No. 07-4943-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

MICHAEL B. MUKASEY, in his official capacity as Attorney General of the United States, ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation, and VALERIE E. CAPRONI, in her official capacity as General Counsel to the Federal Bureau of Investigation,

Defendants-Appellants.

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

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

Theresa A. Chmara
Brian Hauck
Anne E. Ralph
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
tel. (202) 639-6000
fax (202) 639-6066

RULE 26.1 DISCLOSURE STATEMENT

Amici American Library Association, American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., American Association of University Professors, 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.

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MISCELLANEOUS

Amici curiae American Library Association, American Booksellers Foundation for Free Expression, American Association of Publishers, Inc., American Association of University Professors, 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 and 3511. Pursuant to Fed. R. App. P. 29(a), all parties have consented to this filing.

INTERESTS OF *AMICI*

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

Amicus AMERICAN LIBRARY ASSOCIATION ("ALA") 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 THE 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 THE 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 non-profit 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. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Amicus AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS ("AAUP") is an organization with approximately 45,000 members, including academic librarians as well as 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 of 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 more than 210 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 (10th ed. 2006). 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 FREEDOM TO READ FOUNDATION ("FTRF") 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"), the professional association of over 2,600 literary writers, is the largest in a global network of 131 Centers around the world comprising International PEN. PEN's mission is to promote literature and protect free expression whenever writers or their work are

threatened. To advocate for free speech in the United States, PEN mobilizes the literary community to apply its leverage through sign-on letter campaigns, direct appeals to policy makers, participation in lawsuits and amicus curiae briefs, briefing of elected officials, awards for First Amendment defenders, and public events.

Amici share plaintiffs' concerns about the constitutionality of Sections 2709 and 3511 generally, but submit this brief to highlight the particular threat that Section 2709 poses to intellectual and academic freedom. The federal government has expressly identified Section 2709 as a potential tool for obtaining sensitive patron information from libraries and bookstores. Inquiries into the reading habits and intellectual pursuits of library and bookstore patrons chill protected speech and strike at the very heart of the liberty interests protected by the First Amendment. Patrons' reading choices will be circumscribed if the government has the unchecked ability to solicit information about the intellectual pursuits of library and bookstore patrons. The government's authority to impose an apparently permanent gag order on such requests hampers the ability of libraries and bookstores to monitor any abuses by the government when using the broad investigatory tools of the NSL statute. The district court correctly found that the gag order provision is unconstitutional.

STATEMENT OF THE CASE

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 (S.D.N.Y. 2004) ("*Doe I*"), *vacated by* 449 F.3d 415 (2d Cir. 2006). The district court granted the plaintiffs' motion for summary judgment, made with the support of several of the *amici* here, and entered judgment in favor of the plaintiffs, *id.* at 491, holding that Section 2709 violates both the First and Fourth Amendments, *id.* at 475. This appeal, the second appeal in this matter, followed.

While the government's initial appeal was pending, Congress amended Section 2709 and other provisions of the Patriot Act with the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (Mar. 9, 2006) ("PIRA"), and the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (Mar. 9, 2006) ("ARAA"). Under the new legislation, NSLs were treated in a revised Section 2709 and a new Section 3511. However, many of the key features that made the former provision unconstitutional survived — or were tinkered with only enough

[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 sought by the NSL. *Doe I*, 334 F. Supp. 2d at 475 n.3.

to camouflage, but not cure, their unconstitutionality. The revised statute still enables the government to use NSLs to seek individuals' records. As a result, the NSL statute chills protected speech. As the ALA survey discussed below demonstrates, library and bookstore patrons are concerned about government inquiries into their intellectual pursuits. There is no doubt that patrons will refrain from engaging in speech or conducting research on sensitive matters they do not want publicly aired even though there is no illegality involved in such endeavors. Because the FBI withdrew its request for information pursuant to the NSL in this case, the district court did not reach the question of whether the government properly sought the requested information under the new standard of the revised statute. Nonetheless, the FBI insists that the gag order of the NSL statute remain in place. Because the court would be forced under the statute to accept the FBI's certification of a national security threat as "conclusive," and would not in any event be able to review the gag order pursuant to the strict scrutiny standard, the amendments to the NSL statute do not cure the unconstitutionality of Section 2709(c)'s gag order provision.

Although an NSL recipient can now petition the government to defend its prohibition on her ever disclosing that she even received such a letter, the government can overcome such a challenge simply by certifying that disclosure may endanger national security or an individual's safety or that it may interfere

with an investigation or diplomatic relations. 18 U.S.C. § 3511(b)(2), (c). The statute thus continues to permit "a perpetual gag on citizen speech," *Doe v. Gonzales*, 449 F.3d 415, 421 (2d Cir. 2006) (*Doe II*) (Cardamone, J., concurring), without any showing that the restraint is necessary to serve its ends in a particular case; indeed, the government's "certification shall be treated as conclusive" — and essentially unreviewable by the court — unless it was made in bad faith. 18 U.S.C. § 3511(b)(2), (c).

Even in cases where the FBI does not provide a "conclusive" certification, reviewing courts are permitted to modify gag orders only where "there is *no* reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. §§ 3511(b)(2), (b)(3) (emphasis added). This is an exceedingly deferential standard of review that does not adequately protect First Amendment interests of NSL recipients. The government cannot impose content-based restrictions on speech simply because there *may* possibly be some remote and speculative reason to believe that disclosure could be harmful to government interests. This standard of review prevents the courts from adequately determining if there is a compelling need for the content-based restriction and whether the gag order is narrowly tailored to serve that need.

The threat to bookstores and libraries remains. Although the new Section 2709 purports to create an exception for libraries, it does nothing of the sort for the vast majority of libraries. Under Section 2709(f), any library that provides "access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication in print or digitally by patrons for their use, review, examination, or circulation," is exempt from the statute unless the library provides "electronic communication services" under 18 U.S.C. § 2510(15). 18 U.S.C. § 2709(f). But Section 2510(15) then defines "electronic communication service" as any service that enables users "to send or receive … electronic communications." *Id.* § 2510(15). To the extent that a library offers users the ability to send electronic communications — and virtually all libraries do — then, the government may still "seek records from libraries that many, including the *amici* appearing in this proceeding, fear will chill speech and use of these invaluable public institutions." *Doe I*, 334 F. Supp. 2d at 494 n.118.

On remand, the district court correctly found Section 2709 unconstitutional. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007) (*Doe III*). Concluding that it "functions as a licensing scheme," the court cited the statute's lack of procedural safeguards and noted that it was "not a sufficiently narrowly tailored restriction on protected speech." *Id.* at 425. The court also struck down § 3511(b), which it concluded "impermissibly ties the judiciary's hands" and threatens the separation

of powers by imposing a standard of review on courts as to whether a gag order should remain in place. *Id.* at 417.

ARGUMENT

Even as amended, Section 2709 provides the government with an unprecedented power to issue NSLs, and thereby obtain 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). The statute allows the government to bar the recipient from speaking about the receipt of the order — a gag order that can become perpetual based on nothing but the government's unreviewable, "conclusive" statement that the restraint is necessary. The result of this across-the-board, permanent restriction is that public debate concerning the government's anti-terrorism activities loses irreplaceable voices. The potentially permanent gag order ensures that libraries, bookstores and members of the public will be unable to monitor whether the FBI is properly exercising its extremely broad investigatory power under the NSL statute and whether such power is warranted. While purporting to provide a means for judicial review, the fact that a reviewing court must accept the FBI's certification as the last word on the subject means Congress in reality provided no avenue for *meaningful* judicial review.

Section 2709 and Section 3511 facially violate the First Amendment, and *amici* join the plaintiffs in asking the Court to affirm the district court's grant of summary judgment. Section 2709's gag rule violates the First Amendment because it permits the FBI unilaterally to impose secrecy upon recipients of orders without demonstrating to a court the need for such secrecy. The law makes the FBI Director's certification that lifting the gag order "may" create danger essentially unreviewable, giving the Executive Branch a blank check to restrain a particular category of speech in perpetuity. The purported protections added in Section 3511 do not remedy the unconstitutionality of the expanded NSL authority under Section 2709. Because courts can lift a gag order only if there is "*no* reason to believe" that disclosure poses a risk, 18 U.S.C. §§ 3511(b)(2), (b)(3) (emphasis added), the judiciary is stripped of its ability to meaningfully review the speech restrictions. No determination can be made by the court as to whether the speech restrictions meet the standards of strict scrutiny for content-based restrictions. Instead, courts must engage in a speculative review of whether the restrictions *may* be harmful to government interests.

There is no protection for First Amendment rights if the statute does not provide meaningful judicial review of the government's certification. Section 2709 gives the government broad access to private information under a cloak of secrecy that threatens to violate the First Amendment rights of *amici*'s patrons and

members and unconstitutionally chill protected speech. Whereas previously the government could issue an NSL only upon a showing that its subject was a foreign power or foreign agent, *see* 18 U.S.C. § 2709 (1988), or had engaged in communications "under circumstances giving reason to believe that the communication concerned international terrorism," 18 U.S.C. § 2709(b)(2)(B)(ii) (1994), Section 2709 now 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) (2006); *id.* § 2709(b)(2) (2006). 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, and is largely responsible for the explosion in NSLs. The government credits that expanded authority with the increase in NSL requests from 8,500 in 2000 to 47,000 in 2005. *See Doe III*, 500 F. Supp. 2d at 390 (citing Office of Inspector General, *A Review of the FBI's Use of National Security Letters* (March 2007)). 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 request is a likely foreign agent or power. *See* 18 U.S.C. § 2709(b). Moreover, the government can do so in each case under cover of the essentially unreviewable imposition of a gag order. This

secrecy severely hampers *amici*'s and the general public's ability to monitor the lawfulness of the government's use of its NSL powers.

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 academic libraries. The statute authorizes the FBI to demand, among other things, certain patron records and communications from any "wire or electronic communication service provider." *Id.* § 2709(a). Although the statute purports to exclude certain libraries from this definition, the statute specifically includes libraries that provide "electronic communication service[s]" — an exception that swallows the rule. *See id.* § 2709(f). Section 2510(15) makes clear that any library that "provides to users thereof the ability to send or receive wire or electronic communications" — that is, any library or bookstore with Internet terminals from which patrons may send and receive email — is at risk under Section 2709. *See id.* § 2510(12) (defining "electronic communication"). While the amendments' legislative history creates some doubt about the activities that may put a library's patrons in jeopardy, *see, e.g.*, 152 Cong. Rec. S1557 (daily ed. Mar. 1, 2006) (Statement of Sen. Leahy) ("[L]ibraries as they traditionally and currently function are not electronic service providers, and may not be served with NSLs for business records simply because they provide Internet access to their patrons."), the ambiguity is what gives the

statute its force. Speech by patrons is chilled by the mere threat of disclosure. There is no doubt that the threat of disclosure has had an impact on the behavior of library patrons.

Once an NSL issues, the information sought can be extremely broad and intrusive. The statute enables the government to discover "subscriber information" and "electronic communication transactional records," including, *inter alia*, the "name, address, and length of service," *id.* § 2709(b)(2), of any user of a given provider. As the district court twice noted, the "records" that the government may obtain are nearly limitless. *Doe I*, 334 F. Supp. 2d at 509-10 (noting that records may "*include[e] subject lines*" of emails) (emphasis added); *Doe III*, 500 F. Supp. 2d at 387 (listing "activity logs indicating dates and times that the target accessed the internet, the contents of queries made to search engines, and histories of websites visited").

Almost all public libraries, and many bookstores and academic libraries, 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/projectfiles/plinternet/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); Kramerbooks & Afterwords Café & Grill, http://www.kramers.com (visited Feb. 16, 2008) (advertising bookstore's free Internet access). *Amici* fear that such Internet terminals could open the libraries and bookstores to Section 2709 threats simply because they enable patrons to send and receive email on their yahoo, hotmail, or gmail web-based email accounts. *See* 18 U.S.C. § 2510(12).

This threat particularly burdens individuals who, for lack of money or technology, cannot access the Internet outside of their library or a bookstore offering free Internet access. *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: Defining the Digital Divide* (2000), *available at* http://www.ntia.doc.gov/ntiahome/fttn99/contents.html (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 thus 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 and bookstores 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. Essentially unreviewable gag orders hide the intrusion from public view and create an atmosphere of fear that will chill speech.

Fears that NSLs chill speech are not hypothetical. A study by *amicus* American Library Association shows that between October 2001 and the Spring of 2005, federal, state, and local law enforcement officials 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* at 36 (Aug. 25, 2005) (hereinafter "ALA Study"), *available at* http://www.ala.org/ala/washoff/oitp/LawRptFinal.pdf. Whether these requests include Section 2709 NSLs cannot be known definitively, given Section 2709(c)'s gag order against

[2] This figure reports the visits documented in a sample of roughly 25% of public and academic libraries, so the actual number of visits may be approximately four times higher. *See* ALA Study at 36 n.5. The figure also does not report informal requests for patron information, without a court order or other supporting documentation.

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.

There is no doubt that Section 2709 threatens expressive activity protected by the First Amendment. 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:

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

ALA Study at 38. As the report concluded, "[t]hese data could suggest a 'chilling effect' on libraries as a result of the PATRIOT Act." *Id.*

Given Section 2709's broad statutory language and the federal government's asserted authority to use that section specifically against libraries (whether academic or public) and bookstores, Section 2709 must be seen as a real and substantial threat to the constitutional liberties of *amici* and 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 grant of summary judgment for appellees.

Section 2709's statutory "gag rule," 18 U.S.C. § 2709(c)(1), presents a particular threat, permitting the FBI to prohibit anyone from disclosing that an order has issued. The gag rule provides that, on the bare certification of a government official that disclosure "may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person," the NSL recipient is permanently barred from ever disclosing (to anyone but her lawyer and those necessary to enable her to comply with it) that she received the request. *Id.* Although Section 3511(b) now gives NSL recipients the right to challenge the gag order in court, this right is empty. Even when the gag order is challenged — a year, 50 years, or 100 years later — the government can keep the gag order in place simply by certifying that it remains necessary. Save for a review for "bad faith," the *ipse dixit* certification "shall be treated as conclusive." 18 U.S.C. § 3511(b)(2). Even without a certification by the FBI, the court's review is limited and is not the constitutionally mandated strict scrutiny required when the government imposes a content-based restriction.

This "protection" gives the executive branch a blank check to do what it pleases, free from any obligation to justify its intrusions on civil liberties to anyone, in any way. The statute prevents the court from reviewing the justification for this First Amendment infringement in a meaningful way. Section 3511 creates one of those "process[es] in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity … to demonstrate otherwise," and it thus "falls constitutionally short." *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (opinion of O'Connor, J.); *see also id.* at 545 (concurring opinion of Souter, J.) ("[D]eciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security."). This unchallengeable prior restraint on speech is unprecedented outside the PATRIOT Act. The Government's attempt to justify this gag order by comparing it to *Chevron* deference to an agency's rulemaking expertise notwithstanding, Govt. Br. 42-49, none of the other statutes in which a governmental certification is treated as conclusive have even remotely comparable First Amendment implications. *Compare* 50 U.S.C. § 1861(f)(2)(C)(ii) (providing conclusive certification that gag order under § 215 is necessary), *with, e.g.*, 12 U.S.C. § 1748b(b)(2) (providing conclusive certification that certain housing is eligible for mortgage insurance).

As a result, Judge Cardamone's concern that Section 2709's "ban on speech and … shroud of secrecy in perpetuity are antithetical to democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens," *see Doe II*, 449 F.3d at 422 (Cardamone, J., concurring), must prevail. The statute is insufficiently tailored to serve a compelling state interest. The gag rule is still completely open-ended and may apply in perpetuity without the possibility of judicial oversight. It takes no account of the speaker's intent and it restricts anyone with knowledge of the order.

Because it regulates speech based on its content, the gag rule is subject to strict scrutiny. Indeed, 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 this 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. Unlike other subpoenas that threaten to cause hardship to individuals or

infringe their constitutional rights, the government's claim that the disclosure of a particular NSL might jeopardize national security or an ongoing investigation is to be treated as conclusive under Section 3511.

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*, 542 U.S. at 536 (plurality) ("[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.").

Even if there were a compelling need for a prohibition on certain disclosures, the Section 2709 gag rule is not narrowly drawn to serve that interest. With the government able to issue an unreviewable certification any time the ban is challenged, the gag order still operates as an endless restriction on speech. 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).

The extensive reach of Section 2709's gag order is devastating to the system of civic vigilance on which democracy depends. Just as Section 2709 attempts to bar review of NSLs by the courts, Section 2709(c)'s gag order severely curtails the possibility of an effective public debate on NSLs and eliminates the single voice best able to contribute to that discussion: the recipient of an NSL order. The government's suggestion that the suppressed speech is unlikely to be political and that "there is no reason to believe that most recipients of NSLs wish to disclose that fact to anyone," Govt Br. at 33, is contrary to all evidence. That recipients of NSLs desire to have a forum to discuss the investigations into their records was made abundantly clear to the government after it resisted lifting a gag order at every level of review to keep Connecticut librarians from speaking about the NSL they had received at the same time that the New York Times was reporting the recipient's identity. *See* Alison Leigh Cowan, *Librarians Must Stay Silent in Patriot Act Suit, Court Says*, N.Y. Times, Sept. 21, 2005, at B2; *Doe II*, 449 F.3d at 422-23 (Cardamone, J., concurring). The library identified could neither refute that it had received an NSL, acknowledge that it had, nor claim that it was

prohibited from speaking. Once the gag order was lifted, the librarians became important players in a national debate:

> The government was telling Congress that it didn't use the Patriot Act against libraries and that no one's rights had been violated. I felt that I just could not be part of this fraud being foisted on our nation. We had to defend our patrons and ourselves.

Statement of Peter Chase, *Four Connecticuts Shed John Doe Gag* (6/2/2006), *available at* http://www.ala.org/ala/alaonline/currentnews/newsarchive/2006abc/june2006ab/johndoeshed.cfm. Obviously, the librarians' speech was paradigmatic political speech; they had much to say about the citizenry's powers to resist intrusive investigative tactics. But just as importantly, they put a personal face on an otherwise hypothetical debate. Had they been able to speak earlier, they could have demonstrated starkly that the government may one day issue an NSL in your town, at your library, seeking your records.

When debates are deprived of their most informed and powerful voices, the public dialogue is impoverished. And because a well-informed public 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). This law thus threatens the freedoms of *amici* and their members, patrons, and the public at large. The lack of meaningful

review of the government's authority to impose a gag order magnifies the unconstitutionality of this content-based restriction.

CONCLUSION

Sections 2709 and 3511 threaten 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 while imposing an unconstitutional gag order. For the reasons discussed above, *amici* urge the Court to **AFFIRM** the district court's decision.

Respectfully submitted,

Theresa A. Chmara*
Brian Hauck
Anne E. Ralph
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
tel. (202) 639-6000
fax (202) 639-6066

Counsel for Amici *American Library Association, American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., American Association of University Professors, Freedom to Read Foundation, and PEN American Center*

**Application to Second Circuit Pending*

March 14, 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this brief contains 5,364 words, excluding the portions of the brief excluded under Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief is in compliance with Fed. R. App. P. 32(a)(5)-(6), having been prepared using 14-point Times New Roman font.

Brian Hauck

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2008, two copies of the foregoing brief were served by United States mail on the following parties:

Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

David N. Kelley
Jeffrey Oestericher
United States Attorney
Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007

Brian Hauck