



April 1, 2022

The Honorable Jerry Nadler
Chair
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 7072 The NDO Fairness Act – Support

Dear Chair Nadler and Ranking Member Jordan:

The Electronic Frontier Foundation (EFF) writes in support of H.R. 7072, the NDO Fairness Act. This bill takes important steps toward bringing transparency and accountability to the federal government’s use of sweeping nondisclosure orders, and we appreciate the Committee addressing these issues.

EFF is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 35,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

The First Amendment guarantees the public’s right to speak about court proceedings. Yet the Stored Communications Act currently allows the government to obtain court orders prohibiting the providers of electronic communications services from notifying their users when they receive law enforcement orders for user information pursuant to 18 U.S.C. Section 2703. These nondisclosure orders silence their recipients for any period that a court deems appropriate—even indefinitely—leaving the targets of the collection and the broader public unaware of the surveillance and unable to challenge it in court.

The NDO Fairness Act makes significant progress by bringing the Stored Communications Act more in line with constitutional requirements of transparency and accountability. The legislation limits the duration of nondisclosure orders to a maximum of 30 days and allows the government to seek extensions only in 30-day increments. The NDO Fairness Act also requires courts to explain in writing why notice of the collection would be substantially likely to result in harm before issuing nondisclosure orders and to narrowly tailor orders to avoid complete bans on speech wherever possible. This is a much more demanding standard than the current requirement that courts find there be “reason to believe” that such harm may occur. And the legislation puts in place important measures to ensure greater transparency around the government’s use of these secretive orders, both for targeted individuals and the larger public, including by requiring the government to notify targets of surveillance that their communications were intercepted

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and to publish an annual report that provides information about the use of surveillance under Section 2703.

These reforms are a welcome step forward in reforming the secrecy surrounding electronic surveillance under Section 2703 and bringing the Stored Communications Act closer in line with constitutional guarantees. The bill would be even stronger if it provided a more accessible path for individuals to seek remedies for government violations of this law, and we appreciate the Committee’s diligence in this area.

Bringing more transparency to government surveillance of individuals’ communications is a great step forward. We look forward to working together to enact these reforms.

Sincerely,

Andrew Crocker
Senior Staff Attorney
Electronic Frontier Foundation