Nos. 16-16067, 16-16081, 16-16082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: NATIONAL SECURITY LETTER

UNDER SEAL, Petitioner-Appellant
(Nos. 16-16067, 16-16081),

UNDER SEAL, Petitioner-Appellant
(Nos. 16-16082),

v.

LORETTA E. LYNCH, Attorney General,
Respondent-Appellee
(Nos. 16-16067, 16-16081, 16-16082).

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

BRIEF FOR LORETTA E. LYNCH

~~Filed Under Seal~~

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STATEMENT OF JURISDICTION

The district court had jurisdiction over these three consolidated cases under 28 U.S.C. § 1331. The district court entered judgment in each case on April 21, 2016. 2 ER 36 (No. 11-cv-2173), 78 (No. 13-mc-80089), 124 (No. 13-cv-1165). Petitioners filed notices of appeal on June 7, 2016, within the sixty-day period prescribed by Federal Rule of Appellate Procedure 4(a)(1)(B). 2 ER 34 (No. 11-cv-

2173); 76 (No. 13-mc-80089); 122 (No. 13-cv-1165). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court correctly held that the nondisclosure and judicial-review provisions of the National Security Letter statute, as amended in 2015, are constitutional under the First Amendment.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reproduced as an addendum to this brief.

STATEMENT OF THE CASE

The Federal Bureau of Investigation (FBI) is the government agency with primary responsibility for conducting counterterrorism and counterintelligence investigations in the United States. See Exec. Order No. 12,333 §§ 1.14(a), 3.4(a), 46 Fed. Reg. 59,941 (Dec. 4, 1981); 28 C.F.R. § 0.85(*l*) (counterterrorism), 0.85(d) (counterintelligence); see generally Attorney General's Guidelines for Domestic FBI Operations (Sept. 29, 2008), https://go.usa.gov/xkgCs. Congress has authorized the FBI to issue National Security Letters (NSLs), a type of administrative subpoena, to obtain limited information from electronic communication service providers for use in such investigations. Because secrecy typically is vital in national security investigations, Congress has authorized the FBI under specified circumstances to

direct NSL recipients not to disclose information about the NSL. Congress also has provided for judicial review of nondisclosure requirements imposed on an NSL recipient. Congress has substantially amended the NSL statute to ensure that restrictions on disclosures are not unnecessarily broad in scope or duration.

These consolidated cases involve a First Amendment challenge to the nondisclosure and judicial-review provisions of the NSL statute, as amended by Congress in 2015. We begin by summarizing the general terms of the statute as it stood at the outset of this litigation. We then describe the initial round of litigation, the intervening congressional amendments, and the current round of litigation regarding the constitutionality of the statutory scheme as amended.

I. ORIGINAL STATUTORY SCHEME

In conducting national security investigations, the FBI has found that "electronic communications play a vital role in advancing terrorist and foreign intelligence activities and operations." SER 3 (Decl. of Mark F. Giuliano, Asst. Dir. of the Counterintelligence Division, FBI, ¶ 9 (July 20, 2011)) (Giuliano Decl.). Even limited information about an investigative target's account with an electronic-communication service provider is helpful to the FBI in "develop[ing] leads to assist in determining, among other things, investigative subjects' true identities, actions, intent, associates, and financial transactions" and "to remove individuals from

suspicion." 2 ER 88 (Decl. of Robert Anderson, Jr., Asst. Dir. of the Counterintelligence Division, FBI, ¶ 8 (June 21, 2013)) (Anderson Decl.). To support the FBI's ability to conduct effective national security investigations, Congress therefore authorized the FBI to obtain a circumscribed category of electronic communications records.

Originally enacted in 1986, 18 U.S.C. § 2709 authorizes the FBI to direct a "wire or electronic service provider" to give the FBI "subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession" for use in terrorism and intelligence investigations. 18 U.S.C. § 2709(a); see also 12 U.S.C. § 3414(a)(1), (5) (similar authority relating to financial records in the possession of financial institutions); 15 U.S.C. §§ 1681u, 1681v (similar authority relating to consumer records in the possession of consumer reporting agencies); 50 U.S.C. § 3162 (similar authority relating to financial records, financial information, and consumer reports in the possession of financial agencies, financial institutions, holding companies, or consumer reporting agencies).

Section 2709 does not authorize the FBI to obtain the contents of electronic communications. Rather, it permits the FBI Director or specified high-level designees to "request the name, address, length of service, and local and long distance toll billing records of a person or entity" if the FBI certifies 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); see *id.* § 2709(b)(2). If the NSL is issued in connection with an investigation of "a United States person," the investigation may not be "conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States." *Id.* § 2709(b)(1); see *id.* § 2709(b)(2).

National security investigations "ordinarily must be carried out in secrecy if they are to succeed." SER 3 (Giuliano Decl. ¶ 9). "In the vast majority of cases," counterterrorism and counterintelligence investigations are "classified." 2 ER 89 (Anderson Decl. ¶ 13). Consequently, disclosure of an NSL "may prematurely reveal national security investigations to targets, causing them to change behavior patterns, such as by circumventing detection, destroying evidence, and expediting plans of attack." 2 ER 90 (Anderson Decl. ¶ 14).

To protect the necessary secrecy of intelligence and terrorism investigations, Section 2709(c) imposes a nondisclosure obligation on recipients of NSLs. As originally enacted, the statute provided categorically that "[n]o wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." 18 U.S.C. § 2709(c) (1988). The

nondisclosure obligation applied in all cases and remained in effect in perpetuity. In addition, the NSL statute did not provide for judicial review of the nondisclosure obligation or provide any mechanism by which an NSL recipient could be relieved of that obligation.

In 2006, Congress amended Section 2709 and the other NSL statutes. See USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, §§ 115, 116, 120 Stat. 192, 211-17 (2006). As relevant here, the amendments limited the scope and duration of the nondisclosure requirement and established a new statutory mechanism for NSL recipients to seek judicial relief from the requirement. *Id.*

As a result of the 2006 amendment, Section 2709(c) prohibits disclosure only if a designated high-level FBI official certifies, prior to the issuance of the NSL, that the absence of a nondisclosure requirement may result in "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)(1)(B) (2006).

A new statutory provision enacted by the 2006 amendment authorized the recipient of an NSL to petition a district court to modify or set aside the NSL and

authorized the district court to order such relief "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a) (2006). The same provision also authorized an NSL recipient to petition a district court for an order to modify or set aside the nondisclosure requirement, 18 U.S.C. § 3511(b)(1) (2006), and authorized the district court to order that relief if the court found that "there is no reason to believe that disclosure may" cause any of the harms specified in Section 2709(c)(1)(B). 18 U.S.C. § 3511(b)(2) (2006). But if the Attorney General or other specified high-ranking official certified to the court "that disclosure may endanger the national security of the United States or interfere with diplomatic relations," the statute required the court to treat the certification "as conclusive unless the court finds that the certification was made in bad faith." *Id.*

II. INITIAL PROCEEDINGS

These consolidated appeals involve NSLs that the FBI sent to two electronic communication service providers, whom we will refer to as Recipients or Petitioners.[1] The appropriate officials at the FBI determined that disclosure of

[1] The nature of the investigations is classified. The investigations are addressed in detail in classified (secret) declarations submitted *ex parte* to the district court for its *in camera* review. Cf. Exec. Order No. 13,526 § 1.2, 75 Fed Reg. 707, 707-08 (Dec. 29, 2009) (stating that the designation "'Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority

information regarding the NSLs could harm national security, and the NSLs therefore notified the Recipients that they are subject to the nondisclosure obligation in Section 2709(c).

In response to the NSL it received, one Recipient brought suit in 2011 (No. 11-cv-2173), and the United States filed its own suit to enforce the NSL against that Recipient (No. 11-cv-2776). In 2013, the FBI sent two additional NSLs to that same Recipient, who filed an additional action (No. 13-mc-80089). Also in 2013, the FBI sent two NSLs to a different Recipient, who filed a separate suit (No. 13-cv-1165). The United States did not file independent suits concerning the 2013 NSLs but instead cross-petitioned for enforcement in the suits brought by the Recipients.

A. Initial District Court Decision: Facial Constitutionality

In March 2013, the district court entered an order setting aside the NSL at issue in No. 11-cv-2173 because the court concluded that the nondisclosure provision (18 U.S.C. § 2709(c) (2006)) and the provision authorizing judicial review of the nondisclosure requirement (18 U.S.C. § 3511(b) (2006)) were facially

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is able to identify or describe"). At the Court's request, we will provide the classified declarations *ex parte* to this Court, for its own *in camera* review, pursuant to established security arrangements. See *In re National Security Agency Telecomms. Records Litig.*, 671 F.3d 881, 902 (9th Cir. 2011) ("Courts have consistently upheld *in camera* and *ex parte* reviews when national security information is concerned.").

unconstitutional under the First Amendment. *In re National Security Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013) (*In re NSL*).

First, the district court held that, although Section 2709(c) is not a classic prior restraint or a typical content-based restriction on speech, "the nondisclosure provision clearly restrains speech of a particular content—significantly, speech about government conduct." *In re NSL*, 930 F. Supp. 2d at 1071. For that reason, the district court held that the nondisclosure requirement would survive constitutional scrutiny only if it provides the procedural safeguards applicable to speech-related licensing schemes under *Freedman v. Maryland*, 380 U.S. 51 (1965). *In re NSL*, 930 F. Supp. 2d at 1071-73. Under *Freedman*, any administrative restraint on speech must be for a brief time prior to judicial review; judicial review must be expeditious; and the government must bear the burden of initiating judicial review and the burden of proof in the litigation. *Id.* at 1073 (discussing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002)). The district court concluded that the nondisclosure and judicial-review provisions did not comply with the first and third *Freedman* requirements: the provisions placed no time limit on nondisclosure prior to judicial review, and the provisions did not require the government to initiate judicial review and did not place the burden of proof on the government. *Id.* at 1074-75.

Second, the district court held that, as a content-based restriction on speech, the nondisclosure provision must be narrowly tailored to serve a compelling governmental interest. *In re NSL*, 930 F. Supp. 2d at 1075. Although it was undisputed that the nation's national security interests are compelling, the district court concluded that the nondisclosure provision was not narrowly tailored, because it failed to distinguish between the nondisclosure of the fact of receipt of an NSL from nondisclosure of the contents of the NSL, and because it did not authorize the government to rescind the nondisclosure requirement when nondisclosure no longer is required for national security. *Id.* at 1075-77.

Third, the district court held that the judicial-review provision violated the separation of powers and the First Amendment by limiting the scope of the courts' review of an NSL's nondisclosure requirement. *In re NSL*, 930 F. Supp. 2d at 1077-78. By requiring a court to uphold a nondisclosure requirement unless it finds "no reason to believe" that disclosure "may" lead to an enumerated harm, and by requiring courts to give conclusive weight to an executive official's determination that such a harm may occur, the district court held, the judicial-review provision impermissibly limited the court's authority to evaluate the constitutionality of the government's restriction on speech. *Id.*

In *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the Second Circuit had identified many of the same constitutional concerns in the nondisclosure and judicial-review provisions. That court, however, did not invalidate the provisions in their entirety. Instead, it invalidated the provisions only in limited respects, construed the NSL statute in a manner consistent with the requirements of strict scrutiny, and permitted the FBI to implement it consistent with *Freedman*. See *id.* at 875-76, 879, 882-84. The district court in these consolidated cases believed that the NSL statute as construed by the Second Circuit would have been constitutional, but the district court concluded that it lacks authority to "conform" the statute to constitutional requirements as the Second Circuit had done. *In re NSL*, 930 F. Supp. 2d at 1079-81. Accordingly, in contrast to the Second Circuit, the district court fully invalidated the statutory nondisclosure and judicial-review provisions. *Id.* at 1081. And because it concluded that the unconstitutional provisions are not severable from the statute (*id.*), the district court broadly enjoined the government "from issuing NSLs under § 2709 or from enforcing the nondisclosure provision in this or any other case" (*id.*).

B. Initial District Court Decision: Constitutionality As Applied

In the same month that the district court issued its decision in No. 11-cv-2173, the FBI issued two additional NSLs to the Recipient in that case. 2 ER 99.

That Recipient petitioned the district court to set aside the new NSLs and the government cross-petitioned for enforcement. No. 13-mc-80089, see 2 ER 115-16. Although the district court had held in No. 11-cv-2173 that the nondisclosure and judicial-review provisions are facially unconstitutional, it had stayed its judgment pending appeal. *In re NSL*, 930 F. Supp. 2d at 1081. The district court concluded that, in this posture, it was appropriate to "review the arguments and the evidence" concerning the two new NSLs on an as-applied basis. SER 15 (Dkt. No. 20, at 3 (No. 13-mc-80089) (Aug. 12. 2013) (Aug. 2013 Order)).

In No. 11-cv-2173, the Recipient had conceded that, if the nondisclosure and judicial-review provisions were amended to comply with the Second Circuit's *Doe* decision, the provisions would be constitutional. *In re NSL*, 930 F. Supp. 2d at 1070. The district court determined that, in issuing the two new NSLs, the government had satisfied its burden by "compl[ying] with the strictures imposed by the Second Circuit." SER 15 (Aug. 2013 Order, at 3). And considering the classified and unclassified evidence the government submitted in support of the two new NSLs, the district court concluded that the government had established to the court's satisfaction that disclosure of the receipt of the NSLs may cause harm to the United States' national security interests. SER 16 (Aug. 2013 Order, at 4).

Accordingly, the district court granted the government's cross-petition to enforce the nondisclosure requirement relating to the two new NSLs. SER 17 (Aug. 2013 Order, at 5). On the same day, the district court issued a comparable order enforcing the nondisclosure requirement relating to the two NSLs at issue in No. 13-cv-1165. SER 20-21 (Dkt. No. 36, at 3-4 (No. 13-cv-1165) (Aug. 12, 2013)).

III. THE 2015 AMENDMENTS TO THE NONDISCLOSURE AND JUDICIAL-REVIEW PROVISIONS

The government appealed from the decision in No. 11-cv-2173; the Recipient appealed from the decision in No. 13-mc-80089; and this Court consolidated the two appeals. Separately, the other Recipient appealed from the decision in No. 13-cv-1165.

While the cases were pending before this Court, Congress again amended the nondisclosure and judicial-review provisions of the NSL statute. See USA FREEDOM Act of 2015, Pub. L. No. 114-23, § 502(a), (g), 129 Stat. 268, 283-84, 288-89. The amendments "correct[ed] 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 adopt[ed] the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015).

Under the amended judicial-review provision, if an NSL recipient "wishes to have a court review a nondisclosure requirement imposed in connection" with an

NSL, "the recipient may notify the Government or file a petition for judicial review." 18 U.S.C. § 3511(b)(1)(A). If the recipient notifies the government, the government must apply to a district court within thirty days of notification "for an order prohibiting the disclosure of the existence or contents" of the NSL. *Id.* § 3511(b)(1)(B). The government's nondisclosure application must include a certification from a specified high-ranking official

> containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in—(A) a danger to the national security of the United States; (B) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person.

Id. § 3511(b)(2).

The USA FREEDOM Act repealed the requirement that courts give conclusive effect to a good-faith certification of harm by executive branch officials. See H.R. Rep. No. 114-109, at 24. Instead, it directs a district court to issue a nondisclosure order "if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result" in a statutorily enumerated harm. 18 U.S.C. § 3511(b)(3). The statute provides that, upon the request of the government, the court shall review *ex parte* and *in camera* the government's submissions in support of

nondisclosure, including any classified information. *Id.* § 3511(e). The statute also provides that the district court "should rule expeditiously." *Id.* § 3511(b)(1)(C).

The USA FREEDOM Act also amended the nondisclosure provision in important respects. It requires the government to notify the NSL recipient of the right to judicial review of the nondisclosure requirement. 18 U.S.C. § 2709(c)(1)(A), (d)(2). And it authorizes the FBI to permit disclosure of "information otherwise subject to any applicable nondisclosure requirement" to "other persons." *Id.* § 2709(c)(2)(A)(iii).

Another provision of the USA FREEDOM Act requires the Attorney General to adopt procedures to require "the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist." Pub. L. No. 114-23, § 502(f)(1)(A). The procedures also must require "the termination of such a nondisclosure requirement if the facts no longer support nondisclosure," in which case notice of the termination must be given to the NSL recipient. *Id.* § 502(f)(1)(B), (C). (The Attorney General approved the termination procedures required by the statute on November 24, 2015. See FBI, Termination Procedures for National Security Letter Nondisclosure Requirement, https://go.usa.gov/xKpRQ (Termination Procedures).) And yet another provision

authorizes NSL recipients to make public disclosures of aggregate data concerning their receipt of NSLs. Pub. L. No. 114-23, § 603.

IV. THE REMAND PROCEEDINGS

In light of these substantial changes in the law, this Court remanded the cases to the district court for reconsideration. 1 ER 2. On remand, the district court considered the two cases (Nos. 11-cv-2173 and 13-mc-80089) brought by one Recipient together with the third case (No. 13-cv-1165) brought by the second Recipient.

After a hearing on remand, the district court entered an order upholding the constitutionality of the amended nondisclosure and judicial-review provisions. 1 ER 2 ("[T]he Court concludes that the 2015 amendments to the NSL statutes cure the deficiencies previously identified by this Court, and that as amended, the NSL statutes satisfy constitutional requirements.").

The district court reiterated its prior determination that, to pass constitutional muster, the NSL statute must comply with *Freedman*'s procedural safeguards. 1 ER 18-22. The court held that the amended NSL statute does so: It restrains speech for only a limited time before judicial review because it requires the government to notify NSL recipients of their right to have the government initiate judicial review and requires the government to initiate such review within thirty days

of notification. 1 ER 23-24. The statute by its terms requires expeditious judicial review, even though it imposes no specific time limit. 1 ER 24-25. And the statute requires the government to initiate judicial review and imposes the burden of proof on the government. 1 ER 25-29.

The district court also concluded that the amended NSL statute is narrowly tailored to serve a compelling governmental interest. By authorizing courts to "issue a nondisclosure order that includes conditions appropriate to the circumstances" (18 U.S.C. § 3511(b)(1)(C)), the statute permits a court to distinguish between nondisclosure of the fact of receipt of an NSL and the contents of the NSL, as appropriate (1 ER 30). In addition, that same provision authorizes courts to impose temporal limits on nondisclosure, and another provision authorizes the FBI Director to authorize disclosure. *Id.* (discussing 18 U.S.C. § 2709(c)(2)(A)(iii)). Moreover, under the statutorily required procedures adopted by the Attorney General, NSLs will be reviewed three years after the initiation of a full investigation and again at the close of an investigation to determine whether nondisclosure is still required. 1 ER 31.

Reviewing the NSLs under the amended statutory scheme, the district court held that the government satisfied its burden in establishing the need for

nondisclosure for three of the NSLs (two in No. 13-cv-1165 and one in No. 11-cv-2173), but not for the two remaining NSLs (in No. 13-mc-80089).

The district court explained that it reviewed *in camera* the certifications the government submitted in support of nondisclosure pursuant to 18 U.S.C. § 3511(b)(2).[2] 1 ER 32. The court noted that, under the statute, it was required to "determine whether there is a reasonable likelihood that disclosure" of the information would result in a statutorily enumerated harm. *Id.* The court concluded that the classified FBI declarations made such a showing with respect to the NSLs at issue in Nos. 13-cv-1165 and 11-cv-2173. *Id.* By contrast, the court concluded that the FBI's classified declaration did not satisfy the statutory requirement for nondisclosure in No. 13-mc-80089. *Id.*; see 18 U.S.C. § 3511(b)(3).

In light of its conclusions, the district court granted the government's motion for a nondisclosure order in Nos. 13-cv-1165 and 11-cv-2173, but enjoined the government from enforcing the nondisclosure requirement in No. 13-mc-80089. 1 ER 33. The court stayed its order pending appeal. *Id.* Petitioners appealed from

[2] On remand, the government supplemented the previously filed classified declarations with additional unclassified and classified declarations reaffirming the FBI's determination that nondisclosure is required to prevent against a statutory harm. The unclassified declarations are located at 2 ER 39-40, 80-81, 86-94, 134-35, 140-48.

the district court's judgment upholding the constitutionality of the revised NSL nondisclosure provisions. 1 ER 34, 76, 122. The government cross-appealed from the district court's denial of its request for an order enforcing the nondisclosure requirement for the NSLs at issue in No. 13-mc-80089. The government subsequently voluntarily dismissed its cross-appeal. Doc. No. 10193171 (order dismissing cross-appeal). As a result, the recipient of the two NSLs at issue in that matter (No. 16-16190) and in appeal No. 16-16081 is free to disclose those NSLs.

[redacted]

SUMMARY OF ARGUMENT

Congress amended the NSL statute in 2006, and again in 2015, to address potential First Amendment concerns raised by a statutory scheme that requires nondisclosure of highly sensitive information regarding national security investigations. In its amendments, Congress made multiple revisions to the statute to accommodate First Amendment interests, requiring the FBI to establish, with

specific facts, the need for secrecy; authorizing nondisclosure only so long as the need persists; and providing for robust judicial review of the FBI's determinations. And when it amended the statute in 2015, Congress meticulously followed the constitutional guidance provided by the Second Circuit in *Doe*. In arguing that the NSL statute's amended nondisclosure and judicial-review provisions are unconstitutional, Petitioners therefore are asking this Court to hold that Congress's repeated efforts have been for naught, and that even the Second Circuit has been insufficiently solicitous of their constitutional rights. The Court should decline that invitation.

I. Prior restraints on speech are subject to the most exacting First Amendment scrutiny. But not all administrative or judicial orders prohibiting speech in advance constitute prior restraints for First Amendment purposes. When private parties gain access to confidential information through their participation in governmental information-gathering activities, the Supreme Court has permitted the government to place reasonable restrictions on their disclosure of such information without treating those restrictions as prior restraints. Focusing on the traditional treatment of the speech at issue and the effect disclosure would have on the government function at issue, the Supreme Court has thus held that restrictions on

information obtained solely through participation in grand jury investigations or through civil discovery do not qualify as prior restraints.

In so holding, the Court has recognized that private parties have only a limited First Amendment interest in the disclosure of information obtained through participation in confidential governmental activities. That reasoning applies with full force here. There is no history of public access to information obtained by the government through counterterrorism or counterintelligence investigations, and NSL recipients learn such information only through their involvement in the investigations. NSL recipients thus have a limited First Amendment interest in disclosing such information, and a restriction on speech concerning such information does not constitute a prior restraint.

Petitioners contend that the NSL statute authorizes "textbook prior restraints." They contend that the district court here and the Second Circuit in *Doe* erred in holding otherwise because those courts created an unfounded distinction between customary speakers, who have full First Amendment rights, and non-customary speakers, whose First Amendment rights are limited. But that argument attacks a straw man. Both courts instead recognized that the Supreme Court has held that the source of information sought to be disclosed is relevant to determining the strength of the First Amendment right to be vindicated. And even on its own

terms, Petitioners' argument that their interests as customary speakers are impaired is seriously flawed because it exaggerates the scope of the speech that the NSL nondisclosure requirement restricts.

II. The government has a compelling interest in protecting from disclosure information related to its national security investigations, and the amended nondisclosure requirement is narrowly tailored to further that compelling interest. NSL recipients are restricted, at most, from disclosing that they received an NSL and the contents of the NSL. They are otherwise free to engage in public discussion and to disclose any information obtained from any other source. The NSL statute further narrowly tailors the nondisclosure requirement by authorizing the FBI and the courts to tailor the scope and duration of a nondisclosure order; limiting the duration of the nondisclosure requirement to the period in which the government's interest in secrecy continues; and permitting certain public reporting by NSL recipients.

Petitioners do not challenge the government's compelling interest and only argue that the amended NSL statute is overbroad and so not narrowly tailored. But their argument is premised on the mistaken understanding that the statute authorizes nondisclosure orders based on the mere possibility of harm. That interpretation ignores Congress's codification of the Second Circuit's interpretation

of the statute, under which the FBI must establish a reasonable likelihood of harm. Petitioners' further arguments—that the FBI has total discretion to define the scope of the nondisclosure obligation and that the statute permits nondisclosure of unlimited duration—are similarly inconsistent with the statutory text.

III. The amended nondisclosure provisions also comply with the procedures the Supreme Court has required of schemes that condition expression on an administrative body's prior approval. First, the FBI may impose a nondisclosure order only for a short time prior to review by a court. The FBI must inform an NSL recipient of the availability of judicial review, and it must apply to a court for a nondisclosure order within thirty days of notification by a recipient that it would like a court to consider the matter. Second, the statute requires the court to rule expeditiously on any suit initiated by the government or an NSL recipient. And third, the NSL statute places the burden on the government to initiate judicial review, and it gives the government the burden of proof.

Petitioners err in arguing to the contrary. Petitioners contend that the statute leads to indefinite administrative nondisclosure orders without judicial review because an NSL recipient must notify the FBI that it wishes to have a court review the FBI's determination. But the notification requirement imposes at most a *de minimis* burden on NSL recipients, and Petitioners do not contend that the

requirement that the FBI initiate judicial proceedings within thirty days of notification is otherwise improper. Petitioners argue that the statute does not provide for prompt judicial review because it does not contain a specified deadline by which a court must rule. But the statute directs courts to "rule expeditiously," and that is the very language the Supreme Court has used to describe the requirement for prompt review. Finally, Petitioners contend that the statute fails to place the burden of proof on the government. But that argument depends on Petitioners' mistaken belief that the statute authorizes nondisclosure orders based on the mere possibility of harm. Petitioners do not dispute that a statutory standard requiring the government to show a reasonable likelihood of harm properly imposes the burden of proof on the government.

STANDARD OF REVIEW

In reviewing a district court's judgment in a suit alleging a violation of the First Amendment, this Court reviews the district court's conclusions of law and its resolution of "constitutional questions of fact" de novo, and its resolution of "[h]istorical questions of fact" for clear error. *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006).

ARGUMENT

THE NSL STATUTE'S NONDISCLOSURE AND JUDICIAL-REVIEW PROVISIONS ARE CONSTITUTIONAL UNDER THE FIRST AMENDMENT

I. The Nondisclosure Requirement Is Not a Classic Prior Restraint and So Is Not Subject to Heightened First Amendment Scrutiny

Petitioners' principal argument is that the NSL statute's nondisclosure requirement is an unconstitutional prior restraint. Br. 24-34. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotation marks and emphasis omitted). As *Alexander*'s careful reference to "certain communications" suggests, not all advance restrictions on speech qualify as prior restraints. *Id.* The enforcement of an agreement not to disclose classified information obtained during employment with the government, for instance, does not involve the sort of communication the advance prohibition of which qualifies as a prior restraint. See *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980). Neither, as we discuss below, does a statute that prohibits disclosure of information learned only through participation in a state grand jury investigation, or a court order prohibiting pretrial disclosure of information acquired through civil discovery. See *Butterworth v. Smith*, 494 U.S. 624 (1990); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

The speech subject to the nondisclosure provision in Section 2709(c) does not come within the class of "certain communications," *Alexander*, 509 U.S at 550, the restriction of which is subjected to "the most exacting scrutiny," *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979). The information the disclosure of which may be restricted under Section 2709(c) is information obtained only through an NSL recipient's participation in an authorized and secret government investigation to protect against terrorism or clandestine intelligence activities. NSL recipients have, at most, an attenuated First Amendment interest in disclosing such information. For that reason, the heightened scrutiny applicable to classic prior restraints is not appropriate, as the district court in this case and the Second Circuit in *Doe* both recognized. 1 ER 19-20; *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008).

A. Restriction on Speech Concerning Information Obtained Solely Through Participation in a Secret Government Investigation Is Not a Classic Prior Restraint

In related contexts, the Supreme Court, this Court, and other courts of appeals have recognized that speakers have only limited First Amendment interests in disclosing information obtained solely through participation in government investigations or information gathering. In reaching that conclusion, the courts have focused on the traditional treatment of the speech at issue and on the effect disclosure would have on the governmental function at issue, and they have

balanced the speaker's First Amendment interests against the government's interests in secrecy.

Grand jury investigations provide on example of this principle. "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979). That historical practice is based on the understanding "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Id.* at 218; accord *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1087 (9th Cir. 2014). Premature disclosure of information presented to the grand jury could frustrate the grand jury's investigation by, among other things, chilling witnesses' willingness to testify or to testify fully and frankly or by alerting subjects of the investigation that they may be indicted, leading them to flee. *Douglas Oil*, 441 U.S. at 219.

This Court has inferred from the Supreme Court's historical and functional analysis that third parties do not have a First Amendment right of access to state grand jury proceedings. See *Index Newspapers*, 776 F.3d at 1090 (holding that "there is no First Amendment public right of access" to documents that would reveal information presented to the grand jury investigation); see also *United States v. Smith*,

123 F.3d 140, 148 (3d Cir. 1997) ("*Douglas Oil* implicitly makes clear that grand jury proceedings are not subject to a First Amendment right of access.").

Not only are third-parties' First Amendment rights limited with respect to grand juries, but the Supreme Court has recognized that grand jury *participants* also have only restricted First Amendment interests in disclosing information they obtained during grand jury proceedings. In *Butterworth*, an individual who testified before a Florida grand jury challenged a state statute that generally prohibited any "person appearing before the grand jury" from "disclos[ing] the testimony of a witness examined before the grand jury." 494 U.S. at 627 (quoting Fla. Stat. § 905.27 (1989)). In considering the constitutionality of the statute, the Supreme Court did not apply strict scrutiny, but instead "balance[d] respondent's asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings." *Id.* at 630. The Court acknowledged the State's "interests in preserving grand jury secrecy." *Id.* at 632. It held the state statute unconstitutional only insofar as it imposed "a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged," and the grand jury's investigation concluded. *Id.*

Butterworth's reasoning makes clear that the balance tipped in favor of the witness's First Amendment interests for two principal reasons. First, the secrecy

statute would have prevented the grand jury witness from disclosing information he obtained *before* his participation in the grand jury investigation. The Court emphasized that "we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury." 494 U.S. at 632; see *id.* at 636 ("[T]he interests advanced by the portion of the Florida statute struck down are not sufficient to overcome respondent's First Amendment right to make a truthful statement of information he acquired on his own."). By contrast, the Court did not disturb the statute insofar as it prohibited disclosure of information obtained through the grand jury investigation. See *id.* at 633 ("[T]hat part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness remains enforceable under the ruling of the Court of Appeals."); see also *id.* at 636 (Scalia, J., concurring) ("Quite a different question is presented, however, 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."); *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) ("[W]e are convinced a line should be drawn between information the witness possessed prior to becoming a witness and

information the witness gained through her actual participation in the grand jury process.") (discussing *Butterworth*).

Second, the state's interest in secrecy had abated once the grand jury had been discharged:

> When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other. There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over.

Butterworth, 494 U.S. at 632-33; see *In re Grand Jury Proceedings*, 417 F.3d 18, 27 (1st Cir. 2005) ("[T]he grand jury proceeding had long been completed and it was the permanency of the ban that most troubled the Supreme Court.") (discussing *Butterworth*); cf. *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1562 (11th Cir. 1989) (stating that prohibition on disclosure of materials from an ongoing grand jury "is not a case of a prior restraint of protected First Amendment activity").

The Supreme Court employed an analysis similar to that used in *Butterworth* in concluding that litigants have an attenuated First Amendment interest in information obtained only through civil discovery. In *Seattle Times*, civil litigants asserted a First Amendment challenge to a trial court order prohibiting public disclosure, in advance of trial, of information obtained in discovery. "By its terms, the order did not apply to information gained by means other than the discovery

process." 467 U.S. at 27. The litigants subject to the order argued "that civil discovery is not different from other sources of information, and that therefore the information is 'protected speech' for First Amendment purposes." *Id.* at 31. Considering the traditional treatment of information obtained through discovery, the Court observed that discovery "proceedings were not open to the public at common law." *Id.* at 33. For that reason, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Id.*

Moreover, a civil litigant has no constitutional right to obtain discovery: "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Seattle Times*, 467 U.S. at 32. Instead, "the Rules authorizing discovery were adopted by the state legislature," and "the processes thereunder are a matter of legislative grace." *Id.* For that reason, "continued court control over discovered information does not raise the same specter of government censorship that such control might suggest in other situations," and "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 32, 33; see *id.* at 34 ("[T]he party may disseminate the identical information covered by

the protective order as long as the information is gained through means independent of the court's processes.").

In contrast to the litigants' limited First Amendment interests, the government had a "substantial" interest in nondisclosure "unrelated to the suppression of expression": protective orders restricting pre-trial disclosure of discovered information are necessary to prevent abusive litigation practices. *Id.* at 34-35. Balancing the civil litigants' attenuated First Amendment interests against the government's substantial functional concerns, the Court held that the court order was constitutionally permissible. *Id.* at 35-36.

The courts' approach to First Amendment challenges to grand jury secrecy requirements and limitations on the disclosure of information obtained in civil discovery is directly relevant to this appeal. As with information obtained through grand jury proceedings and information discovered in civil litigation, there is no history of public access to information pertaining to the government's secret counterterrorism or counterintelligence investigations. To the contrary, such information is necessarily kept from public view to protect the integrity and effectiveness of the investigations themselves. Thus, restrictions on the dissemination of information obtained through the course of national security investigations are not a restriction on a traditionally public source of information.

And as with grand jury proceedings, secrecy is critical to the proper functioning of counterterrorism and counterintelligence investigations. Indeed, as we have explained above, the investigations themselves generally are classified (as are the investigations in this case), and premature disclosure of such investigations can seriously impair the national security and lead to calamitous results. See *supra* p. 5.

Although the district court agreed that the NSL statute's nondisclosure requirement is not a classic prior restraint (1 ER 19-20), the district court believed that the NSL and civil discovery contexts are not analogous because the FBI's use of NSLs is a matter of extensive public interest, but information obtained in civil discovery is not (1 ER 21). That distinction is factually dubious, however. See, *e.g.*, *Seattle Times*, 467 U.S. at 31 ("[A]s petitioners argue, there certainly is a public interest in knowing more about respondents."). The district court similarly sought to distinguish the "secrecy inherent in grand jury proceedings" because it "arise[s] from the nature of the proceedings themselves." 1 ER 21. But the need for secrecy in counterterrorism and counterintelligence investigations is even more functionally essential, given the compelling interest in national security. It is not an exaggeration to say that premature disclosure of information related to a national security investigation can endanger lives and compromise critical national interests. See, *e.g.*, 2 ER 90 (Anderson Decl. ¶ 14).

Just as participants in grand jury proceedings have only an attenuated First Amendment interest in disclosing the information they obtained during the course of a grand jury investigation, and participants in civil litigation have limited First Amendment interests in the pretrial disclosure of information obtained in discovery, NSL recipients have only limited First Amendment interests in disclosing information they learned from the government solely through participation in a national security investigation. Accordingly, in all of these contexts, rules prohibiting disclosure of such information are not prior restraints, and so are not "the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Seattle Times*, 467 U.S. at 33.

B. Petitioners Have Not Shown that the NSL Statute Is a Classic Prior Restraint

Petitioners' central argument is that the statutory nondisclosure requirement imposes "textbook prior restraints" which must be reviewed under the most exacting First Amendment scrutiny. Br. 14; see Br. 14-28. Petitioners argue that the district court (and the Second Circuit) erred in holding that the nondisclosure requirement is not a "typical" prior restraint.[3] They contend that the district court reached that

[3] Petitioners initially contend that the district court and the Second Circuit accepted their argument that the nondisclosure requirement qualifies as a "textbook" prior restraint for First Amendment purposes. Br. 14 (citing 1 ER 19; *In*

conclusion only be creating a novel distinction between "'customary' speakers who engage in traditional forms of expression" and non-customary speakers, who have less expansive First Amendment rights. Br. 15. Petitioners contend that there is no doctrinal basis for this distinction (Br. 16-19) and that they, in any event, are customary speakers (Br. 19-24). That argument, however, attacks a straw man.

The Second Circuit in *Doe* said that the nondisclosure restriction "is not a typical example of" a prior restraint because "it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies." 549 F.3d at 876. But, the court of appeals then immediately cited *Seattle Times* and referenced the grand jury secrecy cases. *Id.* In context, it is clear that the court of appeals was referring to the Supreme Court's explanation that the *source* of the information sought to be disclosed is relevant to determining the strength of the First Amendment right to be vindicated. See *Seattle Times*, 467 U.S. at 32 ("At the outset, it is important to recognize the extent of the impairment of First Amendment rights that a protective

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re NSL, 930 F. Supp. 2d 1064, 1071 (N.D. Cal. 2013); *Doe*, 549 F.3d at 876). That characterization is mysterious, however, because the district court and the Second Circuit *rejected* that argument. 1 ER 19-20 (holding that, "given the text and function of the NSL statute, petitioners' proposed standards are too exacting"); *Doe*, 549 F.3d at 876 (nondisclosure requirement "is not a typical example of" a prior restraint).

order, such as the one at issue here, may cause. As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes."); see also *Hoffmann-Pugh*, 338 F.3d at 1140 ("[W]e are convinced a line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process.") (discussing *Butterworth*).

The district court properly relied on the Second Circuit's analysis (1 ER 20) in holding that a statute restricting a person's disclosure of information obtained solely through participation in a confidential national security investigation is not a classic prior restraint and so "does not need to satisfy the extraordinarily rigorous" standard applicable to such restrictions (*id.*). Accordingly, Petitioners' argument that the district court failed to require the FBI to establish that nondisclosure is "necessary" to prevent a harm to a "governmental interest of the highest magnitude," Br. 24 (emphasis omitted), fails to join issue with the rationale underlying the district court's decision not to impose the most exacting scrutiny on the NSL statute's nondisclosure requirement.

Petitioners' argument that the district court gave "excessive deference" to the Executive Branch suffers from the same failing. Br. 27. Relying on the *Pentagon Papers* case, Petitioners argue that the Supreme Court has rejected deference to the

Executive Branch's national security concerns in evaluating prior restraints. Br. 27-28 (discussing *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam)). But in the *Pentagon Papers* case, the newspaper did not obtain the classified information it sought to publish only through participation in a confidential governmental investigation. See, *e.g.*, *United States v. Washington Post Co.*, 446 F.2d 1327, 1329 (D.C. Cir. 1971) ("Our conclusion to affirm the denial of injunctive relief is fortified by the consideration that the massive character of the 'leak' which has occurred, and the disclosures already made by several newspapers, raise substantial doubt that effective relief of the kind sought by the government can be provided by the judiciary.").

The NLS Recipients' argument that they are "customary speakers" (Br. 19- 24) is beside the point to petitioner's facial challenge. Regardless of whether they are "customary speakers," Petitioners have made no attempt to show that electronic service providers as a class are. More generally, electronic service providers' status as "customary speakers" has limited bearing on the First Amendment analysis, because any speaker has an attenuated interest in the disclosure of information obtained solely through participation in a confidential national security investigation.

Even understood as part of an as-applied challenge, Petitioners' argument that the nondisclosure requirement impermissibly impinges on their interests as

customary speakers is seriously flawed. One Recipient contends that the requirement prevented it "from informing a legislative official [redacted] that [redacted] seriously misapprehended the scope of that statute." Br. 19. [redacted] Br. 20. [redacted] *Id.* But that is plainly incorrect. The nondisclosure requirement prevented the Recipient from disproving the official's statement by [redacted] But nothing prevented the Recipient from explaining why, as a matter of statutory interpretation, [redacted]

Equally flawed are the arguments that a recipient's inability "to publicly describe its experience as a recipient of NSLs" (Br. 21) and to issue transparency reports precisely identifying the number of NSLs received (Br. 22-24) substantially limits an NSL recipient's First Amendment rights. Those arguments fail to address the limited nature of the First Amendment interest implicated in information obtained solely through participation in a confidential national security investigation. Cf. *Butterworth*, 494 U.S. at 628, 633 (upholding restriction on grand jury witness's disclosure of information obtained solely through the grand jury

process); *Seattle Times*, 467 U.S. at 32-33 (upholding restriction on pre-trial publication of information obtained solely through civil discovery).

Although Petitioners purport to challenge the nondisclosure requirement both facially and as applied, see Br. 3, Petitioners' contention that the nondisclosure requirement actually prevented them "from engaging in the political process and speaking out about important matters of public policy" (Br. 19) is the only as-applied argument Petitioners make. Usually, a court should first consider an as-applied challenge before addressing a facial challenge to a statute. See *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989). But Petitioners' as-applied challenge is so intertwined with their argument that the nondisclosure restriction is facially unconstitutional because it is a classic prior restraint that the Court may wish to address both challenges together. In any event, Petitioners have waived any other as-applied challenge to the NSL statute. See *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

II. The NSL Nondisclosure and Judicial-Review Requirements Satisfy Strict Scrutiny

The district court, like the Second Circuit, recognized that because the NSL nondisclosure requirement is not a classic prior restraint, it is inappropriate to apply to the statutory nondisclosure and judicial-review provisions the most exacting First

Amendment scrutiny that applies to such restrictions on speech. 1 ER 18-22; *Doe*, 549 F.3d at 876. The district court instead subjected those provisions to strict scrutiny and held that those provisions must provide the procedural protections required by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965). 1 ER 23-32.

Because the nondisclosure obligation imposed by the NSL statute furthers a compelling state interest, and because NSL recipients have only a limited First Amendment interest in disclosing information obtained solely through participation in a secret government investigation, the NSL statute's nondisclosure and judicial-review provisions easily satisfy the balancing test the Supreme Court employed in *Butterworth* and *Seattle Times*. But as we explain below, the district court correctly determined that the statutory nondisclosure provisions pass constitutional muster under strict scrutiny and *Freedman*. Accordingly, this Court need not decide whether a lesser standard of review is applicable. See, *e.g.*, *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173, 1180 (9th Cir. 2008) ("[W]e ultimately need not decide what level of scrutiny to apply, because Alaska's primary election law withstands even strict scrutiny.").

A. The Amended NSL Statute Is Narrowly Tailored to Serve the Government's Compelling National Security Interests

When restrictions on speech are subject to strict scrutiny, they "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The nondisclosure obligation imposed on Petitioners satisfies that demanding test. Cf. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

Here, the government's interest in secrecy is at its apex. The nondisclosure obligation authorized by Section 2709(c) furthers a compelling state interest, and is tailored toward disclosures that would jeopardize that interest. Congress authorized the FBI to prohibit an NSL recipient from "disclos[ing] to any person that the Federal Bureau of Investigation has sought or obtained access to information or records," 18 U.S.C. § 2709(c)(1)(A), that are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities," if a high-ranking FBI official certifies that such disclosure "may result in—(i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person." *Id.* § 2709(b)(1), (c)(1)(B). The government has a compelling interest in protecting from

disclosure information that could lead to those harms in the context of national security investigations.

As the district court observed, "[i]t is undisputed that 'no governmental interest is more compelling than the security of the Nation.'" 1 ER 29 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). More specifically, the Supreme Court has "readily agree[d] that the Government has a compelling interest in protecting truly sensitive information from those who * * * might compromise [such] information." *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) (quotation marks omitted; third alteration in original); see also *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."); *Snepp*, 444 U.S. at 509 n.3 (same).

The statutory nondisclosure requirement is narrowly tailored to serve that compelling interest. Like the judicial canon at issue in *Williams-Yulee v. Florida Bar*, which prohibited candidates for judicial office from personally soliciting campaign funds, Section 2709(c) only "restricts a narrow slice of speech." 135 S. Ct. 1656, 1670 (2015). For example, the nondisclosure requirement does not prevent NSL recipients from identifying themselves as the sort of service providers that could

receive NSLs; from speaking publicly about their views concerning the wisdom of NSLs and the nondisclosure requirement; from identifying defects they see in the current NSL statute; from lobbying Congress to change the law; or from working with civil-liberties organizations to broadly publicize what they see as the FBI's misuse of NSLs. See, *e.g.*, Electronic Frontier Foundation, National Security Letters, https://goo.gl/bUAuTI; cf. *Williams-Yulee*, 135 S. Ct. at 1670 (canvassing the speech in which judicial candidates may engage notwithstanding the ban on personal solicitations).

Instead, the statutory nondisclosure requirement only prohibits an NSL recipient from revealing at most that the FBI sought information from it through an NSL and from revealing the information requested.[4] As with constitutional restrictions on the disclosure of information obtained only in grand jury proceedings or civil discovery, the NSL nondisclosure requirement does not prohibit an NSL recipient from speaking about information obtained from any other source.

The statutory nondisclosure obligation is triggered by the FBI's certification that disclosure "may result in" an enumerated harm; the statute does not require a

[4] And as we explain below, see pages 47-48, Congress has further narrowly tailored the NSL statute by authorizing certain public reporting by persons subject to NSL nondisclosure restrictions.

certification that the harm is certain. 18 U.S.C. § 2709(c)(1)(B). But even when a statute is subject to strict scrutiny, in the national security "context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what [courts] may reasonably insist on from the Government." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010); see *id.* at 25-28 (explaining that statute was subject to strict scrutiny). Consequently, while "concerns of national security and foreign relations do not warrant abdication of the judicial role," courts must defer to the Executive Branch "when it comes to collecting evidence and drawing factual inferences." *Id.* at 34; see *id.* (explaining that "respect for the Government's [factual national-security] conclusions is appropriate" because "the lack of competence on the part of the courts is marked").

Here, the harms Congress sought to guard against—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—often, by their nature, involve an element of uncertainty. 18 U.S.C. § 2709(c)(1)(B). The statute authorizes the FBI to order nondisclosure only if it determines that publicity of the information would reasonably likely lead to an enumerated harm. *Id.* And on judicial review, a court may order nondisclosure only if it is satisfied that the FBI has established by

"specific facts" that such harm is reasonably likely to occur. 18 U.S.C. § 3511(b)(2). Such a requirement narrowly tailors the nondisclosure provision to further the government's compelling interest in national security.

Moreover, in amending the NSL statute to respond to the constitutional concerns identified by the Second Circuit, Congress further narrowly tailored the statute's restriction on speech. As amended, the NSL statute authorizes the FBI, or a court on judicial review, to further tailor the substantive scope of the nondisclosure requirement as appropriate to the context. 18 U.S.C. § 2709(c)(2)(A)(iii) (authorizing disclosure to "other persons as permitted" by the FBI); *id.* § 3511(b)(1)(C) (authorizing a district court to issue "a nondisclosure order that includes conditions appropriate to the circumstances"). Thus, for example, the FBI or a court, in appropriate circumstances, may authorize an NSL recipient to disclose the fact of receipt while restricting disclosure of the contents of the NSL.

Congress also amended the NSL statute to ensure that any nondisclosure requirement imposed on an NSL recipient lasts only as long as it is needed to further the government's compelling interests. The same provisions that permit the FBI or a district court to tailor the substantive scope of a nondisclosure requirement permit them also to tailor the requirement's duration. 18 U.S.C. §§ 2709(c)(2)(A)(iii), 3511(b)(1)(C). In addition, Section 502(f) of the USA

FREEDOM Act directed the Attorney General to adopt procedures to require "the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist." Pub. L. No. 114-23, § 502(f)(1)(A). The procedures also must require "the termination of such a nondisclosure requirement if the facts no longer support nondisclosure," in which case notice of the termination must be given to the NSL recipient. *Id.* § 502(f)(1)(B), (C). Thus, the statute authorizes nondisclosure only so long as the government's need for secrecy continues.

Pursuant to the procedures the Attorney General adopted, "the nondisclosure requirement of an NSL shall terminate upon the closing of any investigation in which an NSL containing a nondisclosure provision was issued except where the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied." Termination Procedures 2. In addition, "[t]he FBI also will review all NSL nondisclosure determinations on the three-year anniversary of the initiation of the full investigation and terminate nondisclosure at that time, unless the FBI determines that one of the statutory standards for nondisclosure is satisfied." *Id.* Moreover, the FBI must promptly initiate judicial review of the continuing nondisclosure requirement any time an NSL recipient requests it. 18 U.S.C. § 3511(b)(1)(A), (B). The Termination Procedures and the availability of judicial

review thus guard against the possibility that an NSL nondisclosure requirement will remain in place after the government's interest in secrecy has abated. Cf. *Butterworth*, 494 U.S. at 632-33.[5]

Congress narrowly tailored the nondisclosure requirement still further by authorizing "[p]ublic reporting by persons subject to [nondisclosure] orders." 50 U.S.C. § 1874. For example, an NSL recipient may issue semiannual reports that aggregate the number of NSLs received, reported in bands of 500, starting with 0-499, or in bands of 1000, starting with 0-999. *Id.* § 1874(a)(1)(A), (2)(A). An NSL recipient may issue semiannual reports that aggregate the total number of all national security process received (including NSLs), reported in bands of 250,

[5] Amici Five Members of Congress argue that the Termination Procedures are inconsistent with the requirements of Section 502(f) of the USA FREEDOM Act. Br. 4-8. Because Petitioners have waived any challenge to the Termination Procedures (see 1 ER 31, *infra* n.6), that question is beyond the scope of this appeal. Amici's argument also is inconsistent with the legislative history, which states that Section 502(f)'s review provisions "are based upon nondisclosure reforms proposed by President Obama in January 2014" and implemented by the FBI the next year. H.R. Rep. No. 114-109, at 24-25 (2015). As implemented, "the FBI will now presumptively terminate National Security Letter nondisclosure orders at the earlier of 3 years after the opening of a fully predicated investigation or the investigation's close." *Id.* at 25. The House Report recognized that "[c]ontinued nondisclosure orders beyond this period are permitted" only if a designated FBI official determines "that the statutory standards for nondisclosure continue to be satisfied." *Id.* The Termination Procedures adopted by the Attorney General continue those features of the nondisclosure reforms identified in the House Report.

starting with 0-249. *Id.* § 1874(a)(3)(A). And an NSL recipient may issue annual reports that aggregate the total number of all national security process received (including NSLs), reported in bands of 100, starting with 0-99. *Id.* § 1874(a)(4)(A).

B. Petitioners Have Not Established That the Amended NSL Provisions Fail Strict Scrutiny

Petitioners do not challenge the government's compelling interest in keeping from disclosure information related to a classified national security investigation. Instead, they contend that "[t]he NSL statute fails strict scrutiny because it is not narrowly tailored." Br. 35; see Br. 34-41. Petitioners contend that the statute is not narrowly tailored because it is "overinclusive on its face," permitting the FBI to restrict disclosure when nondisclosure is not required to further the government's compelling interests. Br. 36; see Br. 35-38. Petitioners further argue that the statute is not narrowly tailored because it permits indefinite nondisclosure. Br. 38-41. Even before the 2015 amendments to the nondisclosure requirements, the Second Circuit rejected each of those arguments. The Second Circuit was correct then, and its reasoning applies *a fortiori* to the statute in its current form. Petitioners' arguments provide no reason for this Court to go into conflict with the Second Circuit.

1. Petitioners contend that the amended nondisclosure provision in the NSL statute is overbroad because it permits the FBI to issue nondisclosure orders based

on "a mere possibility of harm" and so it authorizes such an order for "disclosures that also may *not* be harmful." Br. 36-37. But Petitioners err in suggesting that Section 2709(c) authorizes the FBI to issue a nondisclosure order based on "a mere possibility of harm." Br. 37. That provision authorizes the FBI to issue such an order if a high-ranking official determines that disclosure "may result" in a statutorily enumerated harm. 18 U.S.C. § 2709(c)(1)(B). Before Congress amended the NSL statute, the Second Circuit interpreted "the statutory requirement of a finding that an enumerated harm 'may result' to mean more than a conceivable possibility." *Doe*, 549 F.3d at 875. While it "does not require the certainty, or even the imminence of, an enumerated harm," it does require "some reasonable likelihood" that harm will result. *Id.*

Generally, "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." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009). Here, it is not necessary to presume that Congress was aware of the Second Circuit's decision interpreting the NSL statute: Congress amended the NSL statute to address the Second Circuit's expressed constitutional concerns. H.R. Rep. No. 114-109, at 26. And when Congress did so, it did not alter the requirement that the FBI certify that disclosure "may result" in an enumerated harm. The statute is thus

properly understood to permit the FBI to issue a nondisclosure order only if it finds "some reasonable likelihood" that harm will result from disclosure.

A nondisclosure order that may be issued only on the FBI's determination of some reasonable likelihood of a statutory harm in the context of a national security investigation is not substantially overbroad. To succeed in an overbreadth argument, a party must establish that "a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010); see *United States v. Williams*, 553 U.S. 285, 292 (2008) ("[W]e have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."). Petitioners make no attempt to demonstrate that a substantial number of the nondisclosure provision's applications are unconstitutional when the statute is understood to require the government to establish a reasonable likelihood of harm. Their overbreadth argument thus necessarily fails. See *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) ("The overbreadth claimant bears the burden of demonstrating, from the text of [the law] *and from actual fact*, that substantial overbreadth exists.") (quotation marks omitted; emphasis added; brackets in original).

Next, Petitioners argue that amendment to the nondisclosure provision authorizing the FBI to tailor the nondisclosure requirement by permitting disclosure to "other persons," see 18 U.S.C. § 2709(c)(2)(A)(iii), does not help make the provision narrowly tailored, because it does not require the FBI to consider whether a narrower nondisclosure requirement should be entered, Br. 37. But that argument ignores the requirement that the FBI identify some reasonable likelihood that an enumerated statutory harm will result in the absence of a nondisclosure order—a requirement that informs the scope, as well as the existence, of the order.

Petitioners further argue that the nondisclosure provision is not narrowly tailored because it gives the FBI "total discretion" to define the scope of the order. Br. 37. That contention is hard to square with the statute's provision for judicial review, which requires district courts to evaluate the FBI's "statement of specific facts indicating that the absence of a prohibition of disclosure * * * may result in" a statutorily enumerated harm, and which gives the courts authority to issue a nondisclosure order "that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C), (2). Petitioners contend that the availability of judicial review does not "ameliorate the initial overinclusive restriction on speech." Br. 37. But, again, Petitioners have not demonstrated that the FBI's nondisclosure order actually is substantially overinclusive. See *Hicks*, 539 U.S. at 122. And the

availability of judicial review serves as an appropriate safeguard to limit the scope of a nondisclosure order in any particular case. See *Williams-Yulee*, 135 S. Ct. at 1671 (statute challenged under First Amendment and reviewed under strict scrutiny must "be narrowly tailored, not * * * 'perfectly tailored'"). Indeed, in this very case, the district court entered nondisclosure orders as to some of the NSLs at issue, but concluded that the government had not met its burden as to others. 1 ER 32. As a result, the NSL Recipient is now free to disclose those particular NSLs.

Petitioners contend that the provision authorizing NSL recipients to publicly report aggregate numbers of NSLs received does not help narrow the application of the nondisclosure requirement. Br. 37-38. Their chief complaint is that the authorized aggregate "bands" make it impossible for those receiving relatively few NSLs to confirm that they have received any NSLs because the reporting bands begin with zero. *Id.*; see 50 U.S.C. § 1874(a). By contrast, the reporting bands for those recipients who receive a larger number of NSLs begin with a positive number, thus disclosing that those recipients have in fact received some NSLs. That distinction, Petitioners contend, is based on an "arbitrary determination that once a provider receives a certain number of NSLs, it no longer risks harming national security by disclosing that it has received at least one NSL, whereas providers that

receive fewer NSLs are automatically prohibited from doing so, regardless of any other factor such as how many customers they have." Br. 38.

Petitioners' protestation notwithstanding, there is nothing arbitrary about that distinction. In fact, it is precisely that sort of "evaluation of the facts" bearing on national security, by the Executive Branch and Congress, that the Supreme Court has said "is entitled to deference," even in the First Amendment context. *Humanitarian Law Project*, 561 U.S. at 33. Indeed, the different treatment of recipients who receive a large number of NSLs from those who receive relatively fewer illustrates that Congress sought to narrowly tailor the nondisclosure requirement so as to permit disclosure when that would not imperil national security.

2. Petitioners argue that the NSL statute's nondisclosure provisions are not narrowly tailored because they permit the FBI to require nondisclosure indefinitely. Petitioner acknowledges that the amended NSL statute required the Attorney General to adopt termination procedures requiring review of NSL nondisclosure requirements "at appropriate intervals." Br. 39 (quoting Pub. L. No. 114-23, § 502(f)(1)(A)). But, Petitioners contend, the statute does not require those procedures to ensure that the nondisclosure requirement last no longer than necessary. *Id.* That contention ignores the statutory language, however. The statute

requires the termination procedures to require review "at appropriate intervals * * * to assess whether the facts supporting nondisclosure continue to exist." Pub. L. No. 114-23, § 502(f)(1)(A). And it further states that the procedures must require "the termination of such a nondisclosure requirement if the facts no longer support nondisclosure." *Id.* § 502(f)(1)(B).[6]

Petitioners further argue that the judicial-review provision of the NSL statute permits indefinite nondisclosure because "the statute does not require the court to tailor the duration of" the nondisclosure requirement "to the circumstances." Br. 39. Again, Petitioner's position conflicts with the statutory language. If a district court determines that the FBI has carried its burden of establishing by "specific facts" that disclosure may result in result in an enumerated harm, a court "shall * * * issue a nondisclosure order that *includes conditions appropriate to the circumstances*." 18 U.S.C. § 3511(b)(1)(C), (2) (emphasis added). That provision gives district courts full authority to limit the duration of a nondisclosure order if

[6] Petitioners argue that the termination procedures the Attorney General adopted in compliance with the statute do not help to narrowly tailor the statutory nondisclosure requirement. Br. 39-40. But they do not directly challenge the constitutionality of those procedures and therefore have waived any possible argument that the procedures themselves are constitutionally defective. See 1 ER 31 ("Petitioners do not raise any specific challenge to [the termination procedures] * * * other than to assert that there may be some NSLs that" would not be subject to the review provisions.).

doing so is appropriate under the circumstances. And because an NSL recipient may ask the FBI to initiate judicial review of a nondisclosure order at any time, see 18 U.S.C. § 3511(b)(1)(A), a recipient may obtain a court's consideration of the continued need for a nondisclosure order any time the recipient believes that the circumstances requiring nondisclosure have abated. Cf. *Hoffmann-Pugh*, 338 F.3d at 1140 (upholding grand jury witness-secrecy rule in part because state court rule of procedure permits application to court to lift the restriction once "the state no longer has a legitimate interest in preserving the secrecy of that testimony").

III. The Amended NSL Statute Provides Appropriate First Amendment Procedural Protections

A. The NSL Statute's Nondisclosure Provisions Comply with Freedman*'s Procedural Requirements*

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court held that a government scheme conditioning expression on a licensing body's prior approval of the speech's contents must contain certain procedural safeguards to avoid constituting an invalid prior restraint:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Thomas v. Chicago Park Dist., 534 U.S. 316, 321 (2002) (discussing *Freedman*). As the district court correctly determined, the amended statutory nondisclosure provisions comply with those requirements. 1 ER 23-26; see *Doe*, 549 F.3d at 883-84 (describing procedures, now codified in the amended NSL statute, that would satisfy *Freedman*'s requirements).

First, the nondisclosure requirement may be imposed by an NSL only for a short period prior to judicial review. Any NSL imposing a nondisclosure requirement on a recipient must inform the recipient that the nondisclosure obligation is subject to judicial review. 18 U.S.C. § 2709(d)(1), (2). A recipient who wishes to have a court review the nondisclosure requirement can so notify the FBI the same day that it receives the NSL. See *id.* § 3511(b)(1)(A). Upon such notification, the FBI must within thirty days "apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order." *Id.* § 3511(b)(1)(B). Thus, the nondisclosure requirement can remain in effect for as little as thirty days after receipt of an NSL prior to judicial review.

Second, the NSL statute provides for prompt judicial review by providing that courts "should rule expeditiously" on the FBI's application for a nondisclosure order. 18 U.S.C. § 3511(b)(1)(C).

And third, the NSL statute places the burden on the FBI to initiate judicial review, 18 U.S.C. § 3511(b)(1)(B), and it places the burden of proof on the FBI: The FBI's application for a nondisclosure order must contain a certification from a high-ranking official from the Department of Justice or the FBI "containing a statement of specific facts indicating that the absence of a prohibition of disclosure under [Section 3511] may result in" a statutorily enumerated harm. *Id.* § 3511(b)(2). And a court "shall issue a nondisclosure order" if, based on the FBI's submission, the court "determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in" a statutorily enumerated harm. *Id.* § 3511(b)(3).

B. Petitioners Have Not Established That the NSL Statute Fails to Provide the Procedural Protections Required by Freedman

Petitioners incorrectly claim (Br. 28-34) that the amended nondisclosure and judicial-review provisions fail to afford the procedural protections required by *Freedman*.

Petitioners contend that the amended provisions do not limit the duration of the administratively imposed restraint and do not properly place the burden of going to court on the government because the NSL recipient must first "take[] action" by informing the FBI that it desires judicial review. Br. 29. That means, Petitioners claim, that the NSL statute authorizes "an administrative gag of indefinite duration."

Id. But the amended NSL statute requires the government to petition for judicial review within thirty days of notification by the NSL recipient that it wishes to have a court review the FBI's nondisclosure determination. 18 U.S.C. § 3511(b)(1)(B). Petitioners do not challenge the thirty-day time period as constitutionally defective. Thus, Petitioners' argument rests entirely on the premise that requiring the NSL recipient to trigger judicial review by informing the FBI of its desire for such is impermissible under *Freedman*. That is incorrect.

In *Freedman*, the Supreme Court required the government to seek judicial review of every decision to censor a movie. 380 U.S. at 59. But that was because the licensing scheme, by design, necessarily censored speakers at the very time they wished to speak. *Id.* at 52. And because "[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation," the Court held that it would be unduly burdensome to require the exhibitor to initiate judicial proceedings. *Id.* at 59-60. In the NSL context, by contrast, the nondisclosure requirement does not necessarily apply to persons who invariably wish to disclose that they have received a request for information from the FBI. Thus, in this context, the nondisclosure requirement acts as a restraint only on the subset of NSL recipients who wish to disclose the government's request for information. The statute permits such persons to inform the government of their interest in obtaining

judicial review. And that notification is at most a *de minimis* burden. Although the Petitioners imply (Br. 30) that the notification requirement may lead to an NSL recipient's self-censorship, there is no foundation for that speculation. Notification does not impose on the NSL recipient "the burden of instituting judicial proceedings"—the burden *Freedman* identified as likely to lead to self-censorship. 380 U.S. at 59-60. The statute imposes that obligation on the government. 18 U.S.C. § 3511(b)(1)(B).

Petitioners next argue (Br. 31-33) that the amended NSL statute does not provide for prompt judicial review, as required by *Freedman*, because the statute does not prescribe "a specified time frame for [judicial] review" (Br. 32) and instead directs courts to "rule expeditiously." 18 U.S.C. § 3511(b)(1)(C). But Congress enacted the very language the Supreme Court used to describe the requirement. See *Thomas*, 534 U.S. at 321 ("expeditious judicial review of that decision must be available"). In any event, *Freedman* itself did not "lay down rigid time limits or procedures." 380 U.S. at 61; see *id.* at 60 ("How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide."). Rather, the Court made clear that any permissible legislation must "avoid the potentially chilling effect" that a delay in judicial review might have on expression protected by the First Amendment. *Id.* at 61. Petitioners

have made no attempt to demonstrate that courts would ignore a statutory directive to "rule expeditiously," especially where Congress imposed that requirement to address First Amendment concerns.

Petitioners suggest in passing that the amended NSL statute fails adequately to place the burden of proof on the government. Br. 33-34. It does so, they claim, because the statute directs the court to enter a nondisclosure order if it finds "reason to believe" that a statutory harm "may result" in the absence of an order, and that standard permits a court to enter an order based on the mere possibility of harm. Br. 33 & n.16 (discussing 18 U.S.C. § 3511(b)(3)). As explained above, however, in amending the NSL statute, Congress adopted the standards identified by the Second Circuit in *Doe*. See *supra* pp. 49-50. And that standard requires the court to determine that there is "some reasonable likelihood" that disclosure will result in a statutory harm. *Doe*, 549 F.3d at 875. Petitioners do not dispute that the statutory standard, so understood, properly places the burden of proof on the government. See also 18 U.S.C. § 3511(b)(2) (requiring the government's application for a nondisclosure order to contain "a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in" an enumerated harm). That interpretation of the statute governs, because it is "fairly

possible" and because it avoids the constitutional question raised by Petitioners. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

CONCLUSION

The Court should affirm the district court's order requiring nondisclosure and the district court's judgment, which upheld the constitutionality of the NSL statute.

Respectfully submitted,

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November 28, 2016

STATEMENT OF RELATED CASES

Other than the cases consolidated in this appeal, Respondent-Appellee is not aware of any related cases pending before this court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,171 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Goudy Old Style, a proportionally spaced font, using Microsoft Word 2013.

s/ Lewis S. Yelin
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November 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I electronically filed the foregoing Brief for Loretta E. Lynch with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that, having obtained prior consent, I have provided a copy of the Brief for Loretta E. Lynch to Petitioner-Appellants via electronic mail.

s/ Lewis S. Yelin
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November 28, 2016

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE
SEALED DOCUMENTS
INTERIM CIRCUIT RULE 27-13

Case Number: Nos. 16-16067, 16-16081, 16-16082

Case Title: In re: National Security Letter, Under Seal and Under Seal v. Loretta E. Lynch

Note: Documents to be filed under seal are to be submitted electronically. As the parties will not have online access to those documents once they are submitted, the CM/ECF electronic notice of filing will not act to cause service of those documents under FRAP 25(c)(2) and Ninth Circuit Rule 25-5(f). Interim Circuit Rule 27-13(c) therefore requires an alternative method of serving the motion or notice to seal and the materials to be sealed.

○ I certify that I have provided a paper copy of the document(s) listed below to all other parties via personal service, mail, or third-party commercial carrier on the date noted below. *See* FRAP 25(c)(1)(A) – (C).

◉ I certify that, having obtained prior consent, I have provided a copy of the document(s) listed below to all other parties via electronic mail. *See* FRAP 25(c)(1)(D); Interim Circuit Rule 27-13(c).

DESCRIPTION OF DOCUMENTS:

Brief for Loretta E. Lynch
Supplemental Excerpts of Record

Signature: s/ Lewis S. Yelin

(use "s/" format with typed name)

Date: November 28, 2016

STATUTORY ADDENDUM

The First Amendment to the United States Constitution Provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

"(A) summarizing the significant construction or interpretation of any provision of law, which shall include, to the extent consistent with national security, a description of the context in which the matter arises and any significant construction or interpretation of any statute, constitutional provision, or other legal authority relied on by the decision; and

"(B) that specifies that the statement has been prepared by the Attorney General and constitutes no part of the opinion of the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review.".

(b) TABLE OF CONTENTS AMENDMENTS.—The table of contents in the first section is amended—

(1) by striking the item relating to title VI and inserting the following new item:

"TITLE VI—OVERSIGHT";

and

(2) by inserting after the item relating to section 601 the following new item:

"Sec. 602. Declassification of significant decisions, orders, and opinions.".

TITLE V—NATIONAL SECURITY LETTER REFORM

SEC. 501. PROHIBITION ON BULK COLLECTION.

(a) COUNTERINTELLIGENCE ACCESS TO TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709(b) of title 18, United States Code, is amended in the matter preceding paragraph (1) by striking "may" and inserting "may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request".

(b) ACCESS TO FINANCIAL RECORDS FOR CERTAIN INTELLIGENCE AND PROTECTIVE PURPOSES.—Section 1114(a)(2) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)(2)) is amended by striking the period and inserting "and a term that specifically identifies a customer, entity, or account to be used as the basis for the production and disclosure of financial records.".

(c) DISCLOSURES TO FBI OF CERTAIN CONSUMER RECORDS FOR COUNTERINTELLIGENCE PURPOSES.—Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) is amended—

(1) in subsection (a), by striking "that information," and inserting "that information that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information,";

(2) in subsection (b), by striking "written request," and inserting "written request that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information,"; and

(3) in subsection (c), by inserting ", which shall include a term that specifically identifies a consumer or account to be used as the basis for the production of the information," after "issue an order ex parte".

(d) DISCLOSURES TO GOVERNMENTAL AGENCIES FOR COUNTERTERRORISM PURPOSES OF CONSUMER REPORTS.—Section 627(a) of

the Fair Credit Reporting Act (15 U.S.C. 1681v(a)) is amended by striking "analysis." and inserting "analysis and that includes a term that specifically identifies a consumer or account to be used as the basis for the production of such information.".

SEC. 502. LIMITATIONS ON DISCLOSURE OF NATIONAL SECURITY LETTERS.

(a) COUNTERINTELLIGENCE ACCESS TO TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709 of title 18, United States Code, is amended by striking subsection (c) and inserting the following new subsection:

"(c) PROHIBITION OF CERTAIN DISCLOSURE.—

"(1) PROHIBITION.—

"(A) IN GENERAL.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

"(B) CERTIFICATION.—The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in— Applicability.

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) EXCEPTION.—

"(A) IN GENERAL.—A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

"(B) APPLICATION.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

"(C) NOTICE.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

"(D) IDENTIFICATION OF DISCLOSURE RECIPIENTS.—At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.".

(b) ACCESS TO FINANCIAL RECORDS FOR CERTAIN INTELLIGENCE AND PROTECTIVE PURPOSES.—Section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414) is amended—

(1) in subsection (a)(5), by striking subparagraph (D); and

(2) by inserting after subsection (b) the following new subsection:

"(c) PROHIBITION OF CERTAIN DISCLOSURE.—

"(1) PROHIBITION.—

"(A) IN GENERAL.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no financial institution that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a).

Applicability.

"(B) CERTIFICATION.—The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in—

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) EXCEPTION.—

"(A) IN GENERAL.—A financial institution that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

"(B) APPLICATION.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (a) in the same manner as the person to whom the request is issued.

"(C) NOTICE.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

"(D) IDENTIFICATION OF DISCLOSURE RECIPIENTS.—At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.".

(c) IDENTITY OF FINANCIAL INSTITUTIONS AND CREDIT REPORTS.—Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) is amended by striking subsection (d) and inserting the following new subsection:

"(d) PROHIBITION OF CERTAIN DISCLOSURE.—

"(1) PROHIBITION.—

"(A) IN GENERAL.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (e) is provided, no consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, shall disclose or specify in any consumer report, that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a), (b), or (c).

Applicability.

"(B) CERTIFICATION.—The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in—

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) EXCEPTION.—

"(A) IN GENERAL.—A consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

"(B) APPLICATION.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) or (b) or an order under

subsection (c) is issued in the same manner as the person to whom the request is issued.

"(C) NOTICE.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

"(D) IDENTIFICATION OF DISCLOSURE RECIPIENTS.—At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.".

(d) CONSUMER REPORTS.—Section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681v) is amended by striking subsection (c) and inserting the following new subsection:

"(c) PROHIBITION OF CERTAIN DISCLOSURE.—

"(1) PROHIBITION.—

"(A) IN GENERAL.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose or specify in any consumer report, that a government agency described in subsection (a) has sought or obtained access to information or records under subsection (a).

Applicability.

"(B) CERTIFICATION.—The requirements of subparagraph (A) shall apply if the head of the government agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in—

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) EXCEPTION.—

"(A) IN GENERAL.—A consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the head of the government agency described in subsection (a) or a designee.

"(B) APPLICATION.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) is issued in the same manner as the person to whom the request is issued.

"(C) NOTICE.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

"(D) IDENTIFICATION OF DISCLOSURE RECIPIENTS.—At the request of the head of the government agency described in subsection (a) or a designee, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the head or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.".

(e) INVESTIGATIONS OF PERSONS WITH ACCESS TO CLASSIFIED INFORMATION.—Section 802 of the National Security Act of 1947 (50 U.S.C. 3162) is amended by striking subsection (b) and inserting the following new subsection:

"(b) PROHIBITION OF CERTAIN DISCLOSURE.—

"(1) PROHIBITION.—

"(A) IN GENERAL.—If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (c) is provided, no governmental or private entity that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose to any person that an authorized investigative agency described in subsection (a) has sought or obtained access to information under subsection (a).

"(B) CERTIFICATION.—The requirements of subparagraph (A) shall apply if the head of an authorized investigative agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in— Applicability.

"(i) a danger to the national security of the United States;

"(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(iii) interference with diplomatic relations; or

"(iv) danger to the life or physical safety of any person.

"(2) EXCEPTION.—

"(A) IN GENERAL.—A governmental or private entity that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

"(i) those persons to whom disclosure is necessary in order to comply with the request;

"(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

"(iii) other persons as permitted by the head of the authorized investigative agency described in subsection (a) or a designee.

"(B) APPLICATION.—A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (a) in the same manner as the person to whom the request is issued.

"(C) NOTICE.—Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

"(D) IDENTIFICATION OF DISCLOSURE RECIPIENTS.—At the request of the head of an authorized investigative agency described in subsection (a), or a designee, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the head of the authorized investigative agency or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.".

12 USC 3414 note.

(f) TERMINATION PROCEDURES.—

Deadline.

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General shall adopt procedures with respect to nondisclosure requirements issued pursuant to section 2709 of title 18, United States Code, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), as amended by this Act, to require—

(A) the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist;

(B) the termination of such a nondisclosure requirement if the facts no longer support nondisclosure; and

(C) appropriate notice to the recipient of the national security letter, or officer, employee, or agent thereof, subject to the nondisclosure requirement, and the applicable court as appropriate, that the nondisclosure requirement has been terminated.

(2) REPORTING.—Upon adopting the procedures required under paragraph (1), the Attorney General shall submit the procedures to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(g) JUDICIAL REVIEW.—Section 3511 of title 18, United States Code, is amended by striking subsection (b) and inserting the following new subsection:

"(b) NONDISCLOSURE.—

"(1) IN GENERAL.—

"(A) NOTICE.—If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a).

Deadline.

"(B) APPLICATION.—Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant

request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

"(C) CONSIDERATION.—A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) should rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

Certification.

"(2) APPLICATION CONTENTS.—An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in—

"(A) a danger to the national security of the United States;

"(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(C) interference with diplomatic relations; or

"(D) danger to the life or physical safety of any person.

"(3) STANDARD.—A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in—

"(A) a danger to the national security of the United States;

"(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

"(C) interference with diplomatic relations; or

"(D) danger to the life or physical safety of any person.".

SEC. 503. JUDICIAL REVIEW.

(a) COUNTERINTELLIGENCE ACCESS TO TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709 of title 18, United States Code, is amended—

(1) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(2) by inserting after subsection (c) the following new subsection:

"(d) JUDICIAL REVIEW.—

"(1) IN GENERAL.—A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

"(2) NOTICE.—A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).".

(b) ACCESS TO FINANCIAL RECORDS FOR CERTAIN INTELLIGENCE AND PROTECTIVE PURPOSES.—Section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414) is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following new subsection:

"(d) JUDICIAL REVIEW.—

"(1) IN GENERAL.—A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511 of title 18, United States Code.

"(2) NOTICE.—A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).".

(c) IDENTITY OF FINANCIAL INSTITUTIONS AND CREDIT REPORTS.—Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) is amended—

(1) by redesignating subsections (e) through (m) as subsections (f) through (n), respectively; and

(2) by inserting after subsection (d) the following new subsection:

"(e) JUDICIAL REVIEW.—

"(1) IN GENERAL.—A request under subsection (a) or (b) or an order under subsection (c) or a non-disclosure requirement imposed in connection with such request under subsection (d) shall be subject to judicial review under section 3511 of title 18, United States Code.

"(2) NOTICE.—A request under subsection (a) or (b) or an order under subsection (c) shall include notice of the availability of judicial review described in paragraph (1).".

(d) IDENTITY OF FINANCIAL INSTITUTIONS AND CREDIT REPORTS.—Section 627 of the Fair Credit Reporting Act (15 U.S.C. 1681v) is amended—

(1) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(2) by inserting after subsection (c) the following new subsection:

"(d) JUDICIAL REVIEW.—

"(1) IN GENERAL.—A request under subsection (a) or a non-disclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511 of title 18, United States Code.

"(2) NOTICE.—A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).".

(e) INVESTIGATIONS OF PERSONS WITH ACCESS TO CLASSIFIED INFORMATION.—Section 802 of the National Security Act of 1947 (50 U.S.C. 3162) is amended—

(1) by redesignating subsections (c) through (f) as subsections (d) through (g), respectively; and

(2) by inserting after subsection (b) the following new subsection:

"(c) JUDICIAL REVIEW.—

"(1) IN GENERAL.—A request under subsection (a) or a nondisclosure requirement imposed in connection with such request under subsection (b) shall be subject to judicial review under section 3511 of title 18, United States Code.

"(2) NOTICE.—A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).".

TITLE VI—FISA TRANSPARENCY AND REPORTING REQUIREMENTS

SEC. 601. ADDITIONAL REPORTING ON ORDERS REQUIRING PRODUCTION OF BUSINESS RECORDS; BUSINESS RECORDS COMPLIANCE REPORTS TO CONGRESS.

(a) REPORTS SUBMITTED TO COMMITTEES.—Section 502(b) (50 U.S.C. 1862(b)) is amended—

(1) by redesignating paragraphs (1), (2), and (3) as paragraphs (6), (7), and (8), respectively; and

(2) by inserting before paragraph (6) (as so redesignated) the following new paragraphs:

"(1) a summary of all compliance reviews conducted by the Government for the production of tangible things under section 501;

"(2) the total number of applications described in section 501(b)(2)(B) made for orders approving requests for the production of tangible things;

"(3) the total number of such orders either granted, modified, or denied;

"(4) the total number of applications described in section 501(b)(2)(C) made for orders approving requests for the production of call detail records;

"(5) the total number of such orders either granted, modified, or denied;".

(b) REPORTING ON CERTAIN TYPES OF PRODUCTION.—Section 502(c)(1) (50 U.S.C. 1862(c)(1)) is amended—

(1) in subparagraph (A), by striking "and";

(2) in subparagraph (B), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following new subparagraphs:

"(C) the total number of applications made for orders approving requests for the production of tangible things under section 501 in which the specific selection term does not specifically identify an individual, account, or personal device;

"(D) the total number of orders described in subparagraph (C) either granted, modified, or denied; and

"(E) with respect to orders described in subparagraph (D) that have been granted or modified, whether the court established under section 103 has directed additional, particularized minimization procedures beyond those adopted pursuant to section 501(g).".