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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TWITTER, INC., Plaintiff, v. LORETTA E. LYNCH, United States Attorney General, *et al.*,	Case No. 14-cv-4480 **DEFENDANTS' REPLY ADDRESSING PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING THE USA FREEDOM ACT**

INTRODUCTION

The Government explained in its Supplemental Brief Regarding the USA FREEDOM Act, ECF No. 74 ("Suppl. Br."), that the Act[1] establishes a permissive regime that allows recipients of national security legal process to disclose more information than ever before regarding their receipt of such process. Rather than accept the new reporting options, however—or challenge any perceived deficiencies in the new regime—plaintiff insists that this Court and the parties should continue to devote resources to the adjudication of its claims that the January 27, 2014 Letter from then-Deputy Attorney General James M. Cole to the General Counsels of Facebook, *et al.* ("DAG Letter"), Compl. Exh. 1 at 3, impermissibly restricts its speech. *See* Opening Supplemental Brief on Effect of Recent Legislation, ECF No. 75 ("Plaintiff's Supplemental Brief" or "Pl's Br."). As defendants have explained, the DAG Letter never restricted plaintiff's speech. But even assuming *arguendo* it had, plaintiff fails to explain how the DAG Letter could be said to restrict its speech *now*, when the USA FREEDOM Act unmistakably permits the plaintiff to disclose more detailed information than the options described by the DAG Letter. The new, statutory disclosure regime moots the plaintiff's claims directed at the DAG Letter. And, as previously explained, *see* Suppl. Br. 8-9, any remaining challenges to restrictions relating to orders or directives received pursuant the Foreign Intelligence Surveillance Act should be dismissed and adjudicated in the Foreign Intelligence Surveillance Court.

The USA FREEDOM Act also has a significant impact on the balance of plaintiff's claims, as defendants explained in their Supplemental Brief. *See* Suppl. Br. at 10–14. Plaintiff's argument to the contrary (*e.g.* Pl. Br. at 7–11) ignores the USA FREEDOM Act's substantial new procedural protections and amendments to statutes that plaintiff purported to challenge on their face.

[1] The USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 ("the USA FREEDOM Act" or "the Act")

I. Any Claims Challenging the DAG Letter Must Be Dismissed for Lack of Jurisdiction Because the DAG Letter Causes Plaintiff No Ongoing Injury.

The Government explained in its Supplemental Brief that the plaintiff's claims challenging the DAG Letter do not present a live case or controversy at this time. *See* Suppl. Br. at 7 (citing *Diffenderfer v. Cent. Baptist Church of Miami, Fla.*, 404 U.S. 412, 414 (1972) (court must consider the "law as it now stands, not as it stood" previously)). Whatever the prior effect of the DAG Letter,[2] it has no further relevance to plaintiff—and certainly cannot be said to cause plaintiff any continuing injury—now that statutory law offers reporting options more permissive and detailed than those previously declassified by the Director of National Intelligence and described in the DAG Letter. *See* Suppl. Br. at 2–4, 7 (detailing the reporting options provided by the Act and explaining that those options "are modeled on the DAG Letter but provide additional options for more detailed reporting").

Plaintiff does not address its lack of any present or prospective injury from the DAG Letter. *See generally* Pl's Br. Instead, plaintiff presents two ways in which it contends that the DAG Letter currently has legal effect: (1) plaintiff asserts that the DAG Letter "remains" the "*only* stated basis" on which the Government denied the plaintiff's request to publish its draft transparency report, *see* Pl's Br. at 6; and (2) plaintiff insists that providers may choose to disclose data consistent with the options described in the DAG Letter notwithstanding the new legislation. The former is factually incorrect, and the latter is simply inapposite. Neither gives plaintiff standing to continue to litigate these now-mooted claims.

Finally, as discussed below, plaintiff's apparent claim that its challenge is not moot solely because the USA FREEDOM Act introduced a *more* permissive (rather than a more restrictive) disclosure regime has no basis in law or logic. Precisely because the USA FREEDOM Act expressly permits more detailed reporting than the options described in the DAG Letter, it is

[2] As the Government has repeatedly explained, the DAG Letter itself did not prescribe any restrictions on disclosures by the recipients of that letter or by anyone else, including plaintiff. Rather, it was a permissive document that explained how recipients of national security legal process could describe any such process they had received without running afoul of entirely separate legal restrictions on disclosure.

(even more) clear that the DAG Letter does not restrict or injure the plaintiff in any way, and plaintiff cannot establish Article III standing to challenge it.

1. Plaintiff baldly states that "the DAG Letter . . . remains Defendants' *only* stated basis for denying Twitter's request to publish its transparency report." Pl's Br. at 6 (emphasis in original), adding, in a particularly revealing averment, that it does not challenge the USA FREEDOM Act because "[u]pon information and belief, Defendants consider the USAFA to be permissive, not to be or represent a prohibition on Twitter's publication of its transparency report, and therefore not an additional basis for prohibiting Twitter's speech." Pl's. Br. at 6 n.5. Of course, that precisely describes the DAG Letter, as the Government has been telling plaintiff for months: the letter was permissive, and does not itself restrict plaintiff or anyone in any way. *See, e.g.,* Defs' Partial Mot. to Dismiss, ECF No. 28, at 8 ("By its terms . . . the DAG Letter is permissive, not restrictive. . . It does not purport to classify any previously unclassified information, but rather provides guidance for reporting aggregate data . . . consistent with a declassification decision issued by the DNI the same day.").[3]

Indeed, plaintiff's discussion of Section 603 of the USA FREEDOM Act highlights why plaintiff's now-moot challenge to the DAG Letter was never viable. Plaintiff states that the new legislation does not affect its challenge to FISA reporting under the First Amendment because "[w]hile the USA FREEDOM Act establishes four additional reporting options, it does not amend any of the speech-related restrictions in FISA from which Twitter is seeking relief in this proceeding." Pl's Br. at 7. But, again as defendants have repeatedly explained, the same is true of the DAG Letter. The restrictions on plaintiff's disclosure of this classified information stem—and have always stemmed—not from the DAG Letter, but from any applicable orders of the Foreign Intelligence Surveillance Court ("FISC"), Foreign Intelligence Surveillance Act ("FISA") directives supervised by that coordinate court, nondisclosure agreements, and/or

[3] Nor, as this Court has noted, *see* Tr. 14:17–18, did the FBI refer to the DAG Letter as the reason why plaintiff could not lawfully publish its draft "Transparency Report"; rather, the FBI's letter stated that the FBI had "carefully reviewed Twitter's proposed transparency report and [had] concluded that information contained in the report is classified and cannot be publicly released." *See* September 9, 2014 Letter from James A. Baker to counsel for plaintiff, Compl. Exh. 3 ("FBI Letter") at 1.

statutes. Plaintiff's puzzling, contrary claim that "Defendants' *only* stated basis for denying Twitter's request to publish its transparency report" is the DAG Letter (Pl's Br. at 6) is thus plainly wrong. *See, e.g.*, Reply Mem. in Support of Defs' Partial Motion to Dismiss, ECF No. 57 at 5 (explaining that DAG letter had no more legal effect on plaintiff's rights and obligations "than a legal brief that summarizes applicable law"); Partial Mot. to Dismiss at 8, 10–13; Tr. 10:3–12:7. The DAG Letter is not now—and never was—a basis for denying plaintiff's request.

2. Moreover, and in any event, Congress has now enacted a statutory framework that is more permissive than, and thus plainly would supersede, any purported "restrictions" plaintiff attributes to the DAG Letter. Section 603 of the USA FREEDOM Act delineates four reporting options through which a recipient of national security legal process may disclose aggregate data concerning such process. *See* Suppl. Br. at 7–9 (describing the new reporting regime). As defendants have explained, those provisions expand on and add to the two options that had been described in the DAG Letter. *See id.* Thus, while Plaintiff could *choose* to follow the 2014 framework described in the DAG Letter—notwithstanding that the law now permits plaintiff to disclose more—no possible injury could result from it. The *prior* reporting options that Plaintiff claims a provider might use (described in a table listing the options available in 2013, those described in the DAG letter, and those set forth in the Act), *see* Pl's Br., Ex. A, are entirely subsumed in the new, statutory options.[4] Each of these reporting regimes addressed the same universe of information, and allowed progressively more disclosure than the last. Thus, Plaintiff's contention that, following the enactment of the USA FREEDOM Act, "a communications provider can avail itself of one of the Summer 2013 Options, one of the options in the DAG Letter, or one of the [USA FREEDOM Act] options[,]" Pl's Br. at 4 n.3, is true but irrelevant: the prior reporting regimes do not impose *restrictions* on Plaintiff in the face of the new, more permissive statutory framework. In any conceivably relevant respect, Section 603 replaced previously-described reporting options.[5]

[4] Defendants submit their own chart, attached hereto as Exhibit 1, which illustrates how each set of options expanded on those that preceded it.

[5] Nor, even had the DAG Letter injured plaintiff in the first place, would the voluntary cessation exception to the mootness doctrine apply here. *E.g.*, *Clarke v. United States*, 915 F.2d

3. Plaintiff presents no credible argument as to how it could suffer any continuing injury from the superseded options discussed in the DAG Letter. Rather, plaintiff seems to claim that its challenge to the DAG Letter is not moot because the USA FREEDOM Act is more permissive (and not more restrictive) than the framework described in the DAG Letter. Plaintiff asserts that:

> The [USA FREEDOM Act] in no way purports to re-classify or otherwise prohibit the speech approved by the government in 2013 and 2014. The government thus has no basis to say now, in essence: "That speech you were allowed to speak the day *before* passage of the [USA FREEDOM Act] you can no longer lawfully speak *after* passage of the [USA FREEDOM Act].

Pl Br. at 3–4. Immediately thereafter, plaintiff concludes: "Since the DAG Letter was not superseded by the [USA FREEDOM Act], passage of the [USA FREEDOM Act] likewise did not moot Twitter's challenge to the DAG Letter." *Id.* at 4.

This argument is a non-sequitur and simply wrong. The USA FREEDOM Act clearly establishes new law on the permissible disclosure of aggregate data concerning national security process. And there is no support in the law for plaintiff's apparent assumption that Congress could only act more restrictively or that a more permissive regime cannot supersede—and thereby moot a challenge to—a prior regime. *See, e.g., Princeton Univ. v. Schmidt*, 455 U.S. 100, 101, 103 (1982) (per curiam) (challenge to prior set of university regulations governing on-campus speech by members of the public mooted when the university substantially amended those regulations to create a more permissive scheme). In fact, that is precisely the circumstance now before the Court, and plaintiff does not dispute that it can disclose information consistent with the more-detailed options of the Act, regardless of what the DAG Letter said. Moreover, the *Government* itself has made clear that the USA FREEDOM Act reporting options set forth the new benchmark on what information may be permissibly disclosed.

699, 705 (D.C. Cir. 1990) (en banc) (refusing to apply voluntary cessation doctrine against the government; stating "it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose.")

Perhaps most tellingly, plaintiff is still unable to point to any conceivable way in which it would be better off if the DAG Letter were somehow rendered null and void. Plaintiff at one point describes the nature of its challenge as "based on [the Government's] failure to follow the procedural requirements for promulgating substantive rules." Pl.'s Br. at 3. But—again assuming *arguendo* that the DAG Letter was ever a final agency action—Federal Courts do not sit as advisory boards to render judgments on actions that have no legal effect on the party bringing the challenge.

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For all of these reasons, plaintiff's claims addressing the DAG Letter are moot and the Court should dismiss them for lack of subject matter jurisdiction.

II. Plaintiff's Argument Concerning the USA FREEDOM Act Underscores Why its FISA-Based Claims Should be Dismissed and Heard by the FISC in the First Instance.

Plaintiff's assessment of the USA FREEDOM Act effectively concedes a key point defendants raised in their partial motion to dismiss: to the extent plaintiff is subject to any nondisclosure obligations related to FISA process, those obligations would arise by operation of a FISC order or a directive issued under a FISC-supervised program and should therefore be addressed by the FISC in the first instance.[6] *See, e.g.*, Partial Mot. to Dismiss at 16–19. As noted, plaintiff acknowledges that the reporting options in the USA FREEDOM Act are "permissive" and "[do] not amend any of the speech-related restrictions in FISA from which Twitter is seeking relief in this proceeding." Pl's Br. at 6 n.5, 7. But that has been precisely defendants' point: any restrictions plaintiff wishes to challenge result not from the DAG Letter but from any underlying FISA orders, directives or statutory requirements to which plaintiff may be subject, and challenges to any such restrictions should properly be heard in the FISC.

Plaintiff's argument to the contrary emphasizes the FISC's recent decision in *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, Dkt. No.

[6] As before, this discussion of potential nondisclosure obligations stemming from FISC orders or directives is not meant to confirm or deny whether plaintiff has in fact received any such national security legal process.

BR15-75, Op. and Order (F.I.S.C. June 29, 2015) ("June 29, 2015 FISC Opinion" or "June 29, 2015 Opinion"). In that decision, the FISC denied a motion to intervene in its proceedings, citing to another case that the putative interveners had filed in the district court for District of Columbia. *Id.* at 4–5. Plaintiff thus argues that the FISC "rejected an opportunity to assert itself as the preferred forum for the interpretation of FISA." Pl's Br. at 5.

But in that opinion, the request under review did not come—as in this case—from a party (potentially) subject to the FISC's orders or FISA directives under a program it supervises. Rather, in that decision, the FISC addressed the Government's application to continue its bulk telephony metadata program for the duration of the transition period provided by USA FREEDOM Act Section 109(a), s*ee* June 29, 2015 FISC Opinion at 1, and the movants seeking to intervene were non-parties who asked the FISC, *inter alia*, to deny the Government's application and declare that program illegal. *Id.* at 4. Moreover, while the FISC denied a motion to intervene in that case, it most certainly did not "decline[] to assert itself as the preferred forum for the interpretation of FISA," as plaintiff contends. Pl's Brief at 5. In fact, the decision to which plaintiff cites constitutes the FISC's reauthorization of the bulk telephony metadata program for the duration of the transition period provided by USA FREEDOM Act Section 109(a). The court moved expeditiously in the matter as required by statute, *see* FISA § 103(c), and issued a public decision less than one month after the movants' June 5, 2015 motion to intervene was filed.

Moreover, rather than denying the movants the ability to participate in the proceedings altogether, the FISC granted their alternative request to participate as amici curiae. *Id.* In doing so, the FISC emphasized that "Congress, through the USA FREEDOM Act, has expressed a clear preference for greater amicus curiae involvement in certain types of FISC proceedings." *Id.* at 7. Thus, far from demonstrating the FISC is a "nonpublic court . . . that offers no ability for the public or any nonparty to view FISC proceedings," Pl's Br. at 4–5, this decision shows the FISC accommodating participation by a non-party, and, just three days after its decision was

rendered, posting its opinion, without redaction, on its public website.[7] *See* U.S. Foreign Intelligence Surveillance Court Website, http://www.fisc.uscourts.gov/public-filings?field_case_reference_nid=476&=Apply (reflecting that the June 29, 2015 FISC Opinion was posted on that court's public website on July 2, 2015). In short, the situation before the FISC in that case did not raise the same considerations raised here as to whether the FISC should review any restrictions that may be imposed on plaintiff, and in any event underscore that the FISC is the appropriate forum to address matters within its purview.

III. Plaintiff's First Amendment Analysis Largely Overlooks the Impact of the USA FREEDOM Act.

Plaintiff contends that its facial and as-applied First Amendment claims are essentially unaffected by amendments that changed the very portions of the statutes at the heart of its complaint. *See* Pl's Br. at 7. But plaintiff simply overlooks the importance of these amendments under established First Amendment doctrine, as well as the extent to which these changes reinforce the constitutionality of the statutes.

To begin with, insofar as plaintiff asserts facial challenges to the statutes based on overbreadth, Compl. ¶¶ 46, 49, plaintiff ignores the "limited" nature of the overbreadth doctrine, which renders overbreadth analysis "strong medicine," to be employed "only as a last resort." *New York v. Ferber*, 458 U.S. 747, 769 (1982). As defendants explained in their supplemental brief, plaintiff cannot maintain a facial overbreadth challenge to the now-superseded versions of FISA and the NSL statutes; the overbreadth doctrine is unavailable where, as here, "the statute being challenged has been amended." *See Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989); Suppl. Br. at 9–10 (discussing case law).

Furthermore, plaintiff's claim that "many" of the alleged "failings" that it identified in 18 U.S.C. § 3511 "remain unchanged following the amendment," Pl's Br. at 8, ignores that the USA FREEDOM Act amended the statute with respect to every one of the five alleged constitutional problems that plaintiff identified in its complaint, *see id.* (quoting Compl. ¶¶ 46, 48). For

[7] Citing the requirement that it proceed "expeditiously as possible," however, and the "substantial briefing" already submitting by the movants, the FISC denied the movants' request for additional briefing and oral argument. *Id.*

example, with respect to the first issue plaintiff names—that the statute "places the burden of seeking to modify or set aside a nondisclosure order on the recipient of an NSL," *id.*—plaintiff acknowledges that the new legislation "may make it easier for an NSL recipient" but complains that the legislation allows the nondisclosure orders "to be of uncertain and, potentially, unlimited duration" and requires the recipient to "bear[] the obligation of notifying the government." *Id.*

In reality, multiple provisions in the legislation ensure that the nondisclosure orders will not be of uncertain or unlimited duration. To begin with, once an NSL recipient notifies the Government of its objection, the Government must initiate judicial review within thirty days, 18 U.S.C. § 3511(b)(1)(A)–(B). The district court must then "rule expeditiously" on that challenge. *Id.* at § 3511(b)(1)(C). Furthermore, the USA FREEDOM Act now requires the Attorney General to adopt procedures for periodically reviewing nondisclosure requirements issued under the amended NSL statute to assess whether the facts supporting nondisclosure continue to exist. USA FREEDOM Act § 502(f)(1). Finally, in the same provision, the new legislation removed the prior language that had prevented certain NSL recipients from challenging nondisclosure requirements more than once per year. *Id.* These four new safeguards all help to ensure that NSL nondisclosure requirements will not be of "uncertain . . . [or] potentially, unlimited duration," Pl's Br. at 8, and the obligation associated with "notifying" the Government of an objection—so that the Government may the bear the burden of initiating judicial review—is minimal at most.

So, too, with the second issue identified by the plaintiff—namely, that the legislation fails to ensure that "nondisclosure orders imposed prior to judicial review [are] limited to a specified brief period." *Id.* The provisions described above, requiring the Government to initiate judicial review within thirty days of being notified of an objection, 18 U.S.C. § 3511(b)(1)(A)–(B), and the district court to then "rule expeditiously" on that challenge, *id.* § 3511(b)(1)(C), specifically address that concern and, at the least, must be taken into account in any assessment of plaintiff's claim. Indeed, although plaintiff acknowledges that this new language "affect[s]" "one aspect of Twitter's NSL-related claims," plaintiff's insistence that this provision may fail to pass constitutional muster because it is not yet clear how the provision will be interpreted, Pl's Br. at

8, n.7, is difficult to square with plaintiff's Complaint, which alleged that the statute's previous failure to provide for expeditious review rendered it "facially unconstitutional," Compl. ¶ 46.[8]

In short, for each of the alleged constitutional defects that plaintiff identified, the USA FREEDOM Act amended the NSL statutes and reinforced the constitutionality of the provision in question. *See* Suppl. Brief at 10–14 (describing how the changes to the legislation remove any doubt that these provisions comport with the requirements of the First Amendment). The statutes plaintiff challenged on their face no longer apply or exist, so those facial challenges must fail.

CONCLUSION

For the foregoing reasons, and the reasons set forth in defendants' Supplemental Brief, the USA FREEDOM Act moots plaintiff's challenge to the DAG Letter; moots plaintiff's facial challenges to the FISA and the NSL statutes; and, moreover, reinforces their lawfulness.

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[8] To maintain that challenge, plaintiff would need to establish that this provision "is unconstitutional in all of its applications" or that it will suppress a substantial amount of protected speech, "in relation to the statute's plainly legitimate sweep." *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008).