

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

██████████
AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

ALBERTO GONZALES, in his official capacity
as Attorney General of the United States;
ROBERT MUELLER, in his official capacity as
Director of the Federal Bureau of Investigation;
██████████ in his official capacity as
██████████ Federal Bureau of
Investigation,

Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Civ. Action No. _____

FILED UNDER SEAL

August 9, 2005

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs ██████████ the American Civil Liberties Union (ACLU), and the American Civil Liberties Union Foundation (ACLUF) challenge the constitutionality of 18 U.S.C. § 2709, a statute that authorizes the Federal Bureau of Investigation (FBI) to demand the disclosure of a wide range of sensitive and constitutionally protected information, including the identity of a person who has borrowed particular books from a public library or who has engaged in anonymous speech on the Internet. *See* 18 U.S.C. § 2709 (“Section 2709”), as amended by the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) (“Patriot Act”). In its current form, Section 2709 allows the FBI to issue such demands to “electronic communication service providers” in the form of National Security Letters (NSLs) without obtaining prior judicial approval; without demonstrating a compelling

need to justify the production of constitutionally protected information; and without specifying any means by which the recipient can contest the demand's validity. Section 2709 also permanently gags those served with NSLs from disclosing to any other person that the FBI sought or obtained information from them. Because Section 2709 was amended by the Patriot Act to remove any requirement of individualized suspicion, the FBI may now use NSLs to demand sensitive information about innocent people.

2. In [REDACTED] an agent of defendant FBI served an NSL on plaintiff [REDACTED] [REDACTED] The NSL directed [REDACTED] to disclose certain subscriber records and other sensitive information. [REDACTED] strictly guards the confidentiality and privacy of its library and Internet records, and believes it should not be forced to disclose such records without a showing of compelling need and approval by a judge. Because the NSL gags [REDACTED] and its counsel from "disclosing to any person" that the FBI has demanded information, plaintiffs have filed this Complaint initially under seal.

3. Plaintiffs submit that Section 2709 is unconstitutional on its face and as applied. Plaintiffs further submit that the gag provision is unconstitutionally vague, overbroad, and imposes an unlawful prior restraint on speech. Plaintiffs seek a declaration that Section 2709 violates the First, Fourth, and Fifth Amendments; an injunction prohibiting the FBI from seeking to enforce the NSL served on [REDACTED] and an injunction prohibiting the FBI's further use of Section 2709 against plaintiffs or others.

JURISDICTION AND VENUE

4. This case arises under the United States Constitution and the laws of the United States and presents a federal question under Article III of the United States Constitution and 28

U.S.C. § 1331. The Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff [REDACTED]

[REDACTED] The [REDACTED] of [REDACTED] is [REDACTED]. The FBI served the NSL on [REDACTED] in his capacity as [REDACTED] of [REDACTED] sues on its own behalf and on behalf of its [REDACTED].

6. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with more than 400,000 members dedicated to the constitutional principles of liberty and equality. The ACLU is a 501(c)(4) organization. The ACLU's activities include lobbying Congress on legislation that affects civil liberties, analyzing and educating the public about such legislation, and mobilizing ACLU members and activists to lobby their legislators to protect civil rights and civil liberties. The ACLU sues on its own behalf and on behalf of its members.

7. Plaintiff ACLUF is a 501(c)(3) organization that educates the public about civil liberties and that employs lawyers who provide legal representation free of charge in cases involving civil liberties. As counsel to [REDACTED] and privy to the information contained in the NSL served on [REDACTED] lawyers employed by ACLUF are subject to Section 2709's gag provision.

8. Defendant Attorney General Alberto Gonzales heads the United States Department of Justice (DOJ), which is the agency of the United States government responsible

for enforcement of federal criminal laws and domestic intelligence investigations. Defendant Gonzales has ultimate authority for supervising all of the operations and functions of the DOJ. The DOJ includes the FBI, the agency authorized to use the law challenged in this case.

9. Defendant Robert Mueller is the Director of the FBI and is responsible for supervising all of that agency's operations. The FBI is the agency authorized to use the law challenged in this case.

10. Defendant [REDACTED] Federal Bureau of Investigation [REDACTED] Defendant [REDACTED] signed the [REDACTED] NSL.

STATUTORY LANGUAGE AT ISSUE

11. In its current form, as amended by the Patriot Act, Section 2709 authorizes the FBI to issue NSLs ordering "electronic communication service providers" (ECSPs) to disclose "subscriber information," "toll billing records information," and "electronic communication transactional records" upon a certification that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Pub. L. 107-56, Title V, § 505(a), 115 Stat. 365 (Oct. 26, 2001) (codified as 18 U.S.C. § 2709).

12. An "electronic communication service" is "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15).

13. Section 2709 does not require the FBI to meet a probable cause or individualized suspicion requirement of any kind before issuing an NSL.

14. Section 2709 does not require the FBI to obtain judicial authorization before issuing an NSL.

15. Section 2709 does not specify any means by which the recipient of an NSL can challenge the letter's validity.

16. Section 2709 does not require the FBI to provide prior, contemporaneous, or post-deprivation notice to an individual whose information is demanded pursuant to an NSL served on a third party, even if the information is constitutionally protected.

17. Section 2709 includes a gag provision that prohibits a person served with an NSL from disclosing to any other person that the FBI has sought or obtained records. *See* 18 U.S.C. § 2709(c) ("No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the [FBI] has sought or obtained access to information or records under this section.").

18. The gag provision, which on its face prohibits even consultation with counsel, applies in every case, whether or not the government can demonstrate a need for secrecy. *See id.*

19. The gag provision is indefinite and persists even after any legitimate need for secrecy has expired. *See id.*

20. Section 2709 is part of the Electronic Communications Privacy Act (ECPA), which Congress enacted in 1986. *See* Pub. L. 99-508, Title II, § 201[a], 100 Stat. 1867 (Oct. 21, 1986) (codified as 18 U.S.C. § 2510, *et seq.*).

21. As originally enacted, Section 2709 could be used only against people suspected of espionage. The original provision permitted the FBI to issue an NSL only if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; *and* (ii) there were specific and articulable facts giving reason to believe that the subject of the NSL was a foreign power or foreign agent. *See* 18 U.S.C. § 2709 (1988).

22. In 1993, Congress relaxed the individualized suspicion requirement. It authorized the FBI to issue an NSL if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; and (ii) there were specific and articulable facts giving reason to believe that *either* (a) the subject of the NSL was a foreign power or foreign agent, *or* (b) the subject had communicated with a person engaged in international terrorism or with a foreign agent or power "under circumstances giving reason to believe that the communication concerned international terrorism." *See* Pub. L. 103-142, 107 Stat. 1491 (Nov. 17, 1993).

23. In adopting the 1993 amendments, Congress recognized that "the national security letter is an extraordinary device," as it is "[e]xempt from the judicial scrutiny normally required for compulsory process." *See* H.Rep. 103-46 (Mar. 29, 1993).

24. In 2001, through the Patriot Act, Congress further expanded Section 2709 by deleting the individualized suspicion requirement altogether. *See* Pub. L. 107-56, Title V, § 505(a), 115 Stat. 365 (Oct. 26, 2001).

25. As a result of the Patriot Act, the FBI may now use NSLs to obtain sensitive information about innocent individuals who have no connection to espionage or terrorism. *See* 18 U.S.C. § 2709(b).

FACTUAL BACKGROUND

26. On [REDACTED] FBI [REDACTED] of the FBI [REDACTED] telephoned [REDACTED] to inform him that the FBI would be serving an NSL on [REDACTED] did not describe the substance of the letter, and did not notify [REDACTED] about the NSL's non-disclosure provision. [REDACTED] asked [REDACTED] who could receive service of the NSL,

and [REDACTED] told him that [REDACTED] of [REDACTED] would receive service.

27. On [REDACTED] and another [REDACTED] delivered the NSL (hereinafter [REDACTED] NSL"), a copy of which is attached hereto, to [REDACTED] of [REDACTED]. The letter, which is dated [REDACTED] is on FBI letterhead and signed by defendant [REDACTED] FBI [REDACTED] [REDACTED]

28. The [REDACTED] NSL states that [REDACTED] is "hereby directed to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity related to the following: [REDACTED] [REDACTED]

29. The [REDACTED] NSL includes a certification that "the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."

30. The [REDACTED] NSL states, "You are further advised that Title 18, U.S.C., Section 2709(e), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions."

31. The [REDACTED] NSL further states, "You are requested to provide records responsive to this request personally to a representative of the [REDACTED] of the FBI. Electronic versions of the records are requested, if available. Any questions you have regarding this request should be directed only to the [REDACTED]. Due to security considerations, you should neither send the records through the mail nor disclose the substance

of this request in any telephone conversation or electronic communication.” (Emphasis in original.)

32. The [REDACTED] NSL does not specify any procedure by which [REDACTED]

[REDACTED] can challenge the validity of the NSL.

33. [REDACTED] told [REDACTED] that he would like to consult an attorney about the NSL, and [REDACTED] told [REDACTED] to have the attorney call him.

34. On [REDACTED] [REDACTED] called [REDACTED] to inquire about the status of [REDACTED] compliance with the NSL. [REDACTED] informed [REDACTED] that [REDACTED] had retained counsel and to direct further inquiries to counsel.

35. Section 2709 authorizes the FBI to use NSLs to demand information from a variety of for-profit and not-for-profit entities that qualify as “electronic communication service providers” because they facilitate access to the Internet and other online services for subscribers, clients, or members. Such entities include not only what are commonly known as “Internet service providers,” but also universities, businesses, public interest organizations, and public libraries.

36. Electronic communication service providers (“communication providers”) maintain a range of sensitive information about their clients.

37. Communication providers who provide clients with access to the Internet maintain information that may include the client’s name, address, e-mail addresses, telephone numbers, billing information, web sites visited, e-mail addresses with which the client has corresponded, or a list of web purchases.

38. Many people who communicate over the Internet do so anonymously or pseudonymously. Those Internet speakers who prefer to communicate anonymously are

motivated by a variety of concerns. They may prefer anonymity because they fear retaliation or reprisal; because the subjects they discuss are embarrassing, sensitive, or controversial; because they do not want to disclose personal facts about themselves; or because they fear that readers would otherwise dismiss their speech because of their race or religion or because of some other reason unrelated to the content of the speech.

39. Many of those who engage in anonymous or pseudonymous speech on the Internet would engage in self-censorship if they were not confident that their anonymity could be preserved.

40. The vast majority of libraries around the country are "electronic communication service providers" under Section 2709 because they use online services to track circulation and cataloging of library materials, to track patron borrowing, and to provide Internet access to library patrons. As a result, libraries maintain a wide range of sensitive information about the reading habits and Internet usage of library patrons.

41. Protecting library patron privacy and confidentiality has long been an integral part of the mission of libraries. The American Library Association, the oldest and largest library association in the world, with 64,000 members, recognizes that reader privacy is essential to the exercise of free speech, free thought, and free association. In a library, the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others. Librarians recognize an ethical responsibility to protect the privacy of library users. The ALA opposes "any use of governmental prerogatives that lead to the intimidation of individuals or groups and discourages them from exercising the right of free expression guaranteed by the First Amendment." American Library Association, Policy 53.4, adopted Feb. 2, 1973.

42. ALA has emphasized that "Libraries are one of the great bulwarks of democracy. They are living embodiments of the First Amendment because their collections include voices of dissent as well as assent. Libraries are impartial resources providing information on all points of view, available to all persons regardless of origin, age, background, or views. The role of libraries as such a resource must not be compromised by an erosion of the privacy rights of library users." American Library Association, Policy Concerning Confidentiality of Personally Identifiable Information about Library Users, adopted June 2, 1991, amended June 30, 2004.

43. ALA passed a resolution recognizing that provisions of the Patriot Act "increase the likelihood that the activities of library users, including their use of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent." The resolution "opposes any use of governmental power to suppress the free and open exchange of knowledge and information to intimidate individuals exercising free inquiry," and asserts "[t]hat the American Library Association considers sections of the USA Patriot Act [to be] a present danger to the constitutional rights and privacy rights of library users." American Library Association, Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users, adopted January 29, 2003.

44. Forty-eight states, [REDACTED] have statutes that explicitly protect the confidentiality of library records. [REDACTED]

[REDACTED]

45. [REDACTED]
[REDACTED] provides a number of services to [REDACTED]
It administers an [REDACTED]

████ circulation and cataloging of library materials, and to track community borrowing and library usage. Library patrons █████ search library collections and check the status of their accounts.

46. █████ also provides Internet access for use by staff and patrons at █████

47. █████ also provides █████

████████████████████ to its ████████████████████

48. █████ possess a wide array of sensitive information about library patrons, including information about the reading materials borrowed by library patrons and about Internet usage by library patrons.

49. █████ is a member of the American Library Association and abides by its policies on the confidentiality of information about library patrons.

50. Section 2709(c) has prevented █████ from disclosing information about the NSL and this lawsuit to its █████

51. Section 2709(c) has prevented █████ from disclosing information about the NSL and this lawsuit to █████ who use its █████

52. Section 2709(c) has prevented █████ from disclosing information about the NSL and this lawsuit to other libraries, library service providers, and library associations.

53. Section 2709(c) has prevented █████ from disclosing information about the NSL and this lawsuit to the press and public.

54. Section 2709(c) has prevented [REDACTED] from disclosing information about the NSL to Congress, which is currently considering legislation to amend or make permanent Section 2709 and other provisions of the Patriot Act.

55. In part because of the secrecy surrounding the government's implementation and use of new surveillance powers, the new surveillance provisions of the Patriot Act have been the subject of extraordinary public controversy. *See, e.g.,* Loretta Waldman, *Patriot Act's Future Debated; 2 Republicans Have Different Views on Proposed Revisions*, HARTFORD COURANT, June 27, 2005, at B1; David Lightman, *Civil Liberties Watchdog Debated*, HARTFORD COURANT, July 24, 2005, at A1; *A Statute of Liberty?: Patriot Act, Designed To Protect, May Also Pry*, NEWSDAY, August 3, 2005, at A10; Eric Lichtblau, *Senator Faults Briefing on Antiterrorism Law*, N.Y. TIMES, Apr. 13, 2005, at A17; Dana Priest, *Panel Questions Patriot Act Uses*, WASH. POST, Apr. 28, 2005, at A7; *Provision in Patriot Act Is Rejected: Judge Curbs Access to Phone, Web Data*, THE BOSTON GLOBE, September 30, 2004, at A1; Editorial, *Judicial Pushback*, WASH. POST, October 11, 2004, at A22; *Hearing on the USA PATRIOT ACT Before the Senate Select Committee on Intelligence*, 109th Congress (April 27, 2005).

56. The question of whether the FBI has used Patriot Act provisions to obtain information about library patrons has been of extraordinary interest in the library community, in the media, and in Congress. *See, e.g.,* Adon M. Pallasch, *U.S. Attorney to Debate ACLU Official on Patriot Act Provision*, CHICAGO SUN TIMES, Jun. 26, 2005 at pg. 32; Eric Lichtblau, *Libraries Say Yes, Officials Do Quiz Them About Users*, N.Y. TIMES, Jun. 20, 2005 at A5; American Library Association, *Libraries and the USA Patriot Act Legislation*, at <http://www.ala.org/ala/pio/mediarelations/patriotactmedia.htm>; *Hearing on the USA PATRIOT ACT Before the Senate Select Committee on Intelligence*, 109th Congress (April 27, 2005).

57. Notwithstanding widespread public concern about the Patriot Act, the Department of Justice has released very little information about the implementation and use of new surveillance powers.

58. The Department of Justice has refused to disclose aggregate statistics indicating the number of times that new surveillance provisions, including Section 2709, have been used since the passage of the Patriot Act.

59. In response to a Freedom of Information Act request submitted by the ACLU and other organizations in August 2002, the FBI released a document titled "Transactional Records NSLs Since 10/26/2001," which appears to list the ECPA NSLs issued between October 26, 2001, and January 21, 2003. The five-page list is almost entirely redacted.

60. In the past few years, one of the core priorities of the ACLU and the ACLUF has been to stem the backlash on civil liberties that has taken place in the name of national security. In particular, the ACLU and the ACLUF have been the leading voice of opposition to certain provisions of the Patriot Act.

61. The ACLU has lobbied Congress to repeal or amend parts of the Patriot Act and has worked with community groups around the country to pass more than three hundred local and seven state-wide resolutions opposing the Patriot Act.

62. The ACLUF has also litigated a number of cases involving the Patriot Act. The ACLU filed two lawsuits under the Freedom of Information Act to obtain information about the government's use of the Patriot Act. The ACLU, ACLUF, and a John Doe plaintiff also successfully challenged Section 2709 in another lawsuit, which is currently pending before the Second Circuit Court of Appeals. In federal district court in Michigan, the ACLUF represents plaintiffs in a pending facial challenge to the constitutionality of Section 215 of the Patriot Act,

another provision that allows the FBI to demand personal records or things without first establishing probable cause or providing any opportunity to challenge the demand before compliance. In addition, the ACLU filed an amicus brief in the first case ever considered by the Foreign Intelligence Surveillance Court of Review, arguing that the Patriot Act's expansion of the FBI's intelligence wiretap authority is unconstitutional

63. Through public education, litigation, and lobbying efforts, the ACLU and the ACLUF have played a critical role in influencing the public debate over the Patriot Act. Americans around the country are actively opposing the Patriot Act by lobbying their local, state, and federal legislators. Members of Congress have now introduced numerous bills to amend provisions of the Patriot Act.

64. Section 2709(c) has prevented the ACLU and the ACLUF from disclosing information about the [REDACTED] NSL and about this lawsuit to the press and public.

65. Section 2709(c) has prevented the ACLU and the ACLUF from disclosing information about the [REDACTED] NSL to Congress, which is currently considering legislation to amend or make permanent Section 2709 and other provisions of the Patriot Act.

66. The disclosure of information about the government's use of Section 2709, particularly its use against a [REDACTED] would inform and influence the public and congressional debate about the Patriot Act.

67. On September 28, 2004, a federal court in New York ruled that Section 2709 violated the First and Fourth Amendments, and enjoined the FBI from issuing National Security Letters under Section 2709, or from enforcing the gag provisions of Section 2709(c). *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). The court stayed enforcement of its judgment pending appeal. The case is currently on appeal to the Second Circuit Court of Appeals.

CAUSES OF ACTION

68. Section 2709 violates the First Amendment, on its face and as applied, by categorically and permanently prohibiting any person from disclosing to any other person that the FBI has sought or obtained information with an NSL.

69. Section 2709 violates the First Amendment, on its face and as applied, by authorizing the FBI to order the disclosure of constitutionally protected information without demonstrating a compelling need for the information or tailoring the demand to the need.

70. Section 2709 violates the First and Fourth Amendments, on its face and as applied, by failing to specify any mechanism through which the recipient of an NSL can challenge the letter's validity.

71. Section 2709 violates the First, Fourth, and Fifth Amendments, on its face and as applied, by authorizing the FBI to order the disclosure of constitutionally protected information without providing prior notice to individuals whose information is disclosed or requiring the government to justify the non-provision of notice on a case-by-case basis.

72. Section 2709 violates the Fifth Amendment, on its face and as applied, because it is unconstitutionally vague.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that the Court:

1. Declare that Section 2709 violates the First, Fourth, and Fifth Amendments to the United States Constitution.
2. Permanently enjoin defendants from seeking to enforce the [REDACTED] NSL or from penalizing plaintiffs for failing to comply with it.

3. Permanently enjoin defendants from using Section 2709 against plaintiffs or any other person or entity.
4. Award plaintiffs fees and costs.
5. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

ANNETTE M. LAMOREAUX
Local Counsel
(Connecticut Bar # 25769)
American Civil Liberties Union of
Connecticut Foundation
32 Grand St.
Hartford CT 06106
Ph: (860) 247-9823
Fax: (860) 728-0287
E-mail: annettel@cclu.org

ANN BEESON
Lead Attorney
JAMEEL JAFFER
MELISSA GOODMAN
American Civil Liberties Union
Foundation
National Legal Department
125 Broad Street, 18th Floor
New York, NY 10004
Ph: (212) 549-2500
Fax: (212) 549-2651
E-mail: annb@aclu.org

August 8, 2005

ATTACHMENT



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No. [REDACTED]



Dear [REDACTED]

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 (as amended, October 26, 2001), you are hereby directed to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity related to the following:



In accordance with Title 18, U.S.C., Section 2709(b), I certify that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and 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.

You are further advised that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.

You are requested to provide records responsive to this request personally to a representative [REDACTED] of the FBI. [REDACTED] of the records are requested, if available. Any questions you have regarding this request should be directed only to the [REDACTED]. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation or electronic communication.

Your cooperation in this matter is greatly appreciated.

Sincerely,

