

SPEAK NO EVIL: NATIONAL SECURITY LETTERS, GAG ORDERS, AND THE FIRST AMENDMENT

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I. INTRODUCTION

Imagine for a moment that you are the owner of a small start-up. Your company provides multiple online services to its subscribers: a blogging interface, an email platform, and a file-sharing site. As an activist and a digital entrepreneur, you nurture a powerful belief in the democratizing potential of the Internet, and you dedicate much of your free time to campaigning for such causes as net neutrality and consumer data protection. One day, unexpectedly, you receive a letter from the FBI. Under the auspices of the USA Freedom Act, the letter requires you to disclose certain information about one of your subscribers immediately.¹

There is no search warrant. No court has seen or approved the contents of this letter. It is, however, a legal demand. And it comes with an additional mandate: a nondisclosure order, prohibiting you from notifying the FBI's target and from ever revealing—to anyone—that the government has contacted you for information at all. The receipt of this letter marks your induction into the controversial world of national security letters, and until a federal court contradicts the FBI's insistence on your silence, you may not reveal the details of your situation to anyone but a lawyer.

This scenario plays out on a regular basis. An increasingly ubiquitous weapon in the FBI's investigative arsenal, the national security letter (NSL) is unique among the federal government's myriad search powers. Most akin to administrative subpoenas, NSLs permit the FBI to efficiently compel the release of individual consumer data from third-party institutions, such as banks, telephone companies, and Internet service providers (ISPs).² They are, quite literally, letters: sent directly from the FBI to the recipient, demanding access to information that the FBI certifies is relevant to an ongoing national

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1. See Hannah Bloch-Wehba, *Process Without Procedure: National Security Letters and First Amendment Rights*, 49 SUFFOLK UNIV. L. REV. 367 (2016) (identifying such information as pertaining to telephone calls, texts, emails, instant messaging services, and more).

2. See William Bendix & Paul J. Quirk, *Deliberating Surveillance Policy: Congress, the FBI, and the Abuse of National Security Letters*, 28 J. POL'Y HIST. 447, 448 (2016).

security investigation.³ The vast majority of the time,⁴ they are accompanied by a nondisclosure order prohibiting the recipient from communicating anything about the letter—including the bare fact of its existence—to “any person.”⁵ And, as in the hypothetical described above, both the NSL and the accompanying gag order are issued without any judicial oversight.⁶

In First Amendment jurisprudence, censorship that prohibits speech *in advance* of its occurrence—as opposed to regulating it by instituting a *post hoc* penalty—is known as a prior restraint.⁷ Critics have convincingly argued, both in and out of court, that NSL nondisclosure orders constitute such prior restraints because they unilaterally prohibit certain communication before it takes place. Such restraints receive a “heavy presumption” of invalidity when examined by the courts,⁸ and NSL nondisclosure orders have come under heavy judicial fire as a result.⁹ The USA Freedom Act of 2015 was intended to remedy the constitutional deficiencies of past NSL regimes. However, while undoubtedly an improvement on prior statutes, the Act has not done enough to fully guarantee the safeguards that are required for any system of prior restraints to pass constitutional muster.

The Ninth Circuit, however, believes that the Freedom Act is constitutionally sufficient. In July of 2017, the court evaluated a First Amendment challenge to the NSL provision that applies to ISPs—§ 2709¹⁰—and upheld its constitutionality.¹¹ In doing so, the court made two crucial

3. *See id.* at 451 (explaining that “FBI officials simply issue a letter ordering a business to surrender a customer’s or client’s information”); *see also* 18 U.S.C. § 2709(b)(1) (2012) (requiring the FBI to certify that the targeted information is “relevant to an authorized investigation”).

4. *See infra* note 46 and accompanying text.

5. 18 U.S.C. § 2709(c) (2012).

6. *See id.* (permitting the FBI to issue nondisclosure orders subject only to internal certification that disclosure may cause one of four enumerated harms).

7. *See, e.g.*, *Alexander v. United States*, 509 U.S. 544, 550 (1993) (explaining that prior restraints “forbid[] certain communications when issued in advance of the time that such communications are to occur”); *Near v. Minnesota*, 283 U.S. 697, 713–14 (1931) (defining prior restraints as any “previous restraint upon publication,” rather than a later penalty).

8. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (noting that any prior restraint comes before the Court “bearing a heavy presumption against its constitutional validity”).

9. The following Part lays out the political and legal evolution of the NSL authority and includes a discussion of the district court cases that sharply criticized its restrictive impact on speech in the wake of 9/11. *See infra* Section II.D.

10. Section 2709 delineates the FBI’s NSL authority with respect to wire and electronic communications providers, such as telephone companies and ISPs. *See* 18 U.S.C. § 2709 (2012).

11. *See In re Nat’l Sec. Letter*, 863 F.3d 1110, 1131 (9th Cir. 2017) (“[A]ssuming the

assertions. The first was an expression of serious doubt as to whether the FBI's gag orders constituted prior restraints at all.¹² The second was that the law's procedural safeguards were constitutionally sufficient regardless of whether prior restraint doctrine applied, making a final determination on the matter unnecessary.¹³ In this Note, I contend that the court erred on both fronts, having strayed both from precedent and from sound First Amendment policy.

First, I argue that the NSL nondisclosure orders are prior restraints,¹⁴ and that the Ninth Circuit's doubt on that point rested on faulty premises that have serious implications for the First Amendment's continued vitality. Second, I argue that the procedural safeguards implemented by the 2015 USA Freedom Act are insufficient to render NSL nondisclosure orders constitutionally permissible. While a marked improvement over the previous statute, the current framework nonetheless fails to meet the exacting standard required by the Supreme Court's prior restraint jurisprudence.¹⁵

This Note proceeds in three parts. Part II explains the relevant First Amendment caselaw and lays out the legal history of the NSL authority, examining the decades-long dialogue between Congress, the FBI, and the federal courts as they have considered the constitutionality of NSL nondisclosure orders. Part III delves into the Ninth Circuit's recent decision in *In re National Security Letter* to illustrate the court's route to its problematic

nondisclosure requirement is the type of prior restraint for which the *Freedman* procedural safeguards are required, the NSL law provides those safeguards. The nondisclosure requirement in the NSL law therefore does not run afoul of the First Amendment.”); *see also* *Freedman v. Maryland*, 380 U.S. 51 (1965). The Ninth Circuit's decision marks the first time that a federal appellate court has reviewed the constitutionality of the USA Freedom Act.

12. *See id.* at 1129 (“[T]he NSL law is more similar to governmental confidentiality requirements that have been upheld by the courts.”).

13. *See id.* (“We need not, however, resolve the question whether the NSL law *must* provide procedural safeguards, because the 2015 NSL law in fact provides all of them.”).

14. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) (explaining that prior restraints “forbid[] certain communications when issued in advance of the time that such communications are to occur”).

15. The Supreme Court has held that prior restraints can only pass constitutional muster if they incorporate three procedural safeguards. First, the initial restraint must be imposed only for a brief, specified period. Second, the censored speaker must be guaranteed expeditious judicial review. Third, the government must bear the burden of petitioning for said review and must also bear the burden of proving the necessity of the restraint before the court. *See Freedman v. Maryland*, 380 U.S. 58–59 (1965); *see also In re Nat'l Sec. Letter*, 863 F.3d at 1129–30 (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002)) (“First, *Freedman* requires that ‘any restraint prior to judicial review can be imposed only for a specified brief period Second, *Freedman* requires that ‘expeditious judicial review’ must be available Finally, *Freedman* requires that the government ‘bear the burden of going to court to suppress the speech’ and ‘the burden of proof once in court.’”).

ruling. Finally, Part IV argues that the current iteration of the NSL law authorizes prior restraints and fails to provide the safeguards that would render such restraints constitutionally permissible. Part V concludes.

II. LEGAL BACKGROUND

This Part provides the background necessary to situate the Ninth Circuit's recent decision within the complex legal and historical context of both First Amendment law and NSLs. First, I briefly explain First Amendment jurisprudence on prior restraints, illustrating the constitutional framework against which the validity of NSL nondisclosure orders has been evaluated. Next, I describe the evolution of the FBI's NSL authority, tracking its development from a rarely used and severely limited exception to a modern staple of the investigative process. In the process, I identify and explain the cases that have characterized the First Amendment debate over NSL nondisclosure orders.

A. PRIOR RESTRAINT DOCTRINE

Prior restraints are a form of censorship that is traditionally anathema to the First Amendment. As described throughout this Note, they are restrictions that “*forbid*] certain communications when issued in advance of the time that such communications are to occur,” suffocating speech before it can ever reach its audience.¹⁶ While such restraints are “not unconstitutional per se,”¹⁷ they come before the courts “bearing a heavy presumption against [their] constitutional validity”¹⁸ due to “a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”¹⁹ This principle requires a greater presumption and “broader” degree of protection against prior restraints than other, *post hoc* censorship schemes.²⁰ To this end, the Supreme Court has commanded that prior restraints be targeted to accomplish only constitutionally permitted, “pin-pointed objective[s],” for which they must be “tailored as precisely as possible.”²¹ In other words, the Supreme Court's First Amendment jurisprudence demands that the federal courts examine prior restraints with the strictest form of scrutiny, and assume from the outset that they are most likely unconstitutional. Consequently, the Ninth

16. *Alexander*, 509 U.S. at 550.

17. *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

18. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

19. *Conrad*, 420 U.S. at 559.

20. *Id.*

21. *Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 183–84 (1968).

Circuit itself has repeatedly described the evaluation of prior restraints as “extraordinarily exacting.”²²

To pass constitutional muster, a system of prior restraints must not only survive exacting scrutiny but must also fully conform to three procedural safeguards delineated by the Supreme Court’s decision in *Freedman v. Maryland*.²³ First, the initial imposition of the restraint must be limited to a specified, brief period, by the end of which the censor must lift the prohibition or bring it before a court.²⁴ Second, the restrained speaker must be guaranteed expeditious judicial review.²⁵ And third, the burden of seeking that review, and of proving the necessity of the restraint, must be borne by the government.²⁶ In sum, a constitutional prior restraint would involve a brief, temporary nondisclosure order issued to maintain the status quo while the government seeks judicial review; without an expeditious judicial ruling in favor of its necessity under a standard of strict scrutiny, the restraint would then expire. This is because “only a procedure requiring a judicial determination suffices to impose a valid final restraint.”²⁷ The Court also emphasized this principle in *Bantam Books*, stating that it would “tolerate[] such a system [of prior restraints] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.”²⁸

In the Pentagon Papers case, the Supreme Court addressed the question of whether prior restraints could operate constitutionally in a context that pitted compelling national security interests against free speech.²⁹ In that case,

22. *CBS v. Dist. Court*, 729 F.2d 1174, 1178 (9th Cir. 1984); *see also* *Hunt v. NBC*, 872 F.2d 289, 295 (9th Cir. 1989).

23. 380 U.S. 51 (1965).

24. *See id.* at 58–59 (“To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.”); *see also In re Nat’l Sec. Letter*, 863 F.3d 1110, 1129 (9th Cir. 2017) (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002)) (“First, *Freedman* requires that ‘any restraint prior to judicial review can be imposed only for a specified brief period.’”).

25. *Freedman*, 380 U.S. at 59 (“[T]he procedure must also assure a prompt final judicial decision.”); *see also In re Nat’l Sec. Letter*, 863 F.3d at 1130 (quoting *Thomas*, 534 U.S. at 321) (“Second, *Freedman* requires that ‘expeditious judicial review’ must be available.”).

26. *See Freedman*, 380 U.S. at 59 (“[T]he censor will . . . go to court.”); *see also In re Nat’l Sec. Letter*, 863 F.3d at 1130 (quoting *Thomas*, 534 U.S. at 321) (“Finally, *Freedman* requires that the government ‘bear the burden of going to court to suppress the speech’ and ‘the burden of proof once in court.’”).

27. *Freedman*, 380 U.S. at 58.

28. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

29. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

the government sought an injunction to prevent the New York Times and the Washington Post from publishing classified documents about the Vietnam War.³⁰ The Court ruled that the government had not met the “heavy burden” required to justify “the imposition of [a prior] restraint.”³¹ Justice Black, in his concurrence, explained that the First Amendment’s “emphatic command” prohibited the government from restricting speech “in the name of ‘national security,’” a term that he described as a “broad, vague generality.”³² Similarly, Justice Douglas noted that, while “these disclosures may have a serious impact,” the risk was “no basis for sanctioning a previous restraint on the press.”³³ He, Justice Stewart, and Justice White all further extolled the critical importance of an informed public to a functioning democracy. They unequivocally stated that permitting the government to impose a prior restraint on information of public importance would be unacceptable, even weighed against the indisputable interest of maintaining the nation’s wartime security.³⁴

As discussed below, NSL nondisclosure orders restrict speech in advance of the act of speaking but do not guarantee the safeguards that the First Amendment requires under *Freedman*. This makes them unconstitutional prior restraints, despite their national security purpose. Further, because § 2709 does not conform to *Freedman*’s requirements, it also does not satisfy the Supreme Court’s mandate that prior restraints be “tailored as precisely as possible.” Therefore, applying strict scrutiny, the Ninth Circuit should have found the law unconstitutional.³⁵

B. NATIONAL SECURITY LETTERS: AN INTRODUCTION

Today, NSLs are an established feature of the FBI’s investigative machinery and are authorized by a variety of statutory provisions.³⁶ As a general rule, they permit the government to compel the release of private, individual consumer information from various third-party institutions without a warrant or any other form of judicial order.³⁷ However, their specifics vary

30. *See id.*

31. *Id.* at 714.

32. *Id.* at 719.

33. *Id.* at 722–23.

34. *See id.* at 719–20.

35. *Carroll v. Comm’rs of Princess Anne*, 393 U.S. 175, 183–84 (1968).

36. The Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5)(A) (2012), the Fair Credit Reporting Act, 15 U.S.C. § 1681u(a) (2012), and the Electronic Communications Privacy Act, 18 U.S.C. § 2709 (2012), all separately authorize NSLs.

37. *See, e.g.*, 18 U.S.C. § 2709 (2012); 50 U.S.C. § 3162 (2012) (authorizing the FBI to issue NSLs to financial agencies, financial institutions, consumer reporting agencies, etc.); 12 U.S.C. § 3414 (2012) (authorizing NSLs for financial records relevant to “certain intelligence and protective purposes”); 15 U.S.C. §§ 1681(u), (v) (2012) (authorizing NSLs for consumer

slightly depending on the nature of the targeted information.

The particular NSL provision at issue here—a feature of the Electronic Communications Privacy Act (ECPA), known as § 2709—applies specifically to wire and electronic communication service providers, such as telephone companies and ISPs.³⁸ It requires such companies to respond to NSLs with relevant subscriber information, toll billing records information, or electronic communication transactional records.³⁹ These records may include a broad swath of information related to telephone calls, texts, emails, and instant messaging services, such as Facebook messenger.⁴⁰

To issue an NSL, the Director of the FBI or a designee must certify that the targeted information is “relevant” to an “authorized investigation to protect against international terrorism or clandestine intelligence activities.”⁴¹ Certification is entirely internal, and is not subject to judicial oversight or review.⁴²

Similarly, the FBI may—on proper certification—issue a nondisclosure order prohibiting the NSL recipient from speaking about or even revealing the mere fact of the investigation.⁴³ Such an order restrains the recipient from communicating anything about the NSL to “any person” other than an attorney, an FBI-approved exception, or anyone who must be informed to effectively comply with the demand for records.⁴⁴ The certification required to authorize these orders is relatively straightforward. The Director of the FBI or a designee must certify that disclosure “may result” in one of four broad, enumerable harms: (1) “danger to the national security of the United States;” (2) “interference with a criminal, counterterrorism, or counterintelligence investigation;” (3) “interference with diplomatic relations;” or (4) “danger to the life or physical safety of any person.”⁴⁵ The FBI issues these certifications liberally. “[B]y the government’s own estimate,” ninety-seven percent of NSLs come with a gag order.⁴⁶

Like the certification required for NSL issuance, certification for an

reporting agencies).

38. See 18 U.S.C. § 2709 (2012).

39. See 18 U.S.C. § 2709(a) (2012).

40. See Bloch-Wehba, *supra* note 1.

41. 18 U.S.C. § 2709(b) (2012).

42. See 18 U.S.C. § 2709 (2012).

43. See 18 U.S.C. § 2709(c)(1)(A) (2012).

44. 18 U.S.C. § 2709(c)(2)(A) (2012).

45. 18 U.S.C. § 2709(c)(1)(B) (2012).

46. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1074 (N.D. Cal. 2013).

accompanying gag order occurs internally, independent of the courts.⁴⁷ Thus, the FBI is at liberty both to compel the release of customer records and to order complete silence on the subject, all without any prior judicial approval. This is remarkable. In other contexts involving the release of customer records, the courts—not the government—make the tricky constitutional determination as to whether the given investigative circumstances warrant a gag order.⁴⁸ But under the NSL law, a judge only sees nondisclosure orders after they have been issued, and then only if the recipient petitions for judicial review.⁴⁹ Otherwise, the gag's necessity will only ever be examined internally, by FBI review procedures that require nondisclosure orders to be revisited twice: once three years after their issuance, and again at the close of the relevant investigation.⁵⁰ It is, therefore, entirely possible for the FBI to issue a nondisclosure order, re-certify its necessity at the required intervals, and then leave it in place forever, without once being required to submit the matter to a judge.⁵¹

Under the auspices of § 2709's companion provision, § 3511, the subject of an NSL gag may bring the issue before a court via a process known as "reciprocal notice."⁵² This means that the subject may notify the FBI that it would like judicial review, and, in response, the FBI must initiate court proceedings within thirty days.⁵³ The statute then requires the reviewing court

47. See 18 U.S.C. § 2709 (2012).

48. See Bloch-Wehba, *supra* note 1 at 397 (this "confluence of administrative subpoena authority and administrative gag authority is found only in the NSL context When the government seeks a nondisclosure order under the SCA, the government is not empowered to determine itself whether it also met the requisite standard justifying nondisclosure; that inquiry resides with the court Even in the context of FISA applications, in which the FISC enters an ex parte order approving an application with a nondisclosure order as a matter of law, judicial order compels nondisclosure, not executive fiat").

49. See *id.* ("[T]he NSL provision only permits a court to conduct such an inquiry under the limited circumstances in which a recipient has filed a petition for review.").

50. FED. BUREAU OF INVESTIGATION, TERMINATION PROCEDURES FOR NATIONAL SECURITY LETTER NONDISCLOSURE REQUIREMENT (2015) [hereinafter FBI TERMINATION PROCEDURES].

51. As this Note will argue in greater detail in Part IV, such a possibility is one that First Amendment jurisprudence has, historically, been careful to guard against; courts have long recognized the dangers inherent to any system in which the government can preemptively and unilaterally prohibit speech without the guarantee of judicial oversight. Yet, here, the Ninth Circuit has authorized such a system.

52. See Bloch-Wehba, *supra* note 1, at 375 (explaining the Second Circuit's decision to construe the 2006 iteration of the NSL statute as providing for judicial review via "reciprocal notice").

53. 18 U.S.C. § 3511(b)(1) (2012).

to “rule expeditiously” on the matter.⁵⁴ However, it also mandates that the court should uphold the gag order if it finds “reason to believe” that disclosure “may result” in one of the four harms enumerated above.⁵⁵ The combined result of these strictures is that NSL nondisclosure orders are substantially shielded from judicial scrutiny: the courts are absent at their issuance and constrained by a remarkable degree of statutorily stipulated deference in the uncertain event of later review.⁵⁶

The NSL authority has undergone numerous reinventions in an evolution fueled by an ongoing dialogue between the FBI, the legislature, and the courts. To understand the Ninth Circuit’s recent decision on the modern NSL statute, it is, therefore, necessary to understand NSLs within the context of their initial, restricted scope and their subsequent development into a ubiquitous, far-reaching, and opaque investigative tool.

C. THE PRE-PATRIOT ACT ERA: 1978–2001

The FBI’s NSL authority was born in 1978. Originally introduced as a narrow exception to the sweeping data protections implemented by that year’s Right to Financial Privacy Act (RFPA), the FBI’s NSL authority was intended to serve as a limited alternative to new provisions requiring law enforcement to seek some manner of formal judicial order before demanding individual financial records.⁵⁷ During this initial period, NSLs were a means for the FBI to respond to the pressing needs of “foreign intelligence, Secret Service protective functions and emergency situations” without waiting on the slow-moving machinery of the courts.⁵⁸ In contrast to today, NSLs at this time were explicitly *not* meant to be issued in conjunction with investigations “proceeding only under the rubric of ‘national security.’”⁵⁹ Most notably, all letters were

54. 18 U.S.C. § 3511(b)(1)(c) (2012).

55. 18 U.S.C. § 3511(b)(3) (2012).

56. As Part IV will elaborate, well-established precedent holds that restrictions on speech of this sort—prior restraints—are subject to the most exacting degree of judicial scrutiny. *See infra* Section IV.B. The deference the Freedom Act affords to the FBI’s judgment therefore does not accord with legal precedent; indeed, it attempts to subvert the “heavy presumption of invalidity” that traditionally accompanies prior restraints.

57. The RFPA introduced reforms requiring law enforcement to receive either a search warrant or some other formal, written judicial order prior to seizing an individual’s financial records. These measures gave the target of the investigation notice and the opportunity to challenge the order or warrant in court. *See* Andrew E. Nieland, *National Security Letters and the Amended Patriot Act*, 92 CORNELL L. REV. 1201, 1208 (2007).

58. *Id.*

59. *Id.* (“The drafters intended that requests under this Section would be used sparingly, and explicitly warned that ‘investigations proceeding only under the rubric of “national security” do not qualify’ for the exception.”).

framed as requests rather than demands; recipients responded voluntarily, or not at all.⁶⁰

This formulation soon caused problems for the FBI.⁶¹ Many state privacy statutes prohibited the sort of voluntary disclosures that NSLs encouraged, and, as a result, few companies were willing to comply with the government's requests.⁶² So the FBI turned to Congress for assistance,⁶³ beginning the slow expansion of the NSL apparatus that would characterize the next several decades.

In 1986, Congress passed the Electronic Communications Privacy Act (ECPA).⁶⁴ Like the RFPA, ECPA's primary purpose was to shore up safeguards for individual privacy; however, again like the RFPA, it contained an NSL exception.⁶⁵ This exception, granted as a partial response to the FBI's lobbying efforts, established NSL authority regarding wire and electronic communication service providers and also codified nondisclosure orders.⁶⁶ While ECPA did not cement NSLs as compulsory processes on the same footing as subpoenas, it did insulate them from the restrictive effects of state privacy laws.⁶⁷ Suddenly, NSLs were a tool that could achieve tangible results.

ECPA's NSL provision was the precursor to the modern law at issue in the Ninth Circuit's decision in *In re National Security Letter*. And while it represented a substantial victory for the FBI, legitimizing and enhancing NSLs as an investigative tool, it also imposed relatively stringent certification standards. These included a requirement that the Director of the FBI or his designee certify "specific and articulable facts" indicating that the individual to whom the targeted records pertained was a "foreign power or an agent of a foreign power."⁶⁸ However, over the next several decades, this requirement

60. *See id.* at 1208 (explaining that disclosures in response to NSLs were "not mandatory"); *see also* Bendix, *supra* note 2, at 452.

61. *See* Nieland, *supra* note 57, at 1208–09.

62. *See, e.g., id.* at 1209 ("[M]any states enacted privacy laws prohibiting such voluntary disclosures."); Bendix, *supra* note 2, at 452; Brian D. Eyink, *Constitutional Secrecy: Aligning National Security Letter Nondisclosure Provisions with First Amendment Rights*, 58 DUKE. L.J. 473, 479 (2008).

63. *See* Nieland, *supra* note 57, at 1209.

64. *See id.*

65. *See id.*; Bendix, *supra* note 2, at 452.

66. *See* Nieland, *supra* note 57, at 1209.

67. *See id.* at 1210 (explaining that "the drafters did not include any mechanism for enforcing compliance," thereby making NSLs less powerful than subpoenas, but "perfectly sufficient in situations where state privacy legislation presented the only barrier to compliance").

68. Electronic Communication Privacy Act of 1986, Pub. L. No. 99-508 § 201, 100 Stat. 1848, 1867 (1986).

would be significantly relaxed. Today, the FBI must only certify to a target's "relevance" to an ongoing investigation to issue an NSL⁶⁹—a notable departure from the particularity required by the original standard.

For almost twenty years after ECPA's passage, Congress straddled a fine line on NSLs. Faced with calls from the FBI to expand the scope of ECPA's NSL provision but reluctant to nudge NSLs firmly into the realm of administrative subpoenas, the legislature hedged. In 1993, it adjusted the certification requirements to allow the FBI to compel production of records on any target who was allegedly *communicating* with a foreign power about terrorism or other clandestine intelligence operations, rather than requiring the target to *himself* be a foreign power.⁷⁰ Notably, however, in the process of amending this language, the House Judiciary Committee remarked that NSLs were "extraordinary device[s]" whose power should be only sparingly expanded, given that they were "[e]xempt from the judicial scrutiny normally required for compulsory processes."⁷¹

Thus, in the first chapter of its history, the FBI's NSL authority was structured as a limited exception to the general rules of otherwise sweeping privacy legislation. It was regarded warily by a Congress that recognized its potential for executive abuse because it was shielded from the judicial scrutiny that accompanied other compulsory processes. As a result, the FBI's certification requirements were, for decades—and despite their 1993 expansion—extremely stringent by today's standards. All of this changed dramatically in the aftermath of 9/11, when the Patriot Act did away with most of the constraints on NSL use.

D. THE PATRIOT ACT: 2001–2006

Section 505 of the Patriot Act, passed in the wake of 9/11, broadly expanded § 2709 authority with two critical amendments. First, the bill drastically reduced the particularity requirement of the ECPA-era provision, eliminating the need for the FBI to certify "articulable facts" linking the subject of the desired records to a foreign power.⁷² Instead, the Patriot Act allowed the FBI to issue NSLs for any records whose subject was "relevant" to an "authorized investigation" of "international terrorism or other clandestine intelligence activities."⁷³ Second, the Act increased the number of FBI agents with the power to certify an NSL.⁷⁴ Whereas the previous law had permitted

69. See *supra* Section I.B.

70. See Nieland, *supra* note 57, at 1211.

71. *Id.*

72. See *id.*

73. USA Patriot Act of 2001, Pub. L. No. 107-56 § 505, 115 Stat. 273, 365 (2001).

74. The amendment added fifty-six certification-eligible FBI agents. See Bendix, *supra*

only the Director of the FBI or a designated senior official to issue a certification, the Patriot Act made any Special Agent in charge of a field office eligible for the task.⁷⁵

These changes fundamentally altered the role of NSLs in the FBI's investigative arsenal. Far from remaining the sort of limited exception that Congress had envisioned in its late-20th-century privacy legislation, NSLs became ubiquitous. In 2000, the FBI issued approximately 8,500 NSLs.⁷⁶ By 2003, two years after the passage of the Patriot Act, that number had skyrocketed to 39,000.⁷⁷ By 2005, it had reached 74,000.⁷⁸ At liberty to demand the records of any person whom it could internally certify was "relevant" to a national security investigation, the FBI vastly expanded its reach.

At this time, the nondisclosure provision of the NSL law was significantly more restrictive than it is today. It prohibited NSL recipients from speaking to "any person," *including* an attorney for legal advice.⁷⁹ It provided no mechanism for seeking judicial review,⁸⁰ and it was automatically permanent, imposing no requirement on the FBI to revisit the necessity of a gag order at any point after its issuance.⁸¹

The marked uptick in NSL usage following the Patriot Act was, of course, accompanied by an increase in nondisclosure orders. The new volume of demands, coupled with the heavy restrictiveness of the FBI's gags, resulted in litigation assailing the new statute on First Amendment grounds. Two cases defined this early era of Patriot Act NSL jurisprudence.

The first was *Doe v. Ashcroft*. In *Ashcroft*, the ACLU represented an anonymous ISP—an NSL recipient—who alleged that the nondisclosure provision violated the First Amendment.⁸² The reviewing court agreed.⁸³ Specifically, the Southern District of New York court ruled that the law "axiomatically" constituted a system of prior restraints because of the

note 2, at 453.

75. See Patriot Act § 505.

76. Eyink, *supra* note 62, at 477.

77. *Id.*

78. *Id.*

79. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 494–97 (S.D.N.Y. 2004), *vacated*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) (holding that the 2006 reauthorization of the Patriot Act, which newly allowed NSL recipients to consult with an attorney, warranted vacating the plaintiff's First Amendment claims so that they could be reconsidered in the first instance by the district court).

80. See *id.*

81. See *id.* at 519.

82. See *id.* at 475.

83. See *id.*

“straightforward observation that it prohibit[ed] speech before the speech occur[red].”⁸⁴ The government attempted to argue that this was not the case, claiming that NSL gag orders were not prior restraints because they did not involve the sort of licensing scheme that was the traditional subject of prior restraint jurisprudence. The court rejected this argument, reasoning that “a blanket permanent prohibition on future disclosures is an *even purer* form of prior restraint than a licensing system in which the speaker may at least potentially obtain government approval and remain free to speak.”⁸⁵

Applying strict scrutiny, the court ruled that the NSL law was an impermissibly overbroad restriction on speech.⁸⁶ It noted that, measured against the backdrop of other compulsory investigative procedures, NSLs stood “virtually alone in providing for blanket secrecy entirely outside the context of judicial process.”⁸⁷ Ultimately, the court’s decision was a resounding rejection of the government’s equivocations. Rather, the court emphatically affirmed that “democracy abhors undue secrecy” and that “public knowledge secures freedom.”⁸⁸

The second case had a similar outcome. In *Doe v. Gonzales*⁸⁹ (*Gonzales I*)—decided a year after *Ashcroft* and brought by a member of the American Library Association⁹⁰—the Southern District of New York again found that the nondisclosure provision constituted an invalid prior restraint, given that it “unquestionably prohibit[ed] speech in advance of it having occurred.”⁹¹ The court held that although the statute “may not [have] look[ed] like a *typical* prior restraint” it certainly was one, for “contrary to [the government’s] assertion . . . prior restraints [were] not limited” to being either licensing schemes or court orders.⁹² Although those two categories populated the bulk of the Supreme Court’s relevant jurisprudence, the court was emphatic that they did not define the entire universe of prior restraints.

Just like in *Ashcroft*, the court also criticized the nondisclosure provision for overbreadth. It noted that the subject matter covered by the gag orders

84. *Id.* at 511–12.

85. *Id.* at 512 (emphasis added).

86. *Id.* at 519 (saying that § 2709 is “extraordinary in that the breadth and lasting effects of its reach are uniquely exceptional, potentially compelling secrecy even under some decidedly non-sensitive conditions or where secrecy may no longer be justifiable under articulable national security needs”).

87. *Id.* at 515.

88. *Id.* at 519.

89. 386 F. Supp. 2d 66 (S.D.N.Y. 2005).

90. *Id.* at 70.

91. *Id.* at 74.

92. *Id.* (emphasis added).

included “[a]ll details relating to the NSL,” even those that posed no potential risk to the investigation.⁹³ Similarly, it critiqued the categorical permanence of the orders, which would not lapse even once the subject of the investigation had “cease[d] to be of legitimate interest” to the FBI.⁹⁴ This utter lack of circumstantial tailoring was constitutionally fatal. Further, the court pointed out that the law significantly implicated the public interest, “creat[ing] a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority [were] barred from discussing their experience with the public.”⁹⁵ Thus, it was not only the NSL law’s clumsy construction that choked its constitutionality; it was also the law’s chilling effect on public discourse.

With *Ashcroft* and *Gonzales I*, the federal courts dealt § 2709 a serious blow. The Patriot Act had overstepped, creating a system of prior restraints without any of the procedural safeguards or narrow tailoring that would shore up its constitutionality. Congress hurried to address some of these issues shortly after the *Gonzales* decision.

E. THE PATRIOT ACT, TAKE TWO: 2006–2015

In 2006, Congress reauthorized the Patriot Act. In the process, it revised the NSL nondisclosure provision to partially accommodate the First Amendment concerns raised by *Ashcroft* and *Gonzales I*. This involved three principal amendments. First, to issue a gag order, the FBI was now required to certify that disclosure “may result” in one of four enumerable harms—this, of course, remains the standard today.⁹⁶ Second, the new law carved out a nondisclosure exception that allowed recipients to speak with an attorney to seek legal advice—this also remains the case in the modern law.⁹⁷ Third, Congress instituted a provision for judicial review.⁹⁸ This provision mandated a highly deferential standard of review, directing the courts to modify or overturn a nondisclosure order only if there was “no reason” to believe that disclosure might result in one of the four harms.⁹⁹ It also stipulated that the FBI’s certification as to the likelihood of those harms should be treated as “conclusive” unless the court found that it had been made “in bad faith.”¹⁰⁰

93. *Id.* at 80.

94. *Id.* at 79.

95. *Id.* at 81.

96. *See* Nieland, *supra* note 57, at 1224.

97. *See id.*

98. *See id.*

99. USA Patriot Improvement and Reauthorization Act of 2006, Pub. L. No. 109-177 § 115, 120 Stat. 192, 211 (2006).

100. *Id.*

The first case to consider the new iteration of § 2709 was *Doe v. Gonzales*¹⁰¹ (*Gonzales II*), in which the Southern District of New York re-examined *Ashcroft* on remand from the Second Circuit.¹⁰² Once again, the court found that the nondisclosure provision was a violation of the First Amendment. Its various revisions did not prevent it from being a prior restraint, “authoriz[ing] suppression of speech in advance of its expression,” and therefore triggering strict scrutiny.¹⁰³ The court criticized the new judicial review provision for placing the burden of going to court on the NSL recipient, rather than on the government, as prior restraint jurisprudence dictates.¹⁰⁴ Picking up on the thread of public interest concerns raised in *Gonzales I*, it also noted that the enormous breadth and permanence of the gag orders still excluded the most relevant speakers from full participation in “the national debate over the government’s use of surveillance tools such as NSLs.”¹⁰⁵ The First Amendment’s core democratic principles were therefore very much at issue.

The court invalidated the NSL law in its entirety, finding that the facially unconstitutional nondisclosure provision could not be severed from the broader statute.¹⁰⁶ The government appealed, and the Second Circuit decided the case a year later, in *Doe v. Mukasey*.¹⁰⁷

Mukasey was the Second Circuit’s final determination on the issues initially raised by *Ashcroft* four years earlier. Ultimately, the panel upheld the *Gonzales II* decision in part and reversed it in part.¹⁰⁸ It permitted the law to stand, albeit with several revisions instituted by the court; these were later codified in 2015 with the passage of the USA Freedom Act.

The *Mukasey* court was the first to question whether the nondisclosure provision constituted a prior restraint. The panel observed that the restriction was not imposed on “those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies,” and that the gagged content was extremely limited

101. 500 F. Supp. 2d 379 (S.D.N.Y. 2007).

102. *See id.* *Ashcroft* and *Gonzales I* had gone to the Second Circuit on a consolidated appeal, but the panel dismissed *Gonzales I*—because the FBI had voluntarily lifted the gag order, rendering the plaintiff’s claims moot—and sent *Ashcroft* back down to the District Court to be considered in light of the new law.

103. *Id.* at 397.

104. *See id.* at 406.

105. *Id.* at 395.

106. *Id.* at 424.

107. 549 F.3d 861 (2d Cir. 2008).

108. *See id.* at 864 (“We agree that the challenged statutes do not comply with the First Amendment, although not to the extent determined by the District Court We therefore affirm in part, reverse in part, and remand for further proceedings.”).

compared to that which was typically affected by unconstitutional prior restraints.¹⁰⁹ Considering these factors, the court was less willing than its predecessors to label the law a prior restraint. However, it found that a similarly strict standard of review should apply.¹¹⁰ This was in no small part because of the highly political nature of the censored speech, which was “relevant to intended criticism of a governmental activity,” placing it at “the very center of the First Amendment.”¹¹¹

Thus, the court proceeded with doubt as to whether the law was a prior restraint, while still applying a similar degree of scrutiny to that which such restrictions require. Importantly, the panel agreed with the lower court that the statute should have placed the burden of seeking judicial review on the government, rather than on the gagged speaker, and that its failure to do so rendered the relevant provision unconstitutional.¹¹² However, the court lent some credence to the government’s claim that seeking judicial approval for every NSL disclosure order would be unduly burdensome.¹¹³ Rather than calling for such a requirement, it advocated a compromise: the reciprocal notice procedure that has since been codified in the modern law.¹¹⁴ The court suggested:

The Government could inform each NSL recipient that it should give the Government prompt notice, perhaps within ten days, in the event that the recipient wishes to contest the nondisclosure requirement. Upon receipt of such notice, the Government could be accorded a limited time, perhaps 30 days, to initiate a judicial review proceeding to maintain the nondisclosure requirement, and the proceeding would have to be concluded within a prescribed time, perhaps 60 days.¹¹⁵

The court explained that such a system would minimize the burden on the government while also ensuring that NSL recipients have their day in court without being forced to jump through all of the hoops typically necessary to get in front of a judge.¹¹⁶

109. *Id.* at 876.

110. *Id.* at 877–78.

111. *Id.* at 878.

112. *Id.* at 881 (“[I]n the absence of Government-initiated judicial review, Subsection 3511(b) is not narrowly tailored to conform to First Amendment procedural standards.”).

113. *Id.* at 879.

114. *Id.* at 879.

115. *Id.*

116. *See id.* (“Thus, the Government’s litigating burden can be substantially minimized, and the resulting slight burden is not a reason for precluding application of the third *Freedman*

Despite its hesitation to classify the nondisclosure provision as a prior restraint, the *Mukasey* court rejected a government argument that the Ninth Circuit found credible in July 2017. In *Mukasey*, the government contended that NSL gag orders could not be prior restraints because the source of the speaker's desire to communicate was founded in government action—that is, the issuance of the NSL—and pertained to government-originated information.¹¹⁷ Therefore, the government should be at liberty to control the speech. The panel was unconvinced. It noted that, here, “[t]he recipient’s ‘participation’ in the investigation is entirely the result of the Government’s action,” unlike the confidentiality agreements and grand jury nondisclosure orders to which the government had tried to analogize.¹¹⁸ In total, the court was dubious that unilateral government action could dilute the First Amendment rights of a gagged speaker simply because the speech’s content was government-focused. This would set a precedent permitting the government greater latitude to restrain speech when the subject of that speech was government action.

With the 2008 *Mukasey* ruling, the NSL statute was left in a state of limbo. As written, it had been ruled unconstitutional. However, the *Mukasey* court had modified the district court’s injunction to comport with its construction of the statute, so the FBI was free to continue issuing NSL nondisclosure orders, as long as they were in keeping with the court’s guidelines.¹¹⁹ This changed in 2015 when Congress passed the USA Freedom Act and substantially revised the NSL law to comport with the *Mukasey* court’s recommendations.¹²⁰

F. THE USA FREEDOM ACT: 2015–PRESENT

The USA Freedom Act, which governs the current iteration of § 2709 and its accompanying judicial review provision, § 3511, must be understood within the context of the Edward Snowden revelations, to which it was largely drafted in response. Two years before the Act was passed, in the summer of 2013, Snowden—a disillusioned government contractor with near-unfettered access to U.S. security secrets—leaked an enormous amount of information regarding

safeguard.”).

117. *See id.* at 880–81 (“Unlike the movies subject to licensing in *Freedman*, which were created independently of governmental activity, the information kept secret by an NSL, the Government contends, is ‘information that the recipient learns by (and only through) his participation in the [G]overnment’s own investigatory processes.’”).

118. *Id.* at 880.

119. *Id.* at 885.

120. These revisions were also likely made in response to the Northern District of California’s 2013 ruling in *In re National Security Letter I*, striking down the NSL statute. *See infra* Section III.A.

the extent of the American surveillance apparatus.¹²¹ Among other things, the public learned that the National Security Agency (NSA) had been indiscriminately collecting the telephone metadata of millions of Americans since at least 2001 under the authority of the Patriot Act.¹²²

The outcry in response to this revelation was one of deafening outrage. The European Union issued scalding statements condemning the NSA's alleged surveillance of European citizens and German Chancellor Angela Merkel, saying that the United States had severely damaged its bond of trust with its closest allies.¹²³ Meanwhile, domestically, protests erupted across the country.¹²⁴ Also capitalizing on the momentum, technology companies and privacy advocacy groups rallied together to push for legislative reform.¹²⁵ Facing this mounting domestic and international pressure, a "clear majority in the House of Representatives favored reforming surveillance authorities" in the wake of Snowden's leaks.¹²⁶

Reform arrived in the form of the Freedom Act, which was signed into law in 2015. Supported by technology companies and privacy advocates alike,¹²⁷ the bill was a direct response to the political disruption caused by the

121. Mark Mazetti & Michael S. Smith, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html> [<https://perma.cc/LJE2-CTX8>].

122. See Glenn Greenwald, *NSA Collecting Phone Data of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013, 6:05 AM), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/2FYH-QTD6>] (explaining that the dragnet surveillance system was founded in an "extreme interpretation" of the "business records" provision of the Patriot Act").

123. See, e.g., *EU Says Distrust of US on Spying May Harm Terror Fight*, BBC NEWS (Oct. 25, 2013), <http://www.bbc.com/news/world-europe-24668286> [<https://perma.cc/MGG3-A4GA>]; *EU Threatens to Stop Sharing Data with U.S. over Spying Reports*, N.Y. DAILY NEWS (July 6, 2013, 12:42 PM), <http://www.nydailynews.com/news/world/eu-threatens-stop-sharing-data-u-s-spying-reports-article-1.1391702> [<https://perma.cc/2LWF-SUCF>] (reporting that EU officials were considering suspending data-sharing programs with the U.S.).

124. See, e.g., Bart Jansen & Carolyn Pesce, *Anti-NSA Rally Attracts Thousands to March in Washington*, USA TODAY (Oct. 26, 2013, 12:41 PM), <https://www.usatoday.com/story/news/nation/2013/10/26/nsa-dc-rally/3241417> [<https://perma.cc/JE9G-YXRY>] (explaining that thousands of people had marched on Washington to protest the NSA); Heather Kelly, *Protests Against the NSA Spring up Across U.S.*, CNN (July 5, 2013), <http://edition.cnn.com/2013/07/04/tech/web/restore-nsa-protests> [<https://perma.cc/WCF2-LQF4>] (detailing Independence Day protests in "more than 80 U.S. cities").

125. Bart Forsyth, *Banning Bulk: Passage of the USA FREEDOM Act and Ending Bulk Collection*, 72 WASH. & LEE L. REV. 1308, 1323 (2015) (describing an event called "The Day We Fight Back," at which over forty technology companies and privacy groups joined forces to advocate the passage of the USA Freedom Act).

126. *Id.* at 1322.

127. *Id.*

Snowden revelations.¹²⁸ And while national security letters were not the focus of the public's outrage, Congress used this opportunity to make pointed revisions to § 2709's judicial review procedures under § 3511, thereby formally amending the NSL authority to comply with the *Mukasey* court's construction.¹²⁹

This involved three primary changes to the language of the Patriot Act-era statute. First, the new law officially codified the reciprocal notice procedure described in *Mukasey*, shifting the burden of petitioning for judicial review further—although not fully—onto the government.¹³⁰ Second, it eliminated the unconstitutional mandate that reviewing courts treat FBI certification regarding the potential harm of disclosure as conclusive absent a showing of bad faith.¹³¹ Instead, courts were given a slightly less deferential standard and exhorted to uphold nondisclosure orders if they found “reason to believe” that harm “may” otherwise result.¹³² Finally, the new law required the Attorney General to institute procedures for the FBI to review the necessity of nondisclosure orders at “appropriate intervals;” any orders deemed no longer necessary were to be promptly lifted.¹³³ However, the law did not specify what these procedures should be or precisely when they should occur.¹³⁴ The government, therefore, instituted them on its own, providing for review on the three-year anniversary of a nondisclosure's issuance and on the close of the relevant investigation.¹³⁵ These amendments, while undoubtedly improvements over the status quo, still did not go far enough toward developing an NSL authority that would fully comport with the First Amendment.

In re National Security Letter is the first NSL case to be litigated at the appellate level under the USA Freedom Act. It afforded the Ninth Circuit the opportunity to firmly elucidate the stringent First Amendment standards to which the NSL nondisclosure regime ought to comply. Unfortunately, as I

128. Senator Bob Corker explicitly recognized Snowden as the catalyst for Congress's action on the issue. See Jessica Schulberg, *The Elephant in The Room: Senators Finally Credit Edward Snowden for Role in Patriot Act Reforms*, HUFFINGTON POST (June 1, 2015, 1:46 PM, updated Sept. 8, 2015), https://www.huffingtonpost.com/2015/06/01/snowden-nsa-patriot-act_n_7485702.html [<https://perma.cc/YQ43-5XZA>].

129. See USA Freedom Act of 2015, Pub. L. No. 114–23 § 502(g), 129 Stat. 268, 288 (2015).

130. *Id.* (amending 18 U.S.C. § 3511(b)(1)(A) (2012)).

131. *Id.* (amending 18 U.S.C. § 3511(b)(3) (2012)).

132. *Id.*

133. *Id.* at § 502(f)(1).

134. *Id.*

135. FBI TERMINATION PROCEDURES, *supra* note 50.

discuss below, the court hedged. It issued an opinion in which very little seemed to be clear other than that the current law is—one way or another—approximately good enough.

III. *IN RE NATIONAL SECURITY LETTER*

A. THE DISTRICT COURT'S 2013 DECISION

In re National Security Letter involved two ISP plaintiffs—CREDO and Cloudflare—who had received a combined total of five NSLs between 2011 and 2013, while the 2006 re-authorization of the Patriot Act still governed § 2709.¹³⁶ A nondisclosure order accompanied each letter.¹³⁷ The two companies petitioned for judicial review, and the Northern District of California issued a ruling in 2013, shortly before the passage of the Freedom Act.¹³⁸

In that initial case, the district court found the NSL provision facially unconstitutional. While it explained that NSL nondisclosure orders were not “classic” prior restraints, it nonetheless held that the demanding standards of prior restraint doctrine should apply.¹³⁹ In this, the court’s decision echoed *Gonzales I*, where the Southern District of New York had similarly recognized that § 2709 created a system of prior restraints that did not entirely conform to the traditional features of the doctrine, but was not exempt from heightened scrutiny.¹⁴⁰

Thus, the court dismissed the government’s attempts to distinguish NSL nondisclosure orders from traditional prior restraints by arguing that they were more akin to speech restrictions required in various court proceedings.¹⁴¹ Instead, the court evaluated § 2709 against *Freedman*, the case in which the Supreme Court dictated the three procedural safeguards that are required to render a system of prior restraints constitutionally permissible.¹⁴² In so doing, the court ruled that it could not accept the government’s assurances that the

136. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1119 (N.D. 2013).

137. *Id.*

138. *Id.* at 1064.

139. *Id.* at 1071 (explaining that the law must “still meet the heightened justifications for sustaining prior restraints announced in *Freedman v. Maryland*”).

140. *See supra* Section II.D.

141. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d at 1071–72 (“The Court is not persuaded by the government’s attempt to avoid application of the *Freedman* procedural safeguards by analogizing to cases which have upheld restrictions on disclosures of information by individuals involved in civil litigation, grand jury proceedings and judicial misconduct investigations.”).

142. *See id.*

required safeguards were being applied in practice—according to the *Mukasey* court’s mandate—although they were not codified by the language of § 2709.¹⁴³ The government had provided no concrete evidence of its compliance.¹⁴⁴ Therefore, the court explained that “the issuance of a nondisclosure order is, in essence, a permanent ban on speech absent the rare recipient who has the resources and motivation to hire counsel and affirmatively seek review by a district court.”¹⁴⁵ This was an impermissible violation of the Supreme Court’s prior restraint jurisprudence.

Ultimately, the district court ruled that the law, as written, did not pass constitutional muster.¹⁴⁶ It enjoined the government from issuing any further NSLs under § 2709 and from enforcing any nondisclosure orders; however, given the potential national security implications, the court stayed its judgment pending appeal.¹⁴⁷

Critically, throughout its opinion, the district court emphasized that § 2709 implicated speech that was immensely relevant to the ongoing “public debate on the appropriate use of NSLs or other intelligence devices.”¹⁴⁸ The social and political import of the censored information seemed to weigh heavily in the court’s calculus—understandably so, given the alarming implications of any unilateral government action to restrict speech on matters of public concern.¹⁴⁹

The government appealed the district court’s decision, but while the Ninth Circuit deliberated, Congress passed the Freedom Act.¹⁵⁰ The Ninth Circuit, therefore, vacated the district court’s judgments and remanded the case to be

143. *See id.* at 1073–74 (ruling that the statute’s risk of suppressing legitimate speech could not “be adequately ameliorated by governmental promises to comply with *Freedman*’s requirements”).

144. *See id.* at 1073 (“There is no evidence that the Department of Justice has implemented regulations to impose the constructions and safeguards mandated by the Second Circuit in the *John Doe v. Mukasey* decision. There is no evidence that either the DOJ or the FBI has adopted a formal ‘policy’ adhering to those constructions and safeguards.”).

145. *See id.* at 1077.

146. *See id.* at 1081.

147. *See id.*

148. *Id.* at 1071 (“Under section 2709(c), the FBI has been given the unilateral power to determine, on a case-by-case basis, whether to allow NSL recipients to speak about the NSLs. As a result, the recipients are prevented from speaking about their receipt of NSLs and from disclosing, as part of the public debate on the appropriate use of NSLs or other intelligence devices, their own experiences.”).

149. *See id.* at 1072 (emphasizing that “[h]ere, the concern is the government’s unilateral ability to prevent individuals from speaking out about the government’s use of NSLs, a subject that has engendered extensive public and academic debate”).

150. *See In re Nat’l Sec. Letter*, 863 F.3d 1110, 1119–20 (9th Cir. 2017).

reviewed in light of the new law.¹⁵¹ The second time around, evaluating a § 2709 that formally incorporated *Mukasey*'s suggestions, the district court upheld the NSL law.¹⁵² The plaintiffs appealed, and the Ninth Circuit issued its ruling upholding the statute's constitutionality in July of 2017.¹⁵³

B. THE NINTH CIRCUIT

The Ninth Circuit, like the *Mukasey* court, doubted that NSL nondisclosure orders were prior restraints.¹⁵⁴ In fact, the Ninth Circuit directly quoted *Mukasey*'s reasoning, distinguishing between speakers gagged by NSL nondisclosure orders and speakers that have traditionally figured in prior restraint jurisprudence.¹⁵⁵ Here, the court pointed out, the gagged ISPs “did not intend to speak . . . *prior to* the Government’s issuance of an NSL.”¹⁵⁶ According to the court, this distinguished them from the speakers who had been classically protected by constitutional limits on prior restraints. Unlike those speakers with a preexisting desire to speak, such as journalists and movie theater operators, CREDO and Cloudflare had no original desire to express themselves, and their ability to engage in that expression was certainly not “key” to their business models.¹⁵⁷ By making such a distinction, the Ninth Circuit delineated a class of speakers for whom advance restrictions on speech *were* prior restraints and a class of speakers for whom the same advance restrictions on speech *were not* prior restraints. In other words, it adjusted the weight of First Amendment protection based on the character and intent of the censored speaker.

The Ninth Circuit also implied an adjacent adjustment in First Amendment protection based on the source and content of the repressed information, hesitating to apply prior restraint doctrine to “a single, specific piece of information that was generated by the government.”¹⁵⁸ This was a crucial point in the court’s reasoning: Because the repressed speech pertained only to information “generated by the government,” it was not something about which the ISPs would have otherwise independently communicated.¹⁵⁹ Therefore, the court reasoned that it was less deserving of stringent constitutional protection. In contrast to the *Mukasey* court and the district

151. *See id.*

152. *See id.* at 1120.

153. *See id.* at 1110.

154. *See id.* at 1127 (holding that “this argument is not entirely persuasive”).

155. *See id.* at 1128.

156. *Id.*

157. *Id.* at 1129.

158. *Id.* at 1128.

159. *Id.*

courts,¹⁶⁰ the Ninth Circuit did not view the gag order's government-focused subject matter as a factor that ought to heighten judicial scrutiny rather than lessen it.

The court also made an important observation regarding the basic definition of a prior restraint. Expending only a few words to briefly acknowledge that § 2709 does indeed bar speech “in advance” of its occurrence, the Ninth Circuit instead focused on the fact that prior restraints “generally” fall into one of two categories: “censorship schemes and licensing schemes.”¹⁶¹ According to the court, § 2709 did not fit into either category: “It neither require[d] a speaker to submit proposed speech for review and approval, nor [did] it require a speaker to obtain a license before engaging in business.”¹⁶² For the court, this cast significant doubt on the statute's classification as a prior restraint. However, the court did not address the fact that, by issuing a blanket prohibition on speech—the default duration of which is indefinite—§ 2709, in fact, creates a system that the *Ashcroft* court recognized as an “even purer” form of prior restraint than the traditional schemes.¹⁶³ Instead, the Ninth Circuit found that NSL nondisclosure orders were most akin to confidentiality agreements, such as those that bind witnesses in grand jury proceedings.¹⁶⁴ The panel pointed out that such agreements have consistently been “upheld by the courts.”¹⁶⁵

In the end, despite its skepticism, the Ninth Circuit did not definitively rule that § 2709 did not create a system of prior restraints. Instead, the court held that such a determination was unnecessary because the USA Freedom Act adequately provided the procedural safeguards required to render prior restraints constitutional.¹⁶⁶ Therefore, whether or not prior restraint doctrine applied, the statute satisfied its mandates.

The court addressed each of the constitutionally imposed safeguards in

160. *See supra* Section III.E (noting that Mukasey found that the fact that the content of the restricted speech was “relevant to intended criticism of a governmental activity” meant that it was “at the very center of the First Amendment”); *see also* *Doe v. Gonzales* 386 F. Supp. 2d 66, 81 (S.D.N.Y. 2005) (expressing concern that NSLs “create[] a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority [were] barred from discussing their experiences with the public”); *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 519 (S.D.N.Y. 2004) (arguing that “democracy abhors undue secrecy,” and “public knowledge secures freedom”).

161. *See In re Nat'l Sec. Letter*, 863 F.3d at 1127.

162. *Id.* at 1128.

163. *See supra* Section III.D.

164. *See In re Nat'l Sec. Letter*, 863 F.3d at 1129.

165. *Id.*

166. *See id.* at 1129 (“We need not, however, resolve the question whether the NSL law *must* provide procedural safeguards, because the 2015 NSL law in fact provides all of them.”).

turn. First, it considered the requirement that the initial restraint must be imposed only for a “specified brief period” to maintain the status quo until the censor either removes it or goes to court to enforce it.¹⁶⁷ The court found that the Freedom Act “readily provide[d] this assurance” through its reciprocal notice procedure.¹⁶⁸ It held that the § 3511’s thirty-day window—within which the government must go to court after being notified that an NSL recipient would like judicial review—was both “specified and brief.”¹⁶⁹ Second, the court found that the Freedom Act sufficiently provided for timely judicial review by directing courts to “rule expeditiously” on any NSL nondisclosure matter.¹⁷⁰ And third, it held that because the statute did not require the NSL recipient shoulder the burden of initiating court proceedings, only of notifying the FBI that such proceedings were desired, § 3511 adequately placed the burden of seeking judicial review on the government.¹⁷¹

Altogether, the Ninth Circuit ruled that the Freedom Act had eliminated the NSL law’s longstanding flaws by providing adequate prior restraint safeguards whether or not they were actually required. In many ways, the court’s analysis was a fair recognition of the Freedom Act’s improvements. In many other ways, however, its opinion read as an unjustified departure from precedent, frequently seeming simply to relax constitutional standards to carve out an NSL exception.

IV. THE USA FREEDOM ACT AUTHORIZES UNCONSTITUTIONAL PRIOR RESTRAINTS

As this Part will illustrate, the Ninth Circuit’s decision to uphold the current NSL regime was faulty in two respects: in its bases for questioning the nature of NSL gags as prior restraints, and in its elastic interpretation of the *Freedman* requirements. As to the first, the court proved willing to put stock in analogies that every other court to consider the issue had previously dismissed as inapt. As to the second, the court compromised where compromise had never been envisioned.

The result is not reassuring. It is the confirmation of a statute that authorizes the advance censorship of politically relevant speech, potentially indefinitely, unless the target has the resources and the will to challenge the FBI in federal court. This Part argues that such a scheme should correctly be characterized as a system of prior restraints, imposed with only a diluted

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1130.

171. *See id.*

version of the constitutionally required safeguards.

A. THE NSL NONDISCLOSURE PROVISION IS A PRIOR RESTRAINT

1. *The Speaker's Identity and Motivation Is Irrelevant to the Degree of First Amendment Protection*

The Ninth Circuit's decision disregarded the definitional core of a prior restraint. As every other court except *Mukasey* has repeatedly recognized,¹⁷² § 2709 prohibits speech in advance of its occurrence: this is the quintessential feature of a prior restraint.¹⁷³ The Ninth Circuit's departure from this reasoning distorts longstanding First Amendment doctrine and misrepresents the character of prior restraint jurisprudence.

For instance, the court erred by gesturing toward the possibility that nondisclosure orders are prior restraints when they bind some speakers—those with a preexisting desire to speak, such as journalists or movie theater operators—but something less insidious when they bind others.¹⁷⁴ By making such an argument, the court implied that a speaker's identity ought to inform the extent of First Amendment protection available to that speaker. Under such reasoning, traditional targets of prior restraints, nurturing an intent to communicate that predated their gag orders, would benefit from the “heavy presumption” of unconstitutionality that typically applies to prior restraints.¹⁷⁵ Meanwhile, non-traditional targets—such as ISPs and other corporate entities, whose desire to speak may only have been triggered by their involvement in a controversial and clandestine surveillance operation—would not receive this benefit.

This logic is both misguided and incongruent with the Supreme Court's rulings on the issue. For one, corporations are entitled to full First Amendment rights. The Supreme Court's decision in *Citizens United v. Federal Election Commission* made this abundantly clear, holding that companies receive the

172. See *Doe v. Gonzales (Gonzales II)*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (S.D.N.Y. 2005); *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004). While these cases were decided under an earlier iteration of § 2709, the core question regarding the nondisclosure orders' classification as a prior restraint remains the same. In all of its various forms, the statute has authorized the government to restrict speech in advance of its occurrence.

173. See, e.g., *Alexander v. United States*, 509 U.S. 544, 550 (1993) (explaining that prior restraints “[forbid] certain communications when issued in advance of the time that such communications are to occur”); *Near v. Minnesota*, 283 U.S. 697, 713–14 (1931) (holding that a prior restraint is a “previous restraint upon publication” instead of a later punishment).

174. See *supra* Section III.B.

175. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

same free speech protections as individual citizens.¹⁷⁶ Indeed, the Court emphatically stated the principle that “the First Amendment stands against attempts to disfavor certain subjects or viewpoints *or to distinguish among different speakers.*”¹⁷⁷

Second, the First Amendment’s egalitarian sweep is particularly potent in the context of political speech, including that which relates to the “controversial government powers” at issue in NSL cases.¹⁷⁸ To this end, the Supreme Court has held that “there is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers.”¹⁷⁹ Yet, by doubting that gagged ISPs should trigger the same degree of exacting judicial scrutiny that would be afforded to journalists in a similar situation,¹⁸⁰ the Ninth Circuit has advanced precisely that proposition.

This heralds a potentially dangerous shift in First Amendment jurisprudence. If the courts lend credence to the idea that some speakers are simply not vulnerable to certain categories of censorship, such as prior restraints, the judiciary will then be forced to delineate boundaries between different groups and identify the degree of protection that they deserve. This is an affront to the Supreme Court’s ruling in *Citizens United*, and antithetical to the equal protection that ought to be ensured by the First Amendment.

Further, it opens the door to increasingly restrictive government arguments. In distinguishing between ISPs and traditional speakers, the Ninth Circuit implied that there was a similar difference between speech triggered by government action and speech that pre-existed government action. The court reasoned that because the government was both the subject and the source of the suppressed communication, it should be at liberty to restrain the ISPs’ speech.¹⁸¹ But where is the logical end point to this line of reasoning? Should the government be able to argue that it has the right to censor any speech that originates in government action, or that involves information provided by the government to the speaker? The Ninth Circuit’s logic would imply that this is so, but the First Amendment dictates the opposite. As the *Mukasey* court emphasized, the government’s role as both the originator and the subject of the ISPs’ gagged speech *heightened* the presumption of constitutional

176. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

177. *Id.* at 312 (emphasis added).

178. *In re Nat’l Sec. Letter*, 930 F. Supp. 2d 1064, 1077 (N.D. 2013).

179. *Citizens United*, 558 U.S. at 312.

180. *See supra* Section III.B.

181. *See supra* Section III.B.

invalidity.¹⁸²

While it is tempting to defer to the government's judgment regarding the release of information pertinent to national security, such a calculus cannot end the First Amendment inquiry. As Justice Stewart forcefully declared in the Pentagon Papers case, "[t]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry."¹⁸³ Justice Black was equally emphatic: "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."¹⁸⁴ Democracy thrives on robust national debate such as that which has surrounded the use of NSLs¹⁸⁵—the courts should not turn a permissive gaze on government censorship schemes that would curtail such debate, particularly when the focus is government action, and even when the countervailing interest is national security.

2. Confidentiality Agreements Are a Poor Analogue for NSL Gags

The Ninth Circuit further doubted the applicability of prior restraint doctrine because, according to the court, NSL nondisclosure orders were more akin to confidentiality agreements than prior restraints.¹⁸⁶ But confidentiality agreements are a poor analogue for the unilateral, potentially permanent effects of a gag order imposed by the FBI. Even the *Mukasey* court, the only other court to doubt that NSL gags might be prior restraints, dismissed this argument without reservation.¹⁸⁷ NSL nondisclosure orders simply do not share the characteristics that both define confidentiality agreements and remove them from exacting judicial scrutiny.

Take the Ninth Circuit's grand jury analogy, for example. The court pointed out that grand jury witnesses may be prohibited from speaking publicly about any information they learn during the proceedings. In that respect, grand jury confidentiality involves the government imposing a prior restraint on a speaker with regard to information that she gleaned as the result of participation in a government action. However, the judicial process demands

182. See *supra* Section II.E.

183. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

184. *Id.* at 719 (Black, J., concurring).

185. See *supra* Section II.F (explaining that the USA Freedom Act's reforms were a direct response to the public debate fostered by the Edward Snowden revelations).

186. See *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1129 (9th Cir. 2017).

187. See *supra* Section II.E. The *Mukasey* court noted that the "recipient's 'participation' in the investigation is entirely the result of the Government's action." The court found this distinguishable from the grand jury and confidentiality agreements to which the government had tried to analogize. *Doe v. Mukasey*, 549 F.3d 861, 880 (2d Cir. 2008).

secrecy by the very nature of its democratic function: to ensure fair, unbiased trials and the neutral administration of justice. The NSL law, on the contrary, imposes secrecy “at the demand of the Executive Branch under circumstances where [it] might or might not be warranted, depending on the circumstances alleged to justify such secrecy.”¹⁸⁸ As the *Mukasey* court recognized, grand jury confidentiality agreements accompany proceedings that always, inherently, have powerful democratic justifications for secrecy.¹⁸⁹ NSL nondisclosure orders, on the other hand, may or may not possess these justifications: national security, while a potent concern, is—as Justice Black described in the Pentagon Papers case—“a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”¹⁹⁰ It is, therefore, more difficult to justify their indiscriminate use and their potential to remain in place indefinitely.¹⁹¹

Ultimately, the Ninth Circuit turned to the confidentiality agreement analogy because it reasoned that prior restraints could only exist as either “censorship schemes [or] licensing schemes.”¹⁹² While it is true that most prior restraint doctrine involves restrictions that fall into one of those two categories, they do not encompass the full spectrum of possible prior restraints. *Gonzales I* recognized this, correctly pointing out that the existence of two predominant species of prior restraint did not foreclose the possibility of there being other, equally restrictive varieties.¹⁹³ In *Bantam Books v. Sullivan*, for instance, the Supreme Court ruled that a local ban on the circulation of certain publications was a prior restraint.¹⁹⁴ The ban was not a licensing scheme in which publishers could disseminate content if granted government

188. *Mukasey*, 549 F.3d at 877.

189. *Id.* at 876 (“The justification for grand jury secrecy inheres in the nature of the proceeding. As the Supreme Court has noted, such secrecy serves several interests common to most such proceedings, including enhancing the willingness of witnesses to come forward, promoting truthful testimony, lessening the risk of flight or attempts to influence grand jurors by those about to be indicted, and avoiding public ridicule of those whom the grand jury declines to indict . . . [In contrast], the nondisclosure requirement of Subsection 2709(c) is imposed at the demand of the Executive Branch under circumstances where secrecy might or might not be warranted, depending on the circumstances alleged to justify such secrecy.”).

190. *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971).

191. As the Northern District of California recognized, “[t]he issuance of a nondisclosure order is, in essence, a permanent ban on speech absent the rare recipient who has the resources and motivation to hire counsel and affirmatively seek review by a district court.” *In re Nat’l Sec. Letter*, 930 F. Supp. 2d 1064, 1127 (N.D. 2013) (“*In re NSL P*”).

192. *In re Nat’l Sec. Letter*, 863 F.3d 1110, 1127 (9th Cir. 2017).

193. *See supra* Section II.D.

194. 372 U.S. 58, 70 (1963).

approval; rather, the ban prohibited the publications outright.¹⁹⁵ Nor was the ban a censoring injunction via judicial order, for it was perpetrated by a local governmental commission.¹⁹⁶ And yet the Court ruled that the ban was, quite unquestionably, a classic prior restraint.¹⁹⁷ The deciding inquiry was whether the ban was an advance prohibition of speech, not whether the ban took a particular form or function. That inquiry should also be decisive here.

B. THE USA FREEDOM ACT'S PROCEDURAL SAFEGUARDS ARE CONSTITUTIONALLY DEFICIENT

The Ninth Circuit erred by ruling that the Freedom Act's safeguards comport with *Freedman v. Maryland's* requirements. In fact, if *Freedman* had been applied with appropriate strictness, the court would have found that two of the three prongs remained unsatisfied by the Freedom Act's revisions.

First, the current statute does not adequately ensure that NSL nondisclosure orders will last for only a "specified brief period"¹⁹⁸ of time before being brought before a court or lifted by the FBI. The Ninth Circuit held that the thirty-day window following the initiation of reciprocal notice fulfilled this function.¹⁹⁹ However, the thirty-day period is only triggered if the gagged recipient chooses to challenge the nondisclosure order in court.²⁰⁰ The law's default is to leave the nondisclosure order in place—unexamined—for a minimum of three years, at which point the FBI will conduct the first of its two internal assessments regarding the order's continuing necessity.²⁰¹ This hardly restricts the nondisclosure order's effects to a "specified brief period," and certainly does not serve the limited purpose of maintaining the status quo only until a court can issue a final determination.

That is of course because the Freedom Act also does not sufficiently shift the burden of seeking judicial review onto the government, another of *Freedman's* mandates. While reciprocal notice is an improvement on previous regimes, it still leaves the onus of initiating court proceedings on the recipient of the gag order. Without action on the part of the targeted ISP, the FBI is under no obligation to justify its nondisclosure orders in court.²⁰² That the

195. *See id.* at 61.

196. *See id.*

197. *See id.* at 70 ("We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.").

198. *See supra* Section II.A

199. *See In re Nat'l Sec. Letter*, 863 F.3d 1110, 1129 (9th Cir. 2017).

200. *See* 18 U.S.C. § 3511 (2012).

201. *See id.*; *see also supra* Section II.B.

202. *See* 18 U.S.C. § 3511 (2012).

Bureau must be the party to officially petition for judicial review, once notified that it is desired, is a mere formality. The reality remains that, absent action on the part of the ISP, the government is under no obligation to obtain judicial approval of its prior restraints. This is directly contrary to the purpose of *Freedman*'s safeguards, which were intended to ensure that such restraints always quickly ended up before a court, whose final approval was necessary to constitutionally maintain the censorship.²⁰³ The government may contend that it should not be obligated to affirmatively seek judicial review for ISPs which would otherwise not be disposed to ask for it, but that is precisely what *Freedman* requires. Judicial review of a prior restraint should not depend on the gagged speaker's legal action or inaction—it should be automatic.

Despite the Ninth Circuit's willingness to dilute their mandates, the *Freedman* safeguards are not a mere formality. They exist because of the immense presumption against constitutional validity afforded to prior restraints. By watering down and adjusting their strictures, the Ninth Circuit effectively carved out a constitutional exception for NSLs, allowing the FBI to skate past the *Freedman* requirements without shouldering the full weight of their burden, or being expected to meet the standard of exacting scrutiny that the Supreme Court has imposed on prior restraints.

Ultimately, by failing to properly implement *Freedman*, the Ninth Circuit has acquiesced to the possibility of a nondisclosure order that exists in perpetuity, censoring politically important speech indefinitely without ever being examined by a court. If a recipient chooses not to initiate reciprocal notice—whether due to lack of resources or for any other reason—the burden on the government to seek judicial review dissipates entirely. In that case, the FBI must only revisit the necessity of the nondisclosure order a maximum of twice, with the final review occurring at the close of the relevant investigation.²⁰⁴ If at that time the government determines—independent of any external oversight—that the order is still appropriate, it may remain in place forever. The FBI would have no further obligation to assess its relevance, even if the circumstances that weighed against disclosure had changed entirely. This is precisely the sort of scenario that *Freedman*'s safeguards, if enforced with strict scrutiny, ought to guard against. That it is still possible, and indeed likely, concretely demonstrates the failings of the Ninth Circuit's analysis.

V. CONCLUSION

By upholding the constitutionality of the USA Freedom Act's NSL provision, the Ninth Circuit has signaled that the First Amendment is

203. *See supra* Section II.A.

204. *See supra* Section II.B.

astonishingly malleable—capable, at least in the national security context, of accommodating government censorship on issues of immediate, pressing public concern. The court has neutered the impact of *Freedman v. Maryland*, applying its three safeguards haphazardly and with apparent willingness to tolerate significant diversions from its mandate, even if the ultimate effect is to permit precisely the sort of unexamined and unfettered system of prior restraints that the case was meant to guard against. The court did all of this while hesitating to recognize NSL nondisclosure orders as prior restraints at all, in large part due to the identity of their targets.

This is a troubling capitulation to capstone an era that has seen NSLs mutate from their original function as an exceptional, limited-scope, and voluntary investigative mechanism to a massive, compulsory system with the potential to sweep millions of American citizens into its net. The USA Freedom Act was passed in response to revelations about the U.S. surveillance apparatus that spurred urgent public debate.²⁰⁵ It is deeply ironic that the Ninth Circuit would dilute First Amendment doctrine to accommodate the failings of such legislation, particularly when those failings are uniquely geared towards suppressing democratic transparency.

205. *See supra* Part II.F.

