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; 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,	)	Honorable Victor Marrero
Defendants.	)	

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STATUTES

MISCELLANEOUS

Tattered Cover Book Store, http://www.tatteredcover.com/NASApp/store/IndexJsp

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 booksto

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 Amendm

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);

("'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), *gmt. & o 4, e, (r,)Ei*

(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.

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, 87

Section 2709 violates the First Amendment because it permits the government to strip Internet users—including those who use public Internet terminals at

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 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 authoritit

Lichtblau, *Justice Dep't Lists Use Of New Power To Fight Terror*, N

> 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 se (i)Tj 3.36643 0 Td (n)Tj 6.01148 0 Td (t)Tj 3.36643 0 Td (a)Tj 5.2901 0 Td (i)Tj 3.36643 0 Td (n)Tj 6.01148 0 Td (ej 6.01148 0 Td ( )Tj 3.12597 0 Td ( )T

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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 ex

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

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.

Respectfully submitted,

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