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

REPLY BRIEF FOR THE DEFENDANTS-APPELLANTS

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I. 18 U.S.C. §§ 2709(c) and 3511(b) Are Constitutional

A. Introduction

Before we address the plaintiffs' specific objections to 18 U.S.C. §§ 2709(c) and 3511(b), it is useful to take a step back and reflect on the overall contours of those provisions. Section 2709(c) and 3511(b) embody several basic legislative judgments:

- First, secrecy is often essential to the successful conduct of counterterrorism and counterintelligence investigations, and public disclosure of confidential information about an NSL that is being used in such an investigation may pose serious risks to the investigation itself and to other national security interests.
- Second, the FBI should make a case-by-case determination whether those risks are actually present in a particular case before requiring an NSL recipient to maintain the secrecy of the NSL.
- Third, when the FBI determines that secrecy is necessary, that determination should be subject to judicial review.
- Fourth, if judicial review is sought after enough time has passed to create the possibility that secrecy may no longer be necessary, the FBI should reconsider the risks and determine whether the need for nondisclosure still obtains.

- Fifth, judicial review of the FBI's determinations regarding the need for non-disclosure should be conducted with due regard for the differences in institutional capabilities between the Judicial Branch and the Executive Branch in assessing the national security risks presented by public disclosure regarding particular investigations.

As this overview shows, this is not a case in which Congress has chosen to pursue the demands of national security to the exclusion of constitutional interests in free speech. To the contrary, the legislative judgments underlying Sections 2709(c) and 3511(b) reflect a careful effort on the part of Congress to strike a legitimate balance between the national security and the First Amendment – an effort informed in large measure by the district court's own earlier constitutional rulings in this case.

It is instructive to compare the resulting statutory scheme with the nondisclosure statute that this Court sustained in *Kamasinski* v. *Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994). Unlike Section 2709(c), the statute in *Kamasinski* did not require a case-by-case determination of the need for nondisclosure. Instead, it automatically prohibited disclosures in all cases. Moreover, while the plaintiffs challenge the standards of judicial review in Section 3511(b) (see pp. 5-12 *infra*), the statute in *Kamasinski* did not provide for judicial

review *at all*. In both of these basic respects, Sections 2709(c) and 3511(b) are more protective of First Amendment interests than the law upheld in *Kamasinski*.

There is only one respect in which the nondisclosure requirement in Section 2709(c) is potentially broader than *Kamasinski*: it does not terminate automatically at the completion of the investigation. But Section 2709(c) reflects the legislative judgment that the government's interests in nondisclosure of NSLs usually persist after the completion of counterintelligence and counterterrorism investigations, for reasons that are not present in judicial misconduct investigations. See A-68-69. And as discussed below, Section 3511(b) creates both judicial and administrative mechanisms for lifting the nondisclosure requirement in cases where the interests in nondisclosure have genuinely lapsed.

The plaintiffs argue (Br. 24) that this Court subjected the statute in *Kamasinski* to strict scrutiny, and hence strict scrutiny must be applied to the provisions at issue here as well. In making that argument, the plaintiffs lose sight of the constitutional forest for the trees. For present purposes, the critical point about *Kamasinski* is not the precise standard of constitutional review that it employed, but the fact that the nondisclosure statute there survived that review. For the reasons given above, the provisions at issue here are no more problematic under the First Amendment than the statute sustained in *Kamasinski*. The outcome in *Kamasinski* thus argues powerfully

in favor of sustaining the constitutionality of Sections 2709(c) and 3511(b) in this case.

The plaintiffs point to *Cooper* v. *Dillon*, 403 F.3d 1208 (11th Cir. 2005), as an example of a case in which strict scrutiny *was* fatal to a nondisclosure statute. The statute at issue in *Cooper* prohibited "participant[s] in an internal [police] investigation" from disclosing "any information obtained pursuant to the [police] agency's investigation." 403 F.3d at 1211 n.1. A newspaper reporter who had filed a complaint against a police officer was prosecuted for publishing information about the investigation that the agency voluntarily disclosed to him in response to his complaint. *Id.* at 1212.

The Eleventh Circuit reasoned that "the maintenance of the integrity of an investigative process [does not] constitute[] a sufficiently compelling justification for a content-based restriction on speech * * * ." *Id.* at 1217-18. In that respect, the Eleventh Circuit's reasoning is at odds with this Court's holding in *Kamasinski*, where the Court held that New York had a compelling interest in maintaining the confidentiality of internal investigations of judicial misconduct. *Kamasinski*, 44 F.3d at 110-111. The Eleventh Circuit further held that the government could have preserved the secrecy of the information simply by not disclosing it to the reporter in the first place, and hence had no justification for prohibiting disclosure by the

reporter. 403 F.3d at 1218. That holding has no relevance here, for there is no way that the government can keep the existence and terms of an NSL secret from the communications provider on whom the NSL is being served.

B. The Standards of Judicial Review in Section 3511(b) Are Constitutional

1. In our opening brief, we showed that the standards of judicial review under Section 3511(b) are consistent with the First Amendment. Brief for the Defendants-Appellants ("US Br.") 40-49. As we explained there, the federal courts have consistently given deference to reasoned judgments by the Executive Branch regarding the potential harms to national security that may result from disclosures of classified (and even non-classified) information about counterintelligence and counterterrorism programs. They have done so, moreover, in cases presenting First Amendment claims as well as ones arising under FOIA and other statutes. See, *e.g.*, *North Jersey Media Group, Inc.* v. *Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

In response, the plaintiffs argue that Section 2709(c) is subject to strict scrutiny under the First Amendment (Br. 18-24) and that strict scrutiny forecloses courts from deferring to the FBI's judgments about the potential harms from disclosure of NSLs (Br. 28-38). We have already explained why strict scrutiny is inapplicable here. See US Br. 54-56. But even if Section 2709(c) *is* subject to strict scrutiny, the plaintiffs'

assumption that strict scrutiny precludes judicial deference to executive assessments of national security harms is a *non sequitur*.

Ironically, the clearest demonstration of that point appears in one of the cases on which the plaintiffs themselves rely, *Detroit Free Press* v. *Ashcroft*, 303 F.3d 681 (6th Cir. 2002). In *Detroit Free Press*, the Sixth Circuit held that a rule requiring the closure of all "special interest" deportation proceedings violated the First Amendment. *Contra*, *North Jersey Media Group*, 308 F.3d at 209-220 (sustaining constitutionality of same rule).

As the plaintiffs note, the Sixth Circuit subjected the rule in *Detroit Free Press* to strict scrutiny. See 303 F.3d at 705. But at the same time, the Sixth Circuit also did precisely what courts are called on to do in Section 3511(b), and what the plaintiffs insist is unconstitutional here: it deferred to the Executive Branch's judgments about the potential for public disclosures to harm national security. *Id.* at 707. After reviewing declarations from the Department of Justice explaining the potential harms (*id.* at 705-706), the Court stated: "[W]e defer to their judgment. These agents are certainly in a better position [than the court] to understand the contours of the investigation and the intelligence capabilities of terrorist organizations." *Id.* at 707 (citing *CIA* v. *Sims*, 479 U.S. 159, 180 (1985)). Thus, far from assisting the plaintiffs, *Detroit Free Press* repudiates the assumption at the heart

of their First Amendment claim – the assumption that strict scrutiny precludes judicial deference to Executive Branch judgments about potential harms from disclosure.[1]

The primary rationale for judicial deference in this context is the underlying difference in institutional capacities between the Judicial Branch and the Executive Branch in making judgments about the risks to national security posed by the disclosure of particular confidential information. See US Br. 42-43. As the Sixth Circuit recognized in *Detroit Free Press*, that rationale applies with the same force in First Amendment cases as it does in non-constitutional cases. Indeed, while the plaintiffs argue vigorously against judicial deference under Section 3511(b), nowhere do they suggest that courts are any better situated to make independent assessments of national security risks in First Amendment cases than they have in other contexts.

The plaintiffs suggest that the Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (*per curiam*), forecloses judicial deference under Section 3511(b). It is far from clear that *New York Times* rests on a judicial rejection of the Executive Branch's assessment of national security risks. See, *e.g.*, *id.* at 731

[1] The plaintiffs' argument that Section 3511(b) impermissibly places the burden of persuasion on the NSL recipient rather than the government (Br. 29-30) is misconceived for the same reason. Assuming *arguendo* that the First Amendment places the burden on the government to come forward with a justification for nondisclosure, it does not follow that the court is barred from giving deference to the judgments about national security risks that inform that justification.

(White & Stewart, JJ., concurring) ("I am confident" that "revelation of these documents will do substantial damage to public interests"). But in any event, *New York Times* involved a classic prior restraint on speech. For all of the reasons discussed in our opening brief, Section 2709(c) is not a prior restraint, and certainly not the kind of prior restraint at issue in *New York Times*. Moreover, it was a matter of considerable debate whether Congress had ever prohibited the disclosure at issue in *New York Times*,[2] whereas here, the nondisclosure obligation rests on an explicit legislative judgment, not just an executive one, about the need for secrecy. [3]

2. Section 3511(b) directs courts to determine whether there is "reason to believe" that disclosures may endanger national security, interfere with criminal, counterterrorism, or counterintelligence investigations, interfere with diplomatic relations, or endanger lives and physical safety. As explained in our opening brief, the "reason to believe" standard is consistent with the standards that courts have

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[2] Compare 403 U.S. at 720-22 (Douglas & Black, JJ., concurring) (no statute bars disclosure), with *id.* at 735-40 (White & Stewart, JJ., concurring) (citing "potentially relevant" statutes), and *id.* at 744-45 (Marshall, J., concurring) (same).

[3] The plaintiffs also suggest that judicial deference was rejected in *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986). But that case did not address substantive standards of judicial review under the First Amendment at all. Instead, the Fourth Circuit addressed purely procedural issues regarding the closure of criminal plea hearings, such as the need for the district court to give public notice before closing the hearing and the need for the court to specify its reasons for closure. *Id.* at 391-92.

employed to assess similar risks in other cases, both statutory and constitutional. US Br. 46-48.

The plaintiffs assert that the "reason to believe" standard leaves a district court without the ability to conduct meaningful judicial review. Br. 32. That is incorrect. As we explained in our opening brief, "reason to believe" can be interpreted – and has been interpreted in related contexts – to be "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). Thus, while the "reason to believe" standard in Section 3511(b) unquestionably contemplates a deferential standard of review, in no way does it foreclose a court from evaluating the reasonableness of the FBI's judgments.

The plaintiffs also argue that the "reason to believe" standard is less rigorous than the standards employed by the courts under the Freedom of Information Act. Br. 35. That is likewise incorrect. See, *e.g.*, *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982) ("Once 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"); *Center for National Security Studies* v. *Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) ("in the

FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review").[4]

Contrary to the plaintiffs' suggestion (Br. 29), nothing in *Blount* v. *Rizzi*, 400 U.S. 410 (1970), casts doubt on the permissibility of the "reason to believe" standard. In *Blount*, the Supreme Court held that a court could not authorize the Postal Service to detain mail based on a judicial determination that there was "probable cause" to believe that printed matter was obscene, but rather must determine that the matter was in fact obscene. *Id.* at 420. The obscenity determination in *Blount* did not require an assessment of the likelihood of future harms, much less an assessment of the risk of national security harms that courts lack the institutional expertise to make.

Finally, the plaintiffs object to the separate provision of Section 3511(b) that gives conclusive effect to a good-faith certification that disclosure may endanger national security or interfere with diplomatic relations if – but only if – the certification is made by the Director of the FBI, the Attorney General, the Deputy

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[4] Nothing in Section 3511(b) would require a district court to confine judicial review to the FBI's necessarily unelaborated public statement (A-483) about the need for nondisclosure. The provisions in Section 3511(d) and (e) for *ex parte* and *in camera* review provide a ready mechanism for the FBI to provide a more complete explanation of its reasoning, and the court is free to elicit such an explanation as part of the review process.

Attorney General, or an Assistant Attorney General (meaning, in practice, the Assistant Attorney General for the National Security Division or the Criminal Division). Contrary to the plaintiffs' suggestion, this provision does not make judicial review in such cases "illusory." Br. 30. It simply means that when a court and one of the most senior national security and law enforcement officials in the Department of Justice have a good-faith disagreement about the risks to national security or foreign relations, the official's good faith assessment should prevail. There is nothing constitutionally problematic about that result. Moreover, as noted in our opening brief, the statutory language can be read, if necessary, to entail an objective standard of good faith rather than a subjective one, thereby preserving the ability of the court to determine whether there is an objective basis for the official's judgment.[5] US Br. 48 n.6.

3. In addition to arguing that the standards of judicial review in Section 3511(b) violate the First Amendment, the plaintiffs also argue that those standards violate the separation of powers doctrine "because they foreclose reviewing courts from applying a constitutionally mandated standard of review." Br. 38. Like the

[5] We also pointed out in our opening brief (US Br. 61-62) that if this provision *did* run afoul of the First Amendment, this Court could and should sever the provision from the rest of Section 3511(b), leaving the basic statutory framework for judicial review intact. The plaintiffs have not taken issue with that suggestion.

district court, the plaintiffs are thus advancing a separation of powers claim that is wholly contingent on the validity of their First Amendment claim. As explained in our opening brief, if this Court rejects their First Amendment claim, the separation of powers claim falls with it. US Br. 49-52. The plaintiffs say nothing to alter that conclusion.[6]

C. Section 2709(c) Is Not Unconstitutional Under *Freedman*

1. In its first decision in this case, the district court suggested that Congress could reduce the perceived constitutional problems associated with Section 2709(c) by "requir[ing] the FBI to make at least some determination of need before requiring secrecy * * * ." A-179 (emphasis omitted). Congress duly amended Section 2709(c) to require just the kind of case-specific predicate "determination of need" called for by the district court. Congress's reward for its troubles was to have the district court hold that those case-by-case determinations transform Section 2709(c) into the kind of constitutionally suspect administrative licensing scheme condemned on procedural grounds by the Supreme Court in *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

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[6] In a footnote, the plaintiffs make a cursory suggestion that "requiring reviewing courts to defer to (or treat as conclusive) the executive's determinations that secrecy is necessary" might violate the separation of powers doctrine even if such deference did not offend the First Amendment. Br. 41 n.14. As explained in our opening brief, that suggestion is foreclosed by the universal judicial recognition that Congress may prescribe deferential standards of judicial review of administrative actions. See US Br. 50-51.

In our opening brief, we explained at length why Section 2709(c) is not subject to the procedural requirements established in *Freedman*, and in particular, why it is not subject to the third *Freedman* requirement – the requirement that the government bear the burden of bringing suit to give effect to its administrative determination. What is most striking about the plaintiffs' response is the extent to which they simply fail to take issue with our analysis.

As the plaintiffs themselves note, *Freedman* is driven by the risk that administrative licensing schemes will erroneously suppress speech that should be permitted. The risk that Section 2709(c) will be applied to suppress protected speech is far smaller than the risk presented by the kind of licensing scheme at issue in *Freedman*. See US Br. 32-34. First, all of the motion picture exhibitors who were subject to the licensing requirement in *Freedman* had demonstrated an affirmative desire to speak. Here, in contrast, there is no reason to expect that most NSL recipients will want to reveal information to the public concerning a government counterterrorism or counterintelligence investigation, particularly when doing so means alerting the subjects of the investigation. Second, while most commercial films were unlikely to contain any of the statutory elements (such as obscenity and incitement to crime) that would support a licensing denial in *Freedman*, there is every reason to expect that the statutory criteria for nondisclosure in Section 2709(c), such

as whether disclosure may "interfer[e] with a criminal, counterterrorism, or counterintelligence investigation," will be satisfied in the overwhelming majority of cases. Third, as the district court itself acknowledged (SPA-62-69), the statutory criteria in Section 2709(c) are as objective as possible in light of their subject matter, and so further reduce the risk of administrative error or manipulation.

Given the fundamentally smaller risk that administrative determinations under Section 2709(c) will erroneously foreclose speech by persons who actually wish to speak, there is no reason to require the government to initiate thousands of judicial proceedings every year (and subject service providers to the burden of such litigation) on the off chance that someone, somewhere, might be harboring the unexpressed desire to publicize information about an NSL. Instead, it is perfectly appropriate for Congress to create a mechanism for judicial review that can be invoked by any NSL recipient who does have such a desire.

Apart from a footnoted objection to the national security criterion in Section 2709(c) (Br. 55 n.18), the plaintiffs respond to none of this. They do not dispute that these features of Section 2709(c) make administrative errors far less likely than they are under licensing schemes like the one in *Freedman*. Instead, the plaintiffs assert that "*any* statute that invests executive officers with the power to suppress speech must include procedural safeguards to ensure that the executive's power is not

abused." Br. 52. But Section 2709(c) and 3511(b) do contain procedural safeguards against administrative abuses. Indeed, the district court itself held that Section 2709(c) satisfies the first two of *Freedman*'s three procedural requirements, a holding that the plaintiffs do not dispute. SPA-48-49. The only question is whether Congress must *also* require the FBI to initiate a judicial proceeding every time it serves an NSL in order to give effect to its nondisclosure determinations. For the reasons outlined above, there is no reason for imposing such a burden on the government.

2. The plaintiffs' insistence on treating Section 2709(c) like the licensing scheme in *Freedman* is further undercut by *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1980). See US Br. 24-25, 31-32. *Rhinehart* makes clear that when the information in question was obtained by the would-be speaker only through his compelled participation in a confidential proceeding, "control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." 467 U.S. at 32.

Contrary to the plaintiffs' suggestion (Br. 52), we are not asserting that the *Freedman* analysis "turns entirely" on the fact that the information derives from a government investigation. Our point is simply that the provenance of the information that is subject to Section 2709(c), and the fact that the government is not trying to control the dissemination of independently obtained information, provide significant

additional reasons not to treat Section 2709(c) as a classic prior restraint. That is, after all, precisely the reasoning employed by the Supreme Court in *Rhinehart* itself. See 467 U.S. at 33-34 (nondisclosure order was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny" because it "prevents a party from disseminating only that information obtained through the use of the discovery process").

3. As we pointed out in our opening brief, the FBI's determination that disclosure of information concerning an NSL may cause one or more of the harms identified in Section 2709(c) is similar to a determination that government information should be classified on national security grounds. Courts do not treat the classification process itself as a prior restraint for First Amendment purposes, and even when the government engages in pre-publication review to determine whether a particular writing contains classified information, the courts have not required the government to meet the third *Freedman* requirement. US Br. 35-38; see, *e.g.*, *McGehee* v. *Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983); *United States* v. *Marchetti*, 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

The plaintiffs argue that these decisions are inapposite because they involve government employees who voluntarily signed nondisclosure agreements. But the decisions do not rest on that ground. As the Fourth Circuit explained in *Marchetti*,

the employee "did not surrender his First Amendment right of free speech" by signing the agreement. 466 F.2d at 1317. Instead, "[t]he agreement is enforceable only because it is not a violation of those rights." *Id.* Thus, the decisions cannot be dismissed on the theory that the employees' contractual undertakings relieve the government of its obligations under the First Amendment. See *McGehee*, 718 F.2d at 1148 (expressing view that employee who has signed secrecy agreement retains a "strong first amendment interest in ensuring that CIA censorship of his article results from a proper classification of the censored portions").

It is worth noting in this regard that many federal statutes restrict or prohibit businesses from disclosing information regarding their dealings with their customers and clients. See, *e.g.*, 15 U.S.C. § 6501(b)(1)(A)(ii) (prohibiting operators of child-oriented web sites from disclosing, without parental consent, "personal information" about children using the sites); 42 U.S.C. § 1320d-6(a)(3) (restricting disclosure of "individually identifiable health information" by health care providers and health plans); 47 U.S.C. § 222(a) (subjecting telecommunications carriers to "a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers"); 47 U.S.C. § 551(c)(1) (with specified exceptions, cable company "shall not disclose personally identifiable information concerning any subscriber without the prior written or

electronic consent of the subscriber concerned"); see also *United States* v. *Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1138 & n.11 (9th Cir. 2008) (listing federal privacy statutes). The nondisclosure requirements of such statutes are not predicated on the existence of any contractual commitment to preserve the confidentiality of the information, yet no one would suggest that they therefore are beyond the limits of Congress's authority under the First Amendment.

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

1. The plaintiffs argue that the prohibition against disclosing that the FBI "has sought or obtained access to information or records" under Section 2709 sweeps too broadly because it applies even if particular information relating to the NSL could be disclosed without posing any of the risks identified by Congress in the statute. Br. 41-43. That argument might have greater force if Congress had failed to create a mechanism for modifying the scope of the nondisclosure requirement. But that is precisely what it did when it enacted Section 3511(b). By its terms, Section 3511(b) authorizes a court to issue an order "*modifying* or setting aside a nondisclosure requirement" under Section 2709(c). Thus, if a court does not find reason to believe that disclosure of particular information would cause any of the enumerated harms, it is free to modify the nondisclosure requirement accordingly.

Moreover, the plaintiffs are too cavalier about the extent to which Section 2709(c) restricts the disclosure of "harmless" information. For example, like the district court, they criticize the statute for prohibiting an NSL recipient from disclosing "'that it received an NSL, the identity of the target, [or] the type of information that was requested and/or obtained.'" Br. 42 (quoting SPA-98). But those are precisely the kinds of disclosures that normally can be expected to jeopardize the government's counterintelligence and counterterrorism investigations. As the record in this case shows, foreign intelligence and terrorist organizations closely monitor the counterintelligence and counterterrorism efforts of the United States, and it is invaluable to them to know who is being served with NSLs, who are the targets of the NSLs, and what information about them is being sought. A-60, 63-66. Moreover, even items of information that may seem innocuous when viewed in isolation may be combined with other information to allow terrorists and foreign intelligence organizations to discern the scope, focus, and progress of ongoing investigations. A-60; see *Sims*, 471 U.S. at 178 (in foreign intelligence context, "bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself," and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view

of the scene and may put the questioned item of information in its proper context") (internal quotation marks omitted).[7]

2. The plaintiffs also argue that the nondisclosure requirement is likely to be "overbroad in duration" for two reasons. Br. 43. First, they repeat the district court's objection to the waiting provision in Section 3511(b)(3), which provides that an NSL recipient who brings an unsuccessful challenge to nondisclosure more than one year after the NSL was issued must wait for one year before renewing that challenge. But as we showed in our opening brief, the plaintiffs lack standing to challenge that provision, for the simple reason that it does not apply to them. See US Br. 58. Indeed, it is speculative whether anyone will ever find themselves subject to the one-year waiting requirement. The plaintiffs make no attempt to explain how they have standing in these circumstances.

Even if the plaintiffs had standing to attack this provision, their objections to it are unfounded. When a court rejects a request for disclosure under Section 3511(b), it is obviously legitimate to require the recipient to wait for *some* period

[7] The district court also expressed concern that an NSL recipient could not communicate "its opinion as to whether a particular NSL was properly issued in accordance with the applicable criteria." SPA-98. But whenever a recipient believes that an NSL has been issued improperly, it is free to seek relief from the courts under Section 3511(a). And nothing in Section 2709(c) supports the district court's fear that an NSL recipient "perhaps" would be prohibited from expressing "its opinion about the use of NSLs generally." SPA-98.

before renewing its claim; the First Amendment can hardly obligate the court and the FBI to take up the nondisclosure question again immediately after the initial judicial decision. Congress concluded that, when the reasons for nondisclosure have already been found to remain applicable more than one year after the issuance of the NSL, the additional passage of less than twelve months is unlikely to result in a significant change. That conclusion is a constitutionally permissible one. *Cf. Burson* v. *Freeman*, 504 U.S. 191, 210 (1992) (plurality opinion) (difference between legislature's designated 100-foot "campaign-free zone" around polling places and proposed alternative of 25-foot buffer zone "is a difference only in degree, not a less restrictive alternative in kind").

Second, the plaintiffs argue that the nondisclosure requirement is effectively perpetual because judicial review under Section 3511(b) is "virtually meaningless." Br. 44. For reasons discussed above, the assumption that Section 3511(b) does not permit meaningful judicial review is incorrect. Moreover, the plaintiffs ignore the fact that Section 3511(b) also imposes an independent duty on the FBI to reconsider the need for nondisclosure when a party seeks judicial relief more than one year after

the filing of the NSL. That duty may lead to an *administrative* decision to allow disclosure of the NSL, as the FBI decided to do in the Library Connection litigation.[8]

E. Section 2709(c) Does Not Prevent Informed Public Debate Regarding the FBI's Exercise Of Its NSL Authority

1. A recurring theme of the plaintiffs' brief and those filed by the *amici* is that Section 2709(c) interferes with meaningful public debate about the government's use of its NSL authority under Section 2709. The same objection could be made, of course, about the classification of information on national security grounds. Whenever the government classifies information, it has the unavoidable effect of precluding persons who know the information from sharing it with the public, even if they think that the information would contribute to informed public debate about important government programs. Yet it hardly follows that the classification system is constitutionally suspect. The same is true of Section 2709(c).

Having said that, we should add that the plaintiffs seriously overstate the impact of Section 2709(c) on public debate regarding NSLs. The FBI's use of NSLs has been subject to vigorous and ongoing discussion in Congress and among the

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[8] After determining that it was no longer necessary to pursue enforcement of the NSL in the Library Connection case, the FBI made the further determination that the NSL itself could be disclosed. The NSL has been posted by the ACLU at <http://www.aclu.org/images/nationalsecurityletters/asset_upload_file924_25995.pdf>.

public at large. The ACLU itself has been a forceful advocate for legislative changes to Section 2709 and other NSL statutes. See, *e.g.*, Statement for the Record of Caroline Fredrickson, Director, Washington Legislative Office, American Civil Liberties Union, Submitted to the United States House of Representatives, Permanent Select Committee on Intelligence (March 28, 2007) (available at <http://intelligence.house.gov/Media/PDFS/ACLUSFR032807.pdf>). Section 2709(c) has not prevented the ACLU and other advocates from publicly criticizing the breadth of Section 2709, from publicly describing the kinds of information that can be obtained pursuant to it, and from publicly identifying what the ACLU regards as misuses of the NSL process – as the ACLU has done in this litigation itself. See, *e.g.,* ACLU Analysis and Recommendations: Justice Department OIG Report on Misuse of National Security Letters (March 9, 2007) (available at <http://www.aclu.org/safefree/nationalsecurityletters/28969lgl20070309.html>).

Moreover, Congress itself has engaged in ongoing legislative oversight of the FBI's use of NSLs. See, *e.g.*, 18 U.S.C. § 2709(e) (requiring semi-annual reports to Congress regarding NSL usage); USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, § 118(c), 120 Stat. 192, 218 (2006) (Reauthorization Act) (requiring annual reports on number of requests for information concerning United States persons under Section 2709 and other NSL statutes); United States House of

Representatives, Permanent Select Committee on Intelligence, Hearing on National Security Letters (March 28, 2007) (statements available at <http://intelligence.house.gov/OpenHearings.aspx?Section=2>). As part of that oversight process, Congress directed the Inspector General of the Department of Justice in 2006 to conduct a detailed audit of "the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice." Reauthorization Act, § 119(a)-(b), 120 Stat. 219-20. The Inspector General issued an initial report in 2007 and a follow-up report in 2008.

As the plaintiffs note, the Inspector General's first report in 2007 revealed a number of problems with the FBI's implementation of Section 2709 and other NSL statutes and suggested a wide range of administrative changes to correct those problems. The follow-up report examines in detail the FBI's efforts to correct the errors identified in the 2007 report. It concludes that "the FBI and the Department have made significant progress in implementing the recommendations from that report and in adopting other corrective actions to address serious problems we identified in the use of national security letters." Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*, p. 6 (March 2008). The report finds that the FBI has "devoted significant energy, time, and resources toward ensuring that

its field managers and agents understand the seriousness of the FBI's shortcomings in its use of NSLs and their responsibility for correcting these deficiencies." *Id.* at 6-7. The report further finds that "the FBI's senior leadership is committed to correcting the serious deficiencies in the FBI's use of NSLs identified in our first report," and "[t]hey have attempted to reinforce throughout all levels of the FBI the necessity of adhering to the rules governing the use of NSL authorities." *Id.*; see *id.* at 13-74 (discussing corrective measures in detail).[9]

What matters for present purposes is not the specific findings in these reports, but rather the extent to which they illuminate the NSL process as a whole. Both reports provide Congress and the public with extensive information about the scope and operation of Section 2709 and other NSL authorities, while at the same time avoiding public disclosure of case-specific information that could compromise the government's counterintelligence and counterterrorism efforts. As these reports show, the existence of Section 2709(c) has in no way kept Congress or the public from being fully apprised about the FBI's exercise of its authority under Section 2709.

[9] Unclassified versions of both reports are available at <http://www.usdoj.gov/oig/reports/FBI/index.htm>.

2. In a related vein, the plaintiffs allege that the application of Section 2709(c) in this case itself has impaired their ability to participate in public debate over the Patriot Act and the use of NSLs under Section 2709. Br. 21-22. Even taken at face value, those allegations would be relevant, if at all, only to the constitutionality of Section 2709(c) as applied to this case, not to the constitutionality of the statute on its face. But in any event, the allegations are seriously overstated.

For example, the ACLU suggests that Section 2709(c) has prevented it from telling the public about the breadth of information that can be sought under Section 2709. Br. 21. But the reach of Section 2709 is a legal question, not a factual one, and nothing prevents the ACLU from presenting its views about how broadly the statute reaches. Indeed, the ACLU has done so, quite publicly, in this litigation itself.[10]

The ACLU also asserts that Section 2709(c) has prevented it from telling the public about "the FBI's dubious use of the NSL statute in this case." Br. 21. We invite the Court to examine the NSL itself and, if the Court wishes, the classified declaration that explains the investigatory context in which the NSL was issued (see

[10] For example, the plaintiffs' brief in the first appeal in this case argued at length that Section 2709 "affords the FBI access to a vast array of sensitive records, including records that relate to First Amendment activity," and provided numerous examples of such records. Brief for Plaintiffs-Appellees, No. 05-0570-cv, pp. 2-3, 40-42.

US Br. 9 n.1). That review will show that there is nothing "dubious," much less improper, about the NSL.

Finally, the plaintiffs complain that a variety of matters were unjustifiably redacted from their district court filings. Br. 22. But when the plaintiffs objected to those redactions, the district court allowed the plaintiffs to make the redacted matters public. The district court did so precisely because it determined that Section 2709(c) did *not* require the redactions. Thus, the redactions do nothing to support the plaintiffs' constitutional objections to Section 2709(c) itself.

II. The Challenged Statutory Provisions Are Severable

In our opening brief, we showed that the district court erred in holding that Section 2709(c) and 3511(b) are not severable from the remainder of Section 2709. US Br. 59-62. The plaintiffs have only two responses, neither of which has any merit.

First, the plaintiffs repeat the district court's observation that maintaining the secrecy of NSLs was important to Congress. That is unquestionably true. But for reasons we have already discussed, it does not follow that Congress would have preferred to deprive the FBI of the ability to use NSLs altogether if nondisclosure could not be mandated by statute. Instead, there is every reason to think that Congress would have wished to leave the FBI with the power to issue NSLs when the

FBI determines that the recipient can be relied on to maintain the confidentiality of the NSL on a voluntary basis. See US Br. 60-61.[11]

Second, the plaintiffs suggest that severing Section 2709(c) is not a cure for their First Amendment grievance because a *request* by the FBI for an NSL recipient to maintain the confidentiality of the NSL is constitutionally indistinguishable from a statutory *command* forbidding disclosure. Br. 57. But the case on which they rely for that remarkable proposition, *In re Grand Jury Proceedings*, 814 F.2d 61 (1st Cir. 1987) (*Fernandez Diamante*), says nothing of the sort. In that case, a federal grand jury subpoena was accompanied by a letter telling the recipient that "*[y]ou are not to disclose* the existence of this subpoena or the fact of your compliance" for ninety days. *Id.* at 63-64 (emphasis added). The letter went on to describe the consequences of disclosure "in terms substantially identical to those used to describe a very serious federal crime." *Id.* at 70. Unsurprisingly, the First Circuit concluded that the letter

[11] The plaintiffs suggest that, without the nondisclosure requirement in Section 2709(c), NSLs are "to a large extent duplicative" of grand jury subpoenas. That is incorrect. There are significant statutory restrictions on the kinds of customer information that the government may seek from an electronic communication service provider through a grand jury subpoena. See 18 U.S.C. § 2703(c)(2). Moreover, the government can use a grand jury subpoena only when it is investigating criminal activity. Although counterintelligence investigations often involve criminal acts, they also extend to other activities of foreign powers and their agents that are not necessarily criminal. *Cf.* 50 U.S.C. § 1801(e)(1)(C), 1801(e)(2)(A)-(B) (definition of "foreign intelligence information" under Foreign Intelligence Surveillance Act).

went beyond merely requesting confidentiality by conveying the impression that the recipient was under a legal obligation not to make the disclosure. *Id.* It hardly follows that a simple request for confidentiality, as distinct from the combination of command and threat in *Fernandez Diamante*, is constitutionally equivalent to the statutory obligation in Section 2709(c). There is no reason to assume that the FBI would resort to the kind of *de facto* command involved in *Fernandez Diamante*, and refusal to sever Section 2709(c) can hardly be predicated on such an assumption.[12]

We also showed that if the standards of judicial review in Section 3511(b) are found to be unconstitutional in whole or in part, they can and should be severed from the remainder of Section 3511(b), allowing judicial review to go forward under whatever standards may be deemed to be constitutionally required. US Br. 61-62. The plaintiffs have not taken issue with this suggestion.

[12] The plaintiffs also suggest in passing that the FBI needs "authority" from Congress to ask NSL recipients not to disclose NSLs. The plaintiffs offer no support for that novel proposition, and none exists.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,867 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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April 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2008, I filed and served the foregoing REPLY 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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