

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN DOE; and AMERICAN CIVIL)
LIBERTIES UNION,)

Plaintiffs,)

v.)

04 Civ. 2614

JOHN ASHCROFT, in his official capacity)
as Attorney General of the United States;)

Honorable Victor Marrero

ROBERT MUELLER, in his official)
capacity as Director of the Federal Bureau)

of Investigation; and MARION E.)

BOWMAN, in his official capacity as)

Senior Counsel to the Federal Bureau of)

Investigation,)

Defendants.)

**BRIEF OF *AMICI CURIAE* AMERICAN LIBRARY ASSOCIATION, FREEDOM TO
READ FOUNDATION, AND AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

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Amici curiae American Library Association, Freedom to Read Foundation, and American Booksellers Foundation for Free Expression, through undersigned counsel, submit this brief in support of plaintiffs’ challenge to 18 U.S.C. § 2709 (“Section 2709”), as amended by the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (“Patriot Act”).

INTRODUCTION

Amici are associations of libraries and bookstores devoted to the continued vitality of First Amendment values.

Amicus American Library Association is the oldest and largest library association in the world, with more than 64,000 members. Its mission is to promote the highest quality library and information services and public access to information.

Amicus Freedom to Read Foundation is a nonprofit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of all citizens.

Amicus American Booksellers Association Foundation for Free Expression (“ABFFE”) was organized in 1990 by the American Booksellers Association, the leading association of general interest bookstores in the United States. ABFFE’s purpose is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Although *amici* share plaintiffs’ concerns about the constitutionality of Section 2709 generally, they submit this brief to highlight the particular threat posed by that section to libraries, bookstores, and their patrons. The federal government has expressly identified Section 2709 as a potential tool for obtaining sensitive patron information from libraries and bookstores. *Amici* therefore seek to ensure that the Court consider the broader implications of Section 2709 when reviewing plaintiffs’ constitutional challenge.

Section 2709 provides the government with an unprecedented and unchecked power to issue National Security Letters (NSLs), thereby obtaining information protected by the First Amendment whenever the government states, without more, that the materials are sought “to protect against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709(b)(1); *id.* § 2709(b)(2). Going far beyond the government’s traditionally narrowly cabined subpoena power, Section 2709 requires no judicial procedure for a showing of relevance and provides no means of challenging an order once issued. Furthermore, the statute imposes an automatic gag order on the recipient of a request, barring the recipient from telling anyone—including the subject of the records—about the request.

Section 2709 violates the First Amendment in two respects. First, Section 2709 authorizes the disclosure of protected First Amendment information without any governmental showing that the information would actually further a terrorism investigation. When the government seeks to issue a subpoena, courts typically apply a more exacting standard when constitutionally protected information is at issue. But Section 2709 makes no such provision, and, in fact, it contains far fewer safeguards against government abuse than even the standard civil subpoena process. As expanded by the Patriot Act, NSLs unconstitutionally threaten to chill the robust exchange of ideas over the Internet. Second, Section 2709’s automatic gag rule

violates the First Amendment because it unjustifiably imposes a blanket ban of secrecy upon recipients of orders in the absence of any showing of need by the government for such secrecy.

I. THE BROAD SCOPE OF SECTION 2709 THREATENS THE FIRST AMENDMENT INTERESTS OF *AMICI* AND THEIR PATRONS.

The Patriot Act amended Section 2709, part of the Electronic Communications Privacy Act of 1986, to effect a substantial expansion of the government's authority to issue NSLs that poses a serious threat to constitutionally protected expressive activity. The pre-Patriot Act Section 2709 required a showing of individualized suspicion; that is, the government had to demonstrate that the person whose records were sought was a "foreign power" or "agent of a foreign power" in order to issue a proper NSL. 18 U.S.C. § 2709(b)(1)(B) (2000); *id.* § 2709(b)(2)(B) (2000). Now, however, Section 2709 requires only that the government state that the materials are sought "to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b)(1) (2003); *id.* § 2709(b)(2) (2003). As the government itself has noted, the elimination of the individualized suspicion requirement has "greatly broadened" its authority to use NSLs. Memorandum from General Counsel, FBI to All Field Offices of Nov. 28, 2001, at 3, 7, *available at* http://www.aclu.org/patriot_foia/FOIA/Nov2001FBImemo.pdf.

While Section 2709 is aimed in part at telephone companies and Internet service providers (ISPs), Congress designed the statute broadly enough that it likely would apply to many bookstores and nearly all public libraries. Section 2709 enables the government to issue administrative subpoenas to any "wire or electronic communication service provider," 18 U.S.C. § 2709(a), in order to discover "subscriber information" and "electronic communication transactional records," *id.*, including, *inter alia*, the "name, address, and length of service," *id.* § 2709(b), of any user of a given provider. The applicable statutory definition of "wire or electronic communication" includes communication via the Internet, *see* 18 U.S.C. § 2510(12)

(“‘electronic communication’ means any transfer of signs, symbols, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, electromagnetic, photoelectric, or photooptical system that affects interstate or foreign commerce.”), while “‘electronic communication service’ means any service which provides to users thereof the ability to send or receive wire or electronic communications,” *id.* § 2510(15). Given the breadth of these statutory definitions, *amici* fear that Section 2709 could cover their patrons’ expressive activity in two respects.

First, most public libraries and many bookstores offer individuals the ability to communicate over the Internet—typically free of charge—on public terminals. *See* John Carlo Bertot & Charles R. McClure, Information Use Mgmt. & Pol’y Inst., *Public Libraries and the Internet 2002: Internet Connectivity and Networked Services*, tbls. 3 & 4, at 5 (Dec. 2002), *available at* <http://www.ii.fsu.edu/Projects/2002pli/2002.plinternet.study.pdf> (concluding that 98.7% of public libraries are connected to the Internet and 95.3% of outlets provide public access to the Internet as of Spring 2002); *see, e.g.*, Kramerbooks & Afterwords Café, <http://www.kramers.com> (visited May 14, 2004) (home page of Washington, D.C.’s Kramerbooks, advertising that the bookstore offers free Internet access to the public). Such public terminals often supply the only means of Internet access for individuals who, for lack of money or technology, cannot do so otherwise. *See, e.g.*, *American Library Ass’n v. United States*, 201 F. Supp. 2d 401, 467 (E.D. Pa. 2002) (“By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access.”), *rev’d on other grounds*, 539 U.S. 194 (2003); *see also generally* National Telecomms. & Info. Admin., U.S. Dep’t of Commerce, *Falling Through the Net*

(2000), *available at* <http://www.ntia.doc.gov/ntiahome/digitaldivide/> (noting that, as of 2000, rates of Internet access among disadvantaged socioeconomic and racial groups significantly lagged behind the national average). Public libraries in particular help to ameliorate the “digital divide” not only by offering Internet access to those who cannot afford it otherwise, but also by supplying education and outreach services to increase technological literacy in underserved communities. *See* John Carlo Bertot & Charles R. McClure, Information Use Mgmt. & Pol’y Inst., *Policy Issues and Strategies Affecting Public Libraries in the Networked Environment* 10-11 (Dec. 2001), *available at* <http://www.nclis.gov/libraries/PolicyIssues&Strategies.pdf>. Because libraries and bookstores provide these services, Section 2709 grants the government the authority to compel the disclosure of constitutionally sensitive information about patrons using their public Internet terminals—all without any showing of individualized suspicion or opportunity to challenge the subpoena.

In fact, Section 2709 could be construed to apply to libraries and bookstores merely by virtue of the fact that they host a website. Most libraries and bookstores host a website to inform the public about their services and to enable communication with customers and other businesses. *See, e.g.*, District of Columbia Public Library, <http://www.dclibrary.org/> (visited May 18, 2004); New York Public Library, <http://www.nypl.org/> (visited May 18, 2004); Tattered Cover Book Store, <http://www.tatteredcover.com/NASApp/store/IndexJsp> (visited May 18, 2004); Elliott Bay Book Co., <http://www.elliottbaybook.com/> (visited May 18, 2004). Because these websites represent a “service” by which libraries and bookstores “provide to users . . . the ability to send or receive . . . electronic communications,” libraries and bookstores appear to fall within the scope of Section 2709 for this reason as well.

Indeed, the government itself has stated that it regards NSLs as a primary means to obtain sensitive information from libraries and bookstores. In a memorandum from the Department of Justice responding to the House Judiciary Committee’s questions about the FBI’s use of another provision of the Patriot Act (Section 215, codified at 50 U.S.C. § 1861) to obtain information from libraries, bookstores, and newspapers, the government emphasized that “[i]f the FBI were authorized to obtain the information the more appropriate tool for requesting electronic communication transactional records would be a National Security Letter (NSL).” Letter from Daniel J. Bryant, Assistant Attorney General, to F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives 4 (July 26, 2002), *available at* <http://www.house.gov/judiciary/patriotresponses101702.pdf> (answer to question 12) (hereinafter “Bryant letter”).

Given the broad statutory language of Section 2709 and the federal government’s asserted authority to use that section specifically against libraries and bookstores, *amici* view Section 2709 as a real and substantial threat to the constitutional liberties of library and bookstore patrons. As discussed below, *amici* believe the challenged statute cannot pass the rigorous scrutiny required by the First Amendment, and therefore urge this Court to grant plaintiffs’ motion for summary judgment.

II. SECTION 2709 VIOLATES THE FIRST AMENDMENT.

Section 2709 threatens the First Amendment rights of *amici* and their patrons in two ways. First, by ceding to the government unprecedented and unchecked authority to issue NSLs, the Patriot Act risks compromising individuals’ First Amendment right to communicate anonymously over the Internet, and may chill constitutionally protected expression in the future.

Second, Section 2709's automatic gag rule impermissibly imposes a blanket ban on recipients of NSLs in the absence of any showing of need by the government for such prior restraints.

A. Section 2709 Unconstitutionally Threatens the First Amendment Rights of *Amici's* Patrons.

Section 2709 unconstitutionally grants the government unchecked authority to compromise the anonymity of individuals who communicate over the Internet, thereby threatening to compel the disclosure of constitutionally protected, sensitive information. The right to remain anonymous when engaging in expressive activity is a critical component of the First Amendment. “Anonymity is a shield from the tyranny of the majority It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *see also Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999) (invalidating, on First Amendment grounds, a Colorado statute requiring initiative petitioners to wear identification badges); *Talley v. California*, 362 U.S. 60, 65 (1960) (invalidating a California statute prohibiting distribution of handbills without author information). Shielding anonymous expression from government scrutiny encourages speech that otherwise might not occur. “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *McIntyre*, 514 U.S. at 341-42. Indeed, “[a]nonymous speech is a great tradition that is woven into the fabric of this nation’s history.” *Doe v. 2TheMart.Com*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); *see also McIntyre*, 514 U.S. at 341-42 (discussing importance of anonymous political speech in American history).

Particularly because of the amplifying effect that the Internet can have on individual speech, *see Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”), as well as the ease of anonymous communication it provides, the capacity to communicate anonymously over the Internet is critical to preserving the Internet as a forum for communication and so particularly important for advancing First Amendment values. *See 2TheMart.Com*, 140 F. Supp. 2d at 1092 (“Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas.”); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). Accordingly, numerous courts have held that Internet users have a constitutional right to remain anonymous. *See, e.g., 2TheMart.Com*, 140 F. Supp. 2d at 1097 (“[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.”); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (striking down a law that “prevents people from communicating and accessing information anonymously”), *aff’d*, 194 F.3d 1149 (10th Cir. 1999); *Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing a “legitimate and valuable right to participate in online forums anonymously or pseudonymously”); *La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV0301974005, 2003 WL 22962857, at *5-*6 (Conn. Super. Ct. Dec. 2, 2003) (concluding that there is a First Amendment right to anonymous speech that extends to speech on the Internet); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (same); *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000) (same), *rev’d on other grounds by America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001).

Section 2709 violates the First Amendment because it permits the government to strip Internet users—including those who use public Internet terminals at libraries or bookstores or who visit Internet sites hosted by those institutions—of their anonymity without the requisite constitutional safeguards. Where, as here, the government’s investigatory function implicates First Amendment values, courts typically hold the government to a high standard before permitting the government to obtain the materials in question. To be sure, the government may be able to satisfy a heightened standard in a given case depending on the facts of the request. But Section 2709 is unconstitutional because it legislatively overrides the constitutionally required heightened standards and places no meaningful restrictions on the government’s ability to obtain sensitive First Amendment-protected materials.

In order to obtain authorization for an NSL pursuant to Section 2709, the government need only certify that the information is being sought to “protect against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709(b)(1), *id.* § 2709(b)(2). The statute does not require that the government provide any grounds for its belief that the requested records are relevant to a terrorist investigation. The government’s assertion in these circumstances does not even have to withstand any judicial scrutiny; the NSL issues directly upon certification and without any judicial process. *Id.* § 2709(a). And in addition to the ease with which the government can issue NSLs, the individual whose anonymity is compromised cannot learn of the government’s investigation, because Section 2709 imposes a gag order that prevents the recipient of the NSL from discussing it with anyone. *Id.* § 2709(c).

Section 2709’s rubber-stamp character contrasts sharply with the higher degree of scrutiny courts typically apply in government investigations that raise constitutional concerns. For example, in the search warrant context, where Fourth Amendment rights are at issue, a

detached and neutral magistrate must make an independent determination about whether there is “probable cause” to believe that contraband or evidence is located in a particular place. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). When the targets of the search are items protected by the First Amendment, this strict standard is heightened further. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1970) (“Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’”) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

And outside the criminal context, courts have consistently held that where a subpoena threatens to disclose constitutionally protected information, a court must consider the relative interests of the government and the individual before it may order the government to proceed. It is well established that when a subpoena threatens to violate First Amendment rights, the government must make a heightened showing to justify the request. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 12 (1973) (“[G]rand juries must operate within the limits of the First Amendment.”) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1103 (2d Cir. 1985) (“[J]ustifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.” (quoting *Branzburg*, 408 U.S. at 680-81))).¹ As the Tenth Circuit has explained in a related context, in order to enforce a grand jury subpoena implicating First

¹ See also, e.g., *SEC v. McGoff*, 647 F.2d 185, 191 (D.C. Cir. 1981) (concluding that “some balancing or special sensitivity is required” in view of First Amendment implications of agency subpoena duces tecum directed at newspaper publisher); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (“[W]hen the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought.”); *Burse v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (grand jury subpoena to appear and testify implicating First Amendment rights to freedom of the press and to association); 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 8.8(d) at 156-63 (2d ed. 1999) (reviewing cases).

Amendment rights, “the government must demonstrate a compelling interest, and a substantial relationship between the material sought and legitimate governmental goals.” *In re First Nat’l Bank*, 701 F.2d 115, 117 (10th Cir. 1983) (internal quotation marks and citations omitted).

Courts have applied this general principle to instances where civil subpoenas sought to uncover the identity of anonymous Internet users, and have consistently held that such subpoenas require a heightened showing in order to assure that they not unduly compromise First Amendment liberties. *See Seescandy.com*, 185 F.R.D. at 578 (“[S]ome limiting principles should apply to the determination of whether discovery to uncover the identity of a[n anonymous Internet user] is warranted.”); *2TheMart.Com*, 140 F. Supp. 2d at 1093 (holding that “discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts”); *America Online*, 2000 WL 1210372 at *8; *Dendrite Int’l*, 775 A.2d at 761; *La Societe Metro*, 2003 WL 22962857, *5-*6. For example, when faced with this tension between an individual’s First Amendment right to anonymity and a litigant’s desire to subpoena the identity of that user in order to facilitate its recovery at law, one district court crafted a four-part test, determining that the subpoena should issue only if:

- (1) the subpoena seeking the information was issued in good faith and not for any improper purpose,
- (2) the information sought relates to a core claim or defense,
- (3) the identifying information is directly and materially relevant to that claim or defense, and
- (4) information sufficient to establish or disprove that claim or defense is unavailable from any other source.

2TheMart.Com, 140 F. Supp. 2d at 1095. Acknowledging that this heightened showing would make the subpoena more difficult to obtain, the court noted that “imposing a high burden” was necessary because “the First Amendment requires us to be vigilant in making [these] judgments, to guard against undue hindrances to political conversations and the exchange of ideas.” *Id.* (quoting *Buckley*, 525 U.S. at 192).

Yet even though NSLs threaten to reveal constitutionally protected information, Section 2709 contains no provision that reflects the heightened standards that must apply in this case. On the contrary, Section 2709 does not even provide the basic privileges that are available to subpoenaed parties—notice and an opportunity to quash, *see* Fed. R. Civ. P. 45(c). If anything, Section 2709 appears designed to deny to parties whose identity is sought any opportunity even to find out that their First Amendment rights have been compromised, let alone file a legal challenge to vindicate those rights, because the gag order provision prevents the recipient of the NSL from telling the affected party that his anonymity has been compromised. Section 2709, which provides less protection than the civil rules and in fact makes it virtually impossible for an affected user to even know his rights are being violated, falls far short of the required constitutional minimum.²

Section 2709 violates the First Amendment for another, related reason. While requiring the disclosure of constitutionally protected information without adequate safeguards offends the Constitution on its own terms, the effect of this policy will undermine free speech by deterring individuals who wish to speak and receive information anonymously from doing so at public Internet terminals at libraries and bookstores in the future. Patrons likely will curtail their expressive activity if they fear that their anonymity may be compromised by NSLs and possibly form the basis of a criminal investigation. In addition, because of the vital role played by public libraries in narrowing the “digital divide,” the chilling effect of Section 2709 will have a disproportionate effect on those who are unable to obtain Internet access elsewhere.

² Though Section 2709 gestures at these concerns by requiring that NSLs may not issue against an American citizen “solely” on the basis of First Amendment activities, 18 U.S.C. § 2709(b)(1), *id.* § 2709(b)(2), this supposed safeguard is utterly porous. So long as an NSL is certified on any other incriminating information, however slight or dubious, the “solely” requirement is satisfied.

The rich exchange of ideas fostered by the Internet depends in large part on the ease of anonymous communication afforded by that medium. The “ability to speak one’s mind” on the Internet “without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment.”

Seescandy.com, 185 F.R.D. at 578. Courts have held that permitting the government to strip this anonymity using just the civil subpoena power poses an unacceptable risk of chilling First Amendment-protected communication:

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.

2TheMart.Com, 140 F. Supp. 2d at 1093. If the threat of disclosure of Internet users’ identity via civil subpoenas—which at least offer recourse to judicial process—risks chilling First Amendment-protected communication, then NSLs, which are much more readily available to the government and require neither judicial process nor any showing of individualized suspicion, present a much greater risk.

Nor are the fears of *amici* and their patrons mere speculation. A University of Illinois study reports that in the year after the September 11 attacks government authorities visited libraries at least 545 times seeking information about patrons. *See* Leigh S. Estabrook, Library Research Ctr., *Public Libraries And Civil Liberties* (2003), available at http://alexia.lis.uiuc.edu/gslis/research/civil_liberties.html. And former Assistant Attorney General Viet Dinh stated in testimony before Congress in May 2003 that the government had visited libraries approximately 50 times in 2002 to obtain records and information. *See* Eric

Lichtblau, *Justice Dep't Lists Use Of New Power To Fight Terror*, N.Y. Times, May 21, 2003, at A1. The eagerness of government to use the liberal requirements of Section 2709 to achieve this end is also evident. While the government refuses to disclose whether it has issued any NSLs to libraries or bookstores (a FOIA request of the identities of institutions on which the government had served NSLs returned a five-page list, all of which was entirely redacted, *see* http://www.aclu.org/patriot_foia/FOIA/NSLlists.pdf), the government has made clear its opinion that NSLs are the “appropriate tool” to discover sensitive information from libraries and bookstores. Bryant letter at 4.

Section 2709’s clear lack of constitutional safeguards, coupled with the government’s demonstrated willingness to use this investigatory tool against *amici* and their patrons, threatens severe and palpable harm to our system of free expression. As Justice Douglas explained, readers’ and speakers’ constitutional right to anonymity provides a vital bulwark against government intrusion on core First Amendment liberties:

A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or pagers is indeed the beginning of surveillance of the press. . . . Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. . . . If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press.

United States v. Rumely, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring).

B. Section 2709’s Gag Order Provision Violates the First Amendment.

In addition to the constitutional defects in Section 2709 identified above, the provision’s automatic statutory “gag rule,” 18 U.S.C. § 2709(c), which prohibits anyone from disclosing that an order has issued, also violates the First Amendment. The gag rule provides:

No wire or electronic service communication provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

Id. This provision infringes First Amendment rights.

As a content-based speech restriction, the gag rule is subject to, and cannot survive, strict scrutiny. Because it applies automatically to any Section 2709 order – absent any showing of need by the government – the provision is insufficiently tailored to serve a compelling state interest. Moreover, the gag rule is completely open-ended and applies in perpetuity; it takes no account of the speaker’s intent; and it restricts anyone with knowledge of the order.

As shown below, the automatic gag rule has a direct unconstitutional effect on expressive rights. In addition, the provision will magnify the severe chilling effect of Section 2709 discussed above. If the government has ready access to information on individuals’ reading habits, they are likely to steer clear of unusual, provocative, or controversial speech. That chilling effect may be far greater where, as here, every person’s reading habits might be subject to compulsory production *without that person ever knowing it*.

“[T]he Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a ‘state interest of the highest order.’” *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (citation omitted); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). Indeed, the Supreme Court has made clear that “state action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979).

Because it regulates speech based on its content, the gag rule is subject to strict scrutiny. That the statute is content-based is plain by its very terms: it focuses only on the content of a disclosure – that the FBI has issued a Section 2709 order. *See, e.g., Boos v. Barry*, 485 U.S. 312,

321 (1988). Consequently, for the provision to survive constitutional challenge, the government must demonstrate that it serves a compelling interest, is narrowly tailored, and is the least restrictive means of serving the asserted governmental interest. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Section 2709's gag rule fails that test.

Although safeguarding the Nation against international terrorism obviously is a compelling interest, the gag rule is far too broadly drawn to pass constitutional muster. Section 2709's gag rule applies automatically, requiring no specific showing of necessity by virtue of national security concerns. Unlike other subpoenas that threaten to cause hardship to individuals or infringe their constitutional rights, the government need not demonstrate under Section 2709 that the disclosure of a particular NSL might threaten national security or an ongoing investigation.

Despite the gravity of this nation's fight against international terrorism, such a vague and speculative invocation of "national security interests" hardly satisfies the government's constitutionally mandated burden here. Indeed, courts historically have expressed a degree of skepticism regarding proclamations that legislation is necessary as a matter of national security:

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring); *see also, e.g., Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984) ("Even the country's interest in national security must bend to the dictates of the First Amendment."), *aff'd*, 469 U.S. 1200 (1985). Indeed, the Supreme Court continually has warned

against precisely these types of vague statutory justifications. “When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) (citation omitted).³

In addition, even if the government could somehow establish that the mere disclosure that the FBI had sought a Section 2709 order could *possibly* lead to further serious harm, the Supreme Court has made clear that “[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)); *see also, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (“The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”). Indeed, “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.” *Bartnicki*, 532 U.S. at 529-30; *see also, e.g., Worrell*, 739 F.2d at 1223 (“[W]hile we recognize the State’s interest in apprehending criminals, we do not think it is sufficiently compelling to justify the prohibition of publication by *any* person . . . of the contents of a sealed document.”).

Even if there were a compelling need for a prohibition on certain disclosures in order to protect national security or to prevent the disruption of foreign intelligence investigations, the automatic gag rule in Section 2709 is not narrowly drawn to serve that interest. *See, e.g.,*

³ *See also, e.g., Playboy*, 529 U.S. at 822-23 (striking down statute on First Amendment grounds where legislative record was “barren” of evidence of problem that would justify speech ban and holding that “Government must present more than anecdote and supposition”).

Playboy, 529 U.S. at 813. The gag rule is unconstitutionally broad because, rather than eliminating “the exact source of the ‘evil’ it seeks to remedy,” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), it instead prohibits a substantial amount of constitutionally protected speech.

First, as noted above, the rule applies automatically to all Section 2709 orders, regardless of the particular harm threatened in any given instance. This fact alone casts serious doubt on the statute’s constitutionality. Second, the statute contains no time limit and, therefore, its terms apply in perpetuity. As a result, the statute prohibits individuals with knowledge of an FBI search from disclosing that information long after the investigation has concluded. The permanent suppression of information that could have no bearing on national security is unjustified. *See, e.g., Butterworth*, 494 U.S. at 632-33, 635 (striking down statute that prevented disclosure of grand jury testimony “into the indefinite future” and holding that once investigation is at an end there is no reason for grand jury secrecy); *Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir. 1994).

Second, because the statute prohibits *anyone* from disclosing knowledge of a Section 2709 order, it applies not just to the original recipient of the court order mandating the search, but also to anyone who subsequently may learn of the order. This would include, for example, the media. Even if the government could establish a basis for suppressing the initial disclosure, that justification is nonexistent as to others who subsequently learn of the search and, in turn, disclose the information to additional individuals. *See, e.g., Florida Star*, 491 U.S. at 535 (“[I]t is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities . . .”).

Section 2709’s automatic gag rule is therefore unconstitutional.

CONCLUSION

Section 2709 threatens the First Amendment rights of *amici* and their patrons, giving the federal government unchecked authority to compel the disclosure of constitutionally protected information. For the reasons discussed above, *amici* urge the Court to grant plaintiffs' motion for summary judgment and declare Section 2709 unconstitutional.

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