No. 05-0570-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Defendants-Appellants,

v.

JOHN DOE, AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, FREEDOM TO READ FOUNDATION, AND PEN AMERICAN CENTER IN SUPPORT OF AFFIRMANCE

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RULE 26.1 DISCLOSURE STATEMENT

Amici American Association of University Professors, American Booksellers Foundation for Free Expression, American Library Association, Association of American Publishers, Freedom to Read Foundation, and PEN American Center state that they have no parent corporation and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

Amici curiae American Association of University Professors, American Booksellers Foundation for Free Expression, American Library Association, Association of American Publishers, Freedom to Read Foundation, and PEN American Center, through undersigned counsel, submit this brief in favor of affirmance, and in support of appellees' challenge to 18 U.S.C. § 2709, as amended by the USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("Patriot Act").

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

INTERESTS OF *AMICI*

Amici are associations of libraries, bookstores, authors, publishers, and professors devoted to the continued vitality of First Amendment freedoms.

Amicus American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Founded in 1915, AAUP is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. The 1940 *Statement on Principles on Academic Freedom and Tenure*, which was drafted by the AAUP and the Association of American Colleges and Universities and is currently endorsed by approximately 180 disciplinary societies and educational organizations, holds that "[t]he common good depends upon the free

search for truth and its free exposition. . . . [and] [a]cademic freedom . . . in research is fundamental to the advancement of truth." 1940 *Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS 3 (9th ed. 2001). After September 11, 2001, AAUP turned its attention to academic freedom in the wake of growing national security concerns, and emphasized the need for freedom to gain access to information and conduct research without the chilling effects of secret governmental oversight. AAUP, *Academic Freedom and National Security in a Time of Crisis: A Report of AAUP's Special Committee*, 89 Academe: Bulletin of the American Association of University Professors 34 (Nov.-Dec. 2003).

Amicus American Booksellers 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.

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 Association of American Publishers, Inc. (AAP) is the national trade association of the United States book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

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 PEN American Center (PEN) is an organization of over 2,500 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN

has taken a leading role in attacking rules that limit freedom of expression in this country.

Although *amici* share appellees' concerns about the constitutionality of Section 2709 generally, they submit this brief to highlight the particular threat posed by that provision to intellectual and academic freedom. The federal government has expressly identified Section 2709 as a potential tool for obtaining sensitive patron information from libraries, both academic and public, and bookstores. *Amici* therefore seek to ensure that the Court, as the district court did, consider Section 2709's broader implications. *Amici* recognize that "there may be points where some of our freedoms will have to yield to the manifest imperatives of security." AAUP, 89 *Academe* at 37. But *amici* believe that "[w]hat we should not accept is that we must yield those freedoms whenever the alarm of security is sounded." *Id.*

STATEMENT OF THE CASE

Plaintiffs-appellees John Doe, the American Civil Liberties Union, and the American Civil Liberties Union Foundation brought this suit to challenge 18 U.S.C. § 2709. Doe is an Internet access firm that received a Section 2709 "National Security Letter," or NSL.[1] *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475

[1] On the government's motion, the district court sealed the record in this case, precluding *amici* from learning such basic facts as Doe's identity and the records

(S.D.N.Y. 2004). The parties filed cross-motions for summary judgment, with the plaintiffs supported by a brief by several of the *amici* here. The district court entered judgment in favor of the plaintiffs, *id.* at 491, holding that Section 2709 violates both the First and Fourth Amendments, *id.* at 475.

First, the district court reasoned that, inasmuch as administrative subpoenas like NSLs are typically issued without a court's prior permission, they can satisfy the Fourth Amendment's demands if judicial review of the subpoena is reasonably available after the issuance of the subpoena. *See id.* at 495. The district court concluded, however, that Section 2709 fails to provide these necessary safeguards, because "in practice NSLs are essentially unreviewable." *Id.* at 503. Given the important First Amendment concerns at stake, the court reasoned, this lack of available review renders the Section 2709 scheme unconstitutional. *See id.* at 506. The court specifically noted that the government could use NSLs "to seek records from libraries that many, including the *amici* appearing in this proceeding, fear will chill speech and use of these invaluable public institutions." *Id.* at 494 n.118. The government also could use these "essentially unreviewable" tools of coercion to learn what materials an individual is reading — a particularly offensive intrusion to *amici*, their members, and their patrons. *Id.* at 509 n.175.

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sought by the NSL. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475 n.3 (S.D.N.Y. 2004).

The district court also ruled that Section 2709(c)'s automatic gag order, which bars the recipient of an NSL letter from ever disclosing that she even received such a letter, is an unconstitutional, content-based prior restraint on speech. *See id.* at 512. That provision bars recipients from conveying particular information relating to "an entire category of speech," *id.* at 513, without any showing that the restraint is necessary to serve its ends in a particular case. Noting that the government had conceded that there are cases in which "little or no reason may remain for continuing the secrecy of the fact that an NSL was issued," *id.* at 520, the district court concluded that the government failed to show the necessity of Section 2709(c)'s "extraordinary scope," *id.* at 522. Deference to the government's perspective on investigative decisions may be appropriate in individual cases, but the government failed to justify this permanent ban in every case, regardless of the circumstances. *See id.* at 524.

This appeal followed.

ARGUMENT

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 alleges, 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 narrow 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 at least two respects. First, Section 2709 authorizes the compelled disclosure of constitutionally protected information without any governmental showing that the information would actually further a terrorism investigation or any other substantial governmental interest. When the government seeks to issue a subpoena, courts typically apply a more exacting standard when First Amendment interests are at stake. But Section 2709 makes no such provision and, in fact, 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 without any showing of need for such secrecy.

I. SECTION 2709 GIVES THE GOVERNMENT AN UNPRECEDENTED ABILITY TO INTRUDE ON THE INTELLECTUAL AND ACADEMIC FREEDOM OF *AMICI*, THEIR MEMBERS AND PATRONS, AND THE GENERAL PUBLIC.

The Patriot Act amendments to 18 U.S.C. § 2709, part of the Electronic Communications Privacy Act of 1986, substantially expanded the government's authority to issue NSLs in ways that gravely threaten constitutionally protected expressive activity. Before the Patriot Act's passage, Section 2709 required a showing of individualized suspicion; that is, the government had to have "specific and articulable facts giving reason to believe" that the person whose records were sought was a "foreign power" or "agent of a foreign power." 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) (2005); *id.* § 2709(b)(2) (2005). As the government itself has noted, the elimination of the individualized suspicion requirement has "greatly broadened" its authority to use NSLs. *See* Memorandum from General Counsel, FBI to All Field Offices, Nov. 28, 2001, at 3, 7, *available at* http://www.aclu.org/patriot_foia/FOIA/Nov2001FBImemo.pdf. Indeed, under the current statute, the government need not specify whose records it seeks, let alone have clear facts suggesting that the subject of the records is a likely foreign agent or power. *See* 18 U.S.C. § 2709(b).

While Section 2709 is aimed in part at telephone companies and Internet service providers (ISPs), Congress designed the statute broadly enough that it arguably would apply to many bookstores and nearly all public and university libraries and university networks. The statute enables the government to issue administrative subpoenas to any "wire or electronic communication service provider," *id.* § 2709(a), 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. As the district court noted, the category of "electronic communication transactional records" may be almost limitless, covering "a log of email addresses with whom a subscriber has corresponded and the web pages that a subscriber visits," and NSLs may "reasonably be interpreted . . . to require, at minimum, disclosure of all e-mail header information, *including subject lines*." *Doe*, 334 F. Supp. 2d at 509-10 (emphasis added).

The applicable statutory definition of "wire or electronic communication" is similarly broad. It includes communication via the Internet, *see* 18 U.S.C. § 2510(12), 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 this breadth, *amici* fear that Section 2709 could cover their expressive activity — as well as the activity of their members and patrons — in two respects. First, almost all public libraries and universities, and many bookstores, offer individuals the ability to communicate over the Internet 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 & Grill, http://www.kramers.com (visited July 29, 2005) (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 accessing the Internet for individuals who, for lack of money or technology, cannot do so otherwise. *See, e.g.*, *American Library Ass'n, Inc. 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 also help to narrow the "digital divide" by supplying education and outreach services to increase technological literacy in underserved communities. *See* John Carlo Bertot & Charles R. McClure, Bertot Info. Consultant Servs., Inc., *Policy Issues and Strategies Affecting Public Libraries in the National Networked Environment* 10-11 (Dec. 2001), *available at* http://www.nclis.gov/libraries/PolicyIssues&Strategies.pdf. Because libraries, bookstores and universities provide these services, Section 2709 grants the government the authority to compel the disclosure of constitutionally sensitive information about other *amici* and patrons using those 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 *amici* merely by virtue of the fact that they host a website. *Amici* frequently host websites to inform the public about their services. *See, e.g.*, New York Public Library, http://www.nypl.org/ (visited July 29, 2005); Tattered Cover Book Store, http://www.tatteredcover.com/NASApp/store/IndexJsp (visited July 29, 2005);

Yale University, http://www.yale.edu (visited July 29, 2005). Because these websites represent a "service" by which the institutions "provide to users . . . the ability to send or receive . . . electronic communications," *amici* appear to fall within the scope of Section 2709 for this reason as well.

These fears are not hypothetical. The preliminary results of a study by *amicus* American Library Association show that since October 2001, federal, state, and local law enforcement officials have executed at least 137 formal requests for information[2] at public and academic libraries. *See* ALA, *Impact and Analysis of Law Enforcement Activity in Academic & Public Libraries: Preliminary Findings Summary* at 1 (June 2005) (hereinafter "ALA Preliminary Findings"), *available at* http://www.ala.org/ala/washoff/washevents/woannual/PATsum.pdf. Whether these requests include Section 2709 NSLs cannot be known definitively, given Section 2709(c)'s gag order against ever revealing the receipt of such a letter; the actual number of NSLs issued to libraries alone might be even higher. Regardless, the study makes one message clear: *amici* are targets.

Long before the ALA study confirmed this focus, 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

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[2] This number does not include any informal — *i.e.*, without a court order or other supporting documentation — requests for patron information. *See* ALA Preliminary Findings at 2.

and information. *See* Eric Lichtblau, *Justice Dep't Lists Use Of New Power To Fight Terror*, N.Y. Times, May 21, 2003, at A1. To be sure, the government refuses to disclose whether it has issued any NSLs to libraries or bookstores, responding to a FOIA request of the identities of institutions on which the government had served NSLs by releasing a five-page list, all of which was entirely redacted. *See* http://www.aclu.org/patriot_foia/FOIA/NSLlists.pdf. But in addressing Congress'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 has made clear that "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/legacy/judiciary/patriotresponses101702.pdf (answer to question 12).

Patrons have gotten the message. Section 2709 threatens expressive activity protected by the First Amendment, and speech is being chilled. The same ALA study that revealed at least 137 law enforcement inquiries to academic and public libraries since October 2001 found that library patrons have changed their behavior as a result. According to the study's preliminary findings:

> Almost 10% of academic library respondents indicated that once or more often patrons indicated to library staff that the PATRIOT Act had caused changes in library services. More striking is the fact that in public libraries almost 40% of respondents indicated that patrons had inquired of library staff one or more times about policies or practices related to the PATRIOT Act.

ALA Preliminary Findings at 3. As the report concluded, "[t]he data suggest that, at some libraries, there may be a 'chilling effect' on people's use of the library." *Id.*

This threat is no less real elsewhere in the university. Simply by providing Internet access, universities join libraries and bookstores as potential NSL targets. Whereas, previously, law enforcement officials have interrogated professors who gave lectures on controversial topics in their classrooms, *see Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234 (1957), under Section 2709 the FBI can now demand that a university hand over all information relating to a professor's or student's email. *See, e.g.*, AAUP, Academic Freedom, 89 *Academe* at 34 (expressing concern in the academy about the "dangerously intrusive" provisions of the Patriot Act, including Section 2709). This dangerous possibility, like the threats that NSLs pose to intellectual freedom in libraries and bookstores, undermines the law that has been "for decades . . . clearly established" — namely, "that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of

ideas in the classroom." *Dube v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Given the broad statutory language of Section 2709 and the federal government's asserted authority to use that section specifically against libraries (whether academic or public) and bookstores, *amici* view Section 2709 as a real and substantial threat to their constitutional liberties and those of their members and 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 affirm the district court's grant of summary judgment.

II. SECTION 2709 VIOLATES THE FIRST AMENDMENT.

Section 2709 threatens the First Amendment rights of *amici* and their members and patrons in two ways. First, by ceding to law enforcement agents unprecedented and unchecked authority to issue NSLs, Section 2709 compromises individuals' First Amendment right to communicate anonymously over the Internet and has a chilling effect on constitutionally protected expression. Second, Section 2709's automatic gag rule impermissibly imposes a blanket speech 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 Members and Patrons.

1. Vital First Amendment Interests, Including the Right to Anonymous Speech, Are at Stake Here.

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). In case after case, the Supreme Court and other courts have traced the important role that anonymous speech has played "in the progress of mankind" — and in particular, in the progress of groups engaging in legitimate, lawful activities who are nonetheless deemed suspicious. *Talley*, 362 U.S. at 64. "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*

Making important contributions in government and the arts, *see id.* at 64-65; *McIntyre*, 514 U.S. at 341 & n.4, these anonymous speakers have often relied on media that make it possible to reach large numbers of listeners at minimal cost. In that respect, especially for those who depend on Internet terminals made available in public spaces, "the technology brings back the era of the pamphleteer." Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards & The First Amendment*, 39 Fed. Comm. L.J. 217, 223 (1987) (internal quotations omitted). The Internet provides speakers access to listeners, and citizens access to information, with unprecedented efficiency.

Particularly because of this 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, robust anonymous expression in cyberspace is critical to protecting and advancing core First Amendment values. *See 2TheMart.Com*, 140 F. Supp. 2d at 1092; *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. at 578 (recognizing a "legitimate and valuable right to participate in online forums anonymously or pseudonymously").

The government's argument that, through the use of NSLs, it seeks not the "content" of the users' speech, but mere "subscriber information," neither allays *amici*'s fears nor cures the statute's constitutional flaws. Not only is the information obtainable with NSLs far broader than the government suggests, *see*

Doe, 334 F. Supp. 2d at 509-10 (listing information the government may obtain via NSLs, including e-mail addresses with whom a user corresponds, the electronic newsletters to which he subscribes, e-mail message subject lines, advocacy websites he visits, books he reads, and where he shops), but even if the information were as circumscribed as the government claims, it would still threaten First Amendment principles. The Supreme Court has explicitly rejected any distinction between the "content" of the speech and identifying information about the speaker. In striking down a state election law that required campaign literature to include the name and address of the person responsible for the literature, the Court in *McIntyre* concluded that "the identity of the speaker *is no different from other components of the document's content* that the author is free to include or exclude." *McIntyre*, 514 U.S. at 348 (emphasis added). A regulation that bars anonymous speech "is a direct regulation of the content of speech." *Id.* at 345. Though there may be a difference of degree between reading *what* a citizen wrote or read on the Internet and *whether* the citizen used the Internet, there is no difference in kind. Citizens who know that their online activities may be monitored in this way may be chilled not only from distributing certain content, but from using public Internet terminals at all. As the ALA study suggests, this unfortunate result has already occurred. ALA Preliminary Findings at 3.

2. Section 2709 Lacks the Constitutionally Required Safeguards.

Although some governmental scrutiny of constitutionally protected expressive activity theoretically may be justified in certain circumstances, Section 2709 violates the First Amendment by permitting the government to strip Internet users of their anonymity without the requisite constitutional safeguards. Where, as here, the state's investigatory function implicates First Amendment values, courts typically hold the government to a high standard before permitting the compelled production of 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 heightened standards and places no meaningful restrictions on the government's ability to obtain sensitive First Amendment-protected materials. With no limits on whose records may be sought, and very few meaningful limits on the information to be acquired, NSLs are unusually broad — and yet they lack even the usual safeguards.

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 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, even subpoenas under the Patriot Act's controversial Section 215 must be presented to a FISA judge before they are issued. 50 U.S.C. § 1861. Similarly, 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 (1978) ("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)).

Outside the criminal context, courts regularly hold 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. When a subpoena threatens to violate First Amendment rights, the government typically 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)).[3] As the Tenth Circuit has explained in a related context, to enforce a grand jury subpoena implicating First Amendment rights, "the government must demonstrate a compelling interest, and a substantial relationship between the material sought

[3] *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."); 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 8.8(d) at 156-63 (2d ed. 1999) (reviewing cases).

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 seek to uncover the identity of anonymous Internet users, and have consistently held that such subpoenas require a heightened showing to assure that they do not unduly compromise First Amendment liberties. *See Seescandy.com*, 185 F.R.D. at 578 ("[S]ome limiting princip[le]s should apply to the determination of whether discovery to uncover the identity of a[n anonymous Internet user] is warranted."). As one court explained, "imposing a high burden" is 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.'" *2TheMart.Com*, 140 F. Supp. 2d at 1095 (quoting *Buckley*, 525 U.S. at 192, alteration in original).[4]

Yet even though NSLs threaten the compelled disclosure of constitutionally protected information, Section 2709 contains none of the requisite protections or safeguards. On the contrary, Section 2709 does not even provide the basic

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[4] So, too, have courts quashed subpoenas compelling the disclosure of confidential research by faculty because of First Amendment academic freedom concerns. *See, e.g.*, *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 713 (1st Cir. 1998) (warning that forced disclosures would "jeopardize the future information-gathering activities of academic researchers."); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982) ("Clearly, enforcement of the subpoenas carries the potential for chilling the exercise of First Amendment rights.").

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 targeted individuals any opportunity even to learn 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 her 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 even to know his rights are being violated, falls far short of the required constitutional minimum.[5]

Section 2709's clear lack of constitutional safeguards, coupled with the government's demonstrated willingness to use this investigatory tool against *amici* and their members and patrons, threatens severe 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

[5] 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 ground, however slight or dubious, the "solely" requirement apparently is satisfied.

> 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). Under the Section 2709 regime, we know that citizens are being chilled from pursuing their constitutional interests, and that the chill is affecting those most who must rely on publicly provided Internet access. In Section 2709, the government has found its "club" to "hold . . . over speech and over the press."

B. Section 2709's Gag Rule Violates the First Amendment.

In addition to those constitutional defects, Section 2709's automatic statutory "gag rule," 18 U.S.C. § 2709(c), which prohibits anyone from disclosing that a 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. As a content-based speech restriction, the gag rule is subject to, and cannot survive, strict scrutiny. *Doe*, 334 F. Supp. 2d at 511-12. 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.*

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 jeopardize 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. Restricting individuals from disclosing information lawfully in their hands requires "'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (citation omitted). But 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.

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); *cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."). 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) (citation omitted).

In addition, even if the government could somehow establish that the mere disclosure of the existence of 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 Coal.*, 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 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.*, *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 v. Smith*, 494 U.S. 624, 632-33, 635 (1990) (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 likely would not apply to others who subsequently learn of the search and, in turn, disclose the information to additional individuals. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) ("[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.").

This extended reach is unjustifiable from a constitutional perspective, with good reason: It is devastating to the system of civic vigilance on which democracy depends. Just as Section 2709 attempts to bar review of NSLs in courts like this one, Section 2709(c)'s gag order eliminates review of NSLs in the court of public opinion. Because public opinion is often the best check against governmental abuse of its investigative tools, the gag order heightens the already grave risk that the government will abuse its power, *see* Peter P. Swire, *The System of Foreign*

Intelligence Surveillance Law, 72 Geo. Wash. L. Rev. 1306, 1359-60 (2004), and threaten the freedoms of *amici* and their members, patrons, and the public at large. Section 2709's automatic gag rule is therefore unconstitutional.

CONCLUSION

Section 2709 threatens the First Amendment rights of *amici* and their members and 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 affirm the decision of the district court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief contains 6,960 words.

Daniel Mach

CERTIFICATE OF SERVICE

I, Daniel Mach, hereby certify that on August 1, 2005, two copies of the foregoing brief were served by United States mail on the following parties:

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