these basic interpretive principles led it to adopt an incorrect reading of the NSL statute that conflicts with the Second Circuit and unnecessarily exacerbates constitutional concerns.

Second, the recipient relies exclusively on its interpretation of the bare statutory language, when it is required to also consider the "actual fact" of the Government's implementation of that language, N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988), including the authoritative judicial construction of the statute by the Second Circuit as well as the binding Doe injunction, and the manner in which the FBI has implemented the statute since Doe. When those actual facts are considered, the facial constitutionality of the NSL statute is patent. Indeed, tens of thousands of NSLs have been issued and enforced under Doe since 2009, without the Second Circuit or any other court suggesting any violation of Doe, and, as conceded by the recipient and found by the district court, in this context compliance with Doe is necessarily compliance

with the First Amendment.[1]

3. The recipient also fundamentally errs in its invocation of the procedural requirements applicable to administrative prior restraint schemes under Freedman. It would be illogical to apply Freedman here because the NSL nondisclosure requirement is neither a prior restraint nor otherwise akin to the Freedman censorship scheme and is, instead, similar to other regulations to which the Freedman requirements do not apply, including grand jury secrecy and classified information nondisclosure requirements. Freedman involved a law that required government pre-approval of all films based on subjective criteria and allowed the Government to prevent both publication and judicial review through delay. NSL nondisclosure provisions apply to a narrow type of disclosure of national security information based on objective criteria with immediate judicial review available. Accordingly, none of the reasons for the Freedman procedural requirements is present here, and there is no basis for imposing those requirements. In any event, as construed by the Second Circuit and as applied in accordance with the Doe injunction, the nondisclosure provisions of the NSL statute provide all of the safeguards that the Supreme Court demanded of the film censorship law in

[1] The Second Circuit expressly stated that it "salvaged" the constitutionality of the NSL statute, Doe, 549 F.3d at 885, and, on remand from Doe, the district court applied the statute. Doe v. Holder, 703 F. Supp. 2d 313, 318 (S.D.N.Y. 2010) (permitting FBI to enforce nondisclosure requirement); Doe v. Holder, 665 F. Supp. 2d 426, 433-34 (S.D.N.Y. 2009) (same).

Freedman.

ARGUMENT

I. APPLYING SECTION 2709(c) IN CONFORMITY WITH DOE, AS THE FBI HAS DONE CONSISTENTLY SINCE 2009, SATISFIES THE FIRST AMENDMENT.

A. The NSL Nondisclosure Requirement was Constitutionally Applied to the Recipient.

The Government's opening brief explained that the nondisclosure requirements in the three specific NSLs at issue here are narrowly tailored to serve a compelling government interest and therefore satisfy the most rigorous substantive First Amendment test. Gov't Br. 27-31. More broadly, the Government showed that the application of the nondisclosure requirement to the recipient here was constitutional in all respects. Gov't Br. 26-43.

The NSL recipient ignores this issue entirely and makes no effort to argue that the statute was unconstitutional as applied to it. Instead, the recipient's sole argument against enforcement of these NSLs is the supposed facial invalidity of the entire NSL statutory scheme. See Recipient Br. 19, 32, 65; ER 4. The NSL recipient has thus waived on appeal any as-applied claim. See, e.g., Mills v. United States, 742 F.3d 400, 409 n.9 (9th Cir. 2014) (legal theories not specifically and distinctly argued in opening brief are waived). The fact that the recipient continues to challenge the facial validity of the entire statutory scheme does not mitigate this waiver, because "[f]acial and as-applied challenges can be viewed as

two separate inquiries." Acosta v. City of Costa Mesa, 718 F.3d 800, 822 (9th Cir. 2013).

B. The NSL Statute is not Substantially Overbroad; It Has Been Applied In Conformity with Doe (and Therefore with the First Amendment) Tens of Thousands of Times Since 2009.

Because the NSL recipient does not argue on appeal that the specific application of the nondisclosure requirement in these cases violated its First Amendment rights, the only remaining basis on which the recipient can seek relief under the First Amendment is the overbreadth doctrine. But the recipient cannot prevail on overbreadth grounds merely by hypothesizing scenarios in which the NSL statute might conceivably be applied unconstitutionally. E.g., Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984); Parker v. Levy, 417 U.S. 733, 760 (1974). Instead, it "must demonstrate from the text of [the applicable statute] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally," N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988), and whether that number is substantial must be judged "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," United States v. Williams, 553 U.S. 285, 292 (2008).

The NSL recipient does not contest that the "statute's plainly legitimate sweep" encompasses the statute's application to the recipient itself through the

three NSLs directly at issue here. Moreover, this "plainly legitimate sweep" also encompasses the tens of thousands of NSLs issued since the implementation of the Doe decision in 2009. The recipient does not deny that the FBI has uniformly followed the Doe procedures since 2009,[2] and the recipient has already conceded that the Doe procedures meet constitutional requirements, ER 13. In a footnote, the recipient denies its earlier concession and asserts that its new position, directly inconsistent with that concession, is "critical." Recipient Br. 32 & n.11. But the recipient's concession was clear, SER 16,[3] was accurately noted by the district court, ER 13, and remains binding, e.g., Reynoso v. Giurbino, 462 F.3d 1099, 1110 (9th Cir. 2006).

In sum, the recipient does not allege that any of the tens of thousands of NSL nondisclosure requirements imposed since 2009 – including the three directly at issue here – violated any recipient's First Amendment rights. To be sure,

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[2] The recipient notes that here the Government "did not in fact file an affirmative request for judicial review until after Appellee had filed its own challenge to the statute." Recipient Br. 40. That is merely because the recipient chose to file first, not because the burden of filing lay with recipient or because the Government was in any way delinquent. See Doe, 549 F.3d at 883 (noting that "[i]f the NSL recipient declines timely to precipitate Government-initiated review, . . . the Government would not be obliged to initiate judicial review").

[3] The district court asked "If the Congress had enacted legislation, amending legislation to incorporate what the Second Circuit said in the [Doe] case, do you still think the statute would be unconstitutional?" and recipient's counsel forthrightly answered: "I don't think so."

recipient details alleged "misuse" of NSLs prior to 2007, but these allegations involve violations of "'applicable NSL statutes, Attorney General Guidelines, and internal FBI policies,'" Recipient Br. 12 (quoting 2007 OIG Report 124), not violations of the Constitution. Moreover, all these alleged misuses pre-date Doe. See Recipient Br. 13-16.[4] These allegations thus have no bearing on the constitutionality of the operation of the statute for the past five years and into the future under the Doe injunction. It is thus clear that the NSL statute has a broad, plainly legitimate sweep, in comparison to which there is no substantial number of instances in which it has not been or cannot be applied constitutionally. The recipient's overbreadth challenge must fail.

II. THE NSL STATUTE'S NONDISCLOSURE PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT UNDER FREEDMAN.

The recipient's primary contention with respect to the NSL nondisclosure requirements is that they are unconstitutional unless accompanied by the procedural protections set forth in Freedman v. Maryland, 380 U.S. 51 (1965), and that those procedural protections are absent. This claim is wrong on both counts.

A. Freedman Does not Apply Here.

The NSL recipient argues that because 18 U.S.C. § 2709(c) "prevents recipients from speaking in the first instance rather than imposing a penalty after

[4] The one allegation of misuse after 2007 is a typographical error. Compare Recipient Br. 14 with 2010 OIG Report 61.

they have spoken," Recipient Br. 20, the statute imposes a prior restraint subject to the procedural requirements that Freedman imposes on government censorship schemes. This argument is incorrect. As pointed out at length in our opening brief, many similar nondisclosure requirements prevent individuals or entities from speaking in the first instance, yet are not treated as prior restraints subject to the Freedman requirements, including grand jury secrecy rules, rules forbidding disclosure of classified information, rules forbidding disclosure of certain information related to criminal investigations, and rules forbidding disclosure of information related to judicial misconduct inquiries. See Gov't Br. 21-22, 24, 35-43. For example, the federal rule with respect to grand juries provides that individuals covered by the rule "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). As noted in our opening brief, courts have neither applied the "prior restraint" label nor imposed the Freedman requirements to grand jury secrecy and other similar nondisclosure requirements. In these situations, as with NSL nondisclosure requirements, a private party becomes privy to information through its participation in an ongoing Government investigation, and the Government has compelling reasons for requiring the party to maintain the confidentiality of that information. See Gov't Br. 33-43.

The recipient's attempts (on pages 51-53 of its brief) to explain why the nondisclosure requirements here should be treated differently from those imposed

in the grand jury and other contexts noted above are unconvincing. Importantly, the recipient fails to explain why the Constitution requires different treatment for NSL recipients, who are involuntary participants in the Government's national security investigations, on one hand, and grand jurors and grand jury witnesses, who are involuntary participants in the Government's grand jury investigations, on the other hand. It is uncontested that the First Amendment permits limits on disclosures of grand jury information by participants in the grand jury process. See Fed. R. Crim. P. 6(e). Moreover, the recipient concedes that "the Supreme Court has recognized [that] a grand jury witness can . . . be prevented from communicating information he learned 'as a result of his participation in the proceedings of the grand jury.'" Recipient Br. 52 (quoting Butterworth v. Smith, 494 U.S. 624, 632 (1990)); see also Butterworth, 494 U.S. at 636 (Scalia, J., concurring) (drawing distinction between knowledge a grand jury witness acquires "on his own" and knowledge acquired "by virtue of being made a witness"). NSL nondisclosure requirements are constitutionally permissible because they, like the constitutional limits on disclosures by grand jurors and grand jury witnesses, limit the disclosure of information the recipient learns solely "as a result of his participation in the proceedings," and do not cover any information the recipient learns "on his own." See 18 U.S.C. § 2709(c)(1) (NSL recipient shall not disclose "that the [FBI] has sought or obtained access to information or records" through an

NSL).

The recipient also suggests that grand jury secrecy requirements comply with the First Amendment because they "originate from the court." Recipient Br. 52 (citing United States v. Navarro-Vargas, 408 F.3d 1184, 1199 (9th Cir.) (en banc), cert. denied, 546 U.S. 1036 (2005)). But "the grand jury is an institution separate from the courts, over whose functioning the courts do not preside," United States v. Williams, 504 U.S. 36, 47 (1992); accord Navarro-Vargas, 408 F.3d at 1199, 1202, and while grand jury secrecy requirements may be embodied in procedural rules (e.g., Fed. R. Crim. P. 6(e)), they are also often imposed by statute (e.g. Ala. Code § 12-16-216; Ind. Code § 35-34-2-4(i); N.D. Cent. Code § 29-10.1-30(4)), just as the NSL nondisclosure requirement originates from the NSL statute. The recipient thus provides no basis to treat the NSL nondisclosure requirements differently from grand jury secrecy requirements.

Additionally, the recipient made no answer to the point that NSL nondisclosure requirements are constitutional on the same basis as secrecy imposed in judicial misconduct proceedings. See Gov't Br. 39. Just as the First Amendment does not forbid the application of such secrecy to "prohibit . . . a witness's disclosure of the fact that he has testified," Kamasinski v. Judicial Review Council, 44 F.3d 106, 111 (2d Cir. 1994), so too, it does not forbid a governmental prohibition on an NSL recipient's disclosure of the fact that he has

received or responded to an NSL.

The recipient claims that nondisclosure requirements relating to classified information are not analogous to NSL nondisclosure requirements because decisions permitting the former are "wholly dependent on the voluntary agreement between the government and its employees." Recipient Br. 52. That contention has already been rejected. See United States v. Marchetti, 466 F.2d 1309, 1316-17 (4th Cir.) (upholding nondisclosure requirements with respect to classified materials, despite noting that a voluntary agreement is not a surrender of First Amendment rights), cert. denied, 409 U.S. 1063 (1972). The recipient has thus provided no valid basis to treat NSL nondisclosure requirements differently from classified information nondisclosure requirements.

B. In any Event, the Nondisclosure Provisions of the NSL Statute Comply with Freedman.

As noted on pages 33-35 and 52-56 of our opening brief, the NSL recipient at issue here, like every recipient of an NSL since 2009, received all of the Freedman procedural protections. The recipient does not meaningfully deny this, but suggests that the Government has provided these protections (to it and to all NSL recipients since 2009) gratuitously, rather than in accordance with a proper interpretation of the statute. That suggestion is incorrect.

1. The first Freedman requirement is that any administrative restraint on speech preceding judicial review be brief. Thomas v. Chi. Park Dist., 534 U.S.

316, 321 (2002). The NSL statute plainly meets this requirement. The moment an NSL is served, a recipient has two options to challenge the nondisclosure requirement: it may (1) immediately file a petition for judicial review in district court under 18 U.S.C. § 3511(b), or (2) notify the FBI of its intent to challenge the nondisclosure requirement, which triggers the Government's duty under Doe to initiate judicial review within approximately 30 days. The NSL recipient here could have sought judicial review the day it received an NSL, as could any NSL recipient since the enactment of § 3511 in 2006. The availability of immediate judicial review unquestionably satisfies the first Freedman requirement, even if it were not accompanied, as it is here, by the availability of prompt Government-initiated review as well.

2. The second Freedman requirement is that a party challenging a speech restriction have access to a prompt judicial determination of its claim. Thomas, 534 U.S. at 321. The recipient argues that this means that the statute must contain express "brief and finite" limits for the duration of judicial review. Recipient Br. 27. But the Supreme Court has made clear that no such express provision is required so long as the statute provides for judicial review and the court has the discretion to expedite its procedures. City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 781 (2004) ("[O]rdinary 'judicial review' rules offer adequate assurance, not only that access to the courts can be promptly obtained, but also that

a judicial decision will be promptly forthcoming."); accord Dream Palace v. County of Maricopa, 384 F.3d 990, 1003 (9th Cir. 2004) (noting presumption that courts function quickly enough to comply with Freedman). The NSL statute provides for ordinary judicial review with the availability of expedited procedures at the court's discretion[5] and therefore meets the Freedman requirement for a prompt judicial determination.

3. The third Freedman requirement is that the Government bear the burden of going to court to enforce nondisclosure and bear the burden of proof in court. Thomas, 534 U.S. at 321. The recipient argues that the NSL statute violates this requirement by mandating that an NSL recipient initiate judicial review. Recipient Br. 28. But neither this recipient nor any NSL recipient since 2009 has had to bear the burden of initiating judicial review of an NSL nondisclosure requirement. Under Doe, whenever a recipient notifies the FBI that it seeks to challenge an NSL nondisclosure requirement, FBI officials are enjoined "from enforcing the nondisclosure requirement of section 2709(c) in the absence of Government-initiated judicial review." John Doe, Inc. v. Mukasey, 549 F.3d 861, 885 (2d Cir. 2008). There is no danger here of NSL recipients being silenced because they are "unwilling or unable to initiate judicial review themselves," Recipient Br. 29,

[5] Petitions for review of NSLs are filed in district court, 18 U.S.C. § 3511(a) & (b), and are therefore governed by the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 1.

because a recipient does not have to initiate judicial review under the Doe injunction; it merely needs to notify the FBI, and the FBI then bears the burden of initiating judicial review.

The recipient reads the statute as placing the burden of proof on an NSL recipient to demonstrate that there is no need for the nondisclosure requirement. Recipient Br. 28. But neither the courts nor the Government have construed the statute in this manner. The Second Circuit, the only court of appeals to analyze the NSL statute, agreed with the Government that, "as a matter of statutory construction," the NSL statute "place[s] on the Government the burden to persuade a district court that there is good reason to believe that disclosure may result in one of the enumerated harms." Doe, 549 F.3d at 876. The interpretation of the Government and the Second Circuit is preferred because it avoids the possible constitutional doubt identified by the district court. See, e.g., INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (Citation omitted). Indeed, in No 13-16731, when the district court actually applied the NSL statue, it placed the burden of proof on the Government. See ER 5 ("[T]he Court finds that the government has met its burden."). Because the statute is properly construed not to place the burden of

proof on the NSL recipient, it satisfies Freedman.

The recipient also suggests that 18 U.S.C. § 3511(b)(2) violates the third prong of Freedman by making certain certifications "conclusive" unless made in bad faith. Recipient Br. 29, 42-43 & n.10. But such a potentially conclusive certification can be made only by the FBI director or one of a few very high level Department of Justice officials. 18 U.S.C. § 3511(b)(2). No such official made any certification here. The recipient cannot challenge a statutory provision that is inapplicable to it (and may never apply to any NSL recipient). See Gov't Br.58-60 (collecting cases).

The recipient concedes that the facial validity of a statute rests not only on the statutory language but also on "'well-established practice'" and "administrative policy" in interpreting and implementing the statute. Recipient Br. 37, 39 (quoting City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988)). Here, the relevant "well-established practice" and "administrative policy" are reflected in the Doe injunction, which embodies an authoritative construction of the NSL statute and is binding on the FBI, and also FBI policy reflected in its compliance with the Doe injunction with respect to every NSL issued since 2009. These well-established practices and administrative policies must be considered when evaluating the facial constitutionality of the NSL statute.

The recipient incorrectly asserts that the manner in which the statute has

been implemented over the past five years is not based on a fair interpretation of the statute. It bases that assertion on the claim that Doe held that the statute is not susceptible of a limiting construction that renders it constitutional. Recipient Br. 37-38. This is incorrect; Doe correctly interpreted the statute in a manner that preserves the FBI's authority to issue NSLs. Doe, 549 F.3d at 885; see also Doe v. Holder, 665 F. Supp. 2d 426, 429 (S.D.N.Y. 2009) (implementing Doe on remand, the district court found "that the Government has carried its burden and that continuation of the nondisclosure requirement imposed on Plaintiffs is justified"). The "well-established practice" doctrine necessarily includes consideration of the Second Circuit's construction, for any interpretation with "virtually the force of a judicial construction" must be considered. Lakewood, 486 U.S. at 770 n.11; see Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 339 (1986) (considering lower court's construction of statute). Moreover, the Second Circuit's interpretation of the statute is not merely hortatory; the Doe injunction binds the Government, and following that injunction is necessarily a well-established practice.

In addition, the Supreme Court and this Court have extended the "well established practice" doctrine beyond judicial interpretations of a statute to authoritative constructions by the implementing governmental entity. See, e.g., Forsyth County, GA v. Nationalist Movement, 505 U.S. 123, 131 (1992)

(considering "the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."); Desert Outdoor Advertising, Inc. v. City of Oakland, 506 F.3d 798, 803 (9th Cir. 2007); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1035 (9th Cir. 2006). Doe adopted the statutory interpretation advanced by the Government, see, e.g., Doe, 549 F.3d at 875-76, and the Government has maintained that interpretation to the present.

The recipient asserts that only the facial validity of "state statutes" is evaluated in light of well-established practice and administrative policy. Recipient Br. 38. But there is no logical basis for treating state and federal statutes differently in this regard; both must be addressed practically and not divorced from reality. See Jordan v. Sosa, 654 F.3d 1012, 1019, 1020 (10th Cir. 2011) (constitutionality of federal law determined "only as it is actually interpreted and applied" by "the government officials who administer it" pursuant to "implementing regulation").

The recipient erroneously asserts that the authoritative construction and implementation of the NSL statute can be ignored as "voluntary." Recipient Br. 19, 23, 32, 39, 41. But many of the well-established practices relied upon by courts in determining statutory validity are at least as "voluntary" as the FBI's practices are. See, e.g., Sullivan v. City of Augusta, 511 F.3d 16, 30 (1st Cir.

2007), cert. denied, 555 U.S. 821 (2008); Desert Outdoor Advertising, Inc. v. City of Oakland, 506 F.3d 798, 803 (9th Cir. 2007); Santa Monica, 450 F.3d at 1035; Brentwood Academy v. TN Secondary School Athletic Ass'n, 262 F.3d 543, 556-57 (6th Cir. 2001), cert. denied, 535 U.S. 971 (2002); MacDonald v. Safir, 206 F.3d 183, 191, 193 (2d Cir. 2000). Moreover, Doe affirmed (as modified) a court order "enjoining FBI officials" in their official capacities. 549 F.3d at 885. The FBI's compliance with that modified injunction is mandatory, not voluntary.

III. THE NSL STATUTE COMPLIES WITH FIRST AMENDMENT SUBSTANTIVE REQUIREMENTS.

A. The NSL Nondisclosure Requirement is not a "Prior Restraint."

The recipient relies heavily on its assertion that the nondisclosure requirement is a "prior restraint." Recipient Br. 43. But as explained on pages 48-52 of our opening brief, the nondisclosure requirement here bears little resemblance to the sort of administrative censorship schemes that have been subjected to strict scrutiny as prior restraints.

NSL recipients have no knowledge of the issues covered by the nondisclosure requirement unless and until they are served with the NSL. The Government provides information to the recipient and simultaneously seeks to retain its control over that information by preventing further dissemination. Importantly, nothing limits a recipient's ability to speak with respect to any information that it possessed before it received the NSL or that it obtains

independent of the Government. Such a limitation on the dissemination of information provided by the Government itself "does not raise the same specter of government censorship," Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984), as the suppression of information a person acquires "'on his own,'" Butterworth v. Smith, 494 U.S. 624, 636 (1990) (Scalia, J., concurring), and the nondisclosure requirement is, therefore, not subject to the constitutional scrutiny governing prior restraints.

B. Intermediate Scrutiny Applies.

On pages 31-33 of its opening brief, the Government explained that the nondisclosure requirement is content-neutral and therefore subject to only intermediate review. The recipient asserts that the Government conceded in Doe that strict scrutiny applies, but that assertion is incorrect.[6]

Taken on its own terms, recipient's substantive argument in favor of strict scrutiny lacks merit. The recipient asserts that strict scrutiny applies because "[t]he statute aims to suppress speech of a specific content – the fact of the NSL – and it aims to suppress it precisely because it fears the communicative impact of that speech." Recipient Br. 47. It is true that the purpose of the nondisclosure

[6] See, e.g., Doe Gov't Opening Br. 54 (asserting that "the district court was wrong to [apply] the narrow-tailoring requirements associated with conventional strict scrutiny"); Doe Gov't Reply Br. 5 ("We have already explained why strict scrutiny is inapplicable here."). This Court can take judicial notice of those statements. See, e.g., United States v. Howard, 381 F.3d 873, 876 (9th Cir. 2004).

requirement is to prevent terrorists and spies from learning what information the Government is seeking and what means it is using to collect that information. But that fact does not require the application of strict scrutiny. To the contrary, that purpose is essentially the same as the purpose for 18 U.S.C. § 2232(d) – the statute upheld in United States v. Aguilar, 515 U.S. 593, 602 (1995) – which "prohibits the disclosure of information that a wiretap has been sought or authorized,"[7] and is obviously intended to facilitate confidential criminal investigations. See also Haig v. Agee, 453 U.S. 280, 309 (First Amendment does not protect speech intended to obstruct intelligence operations and the recruiting of intelligence personnel). In Aguilar, the Supreme Court concluded that the Government interest in keeping such investigations confidential is not only sufficient to justify the statute but also justifies a broad reading of the statute to prohibit disclosure of information relating to an expired wiretap. Aguilar, 515 U.S. at 606. Aguilar contains no suggestion that strict scrutiny should apply, and § 2232(d), unlike NSL nondisclosure requirements, involves no individualized determination of the need for nondisclosure.

As explained on page 31 of our opening brief, NSL nondisclosure requirements are not content-based under Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994), because Congress did not adopt them "because of

[7] At the time of Aguilar, the statute was codified at § 2232(c).

disagreement with the message [the speech] conveys." But regardless of whether nondisclosure requirements are properly labeled content-neutral or content-based, the reasons for applying strict scrutiny do not apply. The NSL statute does not restrict the disclosure of information about NSLs because the Government disagrees with the NSL recipient or is seeking to discourage public debate over NSLs; it restricts such disclosures because they could alert terrorists and spies to the existence or progress of counterterrorism or counterespionage investigations or of investigatory methods. That is not the sort of concern that subjects a restriction to strict scrutiny under Turner. See also DISH Network Corp. v. FCC, 653 F.3d 771, 778-79 (9th Cir. 2011), cert. denied, 132 S. Ct. 1162 (2012).

C. The NSL Statute Satisfies Strict as Well as Intermediate Scrutiny.

Under intermediate scrutiny, the NSL statute must be upheld if it "advances important governmental interests" and "does not burden substantially more speech than necessary to further those interests." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997). The NSL nondisclosure requirement easily meets that standard and, indeed, the higher strict scrutiny standard as well.

Pages 27-30 of the Government's opening brief explain that the NSL nondisclosure requirements pass strict scrutiny, and necessarily intermediate scrutiny as well, because they are narrowly tailored to serve a compelling governmental interest. Recipient does not challenge the compelling nature of the

Government's interest in counterterrorism and counterespionage investigations. Although the recipient does argue that the nondisclosure requirements are insufficiently narrowly tailored to serve that compelling governmental interest, those arguments fail.

The recipient contends that it is generally unnecessary to forbid an NSL recipient from disclosing the fact that it has received an NSL. Recipient Br. 46-47. But the district court, relying in part on classified evidence, declined to set aside or modify in any way the two NSLs here, including their prohibitions on revealing the fact of receipt of the NSLs. See ER 4-5. The recipient is not challenging the district court's conclusions in that regard, and the recipient does not suggest that the statute is overbroad in that a substantial number of NSLs differ in this respect from the NSLs at issue here. Moreover, the FBI accommodates First Amendment concerns in this area by permitting NSL recipients to disclose in ranges the number of NSLs received over six-month periods. Recipient Br. 16 n.7.[8] There is therefore no risk that a substantial amount of information regarding the fact of receipt of NSLs will be suppressed.

[8] The FBI allows providers to disclose for a six-month period either: (1) the number of NSLs received in bands of 1000 (0 to 999, 1000 to 1999, etc.) or (2) the total number of national security processes received (including NSLs and FISA orders) in bands of 250. See http://www.justice.gov/iso/opa/resources/366201412716018407143.pdf (visited April 22, 2014).

The recipient also suggests that the NSL statute could result in "overly long" restrictions on disclosure and that a court "cannot tailor the duration of the [nondisclosure requirement] to the circumstances." Recipient Br. 47. But the recipient does not allege that the nondisclosure requirements to which it is subject are "overly long," nor does it explain why any nondisclosure requirement directed at another recipient would differ from its own in this regard. The Second Circuit affirmed the constitutionality of NSL statutory provisions in this regard, noting the availability of judicial review in which courts can modify or set aside a nondisclosure requirement that is no longer necessary. See Doe, 549 F.3d at 884 n.16.

Finally, the recipient suggests that the NSL statute provides the Government with an unconstitutional degree of discretion. Recipient Br. 49-50. But the cases on which the recipient relies involved the Government's application of wholly subjective criteria. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149 (1969) ("decency, good order, morals or convenience"); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 132 (1992) ("what would be reasonable"); Seattle Coal. to Stop Police Brutality v. City of Seattle, 550 F.3d 788, 799 (9th Cir. 2008) (what constitutes acting in "a 'reasonable' and 'good faith' manner"). As explained on pages 51-52 of our opening brief, the statutory criteria for imposing a nondisclosure requirement in an NSL are objective and include the likelihood of

"danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person," 18 U.S.C. § 2709(c)(1). Thus no unconstitutional discretion exists here.

The recipient also suggests that, by allowing the imposition of a nondisclosure requirement if disclosure "may" cause statutorily enumerated harm, the NSL statute gives the FBI a constitutionally forbidden degree of discretion. Recipient Br. 50. But certainty is impossible in making predictions necessary to preserve national security and other compelling Government interests, and the Constitution does not forbid the Government from exercising professional judgment in such situations. This same principle is true of many of the speech limits discussed in our opening brief including secrecy requirements associated with classified information, grand jury proceedings, criminal wiretaps, judicial misconduct investigations, and civil discovery. See Gov't Br. 35-40. In each of these instances, the harms feared from disclosure are not certain, but they are possible; they "may" occur. Similarly, here, if the FBI determines that disclosure of information contained in an NSL "may" facilitate a terrorist attack causing multiple casualties, the First Amendment does not forbid the Government from prohibiting the disclosure of that information, especially where, as here, judicial review is available to challenge the FBI's determination. Indeed, speech can be

regulated on the basis of predictive judgments about lesser and more remote harms. See, e.g., Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) (speech "likely" to influence a trial or prejudice the jury venire); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (speech "forecast" to disrupt school activities).

IV. NEITHER THE FIRST NOR THE FIFTH AMENDMENT REQUIRES PRIOR AUTHORIZATION FOR ADMINISTRATIVE SUBPOENAS.

The recipient asserts that the First and Fifth Amendments prohibit the issuance of NSLs without prior judicial authorization. Recipient Br. 53-58. Because the recipient raised this claim in only one of the two consolidated cases here, and the district court addressed it in neither, this Court should not exercise its discretion to address this constitutional issue in the first instance. See, e.g. United States v. Apel, 134 S. Ct. 1144, 1153 (2014); Miller v. Hedlund, 813 F.2d 1344, 1352 (9th Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

In any event, the recipient's argument lacks merit. The recipient relies on cases involving political associations or parties, see Recipient Br. 55 (relying on NAACP v. Alabama, 357 U.S. 449 (1958), and Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982)), while NSLs are directed only at a "wire or electronic communication service provider," 18 U.S.C. § 2709, like the recipient, Recipient Br. 5 (recipient is "a provider of long distance and mobile phone services," not a political association).

At any rate, the recipient does not cite any case that requires judicial review before the service of a subpoena. Instead, the recipient raises the specter of NSLs being abused to target politically unpopular groups, such as the organizers of an anti-government rally or adherents of a religious sect. Recipient Br. 53. But the statute expressly excludes any "investigation of a United States person . . . conducted solely on the basis of activities protected by the first amendment." 18 U.S.C. § 2709(b).

The recipient are also wrong to suggest that the supposedly personal and private nature of the information at issue – "subscriber information and toll billing records information, or electronic communication transactional records," 18 U.S.C. § 2709(a) – mandates a new constitutional rule requiring that a subscriber be given the opportunity to challenge an NSL. Recipient Br. 53-56. No case law supports this contention. Indeed, a subscriber has no legitimate expectation of privacy in the phone numbers called or in any "information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 742, 743-44 (1979). The subscriber information sought in NSLs is exclusively transactional information (as opposed to

content) that the subscriber has voluntarily turned over to the provider. The subscriber has no constitutionally recognized legitimate expectation of privacy in such information. See United States v. Bynum, 604 F.3d 161, 164 (4th Cir.) (a subscriber has no "expectation of privacy in his internet and phone 'subscriber information'" and NSLs, which are directed at the service provider, not the subscriber, therefore do not "invade any legitimate privacy interest" of the subscriber.), cert. denied, 560 U.S. 977 (2010); United States v. Perrine, 518 F.3d 1196, 1204-05 (10th Cir. 2008) (collecting cases).

V. IF ANY PROVISION RELATING TO THE NONDISCLOSURE REQUIREMENT WERE FOUND TO BE UNCONSTITUTIONAL, IT COULD BE SEVERED FROM THE REMAINDER OF THE STATUTE.

For the foregoing reasons, the nondisclosure provisions of the NSL statute do not violate the Constitution. But even if they did, it would not follow that the NSL statute as a whole could be struck down.

To invalidate the entire statute, the recipient has the burden of establishing that Congress would not have enacted the remaining parts of the statute – that is, that Congress would not have empowered the FBI to issue NSLs at all – had it known that the nondisclosure requirement (or some provision related to nondisclosure) was invalid. See Recipient Br. 59. The recipient marshals facts suggesting that Congress viewed the nondisclosure requirement as an important tool that the FBI uses in the vast majority of NSLs. Recipient Br. 59-60. Those

facts do not support the contention, however, that, if Congress had known that nondisclosure requirements were constitutionally unavailable, it would have refused to authorize the FBI to issue NSLs entirely, especially in light of Congress's statement that the records sought by NSLs "are highly important to the successful investigation of counterintelligence cases." S. Rep. No. 99-541, at 44 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3598..

The relevant question for severability is not whether Congress viewed nondisclosure requirements in NSLs as important or even crucial. The relevant question is whether Congress viewed nondisclosure requirements as an indispensable prerequisite, such that it would not want the FBI to issue any NSL without a nondisclosure requirement. We know that this is not true because, although the NSL statute originally applied nondisclosure requirements to every NSL, Pub. L. No. 99-508, § 201, 100 Stat. 1867 (1986), Congress amended it in 2006, specifically adding the authority to issue NSLs not covered by any nondisclosure provision, Pub. L. No. 109-177, § 116(a), 120 Stat. 213 (2006). Thus, Congress specifically gave the FBI the discretion to decide whether to issue NSLs without nondisclosure requirements when the statutory criteria for nondisclosure were not satisfied. The only logical inference is that Congress would also have wanted the FBI to have the same discretion to decide whether to issue NSLs without nondisclosure requirements when the constitutional

requirements for nondisclosure are not satisfied. As noted on pages 61-62 of our opening brief and by the Second Circuit, there are a number of factual scenarios in which it would make sense for the FBI to issue NSLs even if the First Amendment made nondisclosure voluntary rather than compulsory. See Doe, 549 F.3d at 885 ("As the Government points out, even without a nondisclosure requirement, it can protect the national interest by issuing NSLs only where it expects compliance with a request for secrecy to be honored.").

VI. THE GEOGRAPHIC SCOPE OF ANY INJUNCTION MUST BE LIMITED.

The recipient suggests that it was appropriate for the district court below to enjoin the operation of the NSL statute nationwide, despite the fact that the Second Circuit had reversed a similar injunction issued by a district court in New York. That suggestions is incorrect under Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1161 (9th Cir. 2011), which makes clear that a district court may not issue a nationwide injunction when a court of appeals elsewhere in the country has "declined to enter a similar injunction." Accord United States v. AMC Entm't, Inc., 549 F.3d 760, 773 (9th Cir. 2008). Moreover, if the district court injunction were implemented nationwide, it would improperly interfere with the development of the law in multiple Circuits. See, e.g., Ry. Labor Executives' Ass'n v. ICC, 784 F.2d 959, 964 (9th Cir. 1986) (Government agencies allowed to relitigate the same issue in different circuits). Finally, the recipient has ignored (and therefore waived

any response to) our point that injunctive relief should be limited to the parties before the court. See Gov't Br 63. Assuming that the injunction is not reversed entirely, it must be limited in scope accordingly.

CONCLUSION

For the foregoing reasons, the judgment of the district court at issue in No. 13-15957 should be reversed and the order of the district court at issue in No. 13-16731 should be affirmed.

Respectfully submitted,

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MAY 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND WITH CIRCUIT RULE 32-1

I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 6,992 words.

/s/ Jonathan H. Levy
JONATHAN H. LEVY

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, I filed under seal the foregoing Government's Reply Brief using the Court's ECF system.

Parties to the case (but not amici) who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Jonathan H. Levy
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