

I. INTRODUCTION

Plaintiffs John Doe, American Civil Liberties Union, and American Civil Liberties Union Foundation (collectively, "Plaintiffs") initially brought this case in 2004, challenging the constitutionality of 18 U.S.C. § 2709, amended by the USA Patriot Act (the "Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("§ 2709"). Section 2709 was originally enacted as part of Title II of the Electronic Communication Privacy Act of 1986 ("ECPA"), Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1867-68 (1986), and governs the issuance of National Security Letters ("NSLs") by the Federal Bureau of Investigation ("FBI") to wire and electronic communication service providers ("ECSPs"). This Court, in a lengthy decision dated September 28, 2004, granted Plaintiffs' motion for summary judgment and declared § 2709 unconstitutional on its face, under the First and Fourth Amendments. See Doe v. Aschroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) ("Doe I"). "Considering the implications of its ruling and the importance of the issues involved," the Court stayed enforcement of its judgment pending appeal. See id. at 526.

Shortly after this Court's decision, a court in the District of Connecticut enjoined the Government from enforcing the nondisclosure requirement of § 2709(c) insofar as it prevented the plaintiff in that case from revealing its

identity as a recipient of an NSL, holding that § 2709(c) failed to satisfy strict scrutiny because it was not narrowly tailored to serve a compelling state interest. See Doe v. Gonzales, 386 F. Supp. 2d 66, 82 (D. Conn. 2005) ("Doe II").

While appeals in Doe I and Doe II were pending, Congress passed the USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006) (the "Reauthorization Act."). The Reauthorization Act effectuated substantial changes to § 2709 and added several provisions relating to judicial review of NSLs which were codified at 18 U.S.C. § 3511 ("§ 3511").¹ As a result of these amendments, the Second Circuit remanded the Doe I appeal to enable this Court, if the parties were to continue the litigation in light of the amendments to the statute, to consider the validity of the revised § 2709(c) and the new procedures codified in § 3511. See Doe v. Gonzales, 449 F.3d 415, 419 (2d Cir. 2006).²

Plaintiffs filed a second amended complaint and have

¹ Congress made further changes to § 2709(c) in the USA Patriot Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (March 9, 2006). Specifically, this act amended § 2709(c)(4), which requires NSL recipients to inform the FBI of anyone to whom they disclosed having received the NSL, with the exception of counsel, and it added § 2709(f), which excludes libraries from the definition of wire or electronic communications service providers.

² The Second Circuit decision was a consolidated appeal of this Court's decision and Doe II. Because the Government indicated on appeal that in light of the Reauthorization Act, it would not oppose disclosure of plaintiff's identity as an NSL recipient in Doe II, the Second Circuit dismissed Doe II on mootness grounds. See Doe v. Gonzales, 449 F.3d at 421.

moved for summary judgment,³ seeking a declaratory judgment that the amended nondisclosure provision of § 2709(c) and § 3511(b) are unconstitutional on their face and as applied under the First Amendment and the principle of separation of powers, and that § 3511(d) and (e) are unconstitutional on their face under the First and Fifth Amendments. Defendants Alberto Gonzales, Robert Mueller, and Valerie E. Caproni⁴ (collectively, the "Government") have cross-moved for dismissal of the complaint or, in the alternative, summary judgment. Having reviewed the briefs submitted by the parties, as well as the briefs submitted by amicus curiae in support of Plaintiffs' motion,⁵ and having heard oral

³ Plaintiffs framed their present motion as one for partial summary judgment, seeking a ruling that the nondisclosure provisions of § 2709(c) and the secrecy provisions of § 3511 are unconstitutional on their face and as applied. Separately, Plaintiffs also seek to set aside the demand for records issued to John Doe pursuant to 18 U.S.C. § 3511(a). (See Petition to Set Aside Demand for Records, dated September 8, 2006.) The Government, however, has indicated it no longer seeks to enforce the underlying NSL. (See Declaration of Jeffrey Oestericher ("Oestericher Decl."), dated Nov. 7, 2006, ¶ 3.) Thus, it appears to the Court that resolution of the instant motions fully dispose of the case.

⁴ Pursuant to Fed. R. Civ. P. 25(d)(1), although Marion Bowman is the party named in the complaint in her official capacity as FBI Senior Counsel, because she has retired and been replaced by Valerie Caproni, General Counsel to the FBI, "the officer's successor is automatically substituted as a party." (See Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of the Government's Motion to Dismiss or for Summary Judgment ("Gov't Opp."), dated November 8, 2006, at 1 n.1.)

⁵ See Memorandum of Law of Amicus Curiae The Association of the Bar of the City of New York in Support of Plaintiffs' Motion for Partial Summary Judgment ("ABCNY Amicus Brief"), dated September 29, 2006; Brief of Amici Curiae American Library Association, American Booksellers Foundation for Free Expression, American Association of Publishers, Inc., Freedom to Read Foundation and Pen American Center in Support of Plaintiffs' Motion for Partial Summary Judgment and to Set Aside Demand for Records ("Libraries, Bookstores, Publishers and Writers Amici Brief"), dated September 29,

arguments, the Court finds that several aspects of the revised nondisclosure provision of the NSL statute violate the First Amendment and the principle of separation of powers. The Court therefore holds that §§ 2709(c) and 3511(b) are facially unconstitutional. However, the statutory provisions governing hearings, proceedings, and judicial review of evidence related to a challenge to an NSL, §§ 3511(d) and (e) respectively, are constitutional. Accordingly, Plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part, and the Government's cross-motion for dismissal or summary judgment is DENIED.