No. 13-16732

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

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

GOVERNMENT'S ANSWERING BRIEF
Filed Under Seal

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STATEMENT OF JURISDICTION

This appeal arises under 18 U.S.C. §§ 2709 and 3511 and the Constitution. The recipient of two National Security Letters (NSLs) petitioned the district court to set those letters aside, and the Government filed a cross-petition to enforce. The district court denied the recipient's petition and granted the Government's cross-petition in an order entered on August 12, 2013. The recipient filed a timely notice

of appeal on August 22, 2013. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether 18 U.S.C. §§ 2709(c) and 3511(b) as applied here violate the First Amendment.

2. Whether 18 U.S.C. §§ 2709(c) and 3511(b) are facially unconstitutional.

3. Whether the challenged statutory provisions are severable from the remainder of 18 U.S.C. §§ 2709 and 3511.

INTRODUCTION

Congress has empowered the FBI to issue an administrative subpoena known as a National Security Letter (or NSL) as part of authorized investigations to protect against international terrorism and clandestine intelligence activities. NSLs are directed to electronic communications service providers in order to obtain specified limited information; they are not used to obtain the content of communications. Because secrecy is typically vital in such national security investigations, if the FBI certifies that disclosure could cause specified harms, such as interfering with the investigation or endangering the life or physical safety of any person, the NSL statute imposes a nondisclosure obligation on the NSL recipient.

The nondisclosure provisions of the NSL statute are similar to grand jury and other secrecy rules that courts have repeatedly upheld as constitutional. But in a related case before the same district court, the district court invalidated the nondisclosure provisions on their face under the First Amendment. It did so despite the fact that the statutory provisions have been upheld (with minor exceptions) by the Second Circuit and despite the fact that the district court itself found nothing wrong with the basic function of NSLs as information-gathering tools in authorized national security investigations.

As applied here, the nondisclosure provisions meet the most exacting First Amendment standards because they are narrowly tailored to meet unquestionably compelling Government interests, and because the Government has provided the highest level of procedural protections. The facial challenge fails because it requires proof that the statute will suppress a significant amount of constitutionally protected speech, and there is no indication that the continued application of the statute is likely to suppress any such speech. Moreover, no perceived flaw in the nondisclosure provision could justify invalidating the entire NSL statute. The district court therefore properly declined to set the NSLs aside and, instead,

ordered the recipient to comply.[1]

STATEMENT OF THE CASE

The recipient petitioned the district court to set aside two NSLs, and the Government cross-petitioned to enforce these NSLs. During the course of the litigation, the Government informed the district court that it had withdrawn the information demand portion of one of the two NSLs and, going forward, requested only enforcement of the nondisclosure requirement of that NSL. ER 11 n.1. The district court denied the recipient's petition to set aside and granted the Government's cross-petition to enforce. ER 13, 14. The recipient has appealed, and the district court, this Court, and Circuit Justice Kennedy have each denied the recipient's motions for a stay pending appeal. ER 1-7.

[1] Counsel for the recipient here is also counsel for the (different) recipient in related appeal Nos. 13-15957 and 13-16731. The recipient's brief here (No. 13-16732) correctly states that it is "nearly identical" to the brief filed by the recipient in those two related cases, specifically noting that the only material difference is that Nos. 13-15957 and 13-16731 recipient's brief addressed additional issues not raised by the recipient here. Recipient Br. 4. For these reasons, the instant brief is also similar to the brief the Government filed in Nos. 13-15957 and 13-16731. We agree that all three appeals raise similar issues and turn on the facial validity of provisions of the NSL statute. Once this Court has resolved all of the issues raised in Nos. 13-15957 and 13-16731, it will necessarily also have resolved all of the issues raised here.

I. Statutory Background

A. National Security Letters are Administrative Subpoenas Used by the FBI in Counterterrorism and Counterintelligence Investigations.

The President of the United States has charged the FBI with primary authority for conducting counterintelligence and counterterrorism investigations in the United States. See Exec. Order No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg. 59941 (Dec. 4, 1981). Today, the FBI is engaged in extensive investigations into threats, conspiracies, and attempts to perpetrate terrorist acts and foreign intelligence operations against the United States. These investigations are typically long-range, forward-looking, and prophylactic in nature in order to anticipate and disrupt clandestine intelligence activities or terrorist attacks on the United States before they occur.

The FBI's experience with counterintelligence and counterterrorism investigations has shown that electronic communications play a vital role in advancing terrorist and foreign intelligence activities and operations. Accordingly, pursuing and disrupting terrorist plots and foreign intelligence operations often require the FBI to seek information relating to the use of electronic communications. That information often serves as a critical foundation from which the FBI develops leads, determines a suspect's associates and financial

dealings, and applies for warrants to conduct electronic or physical searches; it can also be used to clear individuals of suspicion.

The statutory provision principally at issue in this case, 18 U.S.C. § 2709, was enacted in 1986 to assist the FBI in obtaining such electronic information by empowering the FBI to issue an administrative subpoena commonly referred to as a National Security Letter. Section 2709 is one of several federal statutes that authorize the FBI or other Government authorities to issue such NSLs in connection with counterintelligence and counterterrorism investigations. See 12 U.S.C. § 3414(a)(5) (Right to Financial Privacy Act); 15 U.S.C. §§ 1681u-1681v (Fair Credit Reporting Act); 50 U.S.C. § 3162 (National Security Act of 1947).

Subsections (a) and (b) of § 2709 authorize the FBI to request "subscriber information and toll billing records information, or electronic communication transactional records," all of which Congress deemed to be "less private than other records." Sams v. Yahoo! Inc., 713 F.3d 1175, 1180 (9th Cir. 2013). NSLs may **not** be used to obtain more private records, including the content of any wire or electronic communication. See S. Rep. No. 99-541 at 44 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3598.

In order to issue an NSL, the Director of the FBI, or a designee "not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in

Charge in a Bureau field office" must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b)(1)-(2). In addition, when an NSL is issued in connection with an investigation of a "United States person," one of the same officials must certify that the investigation is "not conducted solely on the basis of activities protected by the first amendment." Ibid.

B. Confidentiality of National Security Letters is Often Necessary for Effective Counterintelligence and Counterterrorism Investigations.

Most counterintelligence and counterterrorism investigations must be carried out in secrecy if they are to succeed. Because these investigations themselves are often classified and are typically directed at clandestine groups, it is often essential that targets not learn that they are the subject of an investigation so that they do not take countermeasures to avoid detection, destroy or conceal evidence, flee, craft alibis, and/or expedite attack plans. ER 29-30 (Demarest Decl. ¶¶ 13-15).[2] Likewise, knowledge about the scope or progress of a particular investigation can allow targets to determine the FBI's degree of penetration of their activities and to

[2] A declaration containing additional information classified at the "Secret" level was submitted to the district court ex parte for in camera review and is similarly available to this Court ex parte for its in camera review. See 18 U.S.C. § 3511(e).

alter their timing or methods. The same concern applies to knowledge about the sources and methods that the FBI is using to acquire information, knowledge that can be used both by the immediate targets of an investigation and by other terrorist and foreign intelligence organizations even after a particular investigation has ended. See ER 29 (Demarest Decl. ¶ 14).

The secrecy needed for successful counterintelligence and counterterrorism investigations can be compromised if an NSL recipient discloses that it has received an NSL or provided information pursuant to one. To avoid that result, § 2709(c) contains provisions that restrict the disclosure of information about NSLs.

Originally, § 2709(c) automatically forbade an NSL recipient from disclosing that the FBI sought or obtained access to information by means of an NSL. Pub. L. No. 99-508, § 201, 100 Stat. 1867 (1986). The original nondisclosure requirement was perpetual, and the statute contained no provision for an NSL recipient to contest the need for nondisclosure in court.

C. Congress Amended the National Security Letter Statute to Avoid Unnecessary Restrictions on Disclosure.

In 2006, Congress enacted significant revisions to the nondisclosure provisions designed to avoid unnecessary restrictions. First, the nondisclosure

requirement no longer applies automatically. Instead, disclosure is prohibited only if one of the high-level FBI officials noted above certifies that, absent such a requirement, "there may result a 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)(2). Although this certification applies in "the vast majority of cases," it is made on a case-by-case basis before each NSL is issued and does not apply, for example, when "the investigation is already overt." ER 29. When such a certification is made, notice of the nondisclosure requirement is included in the NSL itself. Violation of the nondisclosure requirement is a criminal offense under the NSL statute if, but only if, the recipient discloses the information "knowingly and with the intent to obstruct an investigation or judicial proceeding." 18 U.S.C. § 1510(e).

Second, Congress amended the statute to provide a specific statutory mechanism for judicial review of a nondisclosure requirement in an NSL, distinct from judicial review of the NSL itself. An NSL recipient may petition a district court "for an order modifying or setting aside a nondisclosure requirement imposed in connection with" the NSL. 18 U.S.C. § 3511(b)(1). If the petition is filed more than a year after the NSL was issued, the FBI or Department of Justice must either

re-certify the need for nondisclosure or terminate the nondisclosure requirement. Id. § 3511(b)(3).

A district court "may modify or set aside" the nondisclosure requirement if the court finds "no reason to believe" that disclosure may cause any of the statutorily enumerated harms. Id. § 3511(b)(2) & (3). If the Director of the FBI, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General personally certifies at the time of the petition that disclosure may endanger national security or interfere with diplomatic relations, that certification "shall be treated as conclusive" by the district court "unless the court finds that the certification was made in bad faith." Ibid. If a disclosure petition filed a year or more after the issuance of the NSL is denied, the recipient may try again one year later. Id. § 3511(b)(3).

D. NSLs are Enforced in a Manner that Adheres to the Second Circuit's Opinion and Injunction in Doe.

The FBI implements the statutory NSL nondisclosure provisions in strict compliance with the Second Circuit's decision in John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008). See ER 30-33 (Demarest Decl. ¶¶ 18-25). That decision interpreted the nondisclosure provisions in a manner that is deliberately protective of the First Amendment interests of NSL recipients and imposed an injunction that binds the Government. The Government implements the nondisclosure provisions

throughout the country in conformity with Doe and in a manner highly protective of free speech interests.

Like the present case, Doe involved a facial constitutional challenge to the nondisclosure provisions of the NSL statute. The Doe district court had found, much like the district court here, that the nondisclosure provisions lacked constitutionally required procedural safeguards and were substantively overbroad. Also like the court below, the Doe district court had held that the assertedly unconstitutional aspects of the nondisclosure provisions could not be severed from the remaining provisions of the NSL statute, and therefore had prohibited the FBI from issuing NSLs under § 2709 at all. See Doe, 549 F.3d at 870 (describing district court decision).

On appeal, however, the Second Circuit rejected most, although not all, of the district court's constitutional concerns and substantially narrowed the scope of the injunction. The Second Circuit's decision allows the Government to continue to issue and enforce NSLs, including NSLs imposing a nondisclosure obligation under § 2709, as long as specified procedures are followed.

To avoid potential First Amendment concerns, the Second Circuit interpreted §§ 2709 and 3511 to "place on the Government the burden to show that a good reason exists to expect that disclosure of receipt of an NSL will risk an

enumerated harm." Doe, 549 F.3d at 883. The court held that the First Amendment obligates the Government to initiate judicial review of the nondisclosure requirement, and modified the district court's injunction to bar the Government from enforcing nondisclosure requirements unless the Government assumes the burden of seeking judicial review.[3] The court identified a constitutionally permissible "reciprocal notice procedure," under which the recipient of an NSL has 10 days to notify the FBI that it intends to challenge the nondisclosure requirements, and the Government then has approximately 30 days in which to initiate judicial review. 549 F.3d at 879, 883-84.

The Second Circuit in Doe agreed with the district court that § 3511(b) is unconstitutional to the extent that it makes specified Government certifications conclusive in judicial proceedings. Id. at 884. Unlike the district court, however, the Second Circuit held that the constitutionally infirm provisions of the NSL statute could be severed from the remaining provisions. The court had "no doubt that if Congress had understood that First Amendment considerations required the Government to initiate judicial review of a nondisclosure requirement and precluded a conclusive certification by the Attorney General, it would have wanted

[3] Despite the Government's request, however, the court did not modify the unusual reach of the district court's injunction to parties not before it and to geographical areas outside of the Second Circuit.

the remainder of the NSL statutes to remain in force." Id. at 885.

Since 2009, the FBI has complied with the Doe injunction and has implemented Doe's "reciprocal notice" procedures nationwide. See ER 30-31, 39 (Demarest Decl. ¶ 19 & Exh. A, at 2-3 & Exh. B, at 2; Cross-petition ¶ 16). Although historically the FBI has issued thousands of NSLs annually, see Demarest Decl. Exh. A, at 2, since Doe, only a handful of recipients have provided the Government with notice that they intended to challenge the nondisclosure requirement.

II. The Present Controversy

This appeal relates to two ongoing, authorized FBI national security investigations, the backgrounds of which are described in a classified declaration submitted to the district court ex parte for in camera review and similarly available ex parte to this Court for in camera review. Each of the NSLs at issue was served on the recipient under 18 U.S.C. § 2709 and sought information necessary to one of those investigations. ER 36 (Cross-petition ¶ 2).

An authorized FBI official certified in each NSL that disclosure of the fact or contents of the NSL could cause one or more of the statutorily enumerated harms, including endangering national security, and that, therefore, the recipient was prohibited from disclosing the fact or contents of the NSL (other than as

necessary to comply with the NSL or to obtain relevant legal advice). See ER 51, 57. With respect to judicial review of nondisclosure, each NSL notified the recipient of its right to challenge the NSL under 18 U.S.C. § 3511, and of the 10-day period to notify the FBI that it desired to challenge the nondisclosure requirement in order to trigger the FBI's initiation of judicial proceedings. ER 52, 58.

The recipient filed a petition to set aside these NSLs, and the Government filed a cross-petition to enforce them. See ER 67-68. The recipients and the district court relied heavily on the district court's opinion in a related case (currently pending before this Court as Appeal No. 13-15957), holding the entire NSL statutory scheme facially unconstitutional. In re Nat'l Sec. Letter, 930 F. Supp. 2d 1064 (N.D. Cal. 2013) ("In re NSL") (appeal pending).

A. The District Court's Decision in the Previous In re NSL Case.

That earlier In re NSL district court decision is currently on appeal to this Court as Appeal No. 13-15957. The district court's opinion in that case closely tracked the district court opinion in Doe, including the portions of that opinion that were later reversed on appeal by the Second Circuit. The district court in In re NSL rejected the Government's analogy to grand jury proceedings and other settings in which private parties learn information through participation in

Government investigations. Despite observing that a nondisclosure requirement in an NSL "may not be a 'classic prior restraint' or a 'typical' content-based restriction on speech," the district court concluded that such a restriction must not only be "narrowly tailored to serve a compelling governmental interest," but must also meet the heightened standards that the Supreme Court applied to administrative censorship schemes in Freedman v. Maryland, 380 U.S. 51 (1965). In re NSL, 930 F. Supp. 2d at 1071. In applying Freedman, the district court gave no weight to the FBI's "nationwide compliance" with Doe, characterizing that adherence to Doe as "voluntary," rather than the result of legal obligation. Id. at 1074. The court also rejected the Second Circuit's approach in Doe of construing the statutory provisions to avoid potential First Amendment problems, and dismissed as irrelevant the fact that the Government has adhered to Doe's construction of the statute and Doe's reciprocal notice mechanism, as well as Doe's injunction, with respect to the NSLs at issue there and every other NSL since 2009. See id. at 1069, 1073-75.

The district court concluded that the statutory NSL nondisclosure provision is facially unconstitutional in several respects:

1. Although the Government followed the Doe reciprocal notice procedures, the district court found the statute constitutionally deficient under Freedman for not

requiring the Government to institute judicial proceedings. Id. at 1075.

2. The district court noted that "a strong argument" supported forbidding disclosure of the information sought in an NSL, but it faulted the statute for prohibiting disclosure of the mere fact of receipt of an NSL because, in some (unspecified) situations, disclosure of that fact might not be harmful. Id. at 1075-76.

3. The district court found the duration of nondisclosure requirements constitutionally problematic because they remain in effect until judicially set aside and because a recipient can ask a court to set aside a particular nondisclosure requirement no more than once every year. Id. at 1076-77.

4. The district court held that "as written, the statute impermissibly attempts to circumscribe a court's ability to review the necessity for nondisclosure orders" by limiting a court's power to modify or set aside a nondisclosure order to situations in which there is no reason to believe that disclosure may lead to an enumerated harm and by giving conclusive effect to specified officials' certifications that particular harms may occur. Id. at 1077.

In contrast to the Second Circuit, which construed the challenged statutory provisions to minimize potential First Amendment concerns, the district court in In re NSL declined to construe the statutory provisions to avoid potential

constitutional problems. Id. at 1080-81. It reasoned that construing the provisions to avoid First Amendment issues would be inconsistent with what the court took to be Congress's intention to simultaneously "giv[e] the government the broadest powers possible to issue NSL nondisclosure orders" while "preclud[ing] searching judicial review of the same." Id. at 1080. Accordingly, the district court found "no 'reasonable construction'" of the statute "that can avoid the constitutional infirmities." Id. at 1081.

Finally, the district court concluded that the provisions it found unconstitutional – all of which related to the nondisclosure requirement – could not be severed from the underlying substantive provisions that authorize the FBI to issue and enforce NSLs in counterterrorism and counterintelligence investigations. The district court found it "hard to imagine how the substantive NSL provisions – which are important for national security purposes – could function if no recipient were required to abide by the nondisclosure provisions." Ibid. Disagreeing with the Second Circuit in Doe, the district court dismissed the idea that if Congress had believed that the nondisclosure provision was flawed, it would still have authorized the FBI to issue NSLs without a legally binding nondisclsoure obligation (for example, NSLs to recipients that the FBI believed it could trust not to disclose). Accordingly, the district court held the entire NSL statute invalid and

unenforceable.[4]

The district court sua sponte stayed its injunction pending appeal to this Court. Ibid.

B. The District Court's Decision in the Case Below.

Notwithstanding the district court's ruling in In re NSL that the NSL statute was facially invalid, when the two NSLs here subsequently came before the same district court, the court denied the recipient's petition to set aside the NSLs and, instead, granted the Government's cross-petition for enforcement. The district court concluded that it was "appropriate to review the arguments and evidence on an NSL-by-NSL basis," and analyzed the validity of the statute as applied. ER 12.

The district court noted that it is undisputed that "the FBI has complied with the strictures imposed by [Doe, and t]he Government has, therefore, complied with procedural and substantive requirements that the Court and petitioner in the Court's prior case recognized could result in a constitutional application of the nondisclosure and judicial review provisions of 18 U.S.C. § 2709(c) and 18 U.S.C. §§ 3511(b)(2), (b)(3)." ER 13. The district court further concluded that "Congress has authorized the FBI to seek the information requested, the procedural

[4] The district court stated that 18 U.S.C. § 3511(b)(2) and (b)(3) violated separation-of-powers principles, In re NSL, 930 F. Supp. 2d. at 1081, but its opinion contains no analysis of that issue.

requirements set by both the statute and by the Second Circuit's Doe v. Mukasey decision have been followed, . . . the evidence sought is relevant and material to the investigation," and the Government had provided classified evidence "explaining further the need for continued nondisclosure of both NSLs." ER 13-14. Accordingly, the district court granted the Government's motion to enforce. ER 14. The recipient has appealed.

SUMMARY OF ARGUMENT

Public disclosure of actions by the Government to investigate terrorism and espionage may allow individuals and groups under investigation to take steps to evade detection, destroy evidence, mislead investigators, conceal future terrorist and foreign intelligence activities, and speed plans for an attack. The inclusion of nondisclosure requirements within NSLs is thus important for the Government's efforts to prevent terrorism and espionage against the United States.

Congress nevertheless included several provisions to minimize the impact of nondisclosure requirements in NSLs. Such requirements are imposed only for compelling reasons and require a case-by-case certification of those reasons by a high-level FBI official. Immediate judicial review is available. John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008), provides additional procedural protections, including requiring the Government to initiate judicial review whenever a recipient

indicates a desire to challenge a nondisclosure requirement. The Government has scrupulously followed Doe nationwide for the past five years, including with respect to the NSLs at issue here.

1. As the district court correctly realized, the statute's nondisclosure requirement is constitutional as applied here. The Government's interest in the integrity and secrecy of the specific counterterrorism and/or counterintelligence investigations here is paramount, and the Government proved that nondisclosure was necessary to preserve those interests. The Government initiated judicial review soon after the nondisclosure requirements went into effect and bore the burden of proof in that review. Courts have repeatedly upheld nondisclosure requirements in similar contexts involving grand juries, classified information, criminal investigations, judicial misconduct investigations, and other Government procedures, and there is no reason to treat the nondisclosure requirements in the NSLs here differently. The district court therefore properly granted the Government's cross-petition for enforcement and required the recipient to comply with the two NSLs at issue, including their nondisclosure requirements.

2. The statute is facially constitutional because it is capable of being applied constitutionally, not just to the NSL recipient at issue here, but (at a minimum) in every case in which the FBI follows the Doe procedures. Because it is uncontested

that the FBI uniformly follows those procedures, the recipient here cannot meet its facial-challenge burden to show that the application of the statute will suppress a substantial amount of speech protected by the First Amendment. The strictest procedural requirements do not apply in such situations and are, at any rate, satisfied by the protections provided here.

3. The district court erred in In re NSL, 930 F.Supp. 2d 1064, in treating perceived flaws in the nondisclosure requirements as a basis for invalidating the entire NSL statute. Congress clearly wanted the Government to have NSLs as a tool to thwart terrorism and espionage, regardless of what, if any, limitations the Constitution places on nondisclosure requirements. Indeed, Congress specifically authorized the FBI to issue NSLs without nondisclosure requirements.

STANDARD OF REVIEW

"The Ninth Circuit reviews de novo a district court's decision regarding enforcement of an agency subpoena." FDIC v. Garner, 126 F.3d 1138, 1142 (9th Cir. 1997).

ARGUMENT

THE NONDISCLOSURE PROVISIONS OF 18 U.S.C. §§ 2709 AND 3511 ARE CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED HERE

The nondisclosure provisions of 18 U.S.C. §§ 2709 and 3511 reflect a careful effort by Congress to reconcile the needs of counterterrorism and counterintelligence investigations with the First Amendment interests of NSL recipients. In imposing nondisclosure requirements on the recipients of specified NSLs, Congress was aware of potential First Amendment concerns and therefore included numerous safeguards. Those safeguards, especially when construed as the Second Circuit did in Doe, exceed the safeguards previously found to meet constitutional standards with respect to analogous nondisclosure requirements (including those related to grand jury secrecy, classified national security information, judicial disciplinary proceedings, and secret criminal investigations) and to otherwise meet constitutional requirements, especially given the unquestionably compelling Government interest in the integrity and efficacy of its counterterrorism and counterintelligence investigations.

In 2008, the Second Circuit conducted a detailed examination of this statute and concluded that it can be interpreted and applied in a manner that satisfies the First Amendment and that, as a result, "authority to issue NSLs should be preserved." See John Doe, Inc. v. Mukasey, 549 F.3d 861, 885 (2d Cir. 2008).

The Doe court acknowledged that it was possible to interpret several relevant statutory provisions in a manner that would render them constitutionally suspect, but found that the provisions are also susceptible to a different reasonable interpretation that renders them constitutional, and it thus permitted their continued operation. For the past five years, including all times relevant here, the Government has acted in accordance with the statutory provisions as prescribed by Doe.

The district court acknowledged that, interpreted and implemented in this manner, the statutory provisions are constitutional. It necessarily follows that those provisions are constitutional as applied here – and, indeed, as applied in the thousands of other instances in which the FBI has issued NSLs in conformance with Doe, which include every NSL issued since 2009. This is why the district court properly required the recipient to comply with both the substantive information requests and the nondisclosure requirements contained in the NSLs at issue.

The central issue presented here is thus not whether the Government's specific actions comply with the Constitution; by enforcing the NSLs here, the district court itself implicitly recognized that they do. The question is whether the statute should be entirely struck down, despite its constitutional operation here and

thousands of times over the past five years, because it can conceivably be interpreted as not including all of the safeguards addressed in Doe and implemented by the Government. The district court's facial invalidation of the statute on this basis in In re NSL, 930 F. Supp. 2d 1064, was not only incorrect but also represents an extreme intrusion into the legislative realm, contrary to clear instructions from the Supreme Court. This Court should show the same respect for separation of powers that its sister circuit did in Doe and should interpret the relevant statutory provisions with the goal of preserving them rather than destroying them. Doing so will effectuate both congressional intent and First Amendment interests, by allowing the Government to continue to utilize these NSL provisions while safeguarding substantive and procedural protections for First Amendment interests.

I. THE NSL NONDISCLOSURE PROVISIONS ARE CONSTITUTIONAL AS APPLIED HERE.

By denying the recipient's petition to set aside and instead granting the Government's cross-petition for enforcement, the district court implicitly ruled that §§ 2709 and 3511 are constitutional as applied to the two specific NSLs at issue here. That as-applied ruling is correct, as the statutory nondisclosure requirements were applied to this recipient in a manner fully consistent with the First Amendment.

A. The Nondisclosure Requirements in the Two NSLs at Issue Here are Narrowly Tailored to Serve a Compelling Government Interest.

1. The Nondisclosure Requirements in the Two NSLs Here Satisfy Strict Scrutiny.

We explain on pages 28 to 30, below, why the district court erred in applying strict scrutiny here. But this Court need not determine the appropriate standard of review, because, as applied to the NSL recipient here – and, indeed, as similarly applied to every NSL recipient since 2009 – the nondisclosure requirements in these NSLs satisfy strict scrutiny because they are narrowly tailored to meet compelling Government interests.[5]

a. Compelling Government Interest. As a general proposition, maintaining the secrecy of information that relates to Government counterterrorism and counterintelligence investigations is a compelling Government interest. E.g., Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (Government has "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting . . . the secrecy of

[5] The operation of the statutory nondisclosure provisions was constitutional prior to Doe as well, but only their operation after (and in accordance with) Doe is relevant here.

information important to our national security."). Cf. Branzburg v. Hayes, 408 U.S. 665, 700-701 (1972) (compelling interest in furthering grand jury functions). That interest is even more compelling when disclosure may result in one of the harms listed in § 2709(c)(1). Indeed, the district court acknowledged that the Government interests served by nondisclosure here are indisputably compelling. In re NSL, 930 F. Supp. 2d. at 1075.

b. Narrow Tailoring. The Government demonstrated specifically with respect to the two NSLs at issue here that "disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. § 3511(b)(2). As required by § 2709(c), this assertion is included in both NSLs. ER 51, 57. Specific factual support is included in the classified declaration upon which the district court expressly relied in holding that the Government had met its burden of proof necessary to enforce the NSLs. ER 12-14. This classified evidence demonstrates the direct relationship between the nondisclosure requirements in these NSLs and the prevention of one or more of the statutorily enumerated harms. The specific nondisclosure requirements included in the two NSLs before this Court were thus narrowly tailored to serve a compelling Government interest, and any challenge to

the relevant statutes as applied here must be rejected.

By enforcing these two NSLs, despite its earlier ruling regarding the facial validity of the statute, the district court correctly recognized that none of the statute's alleged facial flaws had any effect on the NSL recipient here, and therefore any relevance to the constitutionality of the statute as applied here. For example, the district court believed that in some instances, a recipient might be able to disclose the mere fact that it had received an NSL without risking any of the statutorily enumerated harms. In re NSL, 930 F. Supp.2d at 1075-76. But the district court never suggested that this was such a case. To the contrary, it noted that there are "situations where recipients would appropriately be precluded from disclosing their receipt of an NSL," id. at 1076, and its order here constitutes an implicit finding that the two NSLs here represent such situations.

The district court also suggested that the statute is not sufficiently narrowly tailored because in some instances it could result in NSL nondisclosure requirements that continue in force "longer than necessary to serve the national security interests at stake." Id. at 1076-77. Again, neither the district court nor the recipient here suggested that this is such a case. There is no allegation that the statute, as applied here, has resulted in nondisclosure requirements that have continued in force too long, and the district court's order enforcing the specific

nondisclosure requirements in the two NSLs at issue here is an implicit holding that those requirements have not been in force too long.[6]

The district court also criticized the provision of the NSL statute that allows an NSL recipient to challenge a nondisclosure requirement once every year. Id. at 1075 (citing 18 U.S.C. § 3511(b)(3)). But that statutory provision does not apply here because it is limited to petitions for review of a nondisclosure requirement "filed one year or more after" the issuance of the NSL, 18 U.S.C. § 3511(b)(3), and the challenges here were filed soon after the NSLs were issued.

2. Intermediate Scrutiny is Appropriate.

The Second Circuit correctly concluded in Doe that, because the statutory provisions as applied satisfy traditional strict scrutiny requirements, it is unnecessary to determine whether they are, in fact, subject to a less demanding

[6] At any rate, the only authority the district court cited for the proposition that nondisclosure requirements can sometimes last too long was the district court decision that the Second Circuit reversed on this very point in Doe. In re NSL, 930 F. Supp. 2d at 1076-77 (citing Doe v. Gonzales, 500 F. Supp. 2d 379, 421 (S.D.N.Y. 2007), reversed sub nom. Doe v. Mukasey, 549 F.3d 861 (2008)). The Second Circuit correctly noted that "[t]he information subject to nondisclosure is extremely limited, and, once the need for secrecy – avoiding risk of harm related to international terrorism – has been shown, that need is not likely to dissipate soon." 549 F.3d at 884 n.16. Accordingly, the Second Circuit properly concluded that the statutory provisions allowing a recipient the opportunity to initiate further judicial review (should it believe that circumstances have in fact eliminated the need for nondisclosure) are constitutionally sufficient.

form of First Amendment scrutiny. See Doe, 549 F.3d at 878. Should this Court deem it necessary to conduct this analysis, however, the specific nondisclosure requirements in the NSLs here should not be subjected to traditional strict scrutiny or (as at least one member of the Doe panel suggested) "not quite as 'exacting' a form of strict scrutiny," ibid., but rather should be subjected to intermediate scrutiny, because these requirements are content-neutral.

The Supreme Court has explained that "the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (emphasis added, internal quotation marks omitted); accord Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); DISH Network Corp. v. FCC, 653 F.3d 771, 778 (9th Cir. 2011), cert. denied, 132 S. Ct. 1162 (2012). This remains true even when a statute in fact "refer[s] to the content of speech," Perry v. L.A. Police Dep't, 121 F.3d 1365, 1369 (9th Cir. 1997), cert. denied, 523 U.S. 1047 (1998), and means that strict scrutiny does not always apply even when a statute regulates speech based on its effects, e.g., United States v. Aguilar, 515 U.S. 593, 605-06 (1995) (First Amendment permits criminally punishing disclosure of confidential wiretap information that harms investigation); United States v. Fulbright, 105 F.3d 443,

452 (9th Cir.) (First Amendment permits criminally punishing the filing of judicial documents as part of an attempt to impede a federal officer and obstruct justice), cert. denied, 520 U.S. 1236 (1997), and overruled in part on other grounds by United States v. Heredia, 483 F.3d 913 (9th Cir. 2007).

The nondisclosure requirements in the NSLs here were not imposed because of "disagreement with the message" that a disclosure would convey. The object was not to remove issues and views from the marketplace of ideas, but rather to avoid disclosure of confidential information about particularly sensitive and important national security investigations that could endanger the national security of the United States, endanger someone's life or physical safety, interfere with diplomatic relations, and/or interfere with the investigation itself. These restrictions are analogous to other restrictions on the dissemination of information that could harm criminal investigations or other important governmental interests. E.g., Aguilar, 515 U.S. at 605-06. Accordingly, the proper standard here is that articulated by the Supreme Court in Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997): "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Accord United States v. O'Brien, 391 U.S.

367, 377 (1968); DISH, 653 F.3d at 780. For the same reasons that the specific nondisclosure requirements in the NSLs at issue here meet strict scrutiny, they necessarily also meet any lesser scrutiny that could apply, including intermediate scrutiny. The NSL statute is therefore constitutional as applied here.

B. All of the Freedman Procedural Protections were Provided Here.

In In re NSL, 930 F. Supp. 2d 1064, the district court faulted the statute for allegedly failing, on its face, to provide the procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51 (1965). As discussed below, the Freedman requirements are not applicable here because nondisclosure requirements in NSLs are not part of an administrative censorship scheme. See pages 45-48, below. But in any event, it is undisputed that all of the Freedman requirements were met with respect to the two NSLs at issue here (and, by extension, with respect to all NSLs issued since 2009), because the NSL recipient here "does not dispute that the FBI has complied with the strictures imposed by the Second Circuit [in Doe]." ER 13. Thus, even if Freedman did apply here, the statute was constitutionally applied.

Freedman imposes three procedural requirements on administrative censorship schemes. First, any administrative restraint on speech that precedes judicial review must be brief. Thomas v. Chi. Park Dist., 534 U.S. 316, 321 (2002). Here, that requirement was met by application of the Doe reciprocal notice

arrangement, under which the Government promptly initiated judicial review of the specific nondisclosure requirements at issue. Second, expeditious judicial review must be available. Ibid. That requirement was unquestionably met here. Third, the Government must bear the burden of going to court to enforce the restriction and must bear the burden of proof in court. Ibid. The Government bore the burden of going to court as described in Doe. 549 F.3d at 885. Finally, the district court unquestionably placed the burden of proof on the Government with respect to the specific NSLs at issue here. See ER 14 ("[T]he government has met its burden to enforce these NSLs."). Thus, the as-applied challenge here based on Freedman must fail.

C. There is no First Amendment Right to Disclose Information Learned Through Participation in a Secret Government Investigation.

It is undisputed that the information sought through the NSLs at issue here is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." ER 41-42 (Cross-petition ¶¶ 23, 27); see 18 U.S.C. § 2709(b). In the course of obtaining this information for unquestionably compelling reasons, the Government necessarily revealed to the NSL recipient the existence of the investigations and potentially other information the further dissemination of which may harm those investigations, injure our national security

and foreign relations interests, and endanger individual lives and physical safety. The NSLs are analogous in this respect to other contexts in which the Government both provides information to a third party and restricts any further dissemination of that information to serve compelling interests. Such disclosures-with-restrictions have been repeatedly upheld against First Amendment challenges, and the reasons for doing so apply to the NSLs at issue here as well.

For example, in Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the Supreme Court upheld the constitutionality of a prohibition on the further distribution of sensitive information obtained by a litigant through pretrial discovery. The Court reasoned that, because the parties "gained the information they wish to disseminate only by virtue of the trial court's discovery processes[,] . . . continued court control of the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." Id. at 32. Similarly, in Butterworth v. Smith, 494 U.S. 624 (1990), the Supreme Court rejected limitations on a witness's "right to divulge information of which he was in possession before he testified before the grand jury," but suggested that the Constitution allows limitations on the dissemination of "information which [a grand jury witness] may have obtained as a result of his participation in the proceedings of the grand jury." Id. at 632; see id. at 636

(Scalia, J., concurring) ("Quite a different question is presented . . . by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness."). Indeed, this Court long ago upheld a State's practice of compelling grand jurors and grand jury witnesses to take an oath of secrecy with respect to their participation in grand jury proceedings:

> It has never been supposed that grand jurors are deprived of the constitutional right of free speech through the oath of secrecy which they take; and a witness summoned to appear before them is in no better case. Through their participation in the proceedings both grand jurors and witnesses occupy a special relationship to the state; and for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential. Considerations of mere convenience or even of downright hardship on the part of the witness do not outweigh the policy of secrecy in respect of grand jury investigations.

Goodman v. United States, 108 F.2d 516, 520 (9th Cir. 1939).[7] Other courts of

[7] Goodman is arguably no longer good law to the extent, if any, that the oath barred witnesses from revealing the substance of their own grand jury testimony because that consists of information the witnesses know before attending the grand jury. But Goodman remains good law with respect to grand jurors and any information that either jurors or witnesses obtain as a result of their involvement with the grand jury. Goodman's constitutional ruling is not undermined by Rule 6(e)(2) of the Federal Rules of Criminal Procedure, which applies grand jury secrecy rules to jurors and others involved in the federal grand jury process, but not to grand jury witnesses.

appeals agree.[8]

Similar restrictions constitutionally prohibit the recipients of classified information from making unauthorized disclosures. These restrictions are closely analogous to the nondisclosure requirements in the NSLs here because the FBI's certifications in support of those nondisclosure requirements (that disclosure may endanger national security or cause the other harms specified in § 2709(c)) is similar to the determinations the FBI and other agencies make when they classify information on national security grounds. See generally Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003).

Although the classification of information prohibits the disclosure of that information by its recipients, no court has ever suggested that such classification, as distinct from a subsequent effort to enjoin disclosure, is a prior restraint prohibited by the First Amendment. For example, the D.C. Circuit rejected a former CIA agent's claim that the CIA violated the First Amendment when it

[8] See, e.g., Hoffman-Pugh v. Keenan, 338 F.3d 1136, 1140 (10th Cir. 2003) (constitutional "line should be drawn between information the [grand jury] witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process," the further dissemination of which may be forbidden), cert. denied, 540 U.S. 1107 (2004); In re Charlotte Observer, 921 F.2d 47, 50 (4th Cir. 1990); In re Subpoena, 864 F.2d 1559, 1561, 1563 (11th Cir. 1989); United States v. Jeter, 775 F.2d 670, 674 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986).

classified as "top secret" information contained in the former agent's proposed book. McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983) ("[N]either the CIA's administrative determination nor any court order in this case constitutes a prior restraint in the traditional sense . . . .").

For similar reasons, no case suggests that the Government must initiate judicial proceedings to enforce nondisclosure requirements each time it reveals classified information to an employee or contractor. Indeed, in United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), the Fourth Circuit placed the burden of going to court on a CIA employee seeking to publish a book that could contain classified information. "Because of the sensitivity of the information and the confidentiality of the relationship in which the information was obtained," the court found "no reason to impose the burden of obtaining judicial review upon the CIA." Instead, the Court concluded, "[i]t ought to be on Marchetti." Id. at 1317; accord United States v. Snepp, 897 F.2d 138, 141-42 (4th Cir.), cert. denied, 498 U.S. 816 (1990). Prohibitions on the disclosure of classified information – like grand jury secrecy rules – are enforceable because they do not violate First Amendment rights. Marchetti, 466 F.2d at 1317.

Finally, similar nondisclosure requirements have been upheld in a number of other areas warranting secrecy. See, e.g., United States v. Aguilar, 515 U.S. 593

(1995) (wiretap in criminal investigation); United States v. Richey, 924 F.2d 857 (9th Cir. 1991) (income tax enforcement), Kamasinski v. Judicial Review Council, 44 F.3d 106, 111 (2d Cir. 1994) (proceedings before judicial misconduct board); First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d 467, 478-79 (3d Cir. 1986) (en banc) (same).

Nor are the NSLs here unique. They are similar to numerous other NSLs issued under § 2709 and other statutes authorizing NSLs with nondisclosure requirements. See 12 U.S.C. § 3414(a)(1) & (5); 15 U.S.C. §§ 1681u & 1681v; 50 U.S.C. § 3162(b). And in many other circumstances, disclosures by non-Government actors are prohibited uniformly and automatically. See, e.g., 18 U.S.C. § 2511(2)(a)(ii) (Title III interceptions); id. § 2710(b)(1) (video tape services); id. § 3123(d)(2) (pen registers and trap-and-trace devices); 50 U.S.C. §§ 1802(a)(4), 1822(a)(4)(A), 1842(d), & 1861(d) (FISA pen registers, subpoenas, electronic surveillance, and physical searches). For example, 18 U.S.C. § 3123(d)(2) prohibits the recipient of a pen register order from disclosing the existence of the pen register and the underlying investigation "unless or until otherwise ordered by the court."

The nondisclosure requirements in the NSLs at issue here should be upheld on the same bases as the secrecy rules applicable to grand juries, classified national

security information, judicial misconduct proceedings, and wiretap information discussed above. In each case, First Amendment interests are attenuated because the nondisclosure requirement encompasses only information that the Government provides to a third party along with the disclosure restrictions. The nondisclosure requirements in these NSLs, like the restrictions discussed above, do not censor information that the recipient independently possesses, nor do they impinge upon the ability to engage in general public discussions regarding the scope, operation, or desirability of NSLs or any other governmental information-gathering technique; they merely limit the further dissemination of information provided by the Government about, and as part of, a specific secret counterterrorism or counterintelligence investigation.

Importantly, the Government's need for secrecy here is at least as compelling as the need for secrecy in grand jury or judicial disciplinary proceedings. The district court itself recognized that shielding counterterrorism and counterintelligence investigations from the eyes of terrorists and foreign intelligence organizations is a manifestly compelling governmental interest, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988); Snepp, 444 U.S. at 509 n.3, that was specifically validated with respect to the NSLs at issue here by the Government's classified evidence, see ER 13-14. Indeed, while grand jury

investigations focus on the prosecution of completed crimes (including relatively minor crimes), the counterterrorism and/or counterintelligence investigations furthered by the NSLs here are arguably even more important because they focus on preventing acts of terrorism and espionage and therefore can save lives, rather than only punish criminals. See Brett A. Shumate, "Thou Shalt Not Speak: The Nondisclosure Provisions of the National Security Letter Statutes and the First Amendment Challenge," 41 Gonzaga L. Rev. 151, 174-75 (2005).

The nondisclosure requirements in these NSLs are also more narrowly tailored than constitutional grand jury secrecy rules in key respects. They apply here only because appropriate FBI officials certified with respect to each NSL that nondisclosure may prevent one or more of the statutorily enumerated harms. This ensures that these nondisclosure requirements are not being imposed unnecessarily. Grand jury secrecy rules, by contrast, apply to all grand jury proceedings, even when some of the rationales for secrecy are absent. For example, grand jury secrecy is justified in part by the need to prevent the subject of a grand jury investigation from learning of it and, as a result, fleeing or tampering with witnesses or evidence, e.g., Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979), but the secrecy rules apply even when the grand jury is investigating a suspect who is already incarcerated and therefore incapable of fleeing or

tampering, see Fed. R. Crim. P. 6(e).

The district court's reasons in In re NSL, 930 F. Supp. 2d 1064, for refusing to treat NSL nondisclosure requirements like grand jury secrecy requirements and other similar nondisclosure rules are unpersuasive. First, the district court noted that grand jury secrecy rules "provide[] a mechanism for judicial determination of whether secrecy [is] still required." Id. at 1072. But, as described above, §§ 2709 and 3511 provide simple and straightforward mechanisms for judicial review of both an NSL itself and any nondisclosure requirement contained within an NSL. Indeed, the case under review here constitutes just such judicial review of these specific NSLs.

Second, the district court suggested that the "nature of the proceedings themselves" justifies grand jury secrecy, while "'secrecy might or might not be warranted'" in the investigations furthered by NSLs subject to nondisclosure requirements. In re NSL, 1072 (quoting Doe v. Mukasey, 549 F.3d at 876). But the exact opposite is true. As noted above, the nature of the counterterrorism and/or counterintelligence investigations, coupled with the individualized determination of need for a nondisclosure requirement in each NSL, ensures that these specific nondisclosure requirements are necessary; by contrast, the lack of individualized determinations means that, in some cases, grand jury secrecy

applies even when it is less necessary. Thus, the district court erred in treating the nondisclosure requirements in these NSLs differently from the many other instances in which the Government is permitted to prohibit or limit the further disclosure of information that it provides in connection with secret investigations.

II. THE NSL STATUTORY PROVISIONS ARE FACIALLY CONSTITUTIONAL.

A. A Facial Challenge Under the First Amendment Succeeds on Overbreadth Grounds Only When a Statute Will Suppress a Substantial Amount of Protected Speech.

Ordinarily, a plaintiff can succeed in a facial challenge only by establishing that the law is unconstitutional in all of its applications. E.g. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008). That is plainly not the case here, since the district court ordered that the two NSLs be enforced, see ER 11-14, and, as explained above, all NSLs issued since 2009, if not earlier, comply with the same requirements.

The overbreadth doctrine is an exception to this general rule that applies only in the First Amendment context and "allows a plaintiff to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or

expression." Alphonsus v. Holder, 705 F.3d 1031, 1042 n.10 (9th Cir. 2013) (internal quotation marks omitted); see FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (plurality opinion) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker . . . .").

As an initial matter, this is an inappropriate case in which to even entertain a facial overbreadth challenge. Such a challenge is improper when the party challenging the statute fails to show "that the ordinance will have any different impact on any third parties' interests in free speech than it has on [the party asserting a facial challenge]." Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984); accord Reed v. Town of Gilbert, Ariz., 587 F.3d 966, 974 (9th Cir. 2009). There is no such indication here because the application of the statutory nondisclosure provisions to the NSL recipient here is essentially the same as its application to every NSL recipient since at least 2009.

Moreover, overbreadth typically applies in cases where third-party speech is chilled by the possibility of criminal prosecution and there is no mechanism for obtaining pre-prosecution review. E.g., Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected

speech – especially when the overbroad statute imposes criminal sanctions.") (emphasis added). But here, § 3511 provides for any party to obtain pre-enforcement judicial review of any nondisclosure requirement (and, through the Doe procedures, allows any party to shift the burden of initiating that review to the Government). This is therefore a case in which "the 'strong medicine' of the overbreadth doctrine" is unavailable because potentially affected third parties "are sufficiently capable of defending their own interests in court that they will not be significantly 'chilled.'" Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 191 n.5 (2007).

Should this Court nonetheless entertain the recipient's facial challenge, that challenge faces significant hurdles. To succeed in an overbreadth challenge, a party "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); United States v. Williams, 553 U.S. 285, 292 (2008), and that substantial number must be "judged in relation to the statute's plainly legitimate sweep," Wash. State Grange, 552 U.S. at 449 n.6; United States v. Schales, 546 F.3d 965, 971 (9th Cir. 2008), cert. denied, 555 U.S. 1202 (2009). "[T]he facial overbreadth doctrine is 'strong medicine' that should be employed 'sparingly and

only as a last resort.'" World Wide Video of Wash., Inc. v. City of Spokane, 368 F.3d 1186, 1199 (9th Cir. 2004) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

The fact that the statutory provisions at issue here were applied constitutionally with respect to the NSLs at issue does not, by itself, rule out the possibility that the statute is unconstitutionally overbroad, but it makes proof of overbreadth far more difficult. The statutory provisions could be facially overbroad only if their constitutional application here is an outlier and their more common or typical application results in the unconstitutional suppression of speech. But there is no such contention here. To the contrary, the factors that the district court found warranted enforcing the NSLs here – most notably adherence to the Doe requirements – are common to all NSLs issued since 2009. Accordingly, the constitutional application of the statute to the NSL recipient here strongly suggests that the statute has been applied constitutionally to all other NSL recipients since 2009, will continue to be applied constitutionally in the future, and is not facially unconstitutional.

Moreover, even if there were a conceivable circumstance in which the enforcement of the nondisclosure provisions of the statute would violate the First Amendment, that would be properly remedied by an "as-applied" challenge by the

aggrieved party. See Taxpayers for Vincent, 466 U.S. at 800; Schales, 546 F.3d at 971 ("A statute is not invalid simply because some impermissible applications are conceivable."); Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 145 F.3d 1017, 1024 (9th Cir.) (speech restrictions unconstitutional "in only limited circumstances" are not facially unconstitutional), cert. denied, 525 U.S. 1015 (1998). As noted above, facial challenges are limited to cases in which a substantial number of instances exist in which the statute cannot be applied constitutionally, but the NSL recipient here has shown no such instances.

B. The Freedman Requirements for Administrative Censorship Schemes do not Apply.

In In re NSL, 930 F. Supp. 2d at 1071, the district court held that the statutory NSL nondisclosure provisions, which the court conceded constitute neither "a 'classic prior restraint'" nor "a 'typical' content-based restriction on speech," must nevertheless comply with the rigorous procedural requirements necessary for content-based government censorship under Freedman v. Maryland, 380 U.S. 51 (1965). That holding is erroneous.

Freedman involved the constitutionality of a state "censorship statute" under which no motion picture could be shown unless and until it was licensed by a state Board of Censors, which could take an unlimited amount of time to "approve and

license such films . . . which are moral and proper," and to "disapprove such as are obscene, or such as tend . . . to debase or corrupt morals or incite to crimes." Id. at 52 & n.2, 59-60. The Supreme Court held that such an administrative censorship scheme was constitutionally permissible only if the State employed the procedural safeguards discussed above, such as requiring the State to assume the burden of initiating judicial review and the burden of proof in court. See pages 30-31, above.

None of the concerns that led the Supreme Court to impose these exacting procedural requirements on the censorship scheme in Freedman exists with respect to the statutory NSL nondisclosure provisions. First, Freedman involved "a scheme conditioning expression on a licensing body's prior approval of content," which "'presents peculiar dangers to constitutionally protected speech,'" particularly because it was administered by an official "'[whose] business is to censor,'" and who is therefore likely to overestimate the dangers of controversial speech. Thomas v. Chicago Park Dist., 534 U.S. 316, 321 (2002) (quoting Freedman, 380 U.S. at 57); accord FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 228-29 (1990) (plurality opinion) (noting the "special concerns" present in a censorship scheme). That concern does not apply to NSL nondisclosure provisions administered by the FBI. These nondisclosure provisions are not part of a censorship scheme that requires would-be speakers to present their speech to the

Government for approval before the fact; they are, instead, a common type of regulation that subjects a very narrow type of disclosure to sanction after the fact.[9] Indeed, as noted above, the nondisclosure provisions restrict only the further dissemination of information provided by the Government, not, as in Freedman, the publication of a work created independently from the Government. The NSL nondisclosure provisions are not administered by officials whose "business is to censor," but by high-level officials of the FBI, whose business is to protect and defend the United States against terrorist and foreign intelligence threats.

The Supreme Court's second concern with the censorship scheme in Freedman was that "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U.S. at 58. The "procedural safeguards" required by the Supreme Court were "designed to obviate the[se] dangers" by minimizing the delay and other burdens associated with the administrative process and judicial review. Ibid. That concern is inapplicable here, because there are no undue burdens or delays in either administrative or judicial proceedings relating to NSLs. In contrast to the

[9] Under the NSL statute, the violation of a specific nondisclosure requirement can be criminally prosecuted only if it is accompanied by an "intent to obstruct an investigation or judicial proceeding." 18 U.S.C. § 1510(e).

potentially limitless administrative delay in Freedman, there is no administrative delay here because the service of the NSL itself notifies the recipient of the nondisclosure requirement. And a recipient can obtain judicial review immediately and with minimal burden by: (1) filing a petition for review,[10] or (2) providing notice to the FBI, which starts the FBI's 30-day period in which to initiate judicial review itself.

Finally, the Freedman procedural requirements were imposed "to cabin the censor's otherwise largely unfettered discretion to determine what constitutes suitable, non-obscene expression and what does not." Talk of the Town v. Dep't of Fin. & Bus. Servs., 343 F.3d 1063, 1070 (9th Cir. 2003); accord City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 782 (2004) (characterizing the statutory standards in Freedman as "rather subjective"). But while the Freedman statute employed vague subjective criteria about the content of speech, including whether a film was "moral and proper," Freedman, 380 U.S. at 52 n.2, the statutory criteria here are specific and objective and involve the consequences of disclosure, such as whether a disclosure may "interfere[] with a criminal,

[10] Such a filing is not burdensome, as it requires only a very short statement. See, e.g., ER 62-63 (complete text of the petition for review filed by the recipient here, which takes up two pages).

counterterrorism, or counterintelligence investigation." 18 U.S.C. § 2709(c)(2). Such objective criteria sufficiently protect First Amendment interests without need for the application of the Freedman procedures. See Dream Palace v. Cnty. of Maricopa, 384 F.3d 990, 1003 (9th Cir. 2004) ("[T]he potential harm to First Amendment values is attenuated when the licensing decision depends on reasonably objective criteria.").[11]

C. The Statute Complies with Freedman.

At any rate, as the district court itself recognized in this case (ER 13), the statute as construed by Doe provides the procedural safeguards set forth in Freedman, namely that: (1) any administrative restraint that precedes judicial review must be brief; (2) expeditious judicial review must be available; and (3) the Government must bear the burden of initiating judicial review and the burden of proof in court. Thomas, 534 U.S. at 321; see Freedman, 380 U.S. at 58-60.

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[11] Similar criteria have been deemed sufficiently objective. E.g., Thomas v. Chicago Park Dist., 534 U.S. 316, 324 (2002) ("unreasonable danger to the health or safety of park users."); Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1028 (9th Cir. 2009) ("protect[ing] the safety of persons and property" and "prevent[ing] dangerous, unlawful or impermissible uses"), cert. denied, 559 U.S. 936 (2010); see also Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) ("While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").

The statute here, unlike that at issue in Freedman, allows an NSL recipient to initiate judicial review the moment it becomes subject to a nondisclosure requirement in an NSL. 18 U.S.C. § 3511(b). Alternatively, a recipient may immediately notify the FBI that it wishes to challenge the nondisclosure requirement, and that notice starts a 30-day clock for the Government to initiate judicial review. Doe, 549 F.3d at 885.

As the district court noted, this latter mechanism is not contained within the four corners of the statute. But the Doe reciprocal notice procedure guarantees prompt initiation of judicial review by the Government, has been accepted by the Government, is included in every NSL that imposes a nondisclosure requirement, and has been fully implemented whenever invoked by an NSL recipient. ER 30-33. This is significant because overbreadth analysis requires consideration not only of the statutory text but also of "actual fact," N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988); accord Virginia v. Hicks, 539 U.S. 113, 122 (2003); Pest Comm. v. Miller, 626 F.3d 1097, 1112 (9th Cir. 2010), cert. denied, 132 S. Ct. 94 (2011), and when "a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction," the law "is read in light of those limits[,] . . . even if the face of the statute might not otherwise suggest the limits imposed." City of Lakewood v. Plain Dealer Publ'g

Co., 486 U.S. 750, 770 n.11 (1988); accord Hoye v. City of Oakland, 653 F.3d 835, 848 (9th Cir. 2011). The Doe court's reciprocal notice procedure, which has been well-understood and uniformly applied for the past five years, is clearly such a practice and therefore must be considered before declaring the statutory nondisclosure provisions facially unconstitutional on the basis that they violate Freedman. The district court erred in failing to do so. See Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1035 (9th Cir. 2006) (considering municipal "Administrative Instruction" in determining facial constitutionality of ordinance). When this practice is considered, the compliance with Freedman's first requirement is clear, as the district court agreed. In re NSL, 930 F. Supp. 2d at 1075.

The NSL recipient here contends that the district court failed to resolve its petition quickly enough to meet the requirements of Freedman. Recipient Br. 27-28. But that Freedman requirement is met simply by the application of the usual rules of judicial procedure, which applied here. See City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 777 (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). To the extent that the recipient wanted faster action, the Federal Rules of Civil Procedure allowed it to request that the district court act expeditiously. But the recipient here does not assert that it ever made such a request.

The third Freedman factor requires the Government to initiate judicial review. The statute does not require this within its four corners, but Doe "enjoin[ed] FBI officials from enforcing the nondisclosure requirement of section 2709(c) in the absence of Government-initiated judicial review," 549 F.3d at 885, and the FBI has fully implemented Doe by notifying all NSL recipients that they can notify the FBI of their opposition to a nondisclosure requirement in an NSL in order to have the FBI initiate judicial review proceedings. ER 30-33. Accordingly, there is no risk that the Government will enforce any challenged nondisclosure requirement without initiating judicial review, and there is therefore no risk of a violation of this Freedman requirement. Facial invalidation of the statute on this basis was therefore improper.

The third Freedman factor also requires the Government to bear the burden of proof in court proceedings to sustain and enforce the nondisclosure requirement. In Doe, the Second Circuit noted that the statute is silent with respect to burden of proof and adopted the Government's interpretation of the statute as placing the

burden of proof on the Government. Doe, 549 F.3d at 875. This interpretation is correct, as it fills in a statutory gap in a way that comports with the statutory language and purpose while eliminating constitutional concerns. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). Here, the district court followed Doe and properly placed the burden of proof on the Government (and found that it had been met). ER 14 ("[T]he government has met its burden to enforce these NSLs.").

D. The Statute's Standards of Judicial Review are Constitutional.

A reviewing court may modify or set aside a nondisclosure requirement in an NSL "if it finds that there is no reason to believe that disclosure may" lead to an enumerated harm. 35 U.S.C. § 3511(b)(2). In In re NSL, 930 F. Supp. 2d at 1077, the district court ruled that this was not the "searching standard of review" required by the First Amendment, but provided no authority for that conclusion. Freedman itself provides no such authority, as it focused on the burden of proof, not the standard of review. In contrast, the Second Circuit properly avoided any possible constitutional question by interpreting the statute as requiring the Government "to persuade a district court that there is a good reason to believe that disclosure may risk one of the enumerated harms, and that a district court, in order to maintain a

nondisclosure order, must find that such a good reason exists." Doe, 549 F.3d at 875-76. This is a reasonable reading of the statutory language that gives effect to the language and statutory purpose while eliminating constitutional concerns. See, e.g., United States v. Diaz, 491 F.3d 1074, 1077 (9th Cir. 2007) ("reason to believe," "reasonable belief," and "reasonable grounds for believing" bear the same meaning); United States v. Gorman, 314 F.3d 1105, 1111 n.4 (9th Cir. 2002) (same).

The district court acknowledged that this construction of the judicial review provision "might be less objectionable," In re NSL, 930 F. Supp. 2d at 1078, but the court insisted on adopting a more cramped reading of the provision which, in its view, rendered the statute unconstitutional. It did so by assuming that Congress had an unconstitutional intent in enacting the statute, namely "to circumscribe a court's ability to modify or set aside nondisclosure NSLs unless the essentially insurmountable standard 'no reason to believe' that a harm 'may' result is satisfied." Id. at 1077.

Given the district court's mistaken assumption that Congress intended to enact an unconstitutional statute, it may not be surprising that the district court interpreted the statute in a manner that creates constitutional concerns. But the court erred in starting with that assumption. The doctrine of constitutional

avoidance "assumes that Congress, no less than the Judicial Branch, seeks to act within constitutional bounds, and thereby diminishes the friction between the branches that judicial holdings of unconstitutionality might otherwise generate." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 565-66 (2009); accord Jones v. United States, 526 U.S. 227, 240 (1999) (courts assume that Congress legislates in light of constitutional limitations). This doctrine is particularly apt here because it would have been unreasonable for Congress to have proposed enforcing nondisclosure requirements in NSLs based on any reason – including an irrational or wholly unsupportable reason – and therefore the only reasonable reading of the statute is that it requires a "good" reason. The Second Circuit properly interpreted the statute here in light of both common sense and the assumption that Congress intends to legislate constitutionally, and this Court should do likewise.

The district court also faulted the statute (as did the Second Circuit in Doe) for making certifications by senior officials regarding certain potential harms "conclusive" in judicial proceedings in the absence of bad faith. See In re NSL, 930 F. Supp. 2d at 1077. The district court mischaracterized the statute as making any FBI certification regarding any of the statutorily enumerated harms conclusive, and therefore assumed that the certifications there were conclusive under the

statute. See ibid. But, in fact, the statute provides that certifications for FBI-issued NSLs are conclusive only if made by "the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation" and only if they state "that disclosure may endanger the national security of the United States or interfere with diplomatic relations." 18 U.S.C. § 3511(b)(2). Certifications by other Government officials, and certifications relating to other statutorily enumerated harms (such as "interference with a criminal, counterterrorism, or counterintelligence investigation," 18 U.S.C. § 2709(c)(1)), are not "conclusive" under the statute.

In this case, no certification has been made by the Attorney General, Deputy Attorney General, any Assistant Attorney General, or the FBI Director, and the Government has not asserted (nor could it) that any of the certifications made by lower-level officials is "conclusive." Accordingly, the validity of this statutory provision is irrelevant here, and this NSL recipient lacks standing to challenge it. See, e.g., Get Outdoors II, LLC v. City of San Diego, 506 F.3d 886, 892 (9th Cir. 2007) (overbreadth standing requires that party challenging statute be subject to the specific statutory provision being challenged); Gospel Missions of Am. v. City of L.A., 328 F.3d 548, 554 (9th Cir.) (same), cert. denied, 540 U.S. 948 (2003). Moreover, to our knowledge, no certification entitled to be treated as "conclusive"

under the statute has ever been made. In these circumstances, a facial challenge to this particular statutory provision is inappropriate.

III. ANY ASSERTED CONSTITUTIONAL FLAWS IN THE STATUTORY NONDISCLOSURE PROVISIONS DO NOT JUSTIFY INVALIDATING THE ENTIRE STATUTE.

This Court need not address severability because, as explained above, the entire NSL statute is constitutional. If it addresses this issue, however, it should note that the district court erred by holding that the assertedly unconstitutional portions of the statutory nondisclosure provisions cannot be severed from the other statutory provisions and that it was therefore obligated to strike down the entire NSL statute. In so doing, the district court thwarted clear congressional intent, contravened Supreme Court precedent, and unnecessarily deprived the FBI of an important statutory tool in the fight against terrorism and espionage.

The district court's entire analysis of the severability issue consists of three sentences in which the court opined that Congress was aware of "the importance of the nondisclosure provisions" and that "it is hard to imagine how the substantive NSL provisions – which are important for national security purposes – could function if no recipient were required to abide by the nondisclosure provisions which have been issued in approximately 97% of the NSLs issued." In re NSL, 930 F. Supp. 2d at 1081. This analysis is insufficient, conflicts with binding

severability caselaw, and cannot be reconciled with the only court of appeals decision that has addressed this issue. See Doe, 549 F.3d 884-85.

Constitutional statutory provisions are presumed to be severable from unconstitutional provisions and to remain in effect. E.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010); Hamad v. Gates, 732 F.3d 990, 1001 (9th Cir. 2013) (noting "presumption of severability"), petition for cert. filed (Mar. 13, 2014). The presumption here is that even if some (or all) of the statutory nondisclosure provisions were unconstitutional, all remaining statutory provisions – most importantly those provisions allowing the FBI to issue NSLs and requiring recipients to supply the requested information – remain valid.

This presumption could be overcome only if it were "evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Hamad, 732 F.3d at 1001. The key question is: "Would the legislature have preferred what is left of its statute to no statute at all?" Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 330 (2006), or, here, would the legislature have preferred to permit the FBI to decide whether and when to issue NSLs without nondisclosure requirements, rather than leaving the FBI without authority to issue NSLs at all?

It is easy to answer that question in the affirmative, because Congress did allow the FBI to issue NSLs without nondisclosure requirements. Indeed, it is undisputed that the existing statute confers on the FBI discretion to issue NSLs without any nondisclosure requirement, and over the years in which the statute has existed, the FBI has, in fact, issued numerous such NSLs. See In re NSL, 930 F. Supp. 2d at 1074, 1076, 1081.

This result comports with common sense. The FBI could decide to issue NSLs without legally binding nondisclosure requirements based on its need for the data sought weighed against the likelihood that the recipient would disclose information about the investigation and the harm that such a disclosure would cause. It is impossible that the FBI would never issue NSLs under these circumstances because it is uncontested that the FBI has already issued numerous NSLs without nondisclosure requirements. Id. at 1074, 1076, 1081. And, as a matter of common sense, there is no reason that the FBI would be unable to identify potential recipients who understand the importance of nondisclosure in this context to preventing terrorism and espionage and who would therefore voluntarily keep the necessary information secret. It seems obvious that Congress would want the FBI to engage in this type of analysis and issue NSLs, even if it had to do so without legally binding nondisclosure requirements, as the statute

Congress enacted already provides for NSLs without nondisclosure requirements when the statutory reasons for such requirements are absent. As the Second Circuit explained:

> Congress would surely have wanted the Government to retain the authority to issue NSLs even if all aspects of the nondisclosure requirement of subsection 2709(c) and the judicial review provisions of section 3511(b) had been invalidated. 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.

Doe, 549 F.3d at 885; cf. United States v. Jackson, 390 U.S. 570, 586 (1968) ("[I]t is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it could not include the death penalty . . . .").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

This case is related to consolidated cases Under Seal v. Holder, Nos. 13-15957 and 13-16731, which involve the same legal issues but a different NSL recipient. This Court has ordered that this appeal be briefed separately from, but on the same briefing and oral argument schedule as, Nos. 13-15957 and 13-16731.

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 13,095 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 Answering 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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