NOS. 13-15957, 13-16731

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNDER SEAL,

PETITIONER-APPELLEE (No. 13-15957),
PETITIONER-APPELLANT (No. 13-16731),

v.

LORETTA E. LYNCH, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; and 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
Case Nos. 11-cv-2173 SI, 13-mc-80089 SI
Honorable Susan Illston, District Judge

APPELLEE/APPELLANT UNDER SEAL'S SUPPLEMENTAL BRIEF RE USA FREEDOM ACT FILED UNDER SEAL

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INTRODUCTION

The two National Security Letter ("NSL") recipients who are parties to the consolidated appeals 13-15957, 13-16731 and 13-16732 submit this supplemental brief in response to this Court's order of June 3.

The NSL statute remains unconstitutional because the amendments to 18 U.S.C. § 2709 and 18 U.S.C. § 3511, enacted as part of the USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268 (2015), do not alter the fundamental scheme that was invalidated by the district court. *In re NSL*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013).

First, the amendments are entirely silent about several elements of the statute that the district court found unconstitutional and that are already fully briefed in this appeal.

Second, the most significant revision to the statute is simply to codify the "reciprocal notice" procedure suggested by the Second Circuit in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). As the NSL recipients have already briefed at length, this procedure does not meet the requirements of the First Amendment set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965).

Because the recipients continue to be gagged and because the amendments simply codify a practice that the parties have already briefed, the recipients

respectfully ask this Court to proceed to resolve the merits of this appeal and rule that the statute, even as slightly revised, remains unconstitutional.

AMENDMENTS TO THE NSL STATUTE

On June 2, Congress passed the USA FREEDOM Act, which amends the NSL statute in part but leaves its operation essentially the same.

As before, the FBI can issue a request for records under § 2709(b) to a wire or electronic communication service provider and can bar the recipient from disclosing the fact that it has received an NSL. 18 U.S.C. § 2709(c)(1), *amended by* Pub. L. 114-23 § 502(a).

As before, in order to issue this gag order, an FBI official must in the first instance merely certify that without a gag, one of several enumerated harms "may result." *Id*.

As before, this gag order is not subject to judicial review unless the recipient takes action. 18 U.S.C. § 3511(b)(1)(A), *amended by* Pub. L. 114-23 § 502(g).

And, with only slight modification, a district court reviewing a gag order is limited to determining whether there is "reason to believe" one of the statutory harms "may result" without the gag. *Id.* § 3511(b)(3).

The most significant revision to the NSL statute created by USA FREEDOM does not mark a change in the FBI's practice at all. The amendments merely codify the "reciprocal notice" procedure suggested by the Second Circuit in *Mukasey*, a

procedure the government has previously represented that it voluntarily followed for every NSL it has issued since *Mukasey*. Under the amendments, in addition to allowing the recipient to file a petition to set aside the gag order previously found in § 3511, the statute now also provides that "if a recipient . . . wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government[.]" § 3511(b)(1)(A). The government must then file a petition to enforce the gag order within 30 days, § 3511(b)(1)(B), although the statute does not require the gag to automatically dissolve if the government fails to do so. If the recipient seeks judicial review through either of these avenues, the court must "rule expeditiously." § 3511(b)(1)(C).

The amendments also slightly alter the evidence presented to a court reviewing a gag order and the standard the court applies. On review, the government must now support its certification with a "statement of specific facts" indicating that without a gag, an enumerated harm "may result." § 3511(b)(2). However, the reviewing court is not directed to weigh this statement of facts. Rather, the court need only determine that "that there is reason to believe" an enumerated harm "may result" without a gag, § 3511(b)(3). The statute previously directed the court to set aside the gag if "there [was] no reason to believe" that disclosure would cause an enumerated harm.

Finally, Congress also included a requirement that the Attorney General adopt unspecified procedures for periodically reviewing gag orders for new NSLs, Pub. L. 114-23, § 502(f), and codified the executive branch's limitations on recipients' reporting of broadly aggregated numbers of NSLs they have received, *id.* § 603(a).

ARGUMENT

I. The District Court's Opinion and the Prior Briefs on Appeal Demonstrate That the Amended NSL Statute Remains Unconstitutional.

A. The Amendments Do Not Address Numerous Constitutional Infirmities Already Briefed and Argued to This Court.

As described above, the amendments leave intact the NSL statutory scheme that the district court found unconstitutional. Similarly, the amendments do not resolve or address many of the constitutional deficiencies the NSL recipients presented on appeal. These include:

1. The NSL statute continues to authorize prior restraints, because it allows the government to bar a recipient from speaking in the first instance. *In re NSL*, 930 F. Supp. 2d at 1071; Recipient's First Br. at 20, Nos. 13-15957 & 13-16731.[1]

[1] For brevity, citations are to recipients' briefs in Nos. 13-15957, 13-16731. The same arguments can be found in the recipient's briefs in No. 13-16732, except where noted otherwise.

2. The gag order provision still fails to meet the substantive requirements for prior restraints under the First Amendment. As before, the amended § 2709 only requires that the government certify that an enumerated harm "may result" absent a gag, not that the gag is "necessary" to preventing this harm. Recipient's First Br. at 44.

3. The "may result" standard in § 2709 remains boundless and inherently subjective. The statute still does not set forth "narrow, objective, and definite standards" guiding the discretion of the FBI, as required by the First Amendment. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); Recipient's First Br. at 49-50; Recipient's Second Br. at 17-18.

4. In addition, as the district court held, the gag order provision remains a content-based restriction on speech that fails strict scrutiny. *In re NSL*, 930 F. Supp. 2d at 1075, Recipient's First Br. at 45-46.[2] In particular, the amendments do not address the overinclusiveness of NSL gag orders, which bar recipients from disclosing the mere fact that they have received an NSL. The government may point to § 604 of the USA FREEDOM Act, which codifies the executive branch's

[2] The Supreme Court recently endorsed the recipients' argument that a law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Laws are also considered content-based if they "cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys." *Id.* (internal quotation marks and citations omitted).

limitations on recipients' reporting of NSLs they have received in broad aggregated bands. However, as previously discussed in the briefing and at oral argument, this blanket rule is not narrowly tailored, because it does not require the government to employ less speech-restrictive means, such as allowing recipients to report the mere fact they have received an NSL. Under § 604, recipients must still include "0" in the lowest reporting band, so they are effectively gagged from reporting complete and honest transparency reports. *See* Gov. Ltr. to the Court, Dkt. No. 86 (Nov. 6, 2014).

5. The NSL statute continues to authorize gags of indefinite duration, another example of the lack of narrow tailoring. As the district court explained, "[n]othing in the statute requires . . . the government to rescind the non-disclosure order once the impetus for it has passed." 930 F. Supp. 2d at 1076. In USA FREEDOM, Congress directed the Attorney General to adopt unspecified procedures to review "at appropriate intervals" to determine whether gags issued under the revised statute are still supported. Pub. L. 114-23, § 502(f). However, the statute does not specify that these future administrative procedures will *require* the government to employ less speech-restrictive means, nor will they ensure that gags persist no "longer than necessary." *In re NSL*, 930 F. Supp. 2d at 1076. In addition, the statute does not require the Attorney General to apply these procedures to

NSLs issued before the passage of USA FREEDOM, as with the NSLs at issue here, as well as hundreds of thousands of others.

6. The amendments do not alter the compelled production provision in § 2709(b). The recipient in 13-15957 and 13-16731 continues to challenge this provision as authorizing disclosure of information without prior judicial review in violation of the First and Fifth Amendments. Recipient's First Br. at 56-58.

7. The amendments do not address the severability of the gag order provisions from the rest of the statute. This omission adds additional support to recipients' argument that these provisions are not severable.

The district court's ruling that the NSL statute is unconstitutional can rest on each of these grounds alone. This Court can thus affirm that ruling without any further consideration of USA FREEDOM.

B. Even Where USA FREEDOM Does Address Constitutional Defects Identified by the District Court, It Fails to Cure Them.

1. The amended NSL statute continues to lack the procedural requirements for prior restraints required by *Freedman v. Maryland*.

Recipients' arguments already presented to this Court that the reciprocal notice procedure fails to meet the *Freedman* requirements apply to the "new" procedure as well:

1. The new procedure does not require the government to initiate judicial review as required by *Freedman*. 380 U.S. at 58-59. This procedure still requires

the recipient to be the first mover by notifying the government of its desire for judicial review. Recipient's First Br. at 28-29, 32-33. If the recipient does nothing, the gag order remains in place. This is the very same backward burden that the Supreme Court found impermissible in *Freedman*. 380 U.S. at 57-58.

2. The new procedure still does not require that pre-review gags be limited to a "specified brief period." *Id*. at 59. Rather, the statute continues to authorize gags of indefinite duration: when the recipient exercises the notice provision, the statute directs the government to initiate review within 30 days, but the gag does not dissolve if the government fails to do so.

3. The revised statute still does not require a reviewing court to issue a "prompt final judicial decision," *Freedman,* 380 U.S. at 59, but instead says that it must "rule expeditiously." Congress declined to include a specified time frame for this review, disregarding the *Mukasey* court's suggestion of "a *prescribed* time, perhaps 60 days." 549 F.3d at 879 (emphasis added). Congress had some outer-limit guidance here in that the Supreme Court made clear that the four months for initial review and six months for appellate review in *Freedman* was not fast enough, 380 U.S. at 55, yet it failed to include any specific time frame.

4. The revised standards for reviewing a gag order still fail to place the proper burden of proof on the government. *Id.* at 58-59. Now, the gag may be deemed appropriate if "there is reason to believe" an enumerated harm *may* result.

The defect here is that the government still need only prove the barest possibility of harm. The amendment is a cosmetic change, replacing the previous provision that allowed the district court to *set aside* a gag if "there is no reason to believe" an enumerated harm might result. Either way, the standard is below the constitutional threshold.

Moreover, this standard still does not require the government to "bear any specific burden of proof, in terms of the showing necessary to justify the non-disclosure order." *In re NSL*, 930 F. Supp. 2d at 1075. The requirement that the government now introduce a "statement of specific facts" in support of its gag order certification is not conclusive, since the court's review of the gag need not even take this statement of facts into account.[3]

2. The judicial review provisions in the amended NSL statute remain excessively deferential.

As discussed above, the amended § 3511(b) introduces a small change in the standard applied by a court reviewing a gag order, such that the court is directed to enforce the gag if "there is reason to believe" the enumerated harms "may result." Even assuming that this change grants the court more leeway, the revised statute

[3] Moreover, because the revised statute codifies the reciprocal notice procedure suggested by the Second Circuit in *Mukasey*, this Court need not now determine whether the FBI's voluntary adoption of this procedure is a "well-established practice" for the purposes of a facial challenge.

plainly does not provide for the "searching" standard of review required by the district court. *In re NSL*, 930 F. Supp. 2d at 1077; Recipient's First Br. at 42-43.[4]

II. This Court Can—and Should—Rule on the Amended Statute Now Without Remanding the Case to the District Court.

To avoid any further delay and exacerbated constitutional injuries, the Court can and should resolve the legality of the gags now and not remand the issues to the district court. The NSL recipients in this case have been gagged for years, unable to speak about their receipt of NSLs. In fact, as a result of the gags, they were barred from fully engaging in the debate on the very statute now at issue in these cases, despite their distinct and important perspective on the government's use of NSLs. They could not directly discuss their experiences with their elected representatives as those legislators considered amendments to the NSL statute. This inability to engage in core political speech compounded an injury now ongoing for over four years in 13-15957 and over two years in 13-16731 and 13-16732.

This Court has discretion to decide these issues without a remand. *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976). As explained above, USA FREEDOM has not materially changed most of the issues in this appeal. But even with respect to issues that are somewhat altered, any of the following circumstances will support

[4] The amendments remove the conclusive certification provision in § 3511 that the recipients have challenged.

resolution by this Court: "(1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation marks omitted).

Although only one of the three circumstances need be satisfied, each applies here.

Change in law. As the Supreme Court has held, courts retain jurisdiction after an amendment to a challenged statute where the amended statute "disadvantages [the plaintiff] in the same fundamental way" and where "[t]he gravamen of [the plaintiff's] complaint" remains the same. *See Northeastern Florida Chapter of Assoc.'d Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). This Court has addressed the applicability of new legal frameworks or standards to pending cases for the first time on appeal, without remanding. *See, e.g., Beck v. City of Upland,* 527 F.3d 853 (9th Cir. 2008). *Beck* resolved the question of whether an arrest had been retaliatory, despite the announcement of a new legal standard during appellate briefing. In so doing, it relied upon considerations of judicial efficiency because "it ha[d] already been four years since Beck's arrest and three years since this case was filed." *Id.* at 868-69. Similarly, in *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005) *on reh'g en banc,* 409 F.3d 1073 (9th Cir. 2005), this Court held that it had authority to

consider *sua sponte* defendant's Sixth Amendment challenge to his sentence even though the issue was not raised below, given that a new decision had "worked a sea change in the body of sentencing law."[5] *Id.* at 652 (internal quotation marks and citation omitted).

Here, as in *Northeastern Florida,* the amended statute remains constitutionally flawed—and the NSL recipients remain constitutionally injured—in "the same fundamental way" and the gravamen of their challenge to their gags remains the same. 508 U.S. at 662.

Miscarriage of justice. Remanding for further proceedings would only further prolong an already intolerably long prior restraint. *See Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir. 1995) (noting "the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights.") (internal citation omitted). The loss of the right to speak, "for even minimal periods of time, unquestionably" constitutes a significant and irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Just as the Supreme Court held in its seminal *Pentagon Papers* decision, the prior restraint here "violate[s] the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to

[5] On rehearing en banc, the Court held that limited remand was required to determine whether *Booker* error was harmful. *Ameline*, 409 F.3d at 1073.

examine the claim more thoroughly." *New York Times Co. v. United States,* 403 U.S. 713, 727 (1971) (Brennan, J., concurring).

Purely legal question. Finally, the question presented—the constitutionality of the challenged gags under the amended statute—is purely one of law for which the parties need not supplement the factual record. Nor will the Court's consideration of the question here on appeal in any way prejudice the parties. Indeed, the legal issues presented under the amended statute are the very same legal issues presented by the original statute. These issues have been fully addressed by both parties, and as outlined above, the amendments have not resolved the statute's unconstitutionality. This Court has numerous times considered purely legal issues on appeal under similar circumstances. *See*, *e.g.*, *Fed. Ins. Co. v. Union Pac. R.R. Co*., 651 F.3d 1175, 1178 (9th Cir. 2011); *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2003); *United States v. Kaczynski*, 551 F.3d 1120, 1124 (9th Cir. 2009); *Thompson v. Runnels*, 705 F.3d 1089, 1100 (9th Cir. 2013); *United States v. Winslow*, 962 F.2d 845, 849 (9th Cir. 1992).

For each of these three reasons, independently, this Court should exercise its discretion to address the legality of the gags under the amended statute now on appeal.

CONCLUSION

For the reasons described above, the NSL statute as amended by the USA FREEDOM Act remains unconstitutional and should be struck down.

Dated: July 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. Appellee/Appellant Under Seal's Supplemental Brief Re: USA FREEDOM Act complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4 because this brief contains 3,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 for Mac, the word processing system used to prepare the brief, in 14 point, Times New Roman font.

Dated: July 6, 2015

By: /s/ Kurt Opsahl
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 6, 2015.

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Dated: July 6, 2015 By: /s/ Kurt Opsahl
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