Eric D. Miller, Bar No. 218416
EMiller@perkinscoie.com
Michael A. Sussmann, D.C. Bar No. 433100
(*pro hac vice*)
MSussmann@perkinscoie.com
James G. Snell, Bar No. 173070
JSnell@perkinscoie.com
Hayley L. Berlin, D.C. Bar No. 1011549
(*pro hac vice*)
HBerlin@perkinscoie.com
Amanda L. Andrade, D.C. Bar No. 1010948
(*pro hac vice*)
AAndrade@perkinscoie.com
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Tel: 650-838-4300
Fax: 650-838-4350

Attorneys for Plaintiff
Twitter, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TWITTER, INC.,

Plaintiff,

v.

LORETTA E. LYNCH, Attorney General of the United States, *et al.*,

Defendants.

Case No. 14-cv-04480-YGR

TWITTER'S REPLY SUPPLEMENTAL BRIEF ON EFFECT OF RECENT LEGISLATION

No hearing scheduled.

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INTRODUCTION

In this action, Twitter seeks declaratory and injunctive relief from Defendants' unconstitutional restrictions on Twitter's speech. (Dkt. No. 1.) Defendants have filed a Partial Motion to Dismiss, and on May 5, 2015, this Court heard arguments on that motion. On June 2, 2015, President Obama signed into law the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act" or "USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). On June 11, 2015, this Court directed the parties to "file supplemental briefing on the effect of this legislation, both as to the pending partial motion to dismiss and as to the ultimate claims for relief in Plaintiff's Complaint." (Dkt. No. 69.) On July 17, 2015, the parties simultaneously filed supplemental briefings. (Dkt. Nos. 74, 75.)

ARGUMENT

A. The USA FREEDOM Act Does Not and Cannot "Supersede" the DAG Letter.

Defendants claim that the letter from Deputy Attorney General James Cole to the General Counsels for Facebook, Inc., et al., dated Jan. 27, 2014 (Dkt. No. 1, Ex. 1) ("DAG Letter") "has now been superseded by provisions of the USA FREEDOM Act" and that "[t]he DAG Letter therefore has no further relevance to Twitter." (Dkt. No. 74, at 9.) That assertion is baseless. While some of the reporting options in the USAFA are similar to those in the DAG Letter, none are identical. Indeed, as explained in Twitter's Opening Supplemental Brief (Dkt. No 75, at 5-6, Ex. A), and as Defendants appear to recognize, the DAG Letter provides some options that are not even contained in the USAFA. *See* Dkt. No. 74, at 5-6 (First USAFA option "modeled on the first option [in the DAG Letter] but alters that option to expressly permit slightly more detailed reporting with respect to non-content requests, and alters the timing of reporting"; second USAFA option "modeled on option 1 in the DAG Letter, but it provides for narrower bands and shortens the delay period"; third USAFA option "is the same as option 2 in the DAG Letter but . . . the delayed reporting provisions for new platforms,

products, or services do not apply"; fourth USAFA option "provides an option for more detailed reporting not previously described in the DAG Letter").[1]

The options in the DAG Letter were declassified and available for government-approved speech *before* the USAFA was signed into law. It would require far more than statutory provisions offering additional reporting options or an unsupported statement in a court filing to prohibit all communications providers from using the options in the DAG Letter immediately *after* the USAFA became law. (Indeed, the speech permitted under the DAG Letter would need to be *reclassified* or lawfully brought under some new nondisclosure provision for it now to be considered prohibited speech.) Significantly, in their Supplemental Brief, Defendants themselves admit that the USAFA "provide[s] *additional* options for more detailed reporting" (Dkt. No. 74, at 9 (emphasis added)), which suggests that they understand, as Twitter contends, that the DAG Letter and its reporting options were not superseded by the USAFA.[2]

As explained in Twitter's earlier filings, the DAG Letter does not just permit reporting pursuant to the options that it set forth; it also effectively prohibits providers from speaking in ways that do not conform to those options. Perhaps Defendants' statement that "the letter has now been superseded" means that Defendants now intend to withdraw those prohibitions. If so, that unstated intent would not moot Twitter's challenge pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA"), for two reasons.

First, the APA requires that legislative rules be adopted—and withdrawn—through notice-and-comment rulemaking, not through statements in briefs. *See* 5 U.S.C. § 551(5) (defining "rule making" as "agency process for formulating, amending, *or repealing* a rule) (emphasis added). Defendants' Supplemental Brief would not meet this standard even if it

[1] Twitter notes a further difference between the third USAFA option and option 2 in the DAG Letter: that the third USAFA option imposes a semi-annual reporting period that does not pertain to option 2 in the DAG Letter.

[2] We note that on July 1, 2015—one month *after* passage of the USAFA—a communications provider published its first transparency report and, in doing so, followed formatting pursuant to the DAG Letter options, and not the USAFA options. *See* T-Mobile Transparency Report for 2013 and 2014, *available at* http://newsroom.t-mobile.com/content/1020/files/NewTransparencyReport.pdf.

unambiguously stated an intent to withdraw the DAG Letter. Second, even if Defendants had effectively withdrawn the prohibitions of the DAG Letter, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012).

Indeed, Defendants' new position on the options set forth in the DAG Letter is simply another example of the pattern of conduct for which Twitter seeks this Court's intervention. In its Notice filed with the FISC on January 27, 2014 (Dkt. No. 1, Ex. 2), the Department of Justice unceremoniously announced new speech-related restrictions: "It is the Government's position that the terms outlined in the Deputy Attorney General's letter [i.e., the DAG Letter] define the limits of *permissible reporting* for the parties and other similarly situated companies." (Emphasis added). Likewise, in its letter to Twitter dated September 9, 2014, the FBI purported to restrict Twitter's proposed speech for being "inconsistent" with the DAG Letter and "go[ing] well beyond what is allowed under the [DAG Letter]." (Dkt. No. 1, Ex. 5.) Defendants' new position that the previously available options for speech under the DAG Letter are somehow superseded by the USAFA (and therefore there is no redress for Defendants' prior conduct) reflects cavalier treatment of the requirements of the Administrative Procedure Act and constitutes further unlawful executive branch regulation of speech that is unsupervised by a court.

Should Twitter's APA challenge be dismissed, it is reasonable to expect that Defendants will continue to engage in the regulation of providers' speech through executive branch action that does not conform to the procedural requirements of the APA. Therefore, the voluntary-cessation exception to the mootness doctrine would apply here. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (defendant city had a history of responding to litigation by repealing legislation and later reinstating it).

To conclude, it is difficult for Twitter (and the communications provider community) to know what is allowed and what is prohibited when Defendants act inconsistently, without notice and legal bases, and outside the designated processes for achieving their objectives.

B. Twitter's FISA Claims Are Unaffected by the USA FREEDOM Act.

1. Defendants Have Not Raised any New Arguments in Support of Their Position that this Court Should Defer to the FISC.

In their Supplemental Brief, Defendants repeat the argument made in their Partial Motion to Dismiss that this Court should defer to the Foreign Intelligence Surveillance Court ("FISC") on any FISA-related issues in the interests of "comity" and because of the FISC's supposedly superior ability to deal with such issues. (Dkt. No. 74, at 4.) Defendants' arguments fail for the reasons stated in Twitter's Opposition to Defendants' Partial Motion to Dismiss (Dkt. No. 34, at 15-19) and at oral argument (Hearing Tr. May 5, 2015, at 27-37). Defendants do not explain how anything in the USAFA affects their previously made arguments on this point or Twitter's responses to them.

2. Defendants' Attack on Twitter's Overbreadth Argument Lacks Merit.

Defendants also claim that Twitter's facial challenges to FISA and the NSL statute are now moot because the USAFA "amended both of those statutes in relevant part" and "overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed." (Dkt. No. 74, at 11 (citation and quotation marks omitted).) That is incorrect.

First, FISA was *not* amended "in relevant part." The relevant parts of FISA, including the key provision of FISA that Twitter identified in its Complaint as violating the First Amendment, 50 U.S.C. § 1805(c)(2)(B), were not amended by the USAFA. Defendants latch onto the additional transparency reporting options added to FISA by Section 604 of the USAFA to insist that Twitter's claims "must now be construed in light of the new aggregate data disclosure provisions of FISA." (Dkt. No. 74, at 11 (citation omitted).) But the reporting structures in Section 604 of the USAFA in no way resolve Twitter's First Amendment grievances, either with regard to past or future conduct. Twitter's FISA-related claims are not only not moot; they are unaffected by the USAFA amendments.

Second, Defendants misread *Massachusetts v. Oakes*, 491 U.S. 576 (1989), in making the blanket assertion that "overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed." (Dkt. No. 74, at 11 (citation and quotation marks omitted).)

Instead, the case holds that a statutory amendment moots a challenge to the statute only when the amendment effectively eliminates the constitutional objection, which is not the case here.

In *Oakes*, the defendant was convicted under a Massachusetts statute prohibiting nude photography of children. 491 U.S. at 580. The Massachusetts Supreme Judicial Court invalidated the statute on overbreadth grounds because the statute's expansive definition of "nudity" failed to take account of context. *Id*. at 580-81. After the legislature substantially narrowed the statutory definition, the U.S. Supreme Court declined to rule on whether the prior statute, which was no longer relevant to anyone, was overbroad. *Id*. at 583-84. Instead, the Court instructed the Massachusetts courts to decide Oakes's First Amendment defense on the facts of his particular case. *Id*. at 585.

Neither the procedural posture nor the facts of *Oakes* bear any resemblance to this case. Twitter, along with similarly situated communications providers, will continue to have its expression restricted by the current legal regime in fundamentally the same way it was restricted under the pre-USAFA regime. Twitter's facial challenges to FISA and NSL nondisclosure provisions are therefore not remotely moot. Indeed, the *Oakes* Court noted that overbreadth challenges *can* proceed where a ruling "might be salutary," *id*. at 582, or provide a benefit going forward, *id*. at 584. The FISA and NSL nondisclosure provisions continue to burden all recipients of process under these statutes. A ruling on Twitter's overbreadth claims would undoubtedly be "salutary" and provide a benefit going forward—specifically, it would bring judicial intervention and oversight to executive branch actions concerning speech—and therefore those claims should proceed.

The other cases on which Defendants rely actually establish that a case is "moot" only when a judicial determination *will no longer matter*. In *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006) (Dkt. No. 74, at 11), for example, the court dismissed a case on the basis of mootness where a statutory change "allow[ed] appellants to do precisely what they sought to do." In *Reyes v. City of Lynchburg*, 300 F.3d 449, 453 (4th Cir. 2002) (Dkt. No. 74, at 11), the court dismissed a case as moot where "the City had repealed [the ordinance] and promised not to reenact a similar one." And in *Outdoor Media*

Grp., Inc. v. City of Beaumont, 506 F.3d 895, 901 (9th Cir. 2007), the Ninth Circuit held a case moot because the "new ordinance cure[d] the constitutional deficiencies," and was therefore not "'sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues.'" *Id*. at 902 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla*., 508 U.S. 656, 662 n.3 (1993)).

In a case such as this one, however, where a defendant's new program "is substantially similar to the prior program," the mere fact (not established by Defendants here) that the original program has been amended or repealed does not moot a challenge to it. *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). Defendants cannot seek to avoid this conclusion by reference to a minor change in the legal regime. Indeed, the Supreme Court explicitly rejected such an attempt in *Northeastern Florida*, where the defendant city repealed the challenged statute and replaced it with a similar one. 508 U.S. 656. The Court declined to dismiss the case for mootness, noting that the "new ordinance may disadvantage [the plaintiffs] to a lesser degree than the old one, but . . . it disadvantages them in the same fundamental way." *Id*. at 662. In a case like this one, where the new legal framework continues to cause the same injury, dismissal for mootness is not appropriate.

C. Twitter's NSL Claims Remain Valid After the USA FREEDOM Act.

1. Twitter's Claims Under Section 2709 Are Not Affected by the USAFA.

In its Complaint, Twitter alleged that Section 2709 of Title 18, both facially and as applied, is a prior restraint and content-based restriction, which is not narrowly tailored to serve a compelling governmental interest. (Dkt. No. 1, ¶¶ 46-47.) Defendants do not (and cannot) point to any material change from the USAFA that affects these claims. Instead, Defendants rely on Section 604's reporting structures to argue that the statute "alleviate[s]" Twitter's concerns. (Dkt. No. 74, at 16.) That is not true. The reporting structures in the USAFA do not remotely redress Twitter's First Amendment grievances. It is undisputed, for example, that the NSL nondisclosure provisions continue to apply "not only to the content of the request but to

the fact of receiving an NSL," and that they continue to be "unlimited in duration." (Dkt. No. 1, ¶ 46.)

Defendants seem to believe they can cure these constitutional defects with assurances that the Government *may* take remedial steps in the future. For example, Defendants argue that "the amendments allow the Government to agree to other disclosures in certain circumstances." (Dkt. No. 74, at 16.) But there is no evidence that Defendants intend to do anything with their newly granted authority, and in any event, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Defendants also point to USAFA Section 502(f), which directs the Attorney General to adopt unspecified procedures to review "at appropriate intervals" to determine whether nondisclosure orders are still supported. But Section 502(f) does not require the Government to employ the least speech-restrictive means or ensure that nondisclosure orders last for the shortest duration possible, nor does it direct the Government to apply the procedures to NSLs issued before passage of the USAFA, such as any that may be referred to in Twitter's draft Transparency Report. (Dkt. No. 1, Ex. 4) At this point, the possibility of relief from those procedures is purely speculative.[3]

2. Twitter's Claim that the NSL Framework Is Unconstitutional Because of the Judicial Review Process Is Affected by the USAFA, but Remains Valid.

Defendants also claim that the USAFA's changes to judicial review procedures for NSL nondisclosure orders, codified at 18 U.S.C. § 3511, "reinforce" the constitutionality of the NSL statutes because they align with what the Second Circuit envisioned in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). (Dkt. No. 74, at 12.) However, this view contradicts the view of Congress, as expressed in the legislative history for the USAFA. Congress apparently recognized the serious constitutional inadequacies of the prior judicial review procedures, noting that its revisions were intended to "correct[] the *constitutional defects* in the

[3] *Compare Nat'l Fed'n of Fed. Employees v. United States*, 695 F. Supp. 1196, 1199 n.5 (D.D.C. 1988) (The Government's "proposed changes accommodate many of plaintiffs' concerns [but], the changes may not be considered by the Court in evaluating the lawfulness of the form. The changes have not been implemented, and any remedial effect of the changes . . . is purely speculative.").

issuance of NSL nondisclosure orders found by the Second Circuit [in *Doe*]." H. R. Rep. No. 114-109 (2015) (emphasis added).

Further, Defendants' premise that the USAFA revisions fully comply with all procedural safeguards in *Doe* is flawed. As Defendants tacitly concede, the statute fails to incorporate the most significant of *Doe*'s procedural safeguards: the standard of proof the Government must meet. (Dkt. No. 74, at 13.) Furthermore, in drafting the USAFA, Congress chose not to include a specified time frame for the review of NSLs, noting only that a court should "rule expeditiously"—in clear disregard of the *Doe* court's suggestion of "a prescribed time, perhaps 60 days." 549 F.3d at 879.

Even if the revised Section 3511 *could* be read to incorporate the entire *Doe* framework, the revision would have no effect on the pending Partial Motion to Dismiss. Twitter briefed its challenge to the NSL judicial review procedures *assuming*, in part, that the *Doe* framework could be read into Section 3511. (Dkt. No. 34, at 25-26.) As Twitter previously argued in opposition to Defendants' Partial Motion to Dismiss, the *Doe* standard is constitutionally insufficient because it does not require the harm alleged by the Government to be serious, and therefore it is not narrowly tailored. *Id*. That deficiency was not addressed by the USAFA, and Twitter's position was already before this Court well before the statute's passage. Defendants cannot, therefore, credibly claim that the amendments to Section 3511 significantly alter Twitter's challenge, and their arguments for dismissal are merely an attempt to re-argue their Partial Motion to Dismiss.

D. Defendants Fail to Distinguish Between Issues Addressed in Their Pending Partial Motion to Dismiss and Issues Not Yet Briefed for Consideration and Before the Court.

In its Order calling for supplemental briefing, this Court directed the parties to address "the effect of this legislation, both as to the pending partial motion to dismiss and as to the ultimate claims for relief in Plaintiff's Complaint." (Dkt. No. 69.) Defendants have conflated those two distinct sets of issues, devoting much of their brief to merits-based issues that are not yet before the Court in the context of the Partial Motion to Dismiss and that instead would be

appropriate for consideration in the context of a motion for summary judgment or other phase of this case.

Defendants concede that certain issues are not currently before this Court, but then disregard that reality and argue the merits regardless: "The Government has not yet moved for summary judgment on or dismissal of plaintiff's challenge to NSL nondisclosure requirements under 18 U.S.C. § 2709, and so the parties have not briefed the appropriate standard of review." (Dkt. No. 74, at 15, n.9.) However, despite this concession, Defendants proceed to argue the merits of why the NSL statute is permissible under the First Amendment. *See* Dkt. No. 74, at 15-16.

The ultimate question of whether the NSL provisions are constitutional is not presently before this Court. Instead, the issue being briefed is the *effect* of the USAFA on Defendants' Partial Motion to Dismiss and on Twitter's claims. With respect to the former, only three issues are presently before this Court: (1) Defendants' claims that this Court lacks jurisdiction to hear Twitter's challenge under the Administrative Procedure Act; (2) that certain claims are more appropriately heard in the FISC; and (3) that Twitter's challenge to the review procedures for NSLs should be stayed pending resolution of a Ninth Circuit challenge, Appeal Nos. 13-16732, 13-16731, 13-15957 (9th Cir.). (Dkt. No. 28.) And with respect to the latter, the USAFA does not affect the merits of Twitter's APA claim or Defendants' argument regarding deference to the FISC, but the USAFA *did* revise the NSL judicial review procedures to bring them closer in line to what the Second Circuit envisioned in *Doe*.[4] These changes may (or may not) ultimately affect this Court's First Amendment analysis of Sections 2709 and 3511. However, Twitter contends that the NSL-related changes are not constitutionally sufficient, and it will brief the issue fully at the appropriate time.

[4] These USAFA revisions include adding a reciprocal notice provision that could force the Government to initiate court action, 18 U.S.C. §§ 2709(d)(2), 3511(b)(1)(A)-(B); requiring a certification from the Government and repealing the conclusive effect of "good-faith" certifications, 18 U.S.C. § 3511(b)(2); repealing the provision requiring an unsuccessful NSL challenger to wait a year before re-initiating the process (former 18 U.S.C. § 3511(b)(3), USAFA Section 502(g)); and amending the judicial standard from "no reason to believe [harm will not occur]" to "reason to believe [harm will occur]," 18 U.S.C. § 3511(b)(3).

At this time, this Court need not consider any issues beyond those raised in Defendants' Partial Motion to Dismiss and regarding the effect of the USAFA. Likewise, in its supplemental briefing, Twitter does not address any issues beyond those presently before this Court.

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Respectfully Submitted,

By: /s/ Michael A. Sussmann

Michael A. Sussmann, D.C. Bar No. 433100
MSussmann@perkinscoie.com
Eric D. Miller, Bar No. 218416
EMiller@perkinscoie.com
James G. Snell, Bar No. 173070
JSnell@perkinscoie.com
Hayley L. Berlin, D.C. Bar No. 1011549
HBerlin@perkinscoie.com
Amanda L. Andrade, D.C. Bar No. 1010948
AAndrade@perkinscoie.com

Attorneys for Plaintiff Twitter, Inc.