


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK


AMERICAN CIVIL LIBERTIES UNION;
and AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs,

v.

JOHN ASHCROFT, 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; and MARION E. BOWMAN,
in his official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

04 Civ. 2614 (VM)

SEALED

The government originally gagged the ACLU from disclosing the text that appears below in a shaded background, arguing that its disclosure would pose a threat to national security. After the ACLU objected, the Court lifted the gag order on that text. The ACLU remains gagged from disclosing the blacked out text below.

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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May 17, 2004

The statute also includes a gag provision that prohibits those served with NSLs from ever disclosing that the FBI sought or obtained information from them. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] general categories of information [REDACTED] and from informing the public, press, and Congress about [REDACTED] a federal statute.

[REDACTED] the government has prohibited plaintiff [REDACTED] from disclosing even the mere fact that it has challenged the statute's constitutionality. In addition to unjustifiably curtailing plaintiffs' First Amendment rights, the gag provision deprives the public of information about controversial federal legislation, denies the public an opportunity to evaluate and better understand the surveillance activities of the executive branch, and prevents the public from assuring itself that the judicial process is working as it is meant to.

Section 2709 is manifestly unconstitutional because it authorizes the FBI to compel the disclosure of sensitive and constitutionally protected information without judicial oversight. Further, the statute's gag provision is unconstitutionally vague and imposes an unlawful prior restraint on speech. Plaintiffs seek a declaration that Section 2709 violates the First, Fourth, and Fifth Amendments [REDACTED]

[REDACTED]

[REDACTED] and an injunction prohibiting the FBI's [REDACTED] use of Section 2709 against plaintiffs or others. There are no genuine issues of material fact in dispute. For the reasons stated below, plaintiffs are entitled to judgment as a matter of law and respectfully urge that the Court enter judgment in their favor.

U.S. 829, 838 (1978); see also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *Stranberg v. California*, 283 U.S. 359, 369 (1931) ("[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system").

[REDACTED] plaintiffs would disclose to the public the general categories of information [REDACTED]

[REDACTED] that it opposes the authority that Section 2709 invests in the FBI. SUF at §§VII.H, IX ([REDACTED] Decl. ¶¶21, 23-24, 26-27, 29-30). All of the plaintiffs would use information concerning this case to advocate for the repeal of Section 505 of the Patriot Act. SUF at §§VII.H-I, IX (Romero Decl. ¶¶12-21, 26-27; [REDACTED] Decl. ¶¶29-30). More generally, plaintiffs would inform the public about [REDACTED] the NSL power [REDACTED] [REDACTED] SUF at §§VII.H-I, IX ([REDACTED] Decl. ¶¶20-30; Romero Decl. ¶¶12-21, 26-27; Beeson Decl. ¶¶27-30).²

² Notably, the gag provision forecloses the possibility that speech about the government's use of Section 2709 will serve as a check against abuse of the law. See L. Brandeis, *Other People's Money* 62 (Nat'l Home Library Found., ed. 1933) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("The press . . . guards against the miscarriage of justice by subjecting the policy, prosecutors, and judicial processes to extensive public

20-30; Beeson Decl. ¶¶7-11, 19-26; Beeson Decl. Exhs. 2-8, 13). [REDACTED] declaration,

[REDACTED] states,

[REDACTED] the public should be able to monitor how the government is using these new powers so that it can police against possible abuses.”

SUF at §VII.H ([REDACTED] Decl. ¶30).

All of the plaintiffs have been prohibited from communicating even facts that are already in the public domain. For example, plaintiffs cannot disclose [REDACTED] or that this case involves [REDACTED] information or implicates [REDACTED] SUF at §§VII.C, VII.E (Romero Decl. ¶¶17-22, 24-25; Beeson Decl. ¶¶13-14, 17-18, 23; Beeson Decl. Exhs. 2-8; [REDACTED] Decl. ¶¶11, 21-30). Yet these facts are readily available to anyone who gives even the most cursory scrutiny to the statute and the redacted complaint. SUF at §VII.D (Romero Decl. ¶¶19, 23; Romero Decl. Exh. 1; Beeson Decl. ¶¶7-8, 11-14, 17; Beeson Decl. Exhs. 2-8).

Because the gag provision in Section 2709(c) is not narrowly tailored to meet a compelling government interest, it cannot survive constitutional scrutiny.⁷

II. THE GAG PROVISION SET FORTH IN SECTION 2709(c) IS UNCONSTITUTIONALLY VAGUE.

Section 2709(c) is unconstitutionally vague because, though it restricts activity protected by the First Amendment, it fails to provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited and fails to provide explicit standards to those who apply and enforce the provision.

⁷ For the reasons stated above, Section 2709(c) is also unconstitutionally overbroad. See *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).