

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

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: NATIONAL SECURITY LETTER,

UNDER SEAL,

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

v.

JEFFERSON B. SESSIONS III,
Attorney General,

Respondent-Appellee
(Nos. 16-16067, 16-16081).

In re: NATIONAL SECURITY LETTER,

UNDER SEAL,

Petitioner-Appellant (No. 16-16082),

v.

JEFFERSON B. SESSIONS III,
Attorney General,

Respondent-Appellee (No. 16-16082).

On Appeal From the United States District Court
For the Northern District of California

PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION AND RULE 35(b) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(b), rehearing en banc is necessary in this matter to maintain uniformity of this Court's decisions and decide questions of exceptional importance. The panel's opinion conflicts with such cases as *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Carroll v. Comm'nrs of Princess Anne*, 393 U.S. 175 (1968); *Levine v. District Court*, 764 F.2d 590 (9th Cir. 1985); *CBS v. District Court*, 729 F.2d 1174 (9th Cir. 1984); and *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984).

The panel decision departs from previously undisputed Ninth Circuit and Supreme Court precedent on a doctrine of fundamental constitutional importance: the First Amendment's near-total prohibition on prior restraints. This rule is central to the preservation of free speech; the Founders decided that, while false and harmful speech may be punished *after* the fact, the government may not prevent speech in advance on a prediction that it might prove harmful. However, if the panel's opinion stands, prior restraints will for the first time be treated identically to post-publication content-based restrictions on speech. The panel's decision to loosen the standard for prior restraints led it to mistakenly approve the government's gag orders here, and it has already resulted in confusion in what is likely to be the first of many lower court proceedings.

This case concerns the national security letter (NSL) statute, 18 U.S.C. §§

2709, 3511, which grants the FBI extraordinary power to demand—in secret and without prior judicial oversight—customer records from electronic communication service providers, and to unilaterally impose blanket gag orders banning providers from disclosing any details of NSLs they receive. In the last 15 years, the FBI has issued hundreds of thousands of NSLs,¹ including a total of five to Petitioner-Appellants CREDO Mobile and Cloudflare, Inc. (“NSL Recipients”). Each NSL was accompanied by a gag order preventing the Recipients from disclosing anything about the NSLs to their customers or the public. Both NSL Recipients sought to petition Congress and fully participate in public debate about NSLs, but the gag orders barred them from doing so.

Because the NSL statute allows the executive branch to impose these prior restraints without the judicial oversight required by the First Amendment, NSL Recipients challenged the statute’s constitutionality on its face and as applied to them. They argued that by authorizing gags imposed entirely by the FBI—with no opportunity for judicial scrutiny, let alone the most exacting scrutiny required for prior restraints—the statute violated settled First Amendment law.

A panel of this Court disagreed, in a decision that grants the executive branch wide latitude to bar speech prior to judicial review and to issue permanent gag orders. *In re National Security Letter*, 863 F.3d 1110 (9th Cir. 2017) (“*In re*

¹ See NSL Recipients’ Opening Br. at 6 n.3.

NSL”). Ignoring the Supreme Court’s command that a prior restraint must survive a “heavy presumption against its constitutionality,” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), the panel declined to employ a “granular focus” and “quibble” with the imprecision of the prior restraints imposed on NSL Recipients here. *In re NSL*, 863 F.3d at 1126. Instead, the panel explicitly allowed for imperfect tailoring and authorized prior restraints on the mere “reasonable likelihood” of harm. *Id.* at 1125, 1126.

This holding is in conflict with the strict limitations previously imposed on prior restraints in numerous decisions of this Court and the Supreme Court. En banc review is necessary to conform the panel’s decision to existing First Amendment law, and to provide guidance over the standard that governs prior restraints—“the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press*, 427 U.S. at 559. Rehearing is also necessary in light of the frequency with which the FBI issues NSLs, currently over 12,000 a year.²

The panel’s refusal to apply established prior restraint doctrine to NSL gag orders has already been exploited by the government in another challenge to NSL and FISA gag orders. In a motion for reconsideration of a district court order that

² Office of the Dir. of Nat’l Intel., *Statistical Transparency Report Regarding Use of National Security Authorities for Calendar Year 2016* 21(Apr. 2017), https://www.dni.gov/files/icotr/ic_transparency_report_cy2016_5_2_17.pdf.

had applied the correct standard for evaluating prior restraints in national security cases, the government emphasized the absence of prior restraint hallmarks in the panel's opinion:

The Court of Appeals in *In re NSL* [i.e. this appeal] neither referred to a “heavy presumption against [the] constitutional validity” of such restrictions, July 6, 2017 Order, at *6 (quoting *Pentagon Papers*, 403 U.S. at 714), nor suggested that the NSL statute must overcome “a near-complete ban on prior restraints of speech,” *id.* at *6 (quoting *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 591 (1976) (Brennan, J. concurring)). *See In re NSL*, 863 F.3d at 1123–31. Indeed, the Court of Appeals rejected an argument that the per curiam opinion in *Pentagon Papers* specified a test applicable to prior restraints. *See id.* at 1127 n.21.

Defs.’ Mot. for Reconsideration at 8 n.7, *Twitter v. Sessions*, No. 14-cv-4480, ECF No. 180 (N.D. Cal. Sep. 5, 2017).

The Court should rehear this case to prevent further mischief with settled prior restraint law. In addition, the panel opinion contains what appears to be a clerical error that should be corrected.

REASONS FOR GRANTING REHEARING AND REHEARING EN BANC

I. THE PANEL OPINION CONTAINS AN ERROR THAT SHOULD BE CORRECTED.

The panel opinion contains an apparent clerical error in a sentence that is integral to its holding: “Accordingly, we analyze the recipients’ challenge as a *facial* challenge.” *In re NSL*, 863 F.3d at 1121 (emphasis added). Based on surrounding context, the court seemingly intended to write that it would treat the

NSL Recipients’ challenge “as-applied,” not “facial”:

We begin our constitutional analysis by analyzing whether this appeal raises a facial challenge or an as-applied challenge to the NSL law. “A facial challenge is an attack on a statute itself as opposed to a particular application.” *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449, (2015). By contrast, “[a]n as-applied challenge contends that the law is unconstitutional as applied to the litigant’s particular speech activity, even though the law may be capable of valid application to others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The recipients assert that the nondisclosure requirement of § 2709(c) prevents them from speaking about matters of public policy and engaging in the political process, but do not argue that the NSL law can never be constitutionally applied in any context. Accordingly, we analyze the recipients’ challenge as a facial challenge. *Cf. Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 802–03, (1984) (concluding that the plaintiff’s challenge to an ordinance was an as-applied challenge because the plaintiffs acknowledged that the statute could be validly applied in other cases).

Id. Replacing “facial” with “as-applied” accords the sentence a logical meaning. It is nonsensical for the court to state that the NSL Recipients do not “argue that the NSL law can never be constitutionally applied in any context” and to cite a Supreme Court case in which such a challenge was treated as an as-applied one if it truly construed this case as a facial challenge.

However, amending this sentence does not fully eliminate the confusion evident in the panel’s analysis of the NSL recipients’ arguments. First, throughout the case, NSL recipients challenged the statute on both facial and as-applied bases. *See, e.g.*, NSL Recipients’ Opening Br. at 2; Reply Br. at 15 n.8.; Further Excerpts of Record at 1. Second, the panel noted facts relevant to NSL recipients’ as-applied

challenge, such as the existence of a permanent NSL gag on Appellant CREDO, 863 F.3d at 1120 n.13, but stated that the constitutionality of the specific gags should be left to future courts, *id.* at 1126-27. Therefore, the full court should remedy this confusion.

II. THE PANEL IGNORED BINDING PRECEDENT REQUIRING “PIN-POINT” STRICT SCRUTINY OF PRIOR RESTRAINTS.

Without exception, the Supreme Court has required that prior restraints survive exacting substantive scrutiny and include procedural protections, each unique to prior restraints. *See Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (“In order to be held lawful, [a prior restraint] first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech.”)

NSL gags are prior restraints. “The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quotations and citation omitted, emphasis original). The NSL statute, 18 U.S.C. § 2709(c), does exactly that: it allows the FBI, at its sole discretion, to forbid in advance NSL recipients from disclosing anything about their interaction with the government, even the mere fact that they have received an NSL. *See In re NSL*, 863 F.3d at 1116 (under Section 2709, “the

government may prohibit the recipient from disclosing that it has received the NSL”); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (finding a temporary gag order for purposes of empaneling a jury to be a prior restraint).

However, the panel refused to subject the NSL gag orders to the requisite scrutiny. Indeed, the panel erroneously claimed that “[n]o Supreme Court or Ninth Circuit opinion has articulated” a test holding prior restraints to a higher standard than other content-based restrictions on speech. 863 F.3d at 1127 n.21. As a result, the “strict” scrutiny the panel applied was far less demanding than the strict scrutiny both this Court and the Supreme Court apply to prior restraints.³

Had the panel applied the proper scrutiny, it would have found the NSL statute unconstitutional.

A. This Court requires that prior restraints survive “extraordinarily exacting” strict scrutiny.

This Court has uniformly characterized the strict scrutiny to which prior restraints are subjected as “extraordinarily exacting.” *CBS*, 729 F.2d at 1178; *see also Hunt v. NBC*, 872 F.2d 289, 295 (9th Cir. 1989) (applying “exacting” standard from *Nebraska Press*).⁴ “[P]rior restraints, if permissible at all, are permissible

³ The panel did apply the correct test for procedural protections for prior restraints set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965). NSL Recipients disagree with and urge reconsideration of the panel’s application of those standards, but not the standards themselves.

⁴ Both *CBS* and *Nebraska Press* considered a prior restraint that a trial court deemed appropriate to protect the fair trial rights of a criminal defendant. But

only in the most extraordinary of circumstances.” *CBS*, 729 F.2d at 1183.

The Supreme Court has likewise demanded “pin-pointed” precision for prior restraints. The Court commanded that prior restraints “must be couched in the narrowest terms that will accomplish the *pin-pointed* objective permitted by constitutional mandate and the essential needs of the public order In other words, the order must be tailored *as precisely as possible* to the exact needs of the case.” *Carroll*, 393 U.S. at 183-84 (emphasis added).

One seeking a prior restraint must demonstrate its “necessity.” *Domingo*, 727 F.2d at 1440 n.9. And “the substantive evil” the prior restraint seeks to prevent “must be extremely serious and the degree of imminence extremely high.” *Landmark Commc’ns Inc. v. Virginia*, 435 U.S. 829, 845 (1978); *see also Burch v. Barker*, 861 F.2d 1149, 1155 (9th Cir. 1988) (“Prior restraints are permissible in only the rarest of circumstances, such as imminent threat to national security.”). A “‘solidity of evidence’ is necessary to make the requisite showing of imminence.” *Domingo*, 727 F.2d at 1440 n.9 (quoting *Landmark*, 435 U.S. at 845). “Moreover ‘[t]he danger must not be remote or even probable; it must immediately imperil.’” *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947) (alterations in original)).

This pin-point precision is necessary because prior restraints are “the most

neither court limited that test to fair trial gag orders. Indeed, in *CBS*, this Court also relied upon prior restraint cases from contexts as varied as injunctions against the publication of the Pentagon Papers and leafleting in public. 729 F.2d at 1183.

serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press*, 427 U.S. at 559. Prior restraints require more exacting scrutiny than content-based, ex post punishment because “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.” *Se. Promotions*, 420 U.S. at 559; *Nebraska Press*, 427 U.S. at 556, 559 (First Amendment’s “special protection” against prior restraints premised on the understanding that unlike the “threat of criminal or civil sanctions after publication,” which “chills” speech, prior restraints “freeze” it for their entire duration); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1155 (4th Cir. 1974) (“In the context of the First Amendment and particularly prior restraint of speech, by administrative action, the court has generally required greater precision in regulation than might be required in other constitutional contexts.”) (citing *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1967); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books Inc. v. Sullivan*, 372 U.S. 58 (1963)). The presumption against the constitutionality of prior restraints is thus “heavier than that against restrictions on speech imposed by subsequent penalties.” *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993).

B. The less precise standard employed by the panel conflicts with prior decisions of this Court and the Supreme Court.

Despite the Supreme Court’s call for “pin-pointed” accuracy and this Court’s precedents requiring such exactitude, the panel explicitly rejected the need

for strict precision in assessing the constitutionality of a prior restraint. *In re NSL*, 863 F.3d at 1127. Instead, the panel admittedly employed a less precise articulation of strict scrutiny applicable to all content-based restrictions on speech, treating prior restraints no differently than post-publication punishments. *Id.* Citing the test for content-based restrictions on speech found in *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015), which is not a prior restraint case, the panel expressly refused to employ a “granular focus” that “cannot be reconciled with the Supreme Court’s direction that narrow tailoring is not perfect tailoring,” and declined to “quibble” with the statute’s speech restrictions. 863 F.3d at 1125-26.

But, as explained above, the First Amendment requires courts to scrutinize the substantive judgments made by administrative officials in issuing prior restraints with exacting precision. By dismissively characterizing that serious task as “quibbling” and refusing to undertake it, the panel abdicated its responsibility.

The panel opinion also departed significantly from circuit precedent in this respect. For example, in direct conflict with settled circuit law, the panel refused to apply the requirement that a prior restraint must be designed to prevent harm that is imminent and highly likely to occur. 863 F.3d at 1127 n.21. This Court in *Domingo* required that the “degree of imminence [of the harm be] extremely high” and “[t]he danger must not be remote or even probable; it must *immediately* imperil.” 727 F.2d at 1429 n.9 (emphasis added; internal quotations and citations

omitted). And in *Levine*, 764 F.2d at 595, this Court held that the activity restrained must pose “either a clear and present danger or a serious and imminent threat to a protected competing interest.”

The panel in this case likewise rejected Justice Stewart’s influential command from his *Pentagon Papers* concurrence that the feared harm must “surely result” absent the prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J. concurring). However, in *CBS*, this Court cited with approval Justice Brennan’s similar *Pentagon Papers* concurrence requiring “proof that publication must inevitably, directly, and immediately cause the occurrence of” a serious harm to national security). 729 F.2d at 1184 (quoting *New York Times*, 403 U.S. at 726-27 (Brennan, J., concurring)).⁵

Similarly, the panel refused to require the government to show that the prior restraint would be an effective remedy and actually prevent the harm, despite the Supreme Court’s command that courts *must* “assess the probable efficacy of prior restraint on publication.” *Nebraska Press*, 427 U.S. at 565.

⁵ Other circuits have found Justice Stewart’s command that a prior restraint “surely result in direct, immediate, and irreparable damage to our Nation or its people” to be the enduring legacy of the *Pentagon Papers* case. See, e.g., *Defense Distributed v. Department of State*, 838 F.3d 451, 474 (5th Cir. 2016); *Matter of Providence Journal Co.*, 820 F.2d 1342, 1348-49 (1st Cir. 1986); *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 514 (5th Cir. 1981).

C. Applying the correct standard, the NSL statute is unconstitutional.

Had the panel applied appropriately exacting scrutiny to the NSL statute's gag order scheme, it would have struck down the scheme as an unconstitutional prior restraint.

For example, the statute fails prior restraint analysis because it only requires a showing that absent the gag order, harm "may result," which the panel interpreted as "some reasonable likelihood of harm." 863 F.3d at 1125. Prior restraints, in contrast, are unconstitutional unless the government demonstrates the "necessity" of a gag and the strong probability and imminence of a claimed harm. *See, e.g., Domingo*, 727 F.2d at 1429 n.9; *Levine*, 764 F.2d at 595.

Also, the panel did not require the gag order be the least restrictive means for preventing the harm, acknowledging that the statute allows gags of unlimited and indeed permanent duration. The panel noted that a provision for reviewing outstanding gags merely "reduces the likelihood that an overly long nondisclosure requirement will be imposed," but does not eliminate or minimize that probability. 863 F.3d at 1126.

For further discussion of the statute's failure to meet the exacting scrutiny due prior restraints, *see* NSL Recipients' Opening Br. at 24-33; Reply Br. at 2-6, 17-24.

III. THE PANEL OPINION WOULD DENY PROCEDURAL PROTECTIONS TO A WIDE RANGE OF PRIOR RESTRAINTS.

In another break with settled prior restraint jurisprudence from the Supreme Court, this Court, and its sister circuits, the panel, in dicta, strongly doubted whether gag orders prohibiting speech, such as the NSL gag orders, are entitled to the procedural protections historically accorded prior restraints, set forth in *Freedman v. Maryland*. See *In re NSL*, 863 F.3d at 1127-28. Instead, the panel accorded the *Freedman* protections only to licensing and pre-exhibition review regimes. *Id.* This dicta thus accords gag orders fewer protections than schemes that leave open the possibility of speech if a speaker ‘submit[s] proposed speech for review and approval’ or ‘obtain[s] a license before engaging in business.’ *Id.* at 1128. Indeed, when combined with the panel’s holding that prior restraints are substantively analyzed like ex post content-based penalties on speech, gag orders *prohibiting* speech get no special scrutiny at all. This erosion of the historic protections against prior restraints further necessitates rehearing.

A. The panel opinion erased the historic distinction between prior restraints and other speech restrictions.

Rather than subjecting all prior restraints to the same procedural protections as required by *Freedman*, the panel stated that only “censorship schemes and licensing schemes . . . requiring a putative speaker to submit proposed speech to a governmental body” are granted procedural safeguards to ““obviate the dangers of

a censorship system.” 863 F.3d at 1127 (quoting *Freedman*, 380 U.S. at 58).

In doing so, the panel again avoided using the term “prior restraint” and failed to reconcile its holding with the law governing prior restraints. Instead, it referred awkwardly to “the sort of content-based restriction on speech which must have the procedural safeguards identified by the Supreme Court in *Freedman*,” 863 F.3d at 1127, even though *Freedman* and the cases that follow uniformly apply the protections to “prior restraints.” See *Freedman*, 380 U.S. at 53-54. The panel thus further conflated prior restraints with content-based post-publication restrictions.

The panel found the NSL gag orders to be closer to speech restrictions that are not prior restraints at all, but allegedly instead share the feature that the information suppressed was “generated by the government.”⁶ 863 F.3d at 1128. The panel found support in *Butterworth v. Smith*, 494 U.S. 624 (1990), in which the Court struck down the part of a Florida law prohibiting grand jury witnesses from disclosing their own testimony even after the grand jury was discharged. 494 U.S. at 632. But *Butterworth* dealt with a statutory speech restriction (as opposed to a statutory scheme that authorizes an agency or court to gag speech). Statutes

⁶ The panel also cited the Second Circuit’s opinion in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). But the Second Circuit applied a different distinction, declining to apply prior restraint doctrine to “non-customary” speakers. 549 F.3d at 876. That distinction is inconsistent with Ninth Circuit precedent and was entirely rebutted by the record in this appeal, which contained ample evidence that the NSL Recipients sought routinely to disclose the gagged information through public statements and legislative advocacy. See Excerpts of Record 44-45, 157-58.

that criminalize the publication of certain information are not considered prior restraints because unlike judicial and executive orders, they are not self-executing. *Landmark*, 435 U.S. at 833, 838 (statute that allowed for punishment after publication not a prior restraint). The panel also found *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), analogous. But *Seattle Times* addressed the enforceability of an agreement not to publish: the newspaper had to comply with a protective order to which it had previously agreed in order to obtain discovery, which barred it from disclosing any materials it received through discovery. 467 U.S. at 24-27. Orders enforcing agreements to not publish are not prior restraints. *See Snapp v. United States*, 444 U.S. 507 (1980).

NSL gag orders share neither of these determinative features. Unlike the Florida grand jury secrecy statute at issue in *Butterworth* that was only enforced after the fact, NSL gag orders are prior restraints that allow the FBI to unilaterally prohibit recipients from revealing anything about the NSL, including the simple fact that they have received an NSL. *See* 18 U.S.C. § 2709(c)(1)(A) (prohibition on revealing that FBI has “has sought or obtained access to information or records under this section”). And unlike *Seattle Times*, NSL Recipients did not seek out any information on the condition that they will not reveal it. 467 U.S. at 32; *see also Mukasey*, 549 F.3d at 876 (rejecting comparison between NSLs and speech restrictions in *Butterworth* and *Seattle Times*).

Moreover, information generated or provided by the government is not categorically excluded from the prior restraint doctrine. The Supreme Court and this Court have routinely applied prior restraint doctrine to orders forbidding publication of such information. *See, e.g., Nebraska Press*, 427 U.S. at 543 (press heard confession and other evidence while attending pretrial hearing); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 309 (1977) (reporters obtained juvenile's name by attending court hearing which by law was supposed to be closed); *New York Times*, 403 U.S. at 713 (Pentagon Papers generated by a Defense Department contractor); *CBS*, 729 F.2d at 1176 (temporary restraining order preventing CBS from broadcasting surveillance tapes created by the government).

B. *Freedman* procedural protections apply to speech bans, not just permission schemes.

Contrary to the panel's statement, the *Freedman* procedural protections apply to government speech bans that are not part of a permitting or licensing scheme. In *Vance v. Universal Amusement Co.*, 445 U.S. 308, 310, 316 (1980), for example, a Texas statute empowered the state to obtain an ex parte temporary restraining order lasting as long as 10 days, which could then be converted into a temporary injunction, and ultimately a year-long injunction, against exhibiting films if the distributor had demonstrated a habitual "commercial exhibition of obscenity" in the past. A court ultimately decided whether an injunction was warranted. The scheme in *Vance* was not a permitting scheme like those the panel

found uniquely deserving of *Freedman* protection, and there was no pre-exhibition review of enjoined films. Indeed, films that were actually enjoined were not reviewed at all. Instead, injunctions were based on past exhibitions. *Id.* at 316 & nn.4, 5. Nevertheless, the Supreme Court approved the lower court's finding that the schemes were "procedurally deficient, and that they authorize prior restraints that are more onerous than is permissible under" *Freedman* and its progeny. *Id.* at 317.

This Court applied *Freedman* to a speech injunction, as opposed to a pre-exhibition review scheme, in *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980). In *Spokane Arcades*, this Court held that preliminary and permanent injunctions authorized by a public nuisance statute were an unconstitutional prior restraint. *Id.* at 138. Emphasizing that "the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication," this Court found the statute failed to satisfy *Freedman*. *Id.* (quoting *Vance*, 445 U.S. at 315).

This Court should thus reconsider en banc the panel's strained, aberrant limitations on previously unquestioned prior restraint doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and rehearing en banc.

Dated: October 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 35-4, the foregoing petition for panel rehearing (check applicable option):

Contains 4,189 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

Or

Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Dated: October 2, 2017

/s/ Andrew Crocker

Andrew Crocker

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 2, 2017.

Dated: October 2, 2017

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

<p>IN RE NATIONAL SECURITY LETTER,</p> <hr/> <p>UNDER SEAL, <i>Petitioner-Appellant,</i></p> <p>v.</p> <p>JEFFERSON B. SESSIONS III, Attorney General, <i>Respondent-Appellee.</i></p>	<p>No. 16-16067</p> <p>D.C. No. 3:11-cv-02173-SI</p>
<p>IN RE NATIONAL SECURITY LETTER,</p> <hr/> <p>UNDER SEAL, <i>Petitioner-Appellant,</i></p> <p>v.</p> <p>JEFFERSON B. SESSIONS III, Attorney General, <i>Respondent-Appellee.</i></p>	<p>No. 16-16081</p> <p>D.C. No. 3:13-mc-80089- SI</p>

2

IN RE NATIONAL SECURITY LETTER

IN RE NATIONAL SECURITY LETTER,	No. 16-16082
<hr/>	
UNDER SEAL,	D.C. No.
<i>Petitioner-Appellant,</i>	3:13-cv-01165-SI
v.	OPINION
JEFFERSON B. SESSIONS III, Attorney General,	
<i>Respondent-Appellee.</i>	

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted March 22, 2017
San Francisco, California

Filed July 17, 2017

Before: Sandra S. Ikuta, N. Randy Smith,
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Ikuta

SUMMARY*

Civil Rights

The panel affirmed the district court's orders denying petitions brought by electronic communication service providers pursuant to 18 U.S.C. § 3511(a) to set aside information requests and nondisclosure requirements in National Security Letters issued to them by the Federal Bureau of Investigation.

A National Security Letter is an administrative subpoena issued by the FBI to a wire or electronic communication service provider requiring the provider to produce specified subscriber information that is relevant to an authorized national security investigation. 18 U.S.C. § 2709(a). By statute, a National Security Letter may include a requirement that the recipient not disclose the fact that it has received such a request. In this case, recipients of National Security Letters alleged that the nondisclosure requirement violates their First Amendment rights.

The panel held that § 2709(c)'s nondisclosure requirement imposes a content-based restriction that is subject to, and withstands, strict scrutiny. The panel further held that, assuming the nondisclosure requirement was the type of prior restraint for which the procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965) were required, the National Security Letters law provided those

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

safeguards. The panel concluded that the nondisclosure requirement does not run afoul of the First Amendment.

COUNSEL

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Lewis S. Yelin (argued), Scott R. McIntosh, and Douglas N. Letter, Appellate Staff; Brian Stretch, United States Attorney; Benjamin C. Mizer, Principal Deputy Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Respondent-Appellee.

OPINION

IKUTA, Circuit Judge:

In this case, we consider challenges to the constitutionality of the law authorizing the Federal Bureau of Investigation (FBI) to prevent a recipient of a national security letter (NSL) from disclosing the fact that it has received such a request. 18 U.S.C. § 2709(c). An NSL is an administrative subpoena issued by the FBI to a wire or electronic communication service provider which requires the provider to produce specified subscriber information that is relevant to an authorized national security investigation. *Id.* § 2709(a). By statute, the NSL may include a requirement

that the recipient not “disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records” under the NSL law. *Id.* § 2709(c)(1)(A). Both the information request and the nondisclosure requirement are subject to judicial review. *See id.* § 3511. (Because § 2709 and § 3511 work together, we refer to them collectively as “the NSL law.”)

Certain recipients of these NSLs claim that the nondisclosure requirement violates their First Amendment rights. We hold that the nondisclosure requirement in 18 U.S.C. § 2709(c) is a content-based restriction on speech that is subject to strict scrutiny, and that the nondisclosure requirement withstands such scrutiny. Accordingly, we affirm.

I

We begin by reviewing the statutory framework under which NSLs are issued. The law authorizing the FBI to send an information request to a wire or electronic communication service provider was originally enacted as part of the Electronic Communications Privacy Act of 1986. Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1867. The law was extensively amended in 2006, as part of the USA Patriot Improvement and Reauthorization Act of 2005. Pub. L. No. 109-177, §§ 115, 116(a), 120 Stat. 192, 211–17 (2006). The letters received by the recipients here were issued under the 2006 version of the NSL law. Subsequently, Congress enacted the USA FREEDOM Act of 2015, Pub. L. No. 114-

23, 129 Stat. 268, which further amended the NSL law effective June 2, 2015.¹

The NSL law is best understood as a form of administrative subpoena. Congress may authorize federal agencies to issue administrative subpoenas without court authorization for any purpose within Congress’s constitutional power. *See Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 208–09 (1946); *see also ICC v. Brimson*, 154 U.S. 448, 472–73 (1894), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194, 198–200 (1968). But while an agency may issue a subpoena without prior judicial approval, it must invoke the aid of a federal court to enforce it. *See, e.g., United States v. Sec. State Bank & Trust*, 473 F.2d 638, 641–42 (5th Cir. 1973); *see also Shasta Minerals & Chem. Co. v. SEC*, 328 F.2d 285, 286 (10th Cir. 1964). The “power to punish is not generally available to federal administrative agencies,” and so enforcement must be sought “by way of a separate judicial proceeding.” *Shasta Minerals*, 328 F.2d at 286.

Sections 2709 and 3511 follow the statutory framework typically used to authorize administrative subpoenas. *Compare* 18 U.S.C. §§ 2709, 3511, *with, e.g.,* 21 U.S.C. § 876(a). Section 2709 authorizes the FBI to make an information request to “[a] wire or electronic communication service provider” for “subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession,” and

¹ Where necessary to differentiate between the 2006 and 2015 versions of the NSL law, we refer to the former as the “2006 NSL law” and the latter as the “2015 NSL law.” Unless otherwise noted, a reference to 18 U.S.C. § 2709 or 18 U.S.C. § 3511 refers to the 2015 NSL law.

provides that the recipient “shall comply” with the request. 18 U.S.C. § 2709(a).² In order to issue such a request, the FBI Director or a sufficiently high-ranking designee of the Director must “specifically identif[y] a person, entity, telephone number, or account as the basis for a request,” and must certify that the “records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities” and that the investigation “is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.” *Id.* § 2709(b)(1)–(2).³ The NSL must

² 18 U.S.C. § 2709(a) provides:

Duty to Provide. — A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

³ 18 U.S.C. § 2709(b) provides:

Required Certification. — The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name,

include notice of the availability of judicial review under 18 U.S.C. § 3511. *Id.* § 2709(d).

The NSL law contemplates that in some cases, a recipient's disclosure of the fact that it has received an FBI request for specific information may result in one of four enumerated harms: "(i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person." *Id.* § 2709(c)(1)(B).⁴

address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

⁴ 18 U.S.C. § 2709(c)(1)(B) provides:

Certification. — The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at

If the FBI Director or a sufficiently high-ranking designee of the Director issues a certification “that the absence of a prohibition of disclosure under this subsection may result” in one of these harms, *id.*, and the government gives the recipient notice of the availability of judicial review pursuant to § 3511, *see id.* § 2709(d)(2), the government may prohibit the recipient from disclosing that it has received the NSL, *see id.* § 2709(c)(1)(A),⁵ subject to such judicial review.

Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in —

- (i) a danger to the national security of the United States;
- (ii) interference with a criminal, counterterrorism, or counterintelligence investigation;
- (iii) interference with diplomatic relations; or
- (iv) danger to the life or physical safety of any person.

⁵ 18 U.S.C. § 2709(c)(1)(A) provides:

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

There are three statutory exceptions to the nondisclosure requirement. *See id.* § 2709(c)(2).⁶ First, a recipient “may

⁶ 18 U.S.C. § 2709(c)(2) provides:

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

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

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

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

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

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

(D) Identification of disclosure recipients. — At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such

disclose information otherwise subject to any applicable nondisclosure requirement” to “those persons to whom disclosure is necessary in order to comply with the request.” *Id.* § 2709(c)(2)(A)(i). Second, the recipient may disclose such information to “an attorney in order to obtain legal advice or assistance regarding the request.” *Id.* § 2709(c)(2)(A)(ii). Third, if the recipient wants to provide the information to other individuals, it may do so if it obtains the permission of the FBI Director or the designee of the Director. *Id.* § 2709(c)(2)(A)(iii). The recipient must also inform those persons receiving the information that they are subject to the same nondisclosure requirement applicable to the initial recipient, *id.* § 2709(c)(2)(C).

As is typical in the administrative subpoena context, § 2709 does not contain any penalty provision either for failure to comply with the information request or for failure to comply with the nondisclosure requirement. Only a court has authority to enforce the information request or the nondisclosure requirement. *See id.* § 3511. If a recipient fails to comply with an information request, the government “may invoke the aid” of a district court “to compel compliance with the request.” *Id.* § 3511(c).⁷ The court may “issue an order

disclosure will be made or to whom such disclosure was made prior to the request.

⁷ 18 U.S.C. § 3511(c) provides:

In the case of a failure to comply with a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National

requiring the person or entity to comply with the request,” and “[a]ny failure to obey the order of the court may be punished by the court as contempt thereof.” *Id.* Alternatively, the recipient of an NSL may petition the district court “for an order modifying or setting aside the request,” and the district court may do so “if compliance would be unreasonable, oppressive, or otherwise unlawful.” *Id.* § 3511(a).⁸

Whenever a nondisclosure requirement under § 2709(c) is imposed on a recipient, the recipient may challenge the requirement in one of two ways. First, the recipient may “file a petition for judicial review in any court described in

Security Act of 1947, the Attorney General may invoke the aid of any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity resides, carries on business, or may be found, to compel compliance with the request. The court may issue an order requiring the person or entity to comply with the request. Any failure to obey the order of the court may be punished by the court as contempt thereof. Any process under this section may be served in any judicial district in which the person or entity may be found.

⁸ 18 U.S.C. § 3511(a) provides, in relevant part:

The recipient of a request for records, a report, or other information under section 2709(b) of this title . . . may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.

[§ 3511(a)].” *Id.* § 3511(b)(1)(A).⁹ Second, the recipient “may notify the Government” that it desires judicial review, *id.*, in which case “[n]ot later than 30 days after the date of receipt of a notification [from the recipient], the Government shall apply [to the district court] for an order prohibiting” disclosure, *id.* § 3511(b)(1)(B). The government’s application for a nondisclosure order (or for an extension of

⁹ 18 U.S.C. § 3511(b)(1) provides:

(A) Notice. — If a recipient of a request or order for a report, records, or other information under section 2709 of this title . . . wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a).

(B) Application. — Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

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

such an order), must include a certification from the FBI Director or a sufficiently high-ranking designee “containing a statement of specific facts indicating that the absence of a prohibition of disclosure under [§ 3511(b)] may result in” one of the four harms enumerated in § 2709(c)(1)(B). *Id.* § 3511(b)(2).¹⁰ The nondisclosure requirement remains in effect while the district court considers the recipient’s challenge or the government’s application for a nondisclosure order. *Id.* § 3511(b)(1)(B).

A court receiving a recipient’s petition for judicial review of a nondisclosure requirement or the government’s

¹⁰ 18 U.S.C. § 3511(b)(2) provides:

An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in [the four harms enumerated in 18 U.S.C. § 2709(c)(1)(B)].

Under the 2006 NSL law, the government was not required to provide a statement of specific facts supporting its certification. Rather, “such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith.” 18 U.S.C. § 3511(b)(2) (2006).

application for a nondisclosure order “should rule expeditiously.” *Id.* § 3511(b)(1)(C). The court “shall issue a nondisclosure order or extension thereof . . . if the court determines that there is [good] reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in” one of the four enumerated harms. *Id.* § 3511(b)(3).¹¹ In making this determination, “the court shall, upon request of the government, review *ex parte* and *in camera* any government submission or portions thereof, which may include classified information.” *Id.* § 3511(e). Any nondisclosure order issued by a reviewing court should “include[] conditions appropriate to the circumstances.” *Id.* § 3511(b)(1)(C).

In amending the NSL law in 2015, Congress also required the Attorney General to promulgate procedures for periodically reviewing and terminating any nondisclosure requirements issued in connection with an NSL. Pub. L. No. 114-23, Title V, § 502(f), 129 Stat. at 288 (codified at 12 U.S.C. § 3414 note). The Attorney General adopted such

¹¹ 18 U.S.C. § 3511(b)(3) provides:

A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in [the four harms enumerated in 18 U.S.C. § 2709(c)(1)(B)].

The Second Circuit in *John Doe, Inc. v. Mukasey* adopted the “common-sense understanding” that “reason” in the 2006 NSL law means “good reason.” 549 F.3d 861, 875 (2d Cir. 2008). We also adopt this understanding.

procedures in November 2015. *See* Termination Procedures for National Security Letter Nondisclosure Requirement, Fed. Bureau of Investigation (Nov. 24, 2015), <https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf> (hereinafter “Termination Procedures”). Under these procedures, any nondisclosure requirement must terminate when the underlying investigation is closed or “on the three-year anniversary of the initiation” of the investigation, unless “the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied.” Once the FBI has determined that nondisclosure is no longer required, it must provide written notice to the recipient to that effect. If the FBI does not terminate the nondisclosure requirement at either of these occasions, the recipient retains the right to challenge the requirement in district court. 18 U.S.C. § 3511(a).

The 2015 legislation amending the NSL law also added 50 U.S.C. § 1874, which allows “[a] person subject to a nondisclosure requirement” to disclose aggregate data regarding the number of NSLs (in specified ranges or “bands”) that the person has received. Pub. L. No. 114-23, Title VI, § 603(a), 129 Stat. at 295–96 (codified at 50 U.S.C. § 1874(a)(1)–(4)). For instance, a person may report receiving 0 to 99, 0 to 249, 0 to 499, or 0 to 999 nondisclosure requirements. A person who chooses to report receiving 0 to 99 nondisclosure requirements may make such a disclosure on an annual basis, while a person who chooses to report receipt of a larger range of NSLs may report semiannually. *See* 50 U.S.C. § 1874(a)(1)–(4).

II

We next turn to the facts of these consolidated appeals, which involve five NSLs issued to two recipients between 2011 and 2013 (while the 2006 NSL law remained in effect). Each NSL at issue contained an information request and a nondisclosure requirement, and informed the recipient that it could seek judicial review of the nondisclosure requirement by notifying the FBI and that the FBI would accordingly initiate judicial review within 30 days.

The first recipient, CREDO Mobile, received three of the NSLs at issue, the first in 2011 and two more in 2013. The second recipient, CloudFlare, received the other two NSLs, both in 2012. Following receipt, CREDO and CloudFlare petitioned the district court to set aside the information requests and nondisclosure requirements contained in each NSL. Each recipient also sought to enjoin the government from issuing additional NSLs and from imposing additional nondisclosure requirements. In response, the government cross-moved in each case to compel compliance with the NSLs.

In considering the 2011 NSL issued to CREDO, the district court held that the nondisclosure and judicial review provisions in the 2006 NSL law violated the First Amendment and that these provisions were not severable from the remainder of the statute, and accordingly enjoined the government from issuing information requests and from enforcing nondisclosure requirements. *See In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013). The district court stayed its decision pending the resolution of the government's appeal.

Notwithstanding its conclusion that the 2006 NSL law was constitutionally deficient, the district court denied the petitions to set aside the information requests and nondisclosure requirements in the 2013 NSLs issued to CREDO and the 2012 NSLs issued to CloudFlare. The district court reasoned that those NSLs were issued in full compliance with the procedural and substantive requirements suggested by the Second Circuit in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), which had held that the 2006 NSL law could be constitutionally applied if certain additional safeguards were provided. CREDO and CloudFlare appealed.

While we considered these appeals, Congress enacted the USA FREEDOM Act, effective June 2, 2015. Recognizing the extensive changes to the NSL law made by this enactment, we vacated the district court's judgments and remanded to allow the district court to consider in the first instance the constitutionality of the 2015 NSL law.

On remand, CREDO and CloudFlare submitted renewed petitions under § 3511(a) to set aside the information requests and nondisclosure requirements contained in each NSL and the government cross-petitioned to enforce both components of the NSLs. This time, the district court held that the NSL law, as amended, was constitutional. It also determined that the government had carried its burden of showing that there was good reason to believe that disclosure of the 2011 NSL to CREDO and of the 2012 NSLs to CloudFlare might result in one of the four enumerated harms. Accordingly, it granted the government's cross-petitions to enforce those three NSLs in their entirety. However, with respect to the 2013 NSLs to CREDO, the district court held that the government's certification that one of the four enumerated harms would

result absent nondisclosure was insufficient. Accordingly, it granted CREDO's petition to set aside the nondisclosure requirement in the 2013 NSLs.

CREDO and CloudFlare appealed the denial of their petitions to set aside the information requests and nondisclosure requirements in the 2011 and 2012 NSLs. The government cross-appealed the district court's decision to set aside the nondisclosure requirements in the 2013 NSLs to CREDO, but has since voluntarily dismissed its cross-appeal.¹²

While this appeal was pending, the FBI closed the investigation underlying the 2011 NSL to CREDO. Following the Termination Procedures adopted as required by the 2015 amendments, the FBI determined that continued nondisclosure was no longer necessary and so notified CREDO in writing. According to the FBI's letter to CREDO, CREDO may now disclose "[t]he fact that [CREDO] received the NSL on a certain date" and "[w]hether or not [CREDO] provided responsive information to the FBI pursuant to the NSL." However, "the nondisclosure requirement remains in place for any information regarding the customer account(s) for which information was sought, as well as any other information that could be used to identify the subscriber(s) for the customer account(s)."¹³

¹² The 2013 NSLs' nondisclosure requirements are therefore no longer at issue, and CREDO raises no argument on appeal challenging the information requests contained in the 2013 NSLs.

¹³ The nondisclosure requirement also remains in place for the name and contact information of the FBI Special Agent identified in the NSL.

The FBI also closed the investigation underlying one of the 2012 NSLs issued to CloudFlare. Following the Termination Procedures, the FBI determined that continued nondisclosure was no longer necessary and provided CloudFlare written notice to that effect. According to the FBI's letter to CloudFlare, CloudFlare may now disclose the "[t]he fact that [CloudFlare] received the NSL on a certain date"; "[t]he customer account(s) for which information was sought"; and "[w]hether or not [CloudFlare] provided responsive information to the FBI pursuant to the NSL."¹⁴ The nondisclosure requirement contained in the second 2012 NSL to CloudFlare remains in full effect.¹⁵

In sum, CREDO is now subject to a nondisclosure requirement "for any information regarding the customer account(s) for which information was sought, as well as any other information that could be used to identify the subscriber(s) for the customer account(s)" under the 2011 NSL. CloudFlare is subject to a nondisclosure requirement only as to one of the 2012 NSLs.¹⁶

¹⁴ As with the 2011 NSL to CREDO, the nondisclosure requirement remains in place for the name and contact information of the FBI Special Agent identified in the first 2012 NSL to CloudFlare.

¹⁵ Because CloudFlare identified itself not only as the recipient of one of the 2012 NSLs but also as challenging two NSLs before us, the FBI determined that CloudFlare may be publicly identified.

¹⁶ On appeal, CREDO and CloudFlare raise the same arguments. Therefore, we refer to the appellants together as the "recipients."

III

We begin our constitutional analysis by analyzing whether this appeal raises a facial challenge or an as-applied challenge to the NSL law. “A facial challenge is an attack on a statute itself as opposed to a particular application.” *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015). By contrast, “[a]n as-applied challenge contends that the law is unconstitutional as applied to the litigant’s particular speech activity, even though the law may be capable of valid application to others.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The recipients assert that the nondisclosure requirement of § 2709(c) prevents them from speaking about matters of public policy and engaging in the political process, but do not argue that the NSL law can never be constitutionally applied in any context. Accordingly, we analyze the recipients’ challenge as a facial challenge. *Cf. Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 802–03 (1984) (concluding that the plaintiff’s challenge to an ordinance was an as-applied challenge because the plaintiffs acknowledged that the statute could be validly applied in other cases).

“[C]onstitutional questions of fact (such as whether certain restrictions create a ‘severe burden’ on an individual’s First Amendment rights) are reviewed de novo.” *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006) (emphasis omitted). We also review legal conclusions de novo. *Id.*

IV

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I. Despite the breadth of this language,

the Supreme Court has concluded that some restrictions on speech are constitutional, provided they survive the appropriate level of scrutiny. When the government restricts speech based on its content, a court will subject the restriction to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Under strict scrutiny, restrictions “may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226. If the governmental restriction on speech is content neutral, a court will uphold it if it furthers “an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not burden substantially more speech than is necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 186 (1997) (internal quotation marks omitted).¹⁷

Even if the government has constitutional authority to impose a particular content-based restriction on speech, the government does not have unfettered freedom to implement such a restriction through “a system of prior administrative restraints.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also id.* at 66 (“[A] State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.” (quoting *Marcus v. Search Warrants*, 367 U.S. 717, 730–31 (1961))). Rather, “a law

¹⁷ The government may also restrict the time, place, and manner of speech so long as it does not discriminate based on content and meets certain other criteria. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980). This form of restriction is not at issue here.

subjecting the exercise of First Amendment freedoms to the prior restraint of a license” or other burden must itself pass constitutional muster. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). A system that gives public officials authority to regulate or prohibit an individual’s exercise of First Amendment rights based on the content of the individual’s speech must have “narrow, objective, and definite standards to guide the licensing authority,” *id.* at 151, and must have the “procedural safeguards that reduce the danger of suppressing constitutionally protected speech,” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). These procedural safeguards are as follows: “(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.” *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS v. City of Dallas*, 493 U.S. 215, 227 (1990) (principal opinion of O’Connor, J.), and citing *Freedman v. Maryland*, 380 U.S. 51, 58–60 (1965)). The procedural requirements for systems imposing content-based restraints do not apply, however, to “a content-neutral permit scheme regulating speech in a public forum.” *Id.* at 322.

Accordingly, our analysis of § 2709(c)’s nondisclosure requirement proceeds in three steps. We must first determine whether the nondisclosure requirement is content based or content neutral. If the nondisclosure requirement is content based, we then consider whether it survives strict scrutiny. Finally, we must determine whether the nondisclosure requirement constitutes the type of restraint for which the

procedural safeguards are required and, if so, whether it provides those safeguards.

A

We turn first to the question whether the nondisclosure requirement in § 2709(c) is content based or content neutral. A government’s restriction on “speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 135 S. Ct. at 2227. The first step in determining whether speech is content based is “to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.” *Id.* (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011)). Regulations draw such a distinction if they “target speech based on its communicative content,” *id.* at 2226, prohibit “public discussion of an entire topic,” *id.* at 2230 (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)), or “single[] out specific subject matter for differential treatment,” *id.*

Thus, a regulation or law that restricts speech based on its topic, idea, message, or content is “content based” on its face, and is accordingly subject to strict scrutiny. If a court determines that the law is content based at this first step, the court need not “consider the government’s justifications or purposes” for enacting the regulation. *Id.* at 2227. “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.” *Id.* at 2228 (internal quotation marks omitted). Only if a law is content neutral on its face should a court proceed to consider whether it is nevertheless a content-based regulation of speech because it

“cannot be justified without reference to the content of the regulated speech, or [was] adopted by the government because of disagreement with the message [the speech] conveys.” *Id.* at 2227 (second alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

Applying this framework here, the nondisclosure requirement in § 2709(c) is content based on its face. By its terms, the nondisclosure requirement prohibits speech about one specific issue: the recipient may not “disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records” by means of an NSL. *See* 18 U.S.C. § 2709(c). Such a restriction “target[s] speech based on its communicative content,” and restricts speech based on its “function or purpose.” *Reed*, 135 S. Ct. at 2226–27. Given this conclusion, we need not proceed to the second step of the analysis, to determine whether the statute stifles views with which the government disagrees, *see Ward*, 491 U.S. at 791, or distinguishes among views about NSLs in deciding which speech is prohibited, *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). We conclude that the nondisclosure requirement is a content-based restriction.

B

Because we have determined that the restriction imposed by the nondisclosure requirement is content based, we turn to the Supreme Court’s strict scrutiny test for content-based restrictions on speech and ask whether the nondisclosure requirement permitted by § 2709(c) is narrowly tailored to serve a compelling state interest. *Reed*, 135 S. Ct. at 2226.

As a threshold matter, we readily conclude that national security is a compelling government interest. Indeed, the Court has recognized that “[e]veryone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)). By the same token, keeping sensitive information confidential in order to protect national security is a compelling government interest. *See Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing “the Government’s compelling interest in withholding national security information from unauthorized persons in the course of executive business” (internal quotation marks omitted)); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”). Here, the recipients do not dispute that the nondisclosure requirement directly serves the compelling state interest of national security: a nondisclosure requirement may be imposed only if one of the four enumerated harms “may result” absent nondisclosure. 18 U.S.C. § 2709(c)(1)(B).

We therefore turn to the question whether the nondisclosure requirement in § 2709(c) is narrowly tailored. A restriction is not narrowly tailored “if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997). Nevertheless, strict scrutiny requires that a content-based

restriction “be narrowly tailored, not that it be ‘perfectly tailored.’” *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). Accordingly, a reviewing court should “decline to wade into th[e] swamp” of calibrating the individual mechanisms of a restriction. *Id.* Ultimately, the Supreme Court has emphasized that strict scrutiny is not “fatal in fact.” *Id.* at 1666 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

The recipients argue that the 2015 NSL law is not narrowly tailored for two reasons. First, they claim it is overinclusive because it prevents disclosure of the bare fact of receiving the NSL as well as disclosure of the NSL’s content. Second, they claim it is not the least restrictive alternative because it allows the government to prohibit disclosure indefinitely. Because the recipients claim that the NSL law constitutes a system of prior restraints, they also argue that the statute fails to provide the government with “narrow, objective, and definite standards” to guide its decision to prohibit disclosure. *Shuttlesworth*, 394 U.S. at 150–51. We consider each argument in turn.

1

The recipients contend that the NSL law is not narrowly tailored because, as they interpret the NSL law, it prevents disclosures that are not harmful to national security and therefore does not further the government’s compelling interest. Specifically, the recipients argue that a recipient who has millions of customers could disclose the receipt of a single NSL without impeding national security interests. Second, the recipients argue that 18 U.S.C. § 2709(c)(2)(A)(iii), authorizing the FBI director or a

designee to permit a recipient to make disclosures to additional persons, is an insufficient remedy for overinclusiveness because it gives the FBI total discretion to determine who may receive disclosures and does not require the FBI to engage in any consideration of a narrower nondisclosure requirement. Further, they argue that the judicial review provisions are insufficient to render the nondisclosure requirement narrowly tailored because, according to the recipients, a court's subsequent narrowing of the nondisclosure requirement is irrelevant to the narrow tailoring analysis.¹⁸ Finally, they argue that 50 U.S.C. § 1874, allowing for disclosure of aggregate data in various ranges, does not remedy the overinclusiveness of the nondisclosure requirement, because it arbitrarily differentiates between recipients who receive fewer than 500 NSLs (who must include "0" in the lowest reporting band) from recipients who receive more than 500 NSLs. As a result, the recipients argue, recipients who receive fewer than 500 NSLs are forced to make the false assertion that they might have received no NSLs.

These arguments are based on the erroneous assumption that, in order to determine whether the NSL law is narrowly tailored, we must analyze each provision of the NSL law individually to ensure that each is itself narrowly tailored. This granular focus cannot be reconciled with the Supreme Court's direction that narrow tailoring is not perfect tailoring.

¹⁸ The recipients also argue that the judicial review provisions are insufficient to address overinclusiveness because they are triggered only if a recipient challenges the nondisclosure order. We reject this argument because judicial review is available to every recipient and, as we discuss in Section V, the burden of obtaining review is *de minimis*.

Williams-Yulee, 135 S. Ct. at 1671. Analyzing the statute as a whole, we reject the recipients' arguments.

The statute does not authorize the government to issue a nondisclosure requirement based on a mere possibility of harm; rather, a high ranking official must certify that disclosure "may result" in one of four enumerated harms, 18 U.S.C. § 2709(c)(1)(B), meaning that there is "some reasonable likelihood" that harm will result from the disclosure. *John Doe, Inc. v. Mukasey*, 549 F.3d at 875. The government must engage in an individualized analysis of each recipient when making such a certification, which may include consideration of the size of the recipient's customer base. If disclosure of the receipt of an NSL would not result in one of the enumerated harms because the recipient has millions of customers, the government could not properly make the certification required under the statute. Moreover, under those circumstances, the reviewing court would lack a good reason to believe that continued nondisclosure as to the fact of receipt is necessary. 18 U.S.C. § 3511(b)(3).

Similarly, the new 2015 provision allowing disclosures to "other persons as permitted by the [FBI] Director" or the Director's designee, *id.* § 2709(c)(2)(A)(iii), merely provides the FBI with more flexibility to tailor the scope of the nondisclosure provision. We reject the recipients' argument that this provision gives the government unfettered discretion and therefore creates a system of insufficiently cabined prior restraints. Even if the NSL law is determined to be the type of regulation for which procedural safeguards are required (see section V, *infra*), the law as a whole imposes narrow, objective, and definite standards on the government before it can issue a nondisclosure requirement, *see id.* § 2709(c); *cf. Shuttlesworth*, 394 U.S. at 150 (considering a city ordinance

that “conferred upon the [governmental authority] virtually unbridled and absolute power to prohibit” certain forms of speech). The fact that the statute also gives the FBI Director or a designee discretion to make additional exceptions to the nondisclosure requirement does not lessen the adequacy of the clear standards imposed on these officials before issuing a nondisclosure requirement in the first place.

Nor are we persuaded by the recipients’ attempt to divorce the nondisclosure requirement from the availability of judicial review, which authorizes a court to modify a nondisclosure order with “conditions appropriate to the circumstances,” 18 U.S.C. § 3511(b)(1)(C). The availability of judicial review is a component of each nondisclosure requirement issued under § 2709(c); each recipient is informed of the availability of judicial review in the NSL itself. *See id.* § 2709(d); *see also id.* § 3511(a), (b)(1). The fact that some, or even most, NSL recipients do not seek judicial review of a nondisclosure requirement is not relevant to the question whether the NSL law is narrowly tailored on its face.

Finally, the provision allowing a speaker to disclose its status as a recipient of a specified range of NSLs, *see* 50 U.S.C. § 1874, does not affect our conclusion that the NSL statute is narrowly tailored. To the contrary, the provisions allow recipients to make additional specified disclosures regarding the receipt of the nondisclosure requirements in certain circumstances without obtaining government or court approval. We decline the recipients’ invitation to quibble with the particular ranges selected by Congress. *See Williams-Yulee*, 135 S. Ct. at 1671.

The recipients next argue that the nondisclosure requirement in § 2709(c) is not narrowly tailored because it authorizes restraints of overly long or indefinite duration and so is not the least restrictive means of achieving the government's compelling interest. We agree that in order to ensure that the nondisclosure requirement is narrowly tailored to serve the government's compelling interest in national security, a nondisclosure requirement must terminate when it no longer serves such a purpose. But the 2015 amendments to the NSL law largely address this concern by requiring the Attorney General to promulgate the Termination Procedures, which are now in effect.¹⁹ Under these procedures, the FBI is required to reassess the necessity of nondisclosure on two occasions: three years after an investigation is begun and upon the closing of an investigation. This mandated reassessment reduces the likelihood that an overly long nondisclosure requirement will be imposed. For example, if the need for nondisclosure arises because of the ongoing status of an investigation, nondisclosure would no longer be required following the closure of the investigation, and the requirement would terminate pursuant to the Termination Procedures.²⁰

¹⁹ The recipients do not challenge the Termination Procedures themselves.

²⁰ In this case, the Termination Procedures worked as intended: nondisclosure requirements in two of the NSLs at issue in this case were reduced in scope or entirely removed pursuant to the Termination Procedures, as the FBI determined upon the completion of the relevant investigations that continued nondisclosure was not required.

Nonetheless, the Termination Procedures do not resolve the duration issue entirely. For example, where the government determines that the nondisclosure requirement remains necessary at the close of an investigation, the Termination Procedures do not require any subsequent review. Similarly, if an investigation extends for many years, the Termination Procedures do not provide for any interim review between the third-year anniversary and the date the investigation closes.

But the Termination Procedures are supplemented by the availability of judicial review. When judicial review is sought, either through a recipient's own petition or on the government's application following notice from a recipient, the reviewing court "shall . . . issue a nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C). A court's order enforcing an administrative subpoena must be within constitutional bounds. *See Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349–50 (9th Cir. 1988). Therefore, a reviewing court would be bound to ensure that the nondisclosure requirement does not remain in place longer than is necessary to serve the government's compelling interest. *See Playboy Entm't*, 529 U.S. at 813.

Moreover, as part of the judicial review process, a court may require the government to justify the continued necessity of nondisclosure on a periodic, ongoing basis, or may terminate the nondisclosure requirement entirely if the government cannot certify that one of the four enumerated harms may occur. *See In re Nat'l Sec. Letters*, No. 16-518, 2016 WL 7017215, at *4 (D.D.C. July 25, 2016) (imposing periodic review every three years); *see also In re Nat'l Sec. Letter*, 165 F. Supp. 3d 352, 356 (D. Md. 2015) (imposing

periodic review every 180 days until issuance of the Termination Procedures). Accordingly, any constitutional concerns regarding the duration of the nondisclosure requirement can be addressed by a reviewing court's determination that periodic review should be one of the "conditions appropriate to the circumstances." *See* 18 U.S.C. § 3511(b)(1)(C).

We therefore conclude that the 2015 NSL law is narrowly tailored to serve a compelling government interest, both as to inclusiveness and duration. Accordingly, we hold that the nondisclosure requirement in § 2709(c) survives strict scrutiny.²¹

²¹ The recipients argue that the NSL law should be held to a higher standard than strict scrutiny. According to the recipients, a content-based restriction imposed by a system of prior restraint is permissible only if (1) the harm to the governmental interest is highly likely to occur; (2) the harm will be irreparable; (3) no alternative exists for preventing the harm; and (4) the restriction will actually prevent the harm. This argument is meritless. No Supreme Court or Ninth Circuit opinion has articulated such a test, nor do the three cases cited by the recipients support it. The brief per curiam opinion in *New York Times Co. v. United States (Pentagon Papers)* did not specify a test that should be applied to prior restraints. *See* 403 U.S. 713, 714 (1971). Further, neither *Nebraska Press Ass'n v. Stuart*, 427 U.S. 541 (1976), nor *Levine v. U.S. District Court*, 764 F.2d 590 (9th Cir. 1985), required the government to show that harm to a government interest (i.e., protecting a criminal defendant's Sixth Amendment rights) was highly likely to occur or that no alternative to a restraining order existed. Nor did either case suggest that a pretrial restraint is invalid unless it is certain to prevent the harm at issue. Rather, consistent with the application of strict scrutiny, these opinions considered the availability of *less restrictive* alternatives to a restraining order. *See Nebraska Press*, 427 U.S. at 563–64; *Levine*, 764 F.2d at 599–601.

V

Having determined that the First Amendment does not prevent the government from restricting the information subject to nondisclosure under the NSL law, we next consider the recipients' argument that the nondisclosure requirement in § 2709(c) is the sort of content-based restriction on speech which must have the procedural safeguards identified by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51.

The recipients argue that the NSL law's nondisclosure requirement is such a restriction because it is a content-based rule that "*forbid[s]* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). In the absence of such a restriction, the recipients argue, they would have the opportunity to disclose the receipt of an NSL, subject to subsequent judicial review.

This argument is not entirely persuasive. As the Second Circuit noted, § 2709(c) limits certain speech in advance but "is not a typical example" of a regulation for which procedural safeguards are required. *John Doe, Inc. v. Mukasey*, 549 F.3d at 876. The Supreme Court has generally focused on two types of government schemes requiring safeguards: censorship schemes and licensing schemes. The Court has long held that schemes requiring a putative speaker to submit proposed speech to a governmental body, which is then "empowered to determine whether the applicant should be granted permission — in effect, a license or permit — on the basis of its review of the content of the proposed" speech, *Se. Promotions*, 420 U.S. at 554, "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system,"

Freedman, 380 U.S. at 58. The Court has applied this rule to censorship schemes requiring film exhibitors to obtain prior approval before showing a film, *see id.* at 52–53, requiring producers to obtain permission to show theatrical productions in municipal theaters, *Se. Promotions*, 420 U.S. at 554, allowing the postmaster to hold books sent through the mail pending a determination of obscenity, *Blount v. Rizzi*, 400 U.S. 410, 413–15 (1971), and seizing materials brought into the United States pending an obscenity determination by customs agents, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 365–66 (1971), among other systems of censorship. The need for procedural safeguards in these cases derived from the principle that “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.” *Se. Promotions*, 420 U.S. at 559. “[T]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *Id.*

In later years, the Supreme Court has extended the applicability of *Freedman*, holding that government schemes for licensing constitutionally permissible speech or communicative conduct also require procedural safeguards. *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988) (requiring procedural safeguards in government schemes for licensing professional fundraisers to solicit money); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 776, 780 (2004) (requiring procedural safeguards in government schemes for licensing adult entertainment businesses); *see also FW/PBS*, 493 U.S. at 220, 228–30 (principal opinion of O’Connor, J.) (same); *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1001 (9th Cir. 2004) (same). The safeguards required for licensing schemes

are less extensive than those required in *Freedman* because they do “not present the grave dangers of a censorship system.” *City of Littleton*, 541 U.S. at 783 (quoting *FW/PBS*, 493 U.S. at 228) (internal quotation marks omitted).

The NSL law does not resemble these government censorship and licensing schemes. It neither requires a speaker to submit proposed speech for review and approval, nor does it require a speaker to obtain a license before engaging in business. Rather, the NSL law prohibits the disclosure of a single, specific piece of information that was generated by the government: the fact that the government has requested information to assist in an investigation addressing sensitive national security concerns, i.e., “to protect against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709(b)(1). As the Second Circuit noted, “[u]nlike an exhibitor of movies,” the recipient of a nondisclosure requirement “did not intend to speak and was not subject to any administrative restraint on speaking *prior to* the Government’s issuance of an NSL.” *John Doe, Inc. v. Mukasey*, 549 F.3d at 880 (emphasis added). And unlike the operator of an adult entertainment business, the recipient of a nondisclosure requirement does not operate an enterprise where receiving government approval under the licensing scheme at issue “is the key to [its] obtaining and maintaining a business.” *FW/PBS*, 493 U.S. at 230.

Rather than resembling a censorship or licensing scheme, the NSL law is more similar to governmental confidentiality requirements that have been upheld by the courts. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 634–36 (1990) (upholding in part a law requiring witnesses to maintain the confidentiality of the grand jury process); *Seattle Times Co.*

v. Rhinehart, 467 U.S. 20, 37 (1984) (upholding a restriction on disclosure of information obtained through pretrial discovery). In *Butterworth*, for instance, the Court considered a Florida statute that “prohibit[ed] a grand jury witness from ever disclosing testimony which he gave before that body.” 494 U.S. at 626. While the statute could not constitutionally prohibit a witness from disclosing “information of which he was in possession before he testified before the grand jury,” the Court did not invalidate that “part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness.” *Id.* at 632–33. Similarly, the only information subject to nondisclosure under § 2709(c) relate to the NSL and its contents — information of which a recipient was not in possession prior to the NSL’s issuance. The Supreme Court has sometimes reviewed such governmental confidentiality restrictions under a framework akin to strict scrutiny, considering whether the state has the “highest form of state interest,” and the restriction is “necessary to further the state interests asserted.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979); *see also United States v. Aguilar*, 515 U.S. 593, 605–06 (1995). On other occasions, it has applied a test closer to intermediate scrutiny, *see Rhinehart*, 467 U.S. at 32–34, in which it balanced the government’s interest against that of the speaker’s by considering factors such as whether the speaker obtained the confidential information from a government source and whether the speaker knew the information prior to the government action. *Compare id.* at 31–32 (noting that First Amendment concerns are lessened when the speaker learned the information only as “a matter of legislative grace” through a court’s discovery process), *with Butterworth*, 494 U.S. at 632 (striking down a confidentiality restriction to the extent it restricted disclosure of information that was in the speaker’s possession prior to his grand jury

testimony). But the Court has not held that these sorts of government confidentiality restrictions must have the sorts of procedural safeguards required for censorship and licensing schemes.

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. First, *Freedman* requires that “any restraint prior to judicial review can be imposed only for a specified brief period.” *Thomas*, 534 U.S. at 321. A speaker 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.” *Freedman*, 380 U.S. at 58–59. The 2015 NSL law readily provides this assurance: a recipient may immediately notify the government that it desires judicial review, and the recipient is guaranteed by statute that the government will “go to court” within 30 days of receiving notice by “apply[ing] for an order prohibiting the disclosure of the existence or contents” of the NSL at issue. 18 U.S.C. § 3511(b)(1)(B). This 30-day period is both “specified” and “brief.” See *John Doe, Inc. v. Mukasey*, 549 F.3d at 883 (considering a “30-day period in which the Government considers whether to seek judicial review”); cf. *Thirty-Seven (37) Photographs*, 402 U.S. at 370–74 (plurality opinion) (holding that a 14-day limit on the initiation of judicial proceedings was sufficient under *Freedman*). Accordingly, we reject the recipients’ argument that the 2015 NSL law fails to provide this first safeguard.

Second, *Freedman* requires that “expeditious judicial review” must be available. *Thomas*, 534 U.S. at 321. The 2015 NSL law’s direction to reviewing courts, that they “should rule expeditiously” on any petition by a recipient or

application by the government regarding the validity of a nondisclosure order, 18 U.S.C. § 3511(b)(1)(C), provides this safeguard. The recipients contend that this directive is insufficient because Congress should have imposed a specific time limit. Again, we disagree. While neither party may control how quickly a case moves through a court's docket, we "presume that courts are aware of the constitutional need to avoid undue delay result[ing] in the unconstitutional suppression of protected speech." *City of Littleton*, 541 U.S. at 782 (alteration in original) (internal quotation marks omitted); see also *Dream Palace*, 384 F.3d at 1003 (referring to *City of Littleton*'s "presumption that . . . courts function quickly enough, and with enough solicitude for the First Amendment rights of [speakers]"). Neither *Freedman* nor any other Supreme Court decision requires that judicial review be completed in a specified time frame, such as the 60 days suggested by the Second Circuit in *John Doe, Inc. v. Mukasey*, see 549 F.3d at 879. The courts' duty to "exercise [their] powers wisely so as to avoid serious threats of delay-induced First Amendment harm," *City of Littleton*, 541 U.S. at 782, assures us that judicial proceedings will move sufficiently rapidly to safeguard an NSL recipient's First Amendment rights.

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." *Thomas*, 534 U.S. at 321. The recipients argue that § 3511(b)(1)(B)'s notice procedure is insufficient because a nondisclosure requirement may remain in place without judicial review if the recipient does not notify the government that it wishes to have a court review the order and if the recipient fails to bring its own petition to modify or set aside the nondisclosure requirement. We reject this argument. *Freedman* focused on minimizing

the burden to the film exhibitor to “seek judicial review” of the state’s denial of a license; it did not focus on which party bore the initial burden. 380 U.S. at 58–59. Here, the burden on a recipient is de minimis, as the recipient may seek judicial review simply by notifying the government that it so desires. *Freedman* does not require that the government provide judicial review of confidentiality provisions for the benefit of individuals who do not wish to speak.

The recipients further argue that the NSL law “does not sufficiently place the burden of proof on the government” because the “reason to believe” and “may result” standards are insufficiently stringent. We reject this argument, too. As the Second Circuit held, and as we have already discussed, the government must certify to the reviewing court and establish to the court’s satisfaction, that there is a good reason to believe that absent nondisclosure, one of the enumerated harms is reasonably likely to result. *John Doe, Inc. v. Mukasey*, 549 F.3d at 875. Since the government has prohibited the recipient from disclosing the fact that it has even received an NSL, certification and proof are required to impose a nondisclosure requirement on both the fact of receipt and the contents of the NSL. Because the government must sufficiently certify and establish that both disclosures would likely result in one of the four enumerated harms, these requirements place the burden of proof on the government and thereby provide *Freedman*’s third safeguard.

Because the NSL law provides the three procedural safeguards set forth in *Freedman*, we reject the recipients’ argument that the NSL law is an invalid prior restraint on *Freedman* grounds.

VI

We conclude that § 2709(c)'s nondisclosure requirement imposes a content-based restriction that is subject to, and withstands, strict scrutiny. We further hold that, assuming the 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.

AFFIRMED.

**Form 11. Certificate of Compliance Pursuant to
9th Circuit Rules 35-4 and 40-1 for Case Number 16-16067, 16-16081 & 16-16082**

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

Contains words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or
Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)