07-4943-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN DOE INC., JOHN DOE, AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

v.

MICHAEL B. MUKASEY, in his official capacity as Attorney General of the United States, ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation, and VALERIE E. CAPRONI, in her official capacity as General Counsel to the Federal Bureau of Investigation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

This is an appeal from a final judgment of the District Court for the Southern District of New York (Victor Marrero, J.) entered on September 7, 2007. The judgment was entered in accordance with the district court's Decision and Order of September 6, 2007, which is reported at 500 F. Supp. 2d 379.

STATEMENT OF JURISDICTION

This case arises under 18 U.S.C. §§ 2709 and 3511 and the Constitution. The district court was vested with jurisdiction by 28 U.S.C. § 1331. The district court issued its decision on September 6, 2007, and entered final judgment on September 7, 2007. The defendants-appellants filed a timely notice of appeal on November 5, 2007. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

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

2. Whether 18 U.S.C. § 3511(b) violates the separation-of-powers doctrine.

3. Whether the contested provisions of Section 2709(c) and Section 3511(b) are severable from the remainder of those sections.

4. Whether any injunctive relief should be confined to the plaintiffs rather than binding the government with respect to non-parties.

STATEMENT OF THE CASE

18 U.S.C. § 2709 authorizes the Federal Bureau of Investigation (FBI) to issue National Security Letters (NSLs) that require wire and electronic communication service providers, such as telephone companies and Internet service providers, to provide specified subscriber information and transactional records that are relevant to authorized investigations of international terrorism or clandestine intelligence activities. If the Director of the FBI or other national security officials make a formal determination that disclosure of an NSL may endanger the national security of the United States, endanger anyone's life or physical safety, interfere with diplomatic relations, or interfere with an investigation itself, Section 2709(c) prohibits the recipient of the NSL from making such a disclosure. A recipient who nevertheless wishes to disclose information concerning an NSL may seek judicial relief at any time under 18 U.S.C. § 3511(b).

This case involves an NSL recipient who wants to make disclosures prohibited by Section 2709(c). The recipient has not sought judicial relief under Section 3511(b). Instead, together with the ACLU, the recipient has brought suit to challenge the constitutionality of both provisions.

Acting on cross-motions for summary judgment, the district court held that Section 2709(c) is facially unconstitutional under the First Amendment and that

Section 3511(b) violates both the First Amendment and the separation-of-powers doctrine. The court further held that Section 2709(c) is not severable from the remainder of Section 2709. Based on those holdings, the court not only enjoined the FBI from enforcing the nondisclosure requirement, but enjoined the issuance and enforcement of NSLs under Section 2709 altogether, and did so on a nationwide basis. The government is appealing that decision, and the district court has stayed its decision *sua sponte* pending appeal.

STATEMENT OF FACTS

I. Statutory Background

A. National Security Letters

The President of the United States has charged the FBI with primary authority for conducting counterintelligence and counterterrorism investigations in the United States. See Exec. Order No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg 59941 (Dec. 4, 1981). Today, the FBI is engaged in extensive investigations within the United States and around the world into threats, conspiracies, and attempts to perpetrate terrorist acts and foreign intelligence operations against the United States and its interests abroad. A-56-58.

The FBI's experience with counterintelligence and counterterrorism investigations has shown that electronic communications play a vital role in

advancing terrorist and foreign intelligence activities and operations. A-61. Accordingly, pursuing and disrupting terrorist plots and foreign intelligence operations often require the FBI to seek information relating to the electronic communications of particular individuals.

The statutory provision principally at issue in this case, 18 U.S.C. § 2709, was enacted by Congress in 1986 to assist the FBI in obtaining such information. Section 2709 empowers the FBI to issue a type of administrative subpoena commonly referred to as a National Security Letter (NSL). Section 2709 is one of several federal statutes that authorize the FBI or other government authorities to issue NSLs in connection with counterintelligence and counterterrorism investigations. See 12 U.S.C. § 3414(a)(5); 15 U.S.C. §§ 1681u-1681v; 50 U.S.C. § 436.

Subsections (a) and (b) of Section 2709 authorize the FBI to request "subscriber information" and "toll billing records information," or "electronic communication transactional records," from wire or electronic communication service providers. While Section 2709 authorizes the FBI to seek subscriber and transactional information, it does not provide the FBI with authority to seek the content of any wire or electronic communication. See S. Rep. No. 99-541 at 44 (1986), *reprinted in* 1986 USCCAN 3598.

In order to issue an NSL, the Director of the FBI, or a designee "not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office," must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities * * * ." *Id.* § 2709(b)(1)-(2). In addition, when an NSL is issued in connection with an investigation of a "United States person," the same officials must certify that the investigation is "not conducted solely on the basis of activities protected by the first amendment * * * ." *Id.*

B. Confidentiality of National Security Letters

Counterintelligence and counterterrorism investigations ordinarily must be carried out in secrecy if they are to succeed. A-59. Counterterrorism and counterintelligence investigations are long-range, forward-looking, and prophylactic in nature; the government aims to anticipate and disrupt clandestine intelligence activities and terrorist attacks on the United States before they occur. A-58-59. Because these investigations are directed at groups taking efforts to keep their own activities secret, it is essential that targets not learn that they are the subject of an investigation. *Id.* If targets learn that their activities are being investigated, they can be expected to take action to avoid detection or disrupt the government's intelligence gathering efforts. *Id.* Likewise, knowledge about the scope or progress of a

particular investigation allows targets to determine the FBI's degree of penetration of their activities and to alter their timing or methods. A-59, A-64. The same concern applies to knowledge about the sources and methods the FBI is using to acquire information, knowledge which can be used both by the immediate targets of an investigation and by other terrorist and foreign intelligence organizations. A-60-66. And even after a particular investigation has been completed, information about the FBI's use of NSLs "can educate different terrorist and foreign intelligence organization about how to circumvent and disrupt such intelligence gathering in the future." A-69. For that reason, disclosures can compromise national security investigations and endanger the national security even when they concern closed investigations. *Id.*

The secrecy needed for successful counterintelligence and counterterrorism investigations can be compromised if a telephone company or Internet service provider discloses that it has received or provided information pursuant to an NSL. To avoid that result, Congress has placed restrictions on disclosures by NSL recipients. Those restrictions are contained in 18 U.S.C. § 2709(c).

In its original form, Section 2709(c) provided 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." Pub. L. 99-508, § 201, 100 Stat. 1867 (1986). This nondisclosure obligation applied automatically in all cases and remained in effect in perpetuity, even if the need for nondisclosure in a particular case eventually lapsed. Congress did not provide any statutory mechanism by which a court could entertain objections by the NSL recipient to the original or continuing need for nondisclosure or could relieve the recipient from the nondisclosure obligation.

Congress revised the nondisclosure provision in several basic respects in 2006. To begin, the nondisclosure requirement no longer applies automatically in all cases, but instead requires a case-by-case determination of need by the FBI. Section 2709(c) now prohibits disclosure only if the Director of the FBI or another designated senior FBI official certifies that "otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 2709(c)(1). If such a certification is made, the NSL itself notifies the recipient of the nondisclosure obligation. *Id.* § 2709(c)(2). Violation of the nondisclosure requirement is a criminal offense if, but only if, the recipient discloses the information "knowingly and with the intent to obstruct an investigation or judicial proceeding." *Id.* § 1510(e).

NSL recipients may now avail themselves of a statutory mechanism for judicial review of the nondisclosure requirement. A new statutory provision, 18 U.S.C. § 3511(b), authorizes the recipient of an NSL to petition a district court "for an order modifying or setting aside a nondisclosure requirement imposed in connection with" the NSL. *Id.* § 3511(b)(1). The petition may be filed at any time following receipt of the NSL. If the petition is filed more than a year after the NSL was issued, the FBI or DOJ must either re-certify the need for nondisclosure or terminate the nondisclosure requirement within ninety days after the petition is filed. *Id.* § 3511(b)(3).

A district court "may modify or set aside" the nondisclosure requirement if the court finds "no reason to believe" that disclosure "may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* § 3511(b)(2), (b)(3). If the Director of the FBI, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General personally certifies at the time of the petition that disclosure may endanger national security or interfere with diplomatic relations, the certification "shall be treated as conclusive" by the district court "unless the court finds that the certification was made in bad faith." *Id.* If a petition is filed a year or more after the issuance of the

NSL, the recipient must wait one year after a denial of the petition before filing a successive petition regarding the same NSL. *Id.* § 3511(b)(3).

II. The Present Controversy

A. The Original District Court Proceedings

This case grows out of an authorized FBI counterterrorism investigation, the background of which is described in a classified ex parte declaration submitted to the district court.[1] Pursuant to that investigation, an FBI Special Agent delivered an NSL issued under Section 2709 to an Internet service provider that has been identified in this litigation as "John Doe." A-39. The FBI certified in the NSL that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *Id.* The NSL notified Doe's president that Section 2709(c) prohibited "disclosing to any person [the fact] that the FBI has sought or obtained access to information or records under these provisions." *Id.*

Doe refused to comply with the NSL. Doe, the ACLU, and the American Civil Liberties Union Foundation filed this action against the FBI and the Department of Justice in April 2004. The plaintiffs' original complaint claimed, *inter alia*, that Section 2709 violated the Fourth Amendment and that Section 2709(c) violated the

[1] The ex parte declaration is Exhibit B to the declaration of Meredith Kotler (filed 6/28/04). If this Court wishes to see this classified declaration, we will make the appropriate security arrangements.

First Amendment. A-24. In September 2004, the district court granted the plaintiffs' motion for summary judgment on First and Fourth Amendment grounds and enjoined the government "from issuing National Security Letters under 18 U.S.C. § 2709[] or from enforcing the [nondisclosure] provisions of 18 U.S.C. § 2709(c) * * * ." A-193.

The district court first held that Section 2709 did not permit pre-enforcement judicial review of NSLs and was therefore facially unconstitutional under the Fourth Amendment. A-112-119, 122-135.[2] The court then went on to hold that the then-categorical and perpetual nondisclosure requirement in Section 2709(c) violated the First Amendment. A-157-90. The court held that Congress may constitutionally subject NSLs to a nondisclosure requirement, but held that the First Amendment prohibits a rule of perpetual nondisclosure and requires a mechanism for lifting the nondisclosure requirement when the need for secrecy has passed. A-157-188. The court also suggested, without holding, that the First Amendment might require an administrative determination of need before the nondisclosure requirement could be imposed. A-179.

Having concluded that Section 2709(c) was unconstitutional, the district court refused to sever subsection (c) from the remainder of Section 2709, holding that

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[2] Congress has since expressly authorized pre-enforcement judicial review of NSLs. See 18 U.S.C. § 3511(a).

Congress would not have wanted the FBI to be able to issue NSLs at all in the absence of a statutory nondisclosure requirement. A-189-90. The court proceeded to enjoin the FBI not only from enforcing the nondisclosure requirement but from issuing NSLs at all, and the court made the injunction applicable not only to the plaintiffs in this case but to every other wire and electronic communication service provider in the country. A-193.

B. The Government's Appeal and This Court's Remand

The government appealed the district court's decision to this Court. While the appeal was pending, Congress enacted the revisions to the nondisclosure provision outlined above, as well as a variety of other changes to Section 2709 and other NSL statutes. The revisions to Section 2709(c) were specifically designed to eliminate the features of the original nondisclosure provision that the district court had found constitutionally objectionable. Thus, Section 2709(c) now requires an advance case-by-case administrative determination of the need for nondisclosure; it requires the FBI to determine the need for continued nondisclosure if more than a year has passed when the recipient petitions for relief; and it empowers district courts to modify or terminate the nondisclosure obligation at any time if they do not have reason to believe that disclosure may endanger national security or cause other specified harms.

In May 2006, this Court vacated the district court's opinion and remanded for further proceedings. *Doe* v. *Gonzales*, 449 F.3d 415, 418-19 (2d Cir. 2006). The Court directed the district court to reconsider the plaintiffs' First Amendment challenge to the nondisclosure requirement in light of the statutory revisions.

C. The Remand Proceedings

On remand, the plaintiffs filed an amended complaint (A-197) and moved for summary judgment. The plaintiffs did not seek relief from the nondisclosure requirement in this case under Section 3511(b). Instead, they contended that Section 2709(c) and Section 3511(b) are unconstitutional under the First Amendment and the separation-of-powers doctrine.

Because of developments in the underlying investigation since the NSL was originally issued in 2004, the FBI is no longer seeking to enforce the NSL itself. A-482. However, the Director of the FBI certified in October 2006 that disclosure of the NSL continues to pose a danger to the national security of the United States. A-483.

On September 6, 2007, the district court granted the plaintiffs' summary judgment motion in relevant part and enjoined the FBI and DOJ "from issuing national security letters under 18 U.S.C. § 2709, or from enforcing the provisions of 18 U.S.C. § 2709(c) and 18 U.S.C. § 3511(b)." SPA-111. The court *sua sponte*

"stay[ed] enforcement of the judgment pending any appeal, or, if no appeal is filed, for 90 days after the date of this Order." SPA-112.

The district court began its First Amendment analysis by holding that the amended version of Section 2709(c) is a prior restraint and a content-based speech restriction. SPA-37-38. Based on these holdings, the court held that Section 2709(c) is subject to strict scrutiny under the First Amendment. SPA-41. Accordingly, the court held that the nondisclosure requirement must be shown to be necessary to serve a compelling governmental interest and must be narrowly tailored. *Id.* The court agreed that the government's interest in protecting the nation from terrorism is a compelling one "in appropriate circumstances." SPA-42. The court therefore directed its attention to whether the statute is narrowly tailored and whether it has what the court deemed to be requisite procedural safeguards. *Id.* The court went on to hold that Section 2709(c) and Section 3511(b) are facially unconstitutional in three basic respects.[3]

First, the court held that Section 2709(c) and Section 3511(b) violate the First Amendment restrictions on prior restraints. The court framed its prior restraint analysis in terms of the Supreme Court's decision in *Freedman* v. *Maryland*, 380 U.S.

[3] The court rejected one First Amendment claim – the claim that the standards for certification of nondisclosure under Section 2709(c) vest the FBI with impermissible discretion. SPA-62-69.

51 (1965). See SPA-44-62. As discussed in greater detail below, *Freedman* invalidated a state law that prohibited motion picture exhibitors from showing their films without a license from a state censorship board, which could deny a license to any film deemed to be obscene or immoral. Under *Freedman* and its progeny, such a licensing law is unconstitutional unless it incorporates various procedural safeguards. See pp. 28-31 *infra*.

Here, the district court concluded that the process by which the FBI determines the need for nondisclosure before it issues an NSL under Section 2709(c) is a "licensing scheme" that is equivalent to the censorship scheme in *Freedman* and is subject to the same procedural requirements. The court held that Section 2709(c) fails to satisfy one of *Freedman*'s procedural requirements – the requirement that the government bear the burden of initiating judicial review and establishing the need for nondisclosure. SPA-49. The district court held that a temporary administrative ban on disclosure is constitutionally permissible, but only if the government either lifts the ban or goes to court to continue the ban within a "reasonable and brief period of time." SPA-61.

Second, the district court held that the standards of judicial review in Section 3511(b) violate both the First Amendment and the separation-of-powers doctrine. SPA-69-96. The court held that the First Amendment and separation-of-powers

principles preclude Congress from obligating courts to defer to the Executive Branch's judgments regarding the need for nondisclosure. The court acknowledged that courts have traditionally given deference to national security judgments in a variety of settings, but held that, even if it were appropriate for a court to defer, Congress cannot require such deference. SPA-77.

Third, the court identified two respects in which Section 2709(c) and Section 3511(b) were deemed not to be narrowly tailored. SPA-96-102. The first is the absence of a time limit on the nondisclosure obligation. SPA-96-101. The second is the provision of § 3511(b)(3) that requires an NSL recipient who files his petition more than a year after the issuance of the NSL to wait one year after denial of the petition before filing a new petition. SPA-101-102.

Having concluded that Section 2709(c) is unconstitutional, the court went on to hold that Section 2709(c) is not severable from the rest of § 2709. SPA-108-110. Repeating the severability analysis in its earlier opinion, the court concluded that Congress would not have given the FBI the power to issue NSLs if it had known that NSL recipients would not be subject to a legal prohibition on disclosure. The severability holding was the predicate for the court's injunction, which restrains the FBI and DOJ from enforcing Section 2709 in its entirety. The district court did not

address whether the contested judicial review provisions of Section 3511(b) were severable from the remainder of that section.

SUMMARY OF THE ARGUMENT

1. Secrecy is essential to the effective conduct of counterterrorism and counterintelligence investigations. Public disclosure of steps taken by the government to investigate the activities of terrorist groups and foreign intelligence organizations poses a direct and immediate threat to the ability of the government to detect and prevent those activities. Alerted to the existence of an investigation, its direction, or the methods and sources being used to pursue the investigation, target groups can take steps to evade detection, destroy evidence, mislead investigators, and change their own conduct to minimize the possibility that future terrorist and foreign intelligence activities will be detected.

Section 2709(c) is one of a number of statutory provisions that seek to safeguard the required secrecy of counterterrorism and counterintelligence investigations by preventing private parties to whom the government turns for information from destroying the confidentiality of the government's inquiry. Numerous judicial precedents, including this Court's own decision in *Kamasinksi* v. *Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994), make clear that Congress may constitutionally prohibit disclosure of information about a secret government

investigation that a private party learns only through its own participation in the investigation. Section 2709(c) passes constitutional muster under these precedents, for it is designed to further the compelling governmental and public interest in effectively detecting and preventing terrorism and foreign espionage, and it is carefully tailored to restrict only information that an NSL recipient has learned through its participation in the NSL inquiry itself.

2. In *Freedman*, the Supreme Court held that administrative censorship statutes must employ a variety of procedural safeguards in order to satisfy the First Amendment. The district court held that Section 2709(c) is unconstitutional because it lacks one of *Freedman*'s procedural features – a requirement that the government bear the burden of initiating judicial proceedings to impose nondisclosure. But contrary to the district court's belief, Section 2709(c) differs in every important respect from the kind of administrative censorship scheme at issue in *Freedman*. Rather than seeking to censor independently obtained and developed information and ideas, Section 2709(c) only restricts information obtained through participation in a confidential government investigation. Moreover, the risk that an administrative certification will erroneously suppress protected speech is far smaller than the risk of such suppression in *Freedman*, for the information covered by Section 2709(c) is highly likely to satisfy the statutory prerequisites for non-disclosure, and there is little

reason to expect that most NSL recipients will wish to disclose details about a confidential counterintelligence or counterterrorism investigation. The administrative process created by Section 2709(c) bears a close resemblance to the long-settled process for classifying government information, and no court has ever held that *Freedman* requires the government to initiate judicial proceedings to give legal force to administrative classification decisions.

3. The district court also erred in holding that the standards of judicial review in Section 3511(b) violate the First Amendment and the separation-of-powers doctrine. The statutory standards of review in Section 3511(b) are substantially the same as the standards that the courts themselves have developed in related contexts to review government restrictions on the disclosure of national security information. They reflect the basic institutional differences between the Executive Branch and the judiciary in assessing the risks to national security posed by the disclosure of information about counterintelligence and counterterrorism investigations. Nothing in the First Amendment requires Congress to disregard those differences in framing standards of judicial review under Section 3511(b). And if the standards of review do not offend the First Amendment, nothing in the separation-of-powers doctrine places any additional restraint on the power of Congress to decide the appropriate standard for judicial review of administrative actions.

4. Section 2709(c) and Section 3511(b) are not subject to the same narrow tailoring requirements associated with classic prior restraints and content-based restrictions on private speech. But even if such narrow tailoring did apply, the provisions in question are narrowly tailored to serve the government's compelling interests without placing unnecessary burdens on would-be speakers.

5. Assuming *arguendo* that Section 2709(c) is unconstitutional, that provision is severable from the remainder of Section 2709. Likewise, the judicial review standards in Section 3511(b) are severable from the remainder of that section. And even if Section 2709(c) were not severable, any injunctive relief should be confined to the parties before the district court. The district court therefore erred in enjoining the government from using Section 2709 in its entirety and giving its injunction nationwide effect.

STANDARD OF REVIEW

The district court's grant of summary judgment is subject to *de novo* review. *Miller* v. *Wolpoff & Abramson, LLP*, 321 F.3d 292, 300 (2d Cir.), *cert. denied*, 540 U.S. 823 (2003); see also *United States* v. *Awadallah*, 349 F.3d 42, 51 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005) (*de novo* review of statutory interpretation and constitutionality).

ARGUMENT

18 U.S.C. §§ 2709(c) AND 3511(b) ARE CONSTITUTIONAL

The decision below holds that Section 2709(c) and Section 3511(b) are facially unconstitutional under the First Amendment and the separation-of-powers doctrine. The decision further holds that the perceived constitutional shortcomings of Section 2709(c) required Section 2709 to be struck down in its entirety, rather than severing the putatively unconstitutional part of the statute in order to preserve Congress's underlying grant of authority to issue NSLs. As we now show, both of these holdings are incorrect. Sections 2709(c) and 3511(b) are not facially unconstitutional, and even if they were, the district court should have confined its remedy to the contested provisions rather than abrogate Section 2709 in its entirety and deprive the FBI of the critical investigatory authority that Congress meant for it to have.

I. There Is No First Amendment Right to Disclose Information Learned Through Participation in a Secret Government Investigation

As explained above, effective counterterrorism and counterintelligence programs depend heavily on the capacity of the government to prevent targets from learning of the government's investigative efforts. See pp. 6-8 *supra*. This critical need for secrecy provides the explanation and justification for Section 2709(c) and the corresponding nondisclosure requirements that Congress has attached to other investigatory tools in the counterterrorism and counterintelligence fields. To the extent that the government can conduct such investigations without the assistance of third parties, it can maintain the required secrecy simply by refraining from disclosing information about the investigation. But when relevant information is in the hands of third parties, requests or commands from the government for production of the information unavoidably notify those parties of the existence of the investigation and give them knowledge about the investigation to which they were not previously privy. In these circumstances, the best way to ensure the continued secrecy of the investigation, and thereby prevent the investigation from being compromised, is to obligate the private party not to disclose information about the investigation that it has learned through its own participation.

Numerous judicial decisions make clear that a private individual does not have a First Amendment right to disclose information about a secret government investigation that the party learned only through its own participation in the investigation. The leading precedent is this Court's own decision in *Kamasinski* v. *Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994).

In *Kamasinski*, this Court was presented with a First Amendment challenge to a Connecticut statute that restricted disclosure of information relating to confidential investigations of judicial misconduct. The statute provided that "any individual called by the [investigating] council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council whether probable cause exists," while permitting disclosure of information "known or obtained independently of any such investigation * * * ." Conn. Gen. Stat. § 51-51*l*. A private party who had filed a judicial misconduct complaint challenged the constitutionality of the nondisclosure requirement under the First Amendment. 44 F.3d at 109. The district court held that the statute was constitutional, and this Court affirmed that decision. *Id.* at 110-112.

In assessing the constitutional challenge, this Court identified three distinct categories of information that an individual might wish to disclose. The first category consisted of "the substance of an individual's complaint or testimony, i.e., the

individual's own observations or speculations regarding judicial misconduct." *Id.* at 110. The second consisted of "the complainant's disclosure of the *fact* that a complaint was filed, or the witness's disclosure of the *fact* that testimony was given." *Id.* (emphasis in original). The third consisted of "information that an individual learns by interacting with" the investigating commission. *Id.*

The Court held that disclosure of the first category of information, consisting of information about judicial misconduct independently known by the complainant or witness, could not constitutionally be prohibited. *Id.* At the same time, however, the Court held that Connecticut *could* constitutionally restrict disclosure of the second and third categories of information – information about the party's participation in the investigation and information learned through that participation. *Id.* at 110-112. The Court held that "[t]he State's interest in the quality of its judiciary * * * is an interest of the highest order"; that this interest was furthered by conducting investigations of judicial misconduct on a confidential basis; and that prohibiting disclosure of information about a party's participation in the investigation and information learned through that participation was constitutionally permissible to maintain the confidentiality of the investigation. *Id.* at 110, 111-12.

Other Courts of Appeals have employed the same constitutional reasoning as *Kamasinski* in similar contexts. See *Hoffman-Pugh* v. *Keenan*, 338 F.3d 1136, 1140

(10th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004) ("a [constitutional] line should be drawn between information the witness possessed prior to becoming a witness and information the witness obtained through her actual participation in the grand jury process"); *In re Subpoena to Testify before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1564 (11th Cir. 1989); *First Amendment Coalition* v. *Judicial Inquiry and Review Board*, 784 F.2d 467, 478-79 (3d Cir. 1986) (*en banc*) (state may not prohibit witnesses from disclosing information about judicial misconduct "obtained from sources outside" a judicial misconduct investigation," but may prohibit witnesses and other persons "from disclosing proceedings taking place before the [investigating] Board").

At a more general level, the Supreme Court itself has recognized that restrictions on a party's disclosure of information obtained through participation in confidential proceedings stand on a different and firmer constitutional footing from restrictions on the disclosure of information obtained by independent means. In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), the Supreme Court upheld the constitutionality of a judicial order that prohibited parties to a civil suit from disclosing sensitive information obtained through pretrial discovery. In rejecting a First Amendment challenge to the order, the Court noted that the parties "gained the information they wish to disseminate only by virtue of the trial court's discovery

processes," which themselves were made available as a matter of legislative grace rather than constitutional right. 467 U.S. at 32. The Court reasoned that "control over [disclosure of] the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." *Id.*

The Supreme Court relied on this distinction again in *Butterworth* v. *Smith*, 494 U.S. 624 (1990). In *Butterworth*, the Court held that Florida could not constitutionally prohibit a grand jury witness from disclosing the substance of his testimony after the term of the grand jury had ended. In so holding, the Court distinguished *Rhinehart* on the ground that "[h]ere * * * we deal only with [the witness'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." *Id.* at 632. Enlarging on this point, Justice Scalia observed that "[q]uite a different question is presented * * * by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness." *Id.* at 636 (Scalia, J., concurring).[4]

[4] Notably, the Court did not disturb "that part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness." *Id.* at 633.

When measured against the standards established by these precedents, the basic nondisclosure rule in Section 2709(c) passes constitutional muster. It is designed to vindicate the government's interest in shielding its counterterrorism and counterintelligence investigations from the eyes of terrorists and foreign intelligence organizations. That governmental interest is a manifestly compelling one. See, *e.g.*, *Department of the 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* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (*per curiam*) ("The Government has a compelling interest in protecting * * * the secrecy of information important to our national security"). And Section 2709(c) is carefully tailored to advance that interest without unnecessarily restricting speech that does not implicate the government's legitimate interests in confidentiality.

By its terms, Section 2709(c) applies only to the NSL recipient's disclosure of the fact that the government "has sought or obtained access to information or records under this section." Its scope thus fits squarely within *Kamasinski*'s second and third categories of information – the fact that information has been provided to an investigation (category 2) and "information that an individual learns by interacting with" the investigating body (category 3). 44 F.3d at 110. Section 2709(c) does not

purport to prohibit an NSL recipient from disclosing information that he has learned by means other than his involvement in the NSL inquiry. And it places no restriction on the ability of NSL recipients or others to engage in general public discussions regarding the scope, operation, or desirability of Section 2709.

II. The 2006 Amendments Enhance the Constitutionality of Section 2709

In its original form, the nondisclosure requirement in Section 2709(c) took effect automatically and remained in effect in perpetuity. In its first decision in this case, the district court criticized the absence of an initial administrative determination that nondisclosure was necessary and the lack of a statutory mechanism for lifting the nondisclosure requirement when the need for secrecy had passed. Congress responded by amending Section 2709(c) to eliminate both of those objections.

The district court has now held that the very changes made by Congress to accommodate the court's original concerns are themselves unconstitutional. However, the district court's apprehensions about Congress's liberalization of the nondisclosure requirement are wholly misplaced. By making the nondisclosure obligation contingent on a determination of need by the Director of the FBI or other national security officials, Congress did not turn Section 2709(c) into a prior restraint, much less the kind of licensing scheme that is subject to the procedural requirements of *Freedman*. And the standards for judicial review in Section 3511(b), far from

offending the First Amendment and the separation-of-powers doctrine, are modeled on the standards that the courts themselves have developed in other contexts to review national security determinations by the Executive Branch.

A. Section 2709(c) Is Not A Prior Restraint under *Freedman*

In its first opinion, the district court had held that the original version of Section 2709(c) was a prior restraint for First Amendment purposes simply because it made a particular type of expression unlawful. See A-158-159. That reasoning is squarely foreclosed by *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), which held that a Virginia statute prohibiting disclosure of confidential information about judicial misconduct investigations and subjecting violators to criminal penalties "does not constitute a prior restraint." *Id.* at 838. Similarly, in *Cooper* v. *Dillon*, 403 F.3d 1208 (11th Cir. 2005), the Eleventh Circuit held that a state law prohibiting disclosure of non-public information obtained through participation in a law enforcement investigation "cannot be characterized as a prior restraint on speech because the threat of criminal sanctions imposed after publication is precisely the kind of restriction that the [Supreme] Court has deemed insufficient to constitute a prior restraint." *Id.* at 1215-16. As decisions like *Landmark* and *Cooper* recognize, the prior restraint doctrine is not aimed at laws that prohibit speech and impose penalties for their violation. Instead, it is aimed at schemes in which

"administrative and judicial orders forbidding certain communications [are] issued in advance of the time that such communications are to occur." *Alexander* v. *United States*, 509 U.S. 544, 550 (1993).

In its current decision, the district court concluded that Congress created just such a licensing regime when it narrowed the original scope of Section 2709(c) by making the nondisclosure obligation contingent on a determination by the FBI that disclosure may endanger national security or cause the other harms specified in the statute. SPA-38. The district court regarded Section 2709(c) as analogous to the motion picture licensing statute at issue in *Freedman*, and held that Section 2709(c) is unconstitutional because it fails to satisfy the third of *Freedman*'s three procedural requirements. SPA-44-62. What emerges from a review of *Freedman*, however, is not the similarity between the two statutory schemes, but rather the profound differences between them – differences that go directly to the need for *Freedman*'s procedural requirements and underscore the validity of Section 2709(c).

1. *Freedman* involved the constitutionality of a "censorship statute" that made it unlawful to exhibit any motion picture unless and until the film was "submitted [to] * * * and duly approved and licensed by" a state Board of Censors. 380 U.S. at 735 & n.2. The statute directed the Board of Censors to "approve and license such films * * * which are moral and proper," and to "disapprove such as are obscene, or such

as tend * * * to debase or corrupt morals or incite to crimes." *Id.* at 52 n.2. The statute did not place any time limit on the Board's deliberations, nor did it provide any "assurance of prompt judicial determination" regarding the Board's decisions. *Id.* at 59-60.

The Supreme Court identified two primary concerns with this kind of censorship scheme. First, "[b]ecause the censor's business is to censor," institutional bias may lead to the suppression of speech that should be permitted. *Id.* at 57. Second, "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Id.* at 58. The "procedural safeguards" adopted by the Supreme Court were "designed to obviate the[se] dangers" by minimizing the delay and other burdens associated with the administrative process and judicial review. *Id.*

As elaborated by the Supreme Court in subsequent decisions, *Freedman* requires that: "'(1) any [administrative] 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 District*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990)

(plurality opinion)); see *Freedman*, 380 U.S. at 58-60. Here, the district court held that Section 2709(c) and 3511(b) satisfy the first two of these requirements but fail to satisfy the third.

2. The first major difference between this case and *Freedman* concerns the scope and origin of the information at issue. The statute in *Freedman* undertook to censor private films whose contents were created independently of the government itself. Section 2709(c), in contrast, places no restriction on the public disclosure of independently developed or obtained information. Instead, it is confined to sensitive and confidential national security information that the recipient learns by (and only through) his participation in the government's own investigatory processes.

As noted above, the Supreme Court and this Court have repeatedly relied on this distinction to sustain the constitutionality of laws that restrict the disclosure of information. See pp. 21-27 *supra*. In particular, the Supreme Court relied on this consideration to dispose of a prior restraint claim in *Rhinehart*. The Supreme Court held that the nondisclosure order in *Rhinehart* was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny," because it "prevent[ed] a party from disseminating only that information obtained through the use of the discovery process" and left the party free to disseminate any information "gained through means independent of the court's processes." 467 U.S. at 33-34.

So too here. Section 2709(c) only restricts a communication service provider from disclosing information that it learns through its participation in a government counterintelligence or counterterrorism investigation, while leaving the provider free to disseminate any information obtained by independent means. The object of the statute is not to censor a private party's own speech, but simply to ensure that the secrecy of the government's own counterintelligence and counterterrorism activities is not compromised when those activities must be made known to private persons in order to obtain their assistance. *Cf. United States* v. *Marchetti*, 466 F.2d 1309, 1315 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) ("the Government * * * has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest"). As *Rhinehart* demonstrates, if this is a prior restraint at all, it is "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." 467 U.S. at 33.

3. Section 2709(c) poses a substantially smaller risk to protected speech for another reason. By definition, every motion picture exhibitor who was required to submit a film to the Board of Censors in *Freedman* actually *wanted* to display the film to the public. The same thing is true, of course, of any conventional licensing scheme: by virtue of having sought a license, every potential speaker has manifested

a desire to speak to the public. As a result, every denial of a license application results in an actual curtailment of speech.

Here, in contrast, there is no reason to believe that most recipients of NSLs wish to disclose that fact to anyone. To the contrary, there are obvious reasons why the typical NSL recipient would be reluctant to compromise the secrecy of counterintelligence and counterterrorism investigations. Thus, when the FBI certifies that disclosure of a particular NSL may endanger the national security, it is unlikely that the certification and the resulting nondisclosure requirement under Section 2709(c) will actually foreclose any speech that would otherwise occur. In these circumstances, to require the government to initiate repeated lawsuits against such recipients, in order to deny the recipients permission to make disclosures that they are not interested in making in the first place, would be entirely nonsensical.

4. Moreover, the likelihood of administrative error and "over-censorship" is significantly smaller under Section 2709(c) than under licensing schemes like the one in *Freedman*. That follows both from the nature of the information in question and from the statutory criteria that constrain the FBI's certification decisions.

To begin, the narrow class of information that is subject to Section 2709(c) – information about NSLs issued in counterintelligence and counterterrorism investigations – is highly likely to satisfy the statutory criteria for nondisclosure. For

reasons explained above, disclosures of NSLs create a number of obvious and serious risks to the FBI's ability to detect and prevent terrorism and espionage. Those risks are particularly likely to be present during an ongoing investigation, which is when the FBI is initially called on to make the nondisclosure determination under Section 2709(c). Thus, as the record in this case shows, disclosure during an ongoing investigation will ordinarily create at least one of the serious statutory risks specified by Congress. See A-62-69.

The risk of administrative error is further reduced by the objective nature of the those statutory criteria. As the district court recognized, "danger to the national security of the United States," "interference with a criminal, counterterrorism, or counterintelligence investigation," "interference with diplomatic relations," and "danger to the life or physical safety of any person" are as precise as the English language and the demands of counterintelligence and counterterrorism permit, and they constrain the FBI's discretion within constitutional limits. SPA-62-69. The Supreme Court and this Court have held that similar criteria, such as "health and safety" or "life and health," are sufficiently "specific and objective" to protect against licensing decisions based on the content or viewpoint of the licensee's expression. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 179 (2d Cir. 2006); *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 324 (2002). The standards set out in § 2709(c),

including "life or physical safety," are likewise specific and objective, and they minimize the risk that the nondisclosure requirement will be employed as an engine of censorship.

For these reasons, the central concern of *Freedman* – the fear that administrative censors will erroneously prohibit speech that should be allowed – is significantly attenuated under Section 2709(c). The point is not that errors of judgment cannot occur; they can. But given their relative improbability, they can be dealt with adequately through the judicial review process embodied in Section 3511(b) rather than requiring the prophylactic measures prescribed in *Freedman*.

5. When the FBI certifies that disclosure of an NSL may endanger national security or cause the other harms specified in Section 2709(c), it is performing the same basic function that federal agencies perform when they classify information on national security grounds. See generally Executive Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003) (Executive Order prescribing classification procedures and standards). It is therefore instructive to consider how the courts have applied the prior restraint doctrine in general, and *Freedman* in particular, to classification decisions.

Under the terms of Executive Order 13292, information "owned by, produced by or for, or * * * under the control of" the federal government may be classified if

"the original classification authority determines that unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," including damage to "defense against transnational terrorism" (§ 1.1(a)(2), (4)). Classified information is made available not only to officers and employees of the federal government, but also to private parties who are working with the government, such as defense contractors working on classified military projects.

Whenever the Executive Branch classifies any item of information, it thereby prohibits the disclosure of the information by the information's recipients. Yet no court has ever suggested that the classification of information itself, as distinct from a subsequent effort to enjoin disclosure of such information, is a prior restraint in the First Amendment sense. For example, in *McGehee* v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983), a former CIA agent challenged the CIA's classification of information in his proposed book as top secret. In the course of rejecting the plaintiff's First Amendment challenge to the constitutionality of the CIA's actions, the D.C. Circuit held that "neither the CIA's administrative determination nor any court order in this case constitutes a prior restraint in the traditional sense." *Id.* at 1147. That conclusion applies *a fortiori* to certification determinations under Section 2709(c), which are made before the NSL is issued and do not require the NSL recipient to submit proposed speech to the FBI for administrative review.

Moreover, no case suggests that each time the government makes classified information known to its employees or private contractors, *Freedman* requires the government to initiate a judicial proceeding in order to maintain the secrecy of the information. Indeed, the Fourth Circuit has expressly held that the third *Freedman* requirement is inapplicable when the government uses an administrative restraint to prevent the disclosure of classified information.

In *Marchetti*, *supra*, the Fourth Circuit sustained the constitutionality of a secrecy agreement that required a CIA employee to submit a proposed book to the agency for pre-publication review to ensure that the book did not reveal any classified information. After upholding the constitutionality of the clearance requirement itself, the Fourth Circuit went on to address the agency's procedural obligations. The Court held that "the CIA must act promptly to approve or disapprove any material" submitted for review and that Marchetti was entitled to judicial review of any disapproval. 466 F.2d at 1317. But "[b]ecause of the sensitivity of the information and the confidentiality of the relationship in which the information was obtained," the court found "no reason to impose the burden of obtaining judicial review upon the CIA." Instead, the Court concluded, "it ought to be on Marchetti." *Id.* The Fourth Circuit reiterated *Marchetti*'s holding in *United States* v. *Snepp*, 897 F.2d 138, 141-42 (4th Cir. 1990), explaining that "the national security interests at stake" in

Marchetti "required a different result" than *Freedman* and that Snepp therefore could be required to take the initiative in obtaining judicial review of an adverse disclosure ruling by the CIA.

The plaintiffs in *Marchetti* and *Snepp* were government employees who had entered into contractual agreements to submit their writings to pre-publication review. However, the Fourth Circuit took pains to emphasize in *Marchetti* that the plaintiff "by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights." 466 F.2d at 1317. *Marchetti*'s *Freedman* holding thus does not rest on the plaintiff's employment or his contractual undertaking. Instead, it rests on "the national security interests at stake." *Snepp*, 897 F.2d at 141-42. Those same considerations support the same outcome here.

6. For all of the foregoing reasons, Section 2709(c) does not pose the kind of threat presented by conventional administrative censorship statutes and does not require the procedural safeguards of *Freedman*. Yet the district court characterized Section 2709(c) as being more problematic than the law in *Freedman*, not less so. In the district court's view, Section 2709(c) restricts political speech that lies at the heart of the First Amendment, while the licensing scheme in *Freedman* was aimed at

obscene speech that was constitutionally unprotected. SPA-51-52. This reasoning gets the relationship between the two statutes exactly backward.

The licensing scheme in *Freedman* was not confined, even on its face, to obscene speech. Instead it also extended to films that "tend to debase or corrupt morals" (380 U.S. at 52 n.2), an open-ended category that reaches manifestly protected speech. See, *e.g.*, *Kingsley Intern. Pictures Corp.* v. *Regents of University of State of New York*, 360 U.S. 684, 688-89 (1959). Moreover, even if the *Freedman* statute had been confined by its terms to obscene speech, the Supreme Court's decision was animated by the fear that censors would nevertheless erroneously suppress speech that was *not* obscene. Thus, the risk of suppressing protected speech was at the heart of *Freedman*. In contrast, Section 2709(c) is aimed protecting highly sensitive and secret counterintelligence and counterterrorism investigations, and its reach is limited to an extremely narrow category of information that is not characteristically political.[5]

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[5] Elsewhere in its opinion, the district court speculated that the FBI could employ Section 2709(c) for purposes of viewpoint discrimination, by selectively allowing disclosure of NSLs by "cooperative" communication service providers while disallowing disclosures by recipients who "may speak out against the use of the NSL." SPA-40. That speculation is completely baseless. The purely theoretical possibility that Section 2709(c) could be abused in this fashion is no basis for invalidating the law on its face. See *Thomas* v. *Chicago Park District*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this

The Supreme Court's post-*Freedman* licensing decisions have made clear that the level of procedural safeguards needed in general, and whether the third *Freedman* prong is necessary in particular, depends on the nature of the "typical First Amendment harm at issue." *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782–83 (2004). The "typical First Amendment harm" associated with a law imposing censorship on motion pictures cuts is far greater than the First Amendment risks associated with a law prohibiting the disclosure of confidential information about a counterintelligence or counterterrorism investigation. There are abundant reasons for subjecting an administrative censorship scheme to the procedural safeguards of *Freedman*, but those reasons do not apply here.

B. The Standards of Judicial Review in Section 3511(b) Do Not Offend the First Amendment or the Separation-of-powers Doctrine

As noted above, Section 3511(b) provides that a district court may grant relief from the nondisclosure requirement if it finds "no reason to believe" that disclosure "may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* § 3511(b)(2), (b)(3). If the Director of the FBI, the Attorney General, the Deputy Attorney General,

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abuse must be dealt with if and when a pattern of unlawful favoritism appears").

or an Assistant Attorney General personally certifies at the time of the NSL recipient's petition that disclosure may endanger national security or interfere with diplomatic relations, the certification "shall be treated as conclusive" by the district court "unless the court finds that the certification was made in bad faith." *Id.*

The district court held that these provisions violate the First Amendment and the separation-of-powers doctrine. SPA-69-96. That holding is incorrect. Section 3511(b)'s standards of judicial review reflect two basic considerations: first, that courts lack the national security expertise needed to second-guess Executive Branch judgments regarding the harm that may result from the disclosure of sensitive national security information, and second, that the need for searching judicial review is greatly diminished when the only information at issue is information that the private party has obtained through participation in confidential government investigatory activities. Far from violating the First Amendment, the standards in Section 3511(b) largely recapitulate standards that the federal courts themselves have developed and applied in similar contexts. And if standards for judicial review of administrative decisions do not run afoul of the First Amendment or some other substantive constitutional limitation, nothing in the separation-of-powers doctrine bars Congress from enacting legislation prescribing such standards, as it has done under the Administrative Procedure Act and countless other federal statutes.

1. The Judicial Review Standards Do Not Violate the First Amendment

Federal courts have traditionally exercised great restraint in reviewing decisions by the government to withhold information in the interest of national security. See, *e.g.*, *Egan*, 484 U.S. at 529; *CIA* v. *Sims*, 471 U.S. 159, 179 (1985); *Center for National Security Studies* v. *Department of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004); *McGehee,* 718 F.2d at 1147-49; *North Jersey Media Group, Inc.* v. *Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003). That deference rests in large measure on the institutional differences between the Executive Branch and the courts in this area. For their part, "the Executive departments responsible for national defense and foreign policy have unique insights into what adverse effects might occur as a result of [disclosure of] a particular classified record." *McGehee*, 718 F.2d at 1148; *Center for Nat'l Security Studies*, 331 F.3d at 927 ("It is abundantly clear that the government's top counterterrorism officials are well suited to make this predictive judgment"). "Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." *Center for Nat'l Security Studies*, 331 F.3d at 928; *United States* v. *Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) ("Things that d[o] not make sense to the District Judge would make all too

much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods."); *cf. Egan*, 488 U.S. at 529 ("It is not reasonably possible for an outside nonexpert body to review the substance" of a judgment regarding the risk that an individual will disclose classified information "and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence"). And the need for deference is particularly acute in cases involving terrorism and counterintelligence investigations. See *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); *Egan*, 484 U.S. at 530 ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs").

Accordingly, in cases implicating national security, particularly cases involving terrorism or other special circumstances, courts have been loath to second-guess the considered judgment of the Executive Branch regarding the potential impact of disclosing secret information. Rather, as the D.C. Circuit explained in the analogous context of FOIA, "[o]nce satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts need go no

further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982); *see also Center for Nat'l Security Studies*, 331 F.3d at 932 ("Inasmuch as the concerns expressed in the Government's declarations seem credible—and inasmuch as the declarations were made by counterterrorism experts with far greater knowledge than this Court—we hold that the disclosure of the names of the detainees could reasonably be expected to interfere with the ongoing investigation"); *North Jersey Media Group*, 308 F.3d at 219 (holding that closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism does not violate the First Amendment, and emphasizing that the court is "quite hesitant to conduct a judicial inquiry into the credibility of th[e government's] security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise"); *cf. Tabbaa* v. *Chertoff*, 509 F.3d 89, 106-107 (2d Cir. 2007) (deferring to Executive Branch's assessment of need for intrusive border searches to detect potential terrorists despite applicability of strict scrutiny under First Amendment).

Some of these decisions, such as *Sims* and *Center for National Security Studies*, involve statutory claims under the Freedom of Information Act rather than

First Amendment claims. But the courts have been equally reluctant to second-guess national security judgments in the First Amendment context as well.

For example, in *McGehee*, the D.C. Circuit acknowledged that a former CIA employee had "a strong first amendment interest in ensuring that CIA censorship of his article result from a proper classification of the censored portions." 718 F.2d at 1148. Notwithstanding the weight of that interest, the court emphasized that "judicial review of CIA classification decisions, by reasonable necessity, cannot second-guess CIA judgments on matters in which the judiciary lacks the requisite expertise." *Id.* at 1149. Similarly, in *Snepp*, the Fourth Circuit warned that "[w]hile the author is entitled to judicial review [of a classification decision], the scope of that review is narrow. Courts must avoid second-guessing the CIA's decision to classify information because they have only a limited knowledge of foreign intelligence matters." 897 F.2d at 141 n.2 . And in *North Jersey Media Group*, the Third Circuit deferred to the Executive Branch's assessment of national security risks in rejecting a First Amendment challenge to closure of special-interest deportation hearings involving detainees with alleged terrorist connections. See 308 F.3d at 219. The insistence on judicial deference in these First Amendment cases is hardly surprising, for concerns about institutional competence do not depend on the source of the underlying legal claim.

The standard of review set forth in Section 3511(b) is consistent with, and largely recapitulates, this established body of precedent. In directing the court to determine whether there is "reason to believe" that disclosure may endanger the national security or cause the other specified harms, the standard of review merely acknowledges the deference due to judgments by the Executive Branch regarding the potential effects of disclosing national security information, especially in the context of authorized investigations to protect against international terrorism or clandestine intelligence activities. *See* 18 U.S.C. § 2709(b); *Gardels*, 689 F.2d at 1104; *Center for Nat'l Security Studies*, 331 F.3d at 932; *North Jersey Media Group*, 308 F.3d at 219. And in giving conclusive effect to certifications that disclosure may endanger national security or interfere with diplomatic relations unless the certifications have been made in bad faith, Section 3511(b) simply recognizes that good-faith disagreement is not a sufficient basis for a court to replace the Executive Branch's assessment of national security and foreign relations with its own.

The district court suggested that the D.C. Circuit's decision in *McGehee* requires "a far more substantive showing" than do the standards of Section 3511(b). SPA-89. That suggestion exaggerates the differences between *McGehee* and this case. In *McGehee*, the D.C. Circuit offered several formulations for the appropriate judicial inquiry: whether the agency has "good reason" to believe that disclosure will

harm national security, whether the agency's reasons are "rational and plausible," and whether there is a "logical connection" between the disclosure and the anticipated harms. 718 F.2d at 1148-49. Taken collectively, these formulations are not materially different from the "reason to believe" standard in Section 3511(b). Indeed, the D.C. Circuit used that very language to explain why the particular classification decision before it was constitutionally permissible: "The CIA affidavits give us *reason to believe* that disclosure * * * could reasonably be expected to cause serious damage to the national security." *Id.* at 1149 (emphasis added).

The district court also suggested that the "no reason to believe" standard requires a court to "blindly credit * * * any conceivable and not patently frivolous reason." SPA-92. That is hardly the most obvious reading of the statutory language, and certainly not the only permissible one. For example, in the Fourth Amendment context, courts have held that "[t]he phrase 'reason to believe' is interchangeable with and conceptually identical to the phrases 'reasonable belief' and 'reasonable grounds for believing.'" *United States* v. *Diaz*, 491 F.3d 1074, 1077 (9th Cir. 2007); *United States* v. *Magluta*, 44 F.3d 1530, 1534 (11th Cir.), *cert. denied*, 516 U.S. 869 (1995). Thus, if First Amendment concerns were thought to require courts to take account of the reasonableness of the government's certification, the "no reason to believe" language in Section 3511(b) does not foreclose such an inquiry. By adopting a

reading of the statutory language that exacerbates its own First Amendment concerns, the district court ignored its responsibility to construe Acts of Congress to avoid, rather than create, serious constitutional issues. See, *e.g.*, *Blake* v. *Carbone*, 489 F.3d 88, 100 (2d Cir. 2007). If the "no reason to believe" standard requires a limiting reading in order to ensure its constitutionality, this Court can and should give it such a reading.[6]

Finally, the district court suggested that even if disclosure *would* create a risk to national security, the First Amendment requires judges to balance that risk against the public interest in disclosure – meaning, evidently, that a court could lift the nondisclosure requirement even if it agreed with the FBI that disclosure may endanger national security. SPA-90-91. But if courts lack the institutional competence to second-guess national security determinations, *a fortiori* they lack the competence to "balance" such incommensurate factors. See *McGehee*, 718 F.2d at 1150 (separate statement of Wald, J.) ("It would of course be extremely difficult for judges to 'balance' the public's right to know against an acknowledged national security risk, and I do not believe we are currently authorized to do so"). Nothing in the First

[6] The same thing is true of the provision that makes certifications regarding national security and diplomatic relations conclusive in the absence of bad faith. If necessary, the statutory language can be read to embody an objective standard of bad faith rather than a subjective one, thereby permitting the courts to incorporate objective reasonableness into the bad-faith inquiry.

Amendment requires courts to undertake such a task, particularly given the diminished First Amendment interests that are present when the information in question has been obtained only through participation in the government's confidential investigatory activities.

This Court's decision in *Kamasinski* is instructive in this regard. In sustaining the constitutionality of the nondisclosure requirement in that case, the Court found it sufficient that premature disclosure of information learned through participation in the investigatory process might lead to serious harms. See 44 F.3d at 110-111. The Court did not undertake to balance those harms against the potential public interest in disclosure, nor did it hold the statute to be unconstitutional for failing to provide for such a balancing inquiry. The same analysis applies *a fortiori* here, where the national security interests at stake are even more weighty and even less amenable to judicial balancing than the governmental interests in *Kamasinski*.

2. The Standards of Judicial Review Do Not Violate the Separation-of-powers Doctrine

In addition to holding that the judicial review standards of Section 3511(b) violate the First Amendment, the district court also held that they violate the separation-of-powers doctrine. That holding is misconceived.

In large part, the court's separation-of-powers reasoning piggybacks on its First Amendment analysis. In particular, the court reasoned that separation-of-powers principles are offended when Congress mandates a standard of judicial review that is inconsistent with the demands of the First Amendment (or other constitutionally compelled standards of judicial review). SPA-74-80. But in those circumstances, the separation-of-powers doctrine is superfluous. If Congress places limits on judicial review that offend the First Amendment, they are unconstitutional under the First Amendment itself; the separation-of-powers doctrine adds nothing to the inquiry. Conversely, if the First Amendment does *not* foreclose a particular standard of judicial review, then the supposed separation-of-powers concerns with mandating an independently unconstitutional standard of review never come into play.

The district court insisted that, even if it is constitutional for a court to defer to Executive Branch judgments about national security in First Amendment cases, Congress may not require courts to employ such deference. SPA-77. But nothing in the separation-of-powers doctrine supports that reasoning. Congress routinely mandates deferential standards for judicial review of Executive Branch decisions. The most well known example is the highly deferential "arbitrary and capricious" standard of review prescribed by the Administrative Procedure Act. See 5 U.S.C. § 706(2); *Karpova* v. *Snow*, 497 F.3d 262, 267 (2d Cir. 2007) ("[t]he scope of review

under the 'arbitrary and capricious' standard is narrow, and courts should not substitute their judgment for that of the agency") (internal quotation marks omitted). Countless other federal statutes specify similarly deferential standards of judicial review. See, *e.g.*, 2 U.S.C. § 1407(d); 7 U.S.C. § 1508(3)(B)(iii)(II); 12 U.S.C. §§ 203(b)(1), 1817(j)(5); 15 U.S.C. § 78*l*(k)(5). No decision has ever suggested that the separation-of-powers doctrine entitles courts to disregard an otherwise constitutional standard of review prescribed by Congress in favor of their own standard of review of agency action. As long as the standard of review is not inconsistent with some substantive constitutional limitation, such as the First Amendment, Congress has plenary authority to decide what standard of judicial review should be employed.

At a more general level, the district court erred in thinking that Section 3511(b) compels the courts to abdicate their institutional responsibilities under Article III. As the D.C. Circuit recently explained in another case involving national security and terrorism:

> In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review, we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the court to second-guess executive judgments made in furtherance of that branch's proper role.

Center for Nat'l Security Studies, 331 F.3d at 932. The same reasoning applies with equal force here.

C. Sections 2709(c) and 3511(b) Provide Greater Procedural Protections than Other Law Enforcement Non-Disclosure Statutes

In assessing the adequacy of the procedures for imposing and lifting the nondisclosure requirement in Section 2709(c), it is important to recognize that Section 2709(c) and Section 3511(b) provide greater procedural protections that those applicable to many other federal statutes restricting disclosure of information about law enforcement investigations. In many instances, disclosures by non-government actors are prohibited automatically and without any special procedural protections at all. See, *e.g.*, 18 U.S.C. § 2511(2)(a)(ii) (Title III interceptions); 18 U.S.C. § 3123(d)(2) (pen registers and trap-and-trace devices); 50 U.S.C. §§ 1842(d) and 1861(d) (FISA pen registers and subpoenas).

For example, when the government executes a pen register order under 18 U.S.C. § 3123, the recipient of the order is prohibited from disclosing the existence of the pen register and the underlying investigation. *Id.* § 3123(d)(2). The imposition of the nondisclosure requirement is not contingent on any determination of need by the Executive Branch, and the district court has a non-discretionary obligation both to issue the pen register order and to make the non-disclosure

requirement a part of the order. See *id.* § 3123(a)(1), 3123(d)(2). Moreover, the nondisclosure requirement remains in effect "unless or until otherwise ordered by the court." *Id.* § 3123(d)(2)

Under the logic of the district court's decision, the pen register statute's nondisclosure provision, and others like it, are categorically unconstitutional. To satisfy the requirements of the First Amendment as understood by the district court, the government would have the burden of initiating a separate lawsuit against the recipient of every recipient of a Title III order or pen register order, subject to strict administrative and judicial time limits and probing judicial review, despite the fact that the phone company or ISP had not indicated any affirmative desire to disclose the information in the first place. The First Amendment does not mandate such a result.[7]

IV. Sections 2709(c) and 3511(b) Are Not Overbroad

A. Sections 2709(c) and 3511(b) Are Not Subject to Narrow Tailoring

In addition to the foregoing issues, the district court identified two other aspects of Section 2709(c) and Section 3511(b) that it regarded as unconstitutional

[7] Contrary to the district court's suggestion, see SPA-30, the fact that Congress prohibited disclosure of the "existence" of the surveillance (Title III) or the "existence" of the investigation (ECPA) does not mean that the nondisclosure requirement lapses as soon as (for example) the Title III surveillance is completed.

under the First Amendment. The first is the fact that the nondisclosure requirement in Section 2709(c) "contains no time limit" – that is, it remains in effect until it is lifted by the FBI or a district court under Section 3511(b). SPA-96. The second is the waiting provision in Section 3511(b)(3), which provides that when a district court denies a petition that is filed more than one year after the issuance of the NSL, the recipient must wait for one year before filing a renewed request for relief from the same NSL. SPA-101-102.

The district court held that these provisions are not tailored narrowly enough to survive strict scrutiny under the First Amendment. As we show presently, the provisions in question are, in fact, narrowly tailored. But as a threshold matter, the district court was wrong to hold that Sections 2709(c) and 3511(b) are subject to the narrow-tailoring requirements associated with conventional strict scrutiny.

The district court offered two reasons for engaging in a narrow-tailoring inquiry. The first was the district court's belief that Section 2709(c) is a prior restraint and hence is presumptively unconstitutional under the First Amendment. As we have already shown, however, that premise is incorrect. For all of the reasons discussed above, Section 2709(c) is "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Rhinehart*, 467 U.S. at 33.

Second, the district court held that Section 2709(c) is subject to strict scrutiny because it is content-based rather than content-neutral. SPA-38-39. But as the Supreme Court has explained, "the principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys*." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 642 (1994) (emphasis added). Here, it is manifest that Congress has not restricted disclosure of information about NSLs because of "disagreement with the message" that an NSL recipient may wish to convey. Congress's object in enacting Section 2709(c) was not to remove issues from the marketplace of ideas, but simply to avoid disclosure of confidential information about particularly sensitive and important national security investigations that could seriously compromise the government's investigatory efforts.

Nothing in this Court's decision in *Kamasinski* requires this Court to subject Section 2709(c) and 3511(b) to rigorous narrow-tailoring review. To be sure, *Kamasinski* stated that Connecticut's statutory restrictions on disclosure of confidential judicial misconduct investigations were content-based and were subject to strict scrutiny on that ground. See 44 F.3d at 109. But having done so, the Court nevertheless went on to hold that the government has greater latitude under the First Amendment when it is restricting "disclosure of information gained through

interaction" with a government investigation than it does when it seeks to restrict disclosure of independently obtained information. *Id.* at 111. Moreover, the Court held that the Connecticut statute was sufficiently tailored despite the fact that it did not provide either for an initial administrative determination of the need for secrecy or a judicial mechanism for a witness to seek relief from the nondisclosure requirement. Thus, even if the present provisions are labeled content-based rather than content-neutral, *Kamasinski* counsels in favor of a less demanding application of strict scrutiny and demonstrates that the present provisions are adequately tailored.[8]

B. In Any Event, Sections 2709(c) and 3511(b) Are Narrowly Tailored

1. The district court was correct that the nondisclosure requirement under Section 2709(c) does not have a fixed time limit. But that does not reflect an absence of tailoring on the part of Congress. Instead, it reflects the reality that the need for nondisclosure does not have an automatic end point. As explained above, counterintelligence and counterterrorism investigations are often long-term undertakings, and even after a particular investigation comes to an end, disclosure of details regarding the government's investigative activities can cause serious harms. A-58-60, A-68-69. For example, disclosures of NSLs can allow foreign intelligence

[8] To the extent that *Kamasinski* may be read to require narrow tailoring in this case, we respectfully submit that it is incorrect.

organizations and terrorist groups to monitor the government's intelligence gathering methods and capabilities and use that knowledge to avoid detection in other investigations. A-66, A-69. Requiring Congress to subject the nondisclosure requirement to automatic termination after the passage of a particular period of time or the occurrence of a particular event would therefore jeopardize the vital national security interests that Section 2709(c) is designed to protect.

The district court seems to have believed that, in the absence of a rigid statutory cutoff for the nondisclosure requirement, NSL recipients who wish to make disclosures will be prevented from doing so even if and after the need for nondisclosure has passed. But the whole point of enacting Section 3511(b) was to provide a ready mechanism for lifting the nondisclosure requirement if it becomes unnecessary. Thus, the recipient of an NSL is free to seek permission to disclose, and a district court is free to grant permission, at any time – even immediately after the NSL is issued, if circumstances so warrant. Moreover, if more than one year has passed since the NSL was issued, the filing of a Section 3511(b) petition obligates the FBI itself to lift the nondisclosure requirement unless the agency makes a new determination that nondisclosure continues to be necessary. Taken together, these provisions ensure that NSL recipients who wish to speak will not be prevented from doing so by stale certifications that have been overtaken by events.

2. The district court's holding regarding the one-year waiting provision in Section 3511(b)(3) faces a threshold jurisdictional obstacle: the plaintiffs lack standing under Article III to challenge that provision.

The plaintiffs lack standing for the simple reason that the provision does not apply to them. The plaintiffs are free to file a petition under Section 3511(b) at any time they wish. If and when they choose to do so, the waiting requirement will not stand in their way, because they have never filed a previous Section 3511(b) petition, much less had it denied. Because the waiting provision does not apply to them, they cannot satisfy the basic Article III requirement that they have suffered or are about to suffer a cognizable injury from the provision they are challenging. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Even if the plaintiffs had standing, there are ample justifications for the waiting period. As noted above, the rule comes into play only when the recipient has challenged an NSL that was issued at least a year beforehand. When a district court finds reason to believe that disclosure still may endanger national security even after a year or more has passed since the issuance of the NSL, the ruling is likely to rest on "non-perishable" concerns that are unlikely to change in the near term. At the same time, allowing the recipient to refile at will places an unwarranted burden on the FBI, which is required by Section 3511(b) to re-evaluate the need for nondisclosure

whenever a petition is filed more than one year after the issuance of the NSL. The one-year waiting period avoids this administrative burden without creating a significant risk that material changes in circumstances will be ignored.

V. The District Court Erred in Enjoining the Government from Enforcing Section 2709

A. Sections 2709(c) and 3511(b) Are Severable

1. For the foregoing reasons, Section 2709(c) is not unconstitutional. But even if it were, that conclusion would not support the district court's decision to enjoin enforcement of Section 2709 in its entirety. Instead, any assumed constitutional infirmity in Section 2709(c) could and should be remedied by severing the nondisclosure requirement from the remainder of the statute.

It is a basic principle of constitutional adjudication that "[a] court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines* v. *Brock*, 480 U.S. 678, 683 (1987); *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *Velazquez* v. *Legal Services Corp.*, 164 F.3d 757, 772 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001). Accordingly, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley*, 424 U.S. at 108. If it is "unclear which alternative better carries out the

intent of Congress," this Court has held that the proper course is "to invalidate the smallest possible portion of the statute * * * ." *Velazquez*, 164 F.3d at 773.

The district court reasoned that, because Section 2709 was intended to operate "as a *secret* means of gathering information from communications service providers," Congress would have regarded an NSL statute without a nondisclosure requirement as worse than no NSL statute at all. [SPA-120.] The district court was correct that Congress regarded secrecy as an important element of the statutory scheme. But to infer that Congress would therefore prefer the FBI to have no NSL authority at all is a *non sequitur*.

In the absence of a statutory nondisclosure requirement, some communication service providers, like Doe, may wish to reveal NSLs to their subscribers or the public. Other providers, however, are likely to be entirely willing to maintain the confidentiality of NSLs at the FBI's request, even if such a request does not have the force of a statutory command behind it. By invalidating Section 2709 in its entirety, the district court has thus forced the FBI to give up the investigatory value of NSLs even in cases where the statutory nondisclosure requirement is unnecessary to ensure confidentiality.

If Section 2709(c) is invalidated but the remainder of Section 2709 is left undisturbed, the FBI can make judgments about the risk of disclosure in particular

cases. The FBI can take account of such factors as the identity of the particular communication service provider, the history of cooperation (or lack of cooperation) between the provider and the FBI in the past, the provider's willingness to make commitments regarding confidentiality, the FBI's assessment of the provider's good faith, and the importance of the particular information being sought. If the FBI reaches a judgment that the risk of disclosure in a particular case is small and that the need for the information justifies taking that risk, it will be able to issue an NSL as provided by Congress. The district court's remedy, in contrast, disables the FBI from using an NSL even when the FBI regards the risk as justifiable.

There is no reason to think that Congress would have desired such a result. Instead, it is far more probable that Congress would have preferred the FBI to have the authority contained in Section 2709 and to exercise that authority when, in the agency's expert judgment, the risk of disclosure is sufficiently small. The district court's severability holding therefore should be rejected.

2. For similar reasons, the "no reason to believe" and bad-faith standards of judicial review in Section 3511(b) can and should be severed, if need be, from the remainder of the judicial review provision. Severing either or both of those standards would preserve the underlying statutory mechanism of judicial review, while leaving the courts free to apply whatever standard of review is deemed to be constitutionally

required. There is no reason to believe that Congress would prefer to have Section 3511(b) struck down in its entirety, leaving NSL recipients with no statutory mechanism whatsoever for seeking relief from nondisclosure, particularly if doing so would cast doubt on the constitutionality of the nondisclosure requirement itself. Thus, the district court's constitutional verdict regarding the judicial review standards in Section 3511(b) does not support an injunction against the operation of Section 3511(b) and Section 2709(c), much less the district court's injunction against the use of Section 2709 as a whole.

B. Any Injunction Should be Confined to the Parties

Assuming *arguendo* that the plaintiffs are entitled to injunctive relief against the operation of the contested statutory provisions, the district court should have confined the injunction to the plaintiffs rather than enjoining the government from using Section 2709 in all cases. Absent class certification, injunctive relief should be limited to the parties before the court. See, *e.g.*, *Virginia Society for Human Life, Inc.* v. *Federal Election Comn'n*, 263 F.3d 379, 392-94 (4th Cir. 2001); *Meinhold* v. *United States Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir.1994); see also *United States Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993). Injunctive relief that is not confined to the parties is particularly inappropriate when it reaches outside the geographical confines of an individual Circuit, for doing so "thwart[s] the

development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). To preserve the government's ability to defend the constitutionality of Section 2709 in other jurisdictions, injunctive relief (if any) in this case should therefore be confined to the present litigants.

CONCLUSION

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

Respectfully submitted,

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February 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2008, I filed and served the foregoing BRIEF FOR THE DEFENDANTS-APPELLANTS by causing ten copies to be sent to the Clerk of the Court by Fedex overnight mail delivery and by causing two copies to be sent in the same manner to:

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