Nos. 13-15957, 13-16731, 13-16732

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioners-Appellants (Nos. 13-16731, 13-16732),
Petitioner-Appellee (No. 13-15957)

v.

LORETTA E. LYNCH, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION,

Respondents-Appellees (Nos. 13-16731, 13-16732),
Respondents-Appellants (No. 13-15957)

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

GOVERNMENT'S SUPPLEMENTAL BRIEF
Filed Under Seal

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

STATUTORY BACKGROUND 2

A. The Act's Amendments To 18 U.S.C. § 3511(b) 2

B. The Act's Amendments To 18 U.S.C. § 2709 4

C. Other Provisions Of The Act 5

ARGUMENT 7

I. THE USA FREEDOM ACT REINFORCES THE FACIAL CONSTITUTIONALITY OF THE NONDISCLOSURE PROVISIONS OF 18 U.S.C. §§ 2709 AND 3511 7

A. The Amended Statute Is Constitutional Under *Freedman* 8

B. The Amended Standard Of Review Is Constitutional 10

C. The Nondisclosure Requirements Satisfy Strict Scrutiny 12

II. THE NSL NONDISCLOSURE PROVISIONS ARE CONSTITUTIONAL AS APPLIED IN THESE CASES 13

CONCLUSION 15

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Freedman v. Maryland,
380 U.S. 51 (1965) 8

John Doe, Inc. v. Mukasey,
549 F.3d 861 (2d Cir. 2008) 1, 2, 3, 4, 9, 10, 13

Lorillard v. Pons,
434 U.S. 575 (1978) 11

Microsoft Corp. v. i4i Ltd. Partnership,
131 S. Ct. 2238 (2011) 10

Mills v. United States,
742 F.3d 400 (9th Cir. 2014) 14

Thomas v. Chicago Park Dist.,
534 U.S. 316 (2002) 8

United States v. Lincoln,
277 F.3d 1112 (9th Cir. 2002) 11

Statutes:

The USA FREEDOM Act of 2015,
Pub. L. No. 114-23, 129 Stat. 268 2

The USA FREEDOM Act of 2015, § 502(f)(1) 6, 13

The USA FREEDOM Act of 2015, § 502(f)(1)(A) 6

The USA FREEDOM Act of 2015, § 603(a) 12

18 U.S.C. § 2709 .... 1, 7

18 U.S.C. § 2709(b)(1) 4

18 U.S.C. § 2709(c) 2, 5, 8

18 U.S.C. § 2709(c)(1)(A) 5, 9

18 U.S.C. § 2709(c)(2)(A)(iii) 13

18 U.S.C. § 2709(d)(1)....................5

18 U.S.C. § 2709(d)(2)....................5, 9

18 U.S.C. § 3511 ....1, 8

18 U.S.C. § 3511(b) ....*passim*

18 U.S.C. § 3511(b)(1)(A) 2, 9

18 U.S.C. § 3511(b)(1)(B) 2, 9

18 U.S.C. § 3511(b)(1)(C) 3, 9

18 U.S.C. § 3511(b)(2)....................3, 10, 11, 15

18 U.S.C. § 3511(b)(3)....................4, 10, 11, 12

50 U.S.C. § 1874(a) 12

50 U.S.C. § 1874(a)(1)(A) 7

50 U.S.C. § 1874(a)(2)(A) 7

50 U.S.C. § 1874(a)(3)(A) 7

50 U.S.C. § 1874(a)(4)(A) 7

50 U.S.C. § 1874(c) 13

Legislative Materials:

H.R. Rep. No. 114-109 (2015)....................3, 4, 5, 6, 7, 12

INTRODUCTION

In *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the Second Circuit identified procedures by which the NSL nondisclosure provisions of 18 U.S.C. §§ 2709 and 3511 may be applied in a constitutional manner. In the proceedings below, the district court agreed that the *Doe* procedures satisfy the requirements of the First Amendment. *See* 13-15957 ER 3; 13-16732 ER 13. The court nevertheless held that the NSL statute was facially unconstitutional because the *Doe* procedures were not codified in the statute. *See* 13-15957 ER 20-21. On appeal, the NSL recipients' primary argument was likewise that the statute itself did not contain the *Doe* procedures. *See* 13-15957 Br. 21-41; 13-16732 Br. 22-42.

That is no longer the case. The USA FREEDOM Act of 2015 revises the NSL nondisclosure provisions to codify the procedures outlined in *Doe*. The Act also revises the NSL nondisclosure provisions in other respects that further accommodate First Amendment interests. In particular, the Act directs the Attorney General to establish procedures to require the review at appropriate intervals of nondisclosure requirements issued pursuant to amended § 2709 and the termination of such requirements if the facts no longer support nondisclosure. In light of these amendments, there are no plausible grounds for challenging the facial constitutionality of the NSL nondisclosure provisions. And because it is undisputed that the government has abided by the *Doe* procedures since 2009,

including in these cases, the provisions are likewise constitutional as applied.

STATUTORY BACKGROUND

The two key statutory provisions at issue in this case are 18 U.S.C. §§ 2709(c) and 3511(b). The USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (hereafter "the USA FREEDOM Act" or "the Act"), revises both provisions. The Act also amends other statutory provisions relevant to these appeals.

A. The Act's Amendments To 18 U.S.C. § 3511(b)

Section 502(g) of the USA FREEDOM Act revises the terms of 18 U.S.C. § 3511(b) to codify the reciprocal notice procedure for NSL nondisclosure requirements that the Second Circuit found constitutional in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and that the government has been following since 2009. As amended by the Act, 18 U.S.C. § 3511(b)(1)(A) provides an NSL recipient with two alternative means to obtain judicial review of a nondisclosure requirement: by filing a petition for judicial review or by notifying the government. 18 U.S.C. § 3511(b)(1)(A). If the recipient notifies the government that it wishes to have a court review a nondisclosure requirement, the government must apply for a nondisclosure order within thirty days thereafter. *Id.* § 3511(b)(1)(B). The Act calls on the district court to "rule expeditiously," and if the court determines that

the requirements for nondisclosure are met, it shall "issue a nondisclosure order that includes conditions appropriate to the circumstances." *Id.* § 3511(b)(1)(C).

These provisions are designed to codify the procedure that the Second Circuit identified as constitutional in *Doe*, 549 F.3d at 879, 883-84, and that the government has been following since 2009. The House Committee Report states that Section 502 of the Act "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d. Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015). The option for the recipient to notify the government "is intended to ease the burden on the recipient in challenging the nondisclosure order." *Id.*

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

absence of a nondisclosure order may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(3).

In further accordance with *Doe*, 549 F.3d at 884, the Act modifies § 3511(b) by repealing the provision (formerly in § 3511(b)(2)-(3)) that gave conclusive effect to good-faith certifications by specified officials of certain harms. *See* H.R. Rep. No. 114-109, at 24 ("This section repeals a provision stating that a conclusive presumption in favor of the government shall apply where a high-level official certifies that disclosure of the NSL would endanger national security or interfere with diplomatic relations."). The Act also repeals the provision (formerly in § 3511(b)(3)) under which an NSL recipient who unsuccessfully challenged a nondisclosure requirement a year or more after the issuance of the NSL was obligated to wait one year before again seeking judicial relief.

B. The Act's Amendments To 18 U.S.C. § 2709

The USA FREEDOM Act also amends 18 U.S.C. § 2709(b) and (c) and adds new subsection (d).

Section 501(a) of the Act amends 18 U.S.C. § 2709(b)(1) to authorize NSLs only when a specified FBI official "us[es] a term that specifically identifies a person, entity, telephone number, or account as the basis for [the NSL]." As the House Report explains, this section prohibits the use of NSL authorities "without

the use of a specific selection term as the basis for the NSL request," and "specifies that for each NSL authority, the government must specifically identify the target or account." H.R. Rep. No. 114-109, at 24.

Section 502(a) of the Act replaces the former provisions of 18 U.S.C. § 2709(c) with new provisions. As revised by the Act, § 2709(c) now expressly requires the government to provide the NSL recipient with notice of the right to judicial review in order for the prohibition on disclosure to apply, thus further codifying *Doe*'s reciprocal notice procedure. *Id.* § 2709(c)(1)(A). Apart from this change, the new terms of § 2709(c) impose largely the same substantive requirements as former § 2709(c).

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

C. Other Provisions Of The Act

The USA FREEDOM Act also adds two new provisions that are relevant here. First, Section 502(f) of the Act requires the Attorney General to adopt procedures to require "the review at appropriate intervals" of nondisclosure requirements issued pursuant to amended § 2709 "to assess whether the facts

supporting nondisclosure continue to exist." USA FREEDOM Act § 502(f)(1)(A). The procedures must provide for "the termination of such a nondisclosure requirement if the facts no longer support nondisclosure," and the NSL recipient must be notified that the requirement has been terminated. *See id.* § 502(f)(1)(B)-(C). The Act directs the Attorney General to adopt such procedures within 180 days[1] and to submit the procedures to the Judiciary Committees of the Senate and the House. *See id.* § 502(f)(1)-(2). The House Committee Report states that these procedures are "based upon nondisclosure reforms proposed by President Obama in January 2014," and notes that the Director of National Intelligence announced a policy in response to the President's direction as part of the Signals Intelligence Reform 2015 Anniversary Report. H.R. Rep. No. 114-109, at 24-25. The government notified this Court of that announcement in its Rule 28(j) letter filed on February 12, 2015. *See* 13-16731 Dkt. No. 89; 13-16732 Dkt. No. 80.

Second, § 603(a) of the Act establishes a statutory mechanism for NSL recipients to make public disclosures of aggregated ("band") data about the national security process, including NSLs, that they receive. *See* USA FREEDOM Act § 502(f)(1). For example, a person subject to a nondisclosure order

[1] One hundred and eighty days from the date of enactment is November 29, 2015.

accompanying an NSL may publicly release a semiannual report that, among other things, aggregates the number of NSLs the person was required to comply with in bands of 1000, starting with 0-999, 50 U.S.C. § 1874(a)(1)(A), or in bands of 500, starting with 0-499, *id.* § 1874(a)(2)(A), or the total number of all national security process received in bands of 250, starting with 0-249, *id.* § 1874(a)(3)(A), or an annual report of, among other things, the total number of all national security process received in bands of 100, starting with 0-99, *id.* § 1874(a)(4)(A). The House Committee Report states that this provision is "modeled on" the mechanism previously implemented by the government on a discretionary basis in January 2014—"which allowed for companies to publicly report data concerning government requests for customer information." H.R. Rep. No. 114-109, at 26-27. The government's mechanism for aggregated data disclosures was discussed at oral argument and was the subject of the government's letter dated November 6, 2014. *See* 13-16732 Dkt. No. 75; 13-15957 Dkt. No. 86.

ARGUMENT

I. THE USA FREEDOM ACT REINFORCES THE FACIAL CONSTITUTIONALITY OF THE NONDISCLOSURE PROVISIONS OF 18 U.S.C. §§ 2709 AND 3511

The USA FREEDOM Act's amendments remove any doubt about the facial constitutionality of the NSL nondisclosure provisions in 18 U.S.C. §§ 2709 and

3511. As we explained in our initial briefs, even in their original form, those provisions satisfied the procedural safeguards in *Freedman v. Maryland*, 380 U.S. 51 (1965), because the FBI has carried them out in strict accord with the procedures the Second Circuit found constitutionally sufficient in *Doe*. *See* 13-15957 US Br. 52-55, 13-16732 US Br. 49-53.[2] The USA FREEDOM Act's amendments now codify those procedures. The district court recognized that the statutory nondisclosure provisions would be constitutional if Congress enacted the *Doe* procedures into law. The statutory amendments also make clear that that the NSL provisions incorporate a constitutionally adequate standard of judicial review and that the NSL nondisclosure requirements satisfy strict scrutiny.

A. The Amended Statute Is Constitutional Under *Freedman*

As amended by the Act, 18 U.S.C. §§ 2709(c) and 3511(b) satisfy each of the three procedural requirements outlined in *Freedman*: (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. 380 U.S. at 58-60; *see Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002).

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[2] For reasons discussed in our earlier briefs, the *Freedman* requirements are inapplicable, *see* 13-15957 US Br. 48-52; 13-16732 Br. 45-49, but this Court need not reach that issue because the statute clearly satisfies the *Freedman* standard.

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

Second, the amended terms of § 3511(b) make expeditious judicial review available. Amended § 3511(b) specifies that the district court must "rule expeditiously" on a petition by an NSL recipient or an application by the government. 18 U.S.C. § 3511(b)(1)(C).

Third, amended § 3511(b) assigns the government the burden of initiating judicial review as well as the burden of persuasion in court. As just noted, the government must initiate judicial review upon the NSL recipient's request. 18 U.S.C. § 3511(b)(1)(A)-(B). The amended statute also places the burden of persuasion in court on the government. Even before the recent amendments, the burden of persuasion rested with the government, as the Second Circuit held in *Doe*. *See* 549 F.3d at 875. But the Act amends the relevant statutory language to

make the allocation of the burden more clear. Previously, the statute provided that a court could set aside or modify a nondisclosure requirement when the court found that "there is no reason to believe" that disclosure may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(2)-(3) (2012). As amended, the statute provides that a court shall issue a nondisclosure order or extension thereof if the court finds that "there *is* reason to believe" that disclosure may result in one of the enumerated harms. 18 U.S.C. § 3511(b)(3) (emphasis added). This new language places the onus on the government to make the requisite showing.

B. The Amended Standard Of Review Is Constitutional

The amended statute's standard of judicial review is constitutional. As we explained in our initial briefing, the Second Circuit in *Doe* properly interpreted the standard of review in § 3511(b) 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 (emphasis added); *see* 13-15957 US Br. 56-58; 13-16732 US Br. 53-55.

Congress left *Doe*'s interpretation of the "standard of proof" (*Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2245 (2011)) undisturbed when it revised § 3511(b), changing the statutory language only by bringing it into closer

alignment with *Doe*'s holding regarding the burden of persuasion. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). For example, in *United States v. Lincoln*, this Court observed that it had previously interpreted a statutory definition of "victim" as including the United States, so when Congress amended that definition and did not exclude the United States, this Court "inferred that Congress adopted the judiciary's interpretation." 277 F.3d 1112, 1114 (9th Cir. 2002). So too here. By not changing the standard of proof, Congress implicitly ratified *Doe*'s interpretation of the standard of proof. Further underscoring the evidentiary showing the government must make, 18 U.S.C. § 3511(b)(2) now explicitly requires the government's application for a nondisclosure order to include a certification from a specified government official that contains "a statement of specific facts" showing that the absence of a prohibition on disclosure may result in an enumerated harm.

The district court also found the standard for judicial review unconstitutional because it allowed certain certifications by certain senior officials to be "conclusive" in judicial proceedings in the absence of bad faith. *See* 13-15957 ER 24; 18 U.S.C. § 3511(b)(2)-(3) (2012). The amended statute eliminates this

provision, *see* 18 U.S.C. § 3511(b)(3); H.R. Rep. No. 114-109, at 24, and thereby eliminates the district court's constitutional concern.

C. The Nondisclosure Requirements Satisfy Strict Scrutiny

As we explained in our initial briefs, the NSL nondisclosure requirements are not prior restraints and should be analyzed under intermediate scrutiny. *See* 13-15957 US Br. 31-33, 48-52; 13-15957 US Reply 19-22; 13-16732 US Br. 28-31, 45-49. But, as we argued, even if strict scrutiny applies, the NSL nondisclosure requirements satisfy strict scrutiny because they are narrowly tailored to serve a compelling government interest. *See* 13-15957 US Br. 27-30; 13-15957 US Reply 22-26; 13-16732 US Br. 25-28.

The district court identified two respects in which it regarded the scope of the nondisclosure requirement as unduly broad, both of which Congress has addressed in the amended statute. First, the district court stated that in some instances a recipient may be able to disclose the fact that it had received an NSL without risking any of the statutory harms. 13-15957 ER 21-22. The statutory amendments alleviate this concern by codifying and expanding the procedure by which NSL recipients may publicly disclose aggregated band data about the number of NSLs and other national security process they have received. *See* USA Freedom Act § 603(a); 50 U.S.C. § 1874(a). Furthermore, the amendments allow

the government to agree to other disclosures in certain circumstances. *See* 50 U.S.C. § 1874(c); 18 U.S.C. § 2709(c)(2)(A)(iii).

Second, the district court stated that in some instances the statute could result in NSL nondisclosure requirements that continue in force "longer than necessary to serve the national security interests at stake." 13-15957 ER 23. The Second Circuit noted in *Doe* that the judicial review provisions in § 3511(b) already enabled courts to modify or set aside a nondisclosure requirement that is no longer necessary. 549 F.3d at 884 n.16. Congress has now gone further by directing the Attorney General to adopt procedures for periodically reviewing nondisclosure requirements issued pursuant to amended § 2709 to assess whether the facts supporting nondisclosure continue to exist. *See* USA FREEDOM Act § 502(f)(1). Moreover, Congress has removed the provision that precluded certain NSL recipients from challenging a nondisclosure requirement more than once per year. *See id.* These changes minimize the possibility that NSL nondisclosure requirements will remain in effect after the need for them has lapsed.

II. THE NSL NONDISCLOSURE PROVISIONS ARE CONSTITUTIONAL AS APPLIED IN THESE CASES

The district court did not reach the as-applied challenge in Nos. 13-15957, and it rejected the as-applied challenges in Nos. 13-16731 and 13-16732. On

appeal in Nos. 13-16731 and 13-16732, the NSL recipients' sole argument against enforcement of the NSLs is the supposed facial invalidity of the entire statutory scheme. The NSL recipients have thus waived on appeal any as-applied claims. *See, e.g.*, *Mills v. United States*, 742 F.3d 400, 409 n.9 (9th Cir. 2014) (legal theories not specifically and distinctly argued in opening brief are waived). Accordingly, the as-applied challenges are not properly before this Court.

In any event, the as-applied challenges fail. As explained in our initial briefing, the NSL recipients received the procedures specified in *Doe*, the district court applied the standard of review as interpreted in *Doe*, and these NSL nondisclosure requirements are narrowly tailored to serve the compelling government interest in counterterrorism and counterintelligence.

Insofar as these cases are ongoing, the amended standard of judicial review and certification requirement in § 3511(b) apply. The district court did not reach the merits of the nondisclosure requirement in No. 13-15957, but the new procedures will apply on remand if this Court finds the statute constitutional. The district court enforced the NSL nondisclosure orders in Nos. 13-16731 and 13-16732, applying the prior version of the statute as interpreted in *Doe*. *See* 13-15957 ER 3-5; 13-16732 ER 13-14. The judicial review standard the district court applied is the same standard that is in the amended statute. And while the

requirement that the government's certification contain "a statement of specific facts" indicating that the absence of a prohibition on disclosure may result in enumerated harms, 18 U.S.C. § 3511(b)(2), was not then in effect, the detailed information the government provided to support the nondisclosure order effectively satisfies that requirement, and the district court found that information sufficient to satisfy the standard of proof. *See* 13-15957 ER 4; 13-16732 ER 13-14. Accordingly, no remand is required in Nos. 13-16731 and 16732.

CONCLUSION

For the foregoing reasons, in Nos. 13-16731 and 13-16732, the district court's decision enforcing the NSLs should be affirmed. In No. 13-15957, the district court's decision holding the NSL statute unconstitutional and the accompanying injunction should be reversed, and the case should be remanded for further proceedings under 18 U.S.C. § 3511(b).

Respectfully submitted,

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JULY 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I filed under seal the foregoing Government's Supplemental Brief using the Court's ECF system.

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/s/ Katherine Twomey Allen
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