


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK


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

Plaintiffs,

04 Civ. 2614 (VM)

v.

SEALED

JOHN ASHCROFT, in his official capacity as
Attorney General of the United States;
ROBERT MUELLER, in his official
capacity as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN,
in his official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION TO THE GOVERNMENT'S
CROSS-MOTION TO DISMISS THE COMPLAINT OR
FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	4
I. SECTION 2709 IS INVALID ON ITS FACE BECAUSE IT VIOLATES THE FOURTH, FIRST AND FIFTH AMENDMENTS.....	4
A. Section 2709 violates the Fourth Amendment.....	4
1. The plain language of Section 2709 prohibits a service provider from contesting the validity of a national security letter in court.....	5
2. Section 2709's effect is to permit the FBI unilaterally to compel the production of records.....	9
3. The government has not justified Section 2709's failure to comply with the Fourth Amendment.....	15
B. Section 2709 violates the First Amendment.....	18
1. Section 2709 reaches information protected by the First Amendment.....	18
2. Section 2709 allows the FBI to obtain constitutionally protected information without demonstrating a compelling need or narrowly tailoring its demand to that need.....	25
C. Section 2709 violates the First and Fifth Amendments by failing to require the FBI to justify the non-provision of notice on a case-by-case basis.....	26
D. Section 2709's defects cannot be cured absent facial invalidation.....	28
II. THE GAG PROVISION IN SECTION 2709(c) SHOULD BE INVALIDATED ON ITS FACE.....	32
A. The gag provision in Section 2709(c) imposes an unconstitutional prior restraint.....	32
B. Section 2709(c) fails strict scrutiny.....	36

1. Section 2709(c) fails narrow tailoring because it does not require the government to justify the imposition of a gag on a case-by-case basis to a court.....	37
2. Section 2709(c) fails narrow tailoring because the gag it imposes is indefinite.....	42
3. Section 2709(c) fails narrow tailoring because it unnecessarily suppresses a broad array of non-sensitive information.....	43
C. Section 2709(c) is unconstitutionally vague.....	47
III. THE ██████████ NSL VIOLATES THE FIRST, FOURTH AND FIFTH AMENDMENTS.....	49
A. The ██████████ NSL is invalid because the government has not demonstrated a compelling need for the information or shown that the demand is narrowly drawn.....	50
B. The gag imposed by the ██████████ NSL must be invalidated because the government has not satisfied the strict constitutional scrutiny required to justify such a broad and indefinite restraint on protected speech.....	51
1. The gag imposed by the ██████████ NSL has required plaintiffs to seek permission from the government before engaging in speech protected by the First Amendment.....	51
2. The gag imposed by the ██████████ NSL has suppressed a wide array of non-sensitive speech in this case, and is far from narrowly tailored.....	52
3. The gag imposed by the ██████████ NSL is unconstitutionally vague.....	56
CONCLUSION.....	57

TABLE OF AUTHORITIES

CASES

<i>ABC, Inc. v. Stewart</i> , 360 F.3d 90 (2d Cir. 2004)	30
<i>ACLU of Mississippi v. Mabus</i> , 719 F. Supp. 1345 (S.D. Miss. 1989)	33
<i>In re Administrative Subpoena (Doe v. United States)</i> , 253 F.3d 256 (6th Cir. 2001).....	4
<i>Alexander v. United States</i> , 509 U.S. 544 (1993)	32
<i>Ashcroft v. ACLU</i> , 124 S. Ct. 2783 (2004)	36, 43
<i>Bantam Books v. Sullivan</i> , 372 U.S. 58 (1963).....	11, 12, 13, 27
<i>Berger v. New York</i> , 388 U.S. 41 (1967)	4, 27, 29
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	20
<i>Butterworth v. Smith</i> , 494 U.S. 624 (1990).....	42
<i>Capital Cities Media Inc. v. Toole</i> , 463 U.S. 1303 (1983)	37
<i>Carroll v. President and Commissioners of Princess Anne County</i> , 393 U.S. 175 (1968).....	36
<i>Center for National Security Studies v. U.S. Department of Justice</i> , 331 F.3d 918 (D.C. Cir. 2003)	41
<i>CIA v. Sims</i> , 471 U.S. 159 (1985).....	41
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 486 U.S. 750 (1988).....	29
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979).....	49
<i>Columbia Insurance Co. v. Seescandy.com</i> , 185 F.R.D. 573 (N.D.Cal. 1999)	22, 50
<i>Dendrite v. Doe</i> , 775 A. 2d 756 (N.J. App. 2001)	22, 50
<i>Detroit Free Press v. Ashcroft</i> , 303 F.3d 681 (6th Cir. 2002)	42
<i>Doe v. 2theMart.com</i> , 140 F. Supp. 2d 1088 (W.D. Wash. 2001)	21, 50

<i>Doe v. Gonzalez</i> , 723 F. Supp. 690 (S.D. Fla. 1988).....	33
<i>Doe v. Supreme Court of Florida</i> , 734 F. Supp. 981 (S.D. Fla. 1990).....	33, 35
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965).....	31
<i>Donovan v. Lone Steer</i> , 464 U.S. 408 (1984).....	4
<i>Dove Audio, Inc. v. Lungren</i> , 1995 WL 432631 (C.D. Cal. 1995).....	33
<i>Drive In Theatres v. Huskey</i> , 435 F.2d 228 (4th Cir. 1970).....	15
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. 469 (1992).....	7
<i>First Amendment Coalition v. Judicial Inquiry and Review Board</i> , 784 F.2d 467 (3d Cir. 1986).....	33
<i>The Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989).....	37, 54
<i>Freedman v. State of Maryland</i> , 380 U.S. 51 (1965).....	27
<i>Gardner v. Bradenton Herald, Inc.</i> , 413 So.2d 10 (Fla. 1982).....	33
<i>Gentile v. State Bar of Nevada</i> , 501 U.S. 1030 (1991).....	45
<i>Gibson v. Florida Legislative Investigative Committee</i> , 372 U.S. 539 (1963).....	19, 25
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975).....	27
<i>In re Grand Jury Proceedings (Fernandez Diamante)</i> , 814 F.2d 61 (1st Cir. 1987).....	14, 15, 39
<i>In re Grand Jury Subpoena</i> , 103 F.3d 234 (2d Cir. 1996).....	39, 42
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	57
<i>Hamdi v. Rumsfeld</i> , 124 S. Ct. 2633 (2004).....	38
<i>Harris v. Sullivan</i> , 968 F.2d 263 (2d Cir. 1992).....	7
<i>ICC v. Brimson</i> , 154 U.S. 447 (1894).....	15, 16
<i>In re International Business Machines Corp.</i> , 687 F.2d 591 (2d Cir. 1982).....	9
<i>Iselin v. United States</i> , 270 U.S. 245 (1926).....	9

<i>Johnson v. United States</i> , 333 U.S. 10 (1948)	4
<i>Kamasinski v. Judicial Review Board</i> , 44 F.3d 106 (2d Cir. 1994).....	35
<i>Landmark Communications v. Virginia</i> , 435 U.S. 829 (1978).....	33
<i>McGehee v. Casey</i> , 718 F.2d 1137 (D.C. Cir. 1983).....	41
<i>McIntyre v. Ohio Elections Commission</i> , 514 U.S. 334 (1995).....	18, 22, 25, 50
<i>Melvin v. Doe</i> , 836 A.2d 42 (2003)	21, 50
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....	19, 20, 23
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	31, 49
<i>Nakatomi Investment v. City of Schenectady</i> , 949 F. Supp. 988 (N.D.N.Y. 1997)	43
<i>National Council of Resistance of Iran v. Department of State</i> , 251 F.3d 192 (D.C. Cir. 2001).....	27
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	32, 33, 34
<i>Nebraska Press Association v. Stewart</i> , 427 U.S. 539 (1976).....	32
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971).....	32, 36
<i>Penthouse International v. McAuliffe</i> , 610 F.2d 1353 (5th Cir. 1980)	15
<i>People v. Denver Publishing Co.</i> , 597 P.2d 1038 (Colo. 1979).....	33
<i>Piesco v. City of New York Department of Personnel</i> , 933 F.2d 1149 (2d Cir. 1991).....	46
<i>Press-Enterprise Co. v. Superior Court</i> , 478 U.S. 1 (1986).....	30
<i>Providence Journal Co. v. Newton</i> , 723 F. Supp. 846 (D.R.I. 1989)	35
<i>Quantity of Copies of Books v. Kansas</i> , 378 U.S. 205 (1964).....	27
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	34
<i>Rattner v. Netburn</i> , 930 F.2d 204 (2d Cir. 1991).....	13, 14

<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	21, 36
<i>Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.</i> , 593 F.2d 1030 (D.C. Cir. 1978).....	26
<i>Rumsfeld v. Padilla</i> , 124 S. Ct. 2711 (2004)	38
<i>Sable Communications of California, Inc. v. FCC</i> , 492 U.S. 115 (1989)	36
<i>Savago v. Village of New Paltz</i> , 214 F. Supp. 2d 252 (N.D.N.Y. 2002)	34
<i>Seattle Times v. Rhinehart</i> , 467 U.S. 20 (1984).....	46
<i>SEC v. O'Brien</i> , 467 U.S. 735 (1984).....	26
<i>Secretary of State v. Joseph H. Munson Co.</i> , 467 U.S. 947 (1984).....	31
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	19, 36
<i>Smith v. Daily Mail Publishing Co.</i> , 443 U.S. 98 (1979)	34
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	49, 57
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979)	23
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).....	32
<i>In re Subpoena Duces Tecum (United States v. Bailey)</i> , 228 F.3d 341 (4th Cir. 2000)	4
<i>Tropea v. Shell Oil Co.</i> , 307 F.2d 757 (2d Cir. 1962)	24
<i>Transportation Alternatives, Inc. v. City of New York</i> , 218 F. Supp. 2d 423 (S.D.N.Y. 2002).....	43
<i>Travelers Indemnity Co. v. Scor Reinsurance Co.</i> , 62 F.3d 74 (2d Cir. 1995).....	24
<i>United States v. Aguilar</i> , 515 U.S. 593 (1995)	41
<i>United States v. Awadallah</i> , 349 F.3d 42 (2d Cir. 2003)	39
<i>United States v. Ford</i> , 830 F.2d 596 (6th Cir. 1987).....	42
<i>United States v. Holroyd</i> , 732 F.2d 1122 (2d Cir. 1984).....	8
<i>United States v. James Daniel Good Real Prop.</i> , 510 U.S. 43 (1993)	27

<i>United States v. Marchetti</i> , 466 F.2d 1309 (4th Cir. 1972)	41
<i>United States v. Morton Salt Co.</i> , 338 U.S. 632 (1950).....	4
<i>United States v. New York Telephone Co.</i> , 434 U.S. 159 (1977).....	23
<i>United States v. Rumely</i> , 345 U.S. 41 (1953).....	30, 31
<i>United States v. Rutherford</i> , 442 U.S. 544 (1979).....	9
<i>United States v. Salameh</i> , 992 F.2d 445 (2d Cir. 1993).....	42
<i>United States v. Sells Engineering, Inc.</i> , 463 U.S. 418 (1983)	39
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	7
<i>United States v. United States District Court for the Eastern District of Michigan</i> , 407 U.S. 297 (1972)	53, 55
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	17
<i>Van Wie v. Pataki</i> , 267 F.3d 109 (2d Cir. 2001).....	30
<i>Virginia v. American Booksellers Association, Inc.</i> , 484 U.S. 383 (1988).....	31
<i>Watchtower Bible & Tract Society of New York v. Village of Stratton</i> , 536 U.S. 150 (2002).....	24
<i>West Virginia Univ. Hosps. v. Casey</i> , 499 U.S. 83 (1991)	9
<i>Worrell Newspapers of Indiana, Inc. v. Westhafer</i> , 739 F.2d 1219 (7th Cir. 1984).....	36

STATUTES

18 U.S.C. §1968.....	8, 48
18 U.S.C. §2232.....	49
18 U.S.C. §2705.....	42
18 U.S.C. §2709.....	passim
18 U.S.C. §3414.....	20
18 U.S.C. §3486.....	passim

50 U.S.C. §1805.....	40
50 U.S.C. §1824.....	40
Anti-Terrorism Tools Enhancement Act of 2003, H.R. 3037, 108th Cong. (Sept. 9, 2003)	passim
Federal Rule of Civil Procedure 45	8, 48
Federal Rule of Criminal Procedure 17	8, 17, 48
N.Y. Criminal Law §235.07 (McKinney 1999).....	32
N.Y. Penal Law §235.07 (McKinney 1999).....	32
USA Patriotic Act, Pub. L. 107-56, Title V, §505(a), 115 Stat. 365 (Oct. 26, 2001).....	19, 31

OTHER AUTHORITIES

Charles Doyle, <i>Libraries and the USA PATRIOT Act</i> , Congressional Research Service (Feb. 26, 2003).....	7
FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report by Senators Patrick Leahy, Charles Grassley & Arlen Specter (February 2003)	16
Rod Smith, <i>FBI Gathered Visitor Information Only in Las Vegas</i> , Las Vegas Review- Journal (Jan. 7, 2004).....	19
<i>The Supreme Court, 1966 Term</i> , 81 Harv. L. Rev. 186 (1967)	29

INTRODUCTION

Plaintiffs [REDACTED] American Civil Liberties Union (“ACLU”), and American Civil Liberties Union Foundation (“ACLU Foundation”) have moved for summary judgment, alleging that the national security letter (NSL) power authorized by 18 U.S.C. §2709 is facially invalid under the Fourth, First, and Fifth Amendments and that an NSL served by the FBI upon plaintiff [REDACTED] is unconstitutional. Section 2709 authorizes the Federal Bureau of Investigation (FBI) to order “electronic communication service providers” (“service providers”) to disclose constitutionally protected information about their clients and permanently prohibits service providers from disclosing to any person that the FBI has sought or obtained information under the provision. Plaintiffs here reply to the government’s opposition to plaintiffs’ motion for summary judgment and respond to the government’s cross-motion to dismiss or for summary judgment.

Cutting through the rhetoric, the government’s brief in fact concedes much of plaintiffs’ case. It concedes that the FBI may issue NSLs to force service providers to disclose the identity of Internet users and to disclose an array of other records. It concedes that the FBI may use NSLs to seek information about persons not suspected of any wrongdoing. It concedes that the Fourth Amendment does not permit the FBI unilaterally to compel the production of records, and that a heightened standard of judicial scrutiny is required where a government demand for records implicates First Amendment activity. It concedes that neither Section 2709 nor the [REDACTED] NSL expressly authorizes a service provider to contest the validity of the demand before a judge. Finally, it concedes that Section 2709(c) permanently bars service providers from

disclosing that the FBI has sought information, regardless whether the government can demonstrate a legitimate need for secrecy in the particular case.

As discussed below, none of the government's arguments for upholding the statute against facial attack has any merit. First, to overcome the statute's fatal Fourth Amendment defects, the government invites the Court to rewrite the statute to allow service providers to contest the validity of an NSL before a judge. However, the statute does not simply fail expressly to provide for such challenges; it expressly *prohibits* them. It would be unprecedented for a court to engage in the kind of wholesale rewriting that the government proposes. Second, the government argues that Section 2709 does not implicate the First Amendment because Internet users voluntarily disclose their identity to service providers. That argument is flatly contradicted by decades of Supreme Court case law recognizing the fundamental right to communicate anonymously and extending First Amendment protection to information entrusted to third parties. Third, the government argues that any constitutional concerns raised by the statute must be made in the context of a challenge to a particular NSL. However, the statute itself forecloses such challenges. The government's proposal is essentially a proposal to insulate the statute from judicial review altogether.

As to the statute's gag provision, the government argues that the provision should not be subject to strict scrutiny and that the provision is justified by the government's need to protect national security. But under long-standing case law, Section 2709(c) must be subjected to the most exacting scrutiny because it is both a prior restraint and a content-based regulation on speech. Section 2709(c) cannot survive such scrutiny because it imposes a gag that is indefinite, that suppresses far more speech than

necessary, and that is not based on any showing that secrecy is necessary in the particular case.

Finally, with no support whatsoever save a wholly improper *ex parte* declaration, the government argues that the ██████████ NSL is valid. This conclusory argument comes nowhere close to meeting the constitutional standard for demanding records implicating the First Amendment or for permanently barring the plaintiffs from disclosing a broad category of innocuous information.

Though the government characterizes Section 2709 as a statute very much like other compelled production statutes, Section 2709 is in fact extraordinary in the scope of the authority it invests in the FBI. As amended by the Patriot Act, the FBI may now use an NSL unilaterally to force disclosure of the identity and other protected records of a person who has affirmatively chosen to communicate anonymously on the Internet. Because individualized suspicion is no longer required, the FBI may use NSLs to investigate people who are neither criminal suspects nor foreign agents. A single NSL may seek records relating to hundreds or even thousands of people. NSLs are issued and effectively enforced without judicial oversight of any kind. Service providers are gagged – forever – from disclosing in even the most general terms that the FBI has sought or obtained information under the provision. The subjects of NSLs never learn that their rights were compromised, even years later, and even if they are innocent.

The Constitution simply does not allow such broad and unchecked power to be invested in the executive branch. Indeed, the pernicious surveillance scheme challenged here is inimical to a free society. Plaintiffs accordingly urge that this Court declare Section 2709 to be unconstitutional on its face and enjoin the enforcement of the

██████████ NSL. For the reasons stated below, plaintiffs are entitled to judgment as a matter of law.

ARGUMENT

I. SECTION 2709 IS INVALID ON ITS FACE BECAUSE IT VIOLATES THE FOURTH, FIRST AND FIFTH AMENDMENTS.

A. Section 2709 violates the Fourth Amendment.

As plaintiffs' opening brief discusses at length, the Fourth Amendment does not permit the government unilaterally to compel the production of records. See Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment (hereinafter, "Pl. Br."), at 23-28. Rather, a person from whom the government demands records or tangible things must be afforded an opportunity to contest the validity of the demand before a judge. See, e.g., *Berger v. New York*, 388 U.S. 41, 54 (1967) (noting "Fourth Amendment requirement that a neutral and detached authority be interposed between the police and the public"); *Johnson v. United States*, 333 U.S. 10, 14 (1948). In light of that principle, the courts have repeatedly held that subpoenas are consistent with the Fourth Amendment only because they afford recipients an opportunity to challenge their validity in court. See, e.g., *Donovan v. Lone Steer*, 464 U.S. 408, 415 (1984) (holding that administrative subpoenas may be issued without warrants because they "provide protection for a subpoenaed [person] by allowing him to question the reasonableness of the subpoena[] before suffering any penalties for refusing to comply with it"); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *In re Administrative Subpoena (Doe v. United States)*, 253 F.3d 256, 264 (6th Cir. 2001); *In re Subpoena Duces Tecum (United States v. Bailey)*, 228 F.3d 341, 348 (4th Cir. 2000). As Section 2709 does not

afford service providers any opportunity to contest the validity of an NSL in court, the provision is inconsistent with the Fourth Amendment.

1. The plain language of Section 2709 prohibits a service provider from contesting the validity of a national security letter in court.

To save the challenged statute from a flaw that the government acknowledges would be fatal, the government is forced to take the position that Section 2709 affords a service provider served with an NSL an opportunity to challenge the validity of the letter in court. See Government's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the Government's Cross-Motion to Dismiss the Complaint or for Summary Judgment (hereinafter, "Govt Br."), at 21-23, 35. Although plaintiffs would of course prefer a statute that contemplated such challenges, Section 2709 is simply not susceptible to this construction.

First, the statute's language is mandatory and unqualified. As plaintiffs noted in their opening brief, Pl. Br. 24, Section 2709 states that a person served with an NSL has a "[d]uty to provide" the information sought, and that the person served "shall comply" with the demand, 18 U.S.C. §2709(a). Moreover, the [REDACTED] NSL "hereby direct[s]" plaintiff [REDACTED] to produce the records sought. [REDACTED] Decl. Exh. 1. The government appears to acknowledge that the plain import of both the statute and the letter is that an NSL is self-executing and that the recipient has a legal obligation immediately to comply with the FBI's demand. Govt Br. 21 ("To be sure, a service provider's obligation to produce records requested in an NSL is mandatory.").

Second, nowhere does the statute suggest, let alone expressly state, that a service provider served with an NSL may contest the letter's validity in court. Neither the statute nor the [REDACTED] NSL mentions the possibility of such a challenge. And of course

neither indicates when such a challenge would have to be filed, or in which court, or on what grounds such a challenge could be brought. If the statute actually contemplated case-by-case challenges to particular NSLs, the statute might also be expected to include language requiring such challenges to be filed under seal. It includes no such language. The government concedes, as it must, that the statute “does not expressly notify recipients of requests for records that they can move to quash prior to production.” Govt Br. 23 (emphasis omitted).¹

Third, and fatal to the government’s theory of the statute, Section 2709 includes a gag provision that prohibits a service provider from disclosing “to any person” that the FBI has sought or obtained records under the provision. 18 U.S.C. §2709(c). The problem with the statute, then, is not simply that it fails “*expressly* [to] notify recipients of requests for records that they can move to quash prior to production.” Govt Br. 23 (emphasis in original). Rather, the statute on its face expressly *prohibits* recipients from filing such challenges. It would be impossible to file such a challenge, of course, without disclosing the existence of the NSL to (at least) an attorney, a judge, and the clerk of the court.²

¹ Through litigation under the Freedom of Information Act, plaintiff ACLU has obtained two FBI memoranda concerning NSLs. The first is a 13-page memorandum, dated October 26, 2001, that “[s]ummarizes recent changes to . . . legal authorities relating to NSLs, and describes implementation procedures.” Beeson Decl. Exh. 10. The second is a 10-page memorandum, dated November 28, 2001, that “[p]rovides guidance on the preparation, approval, and service of National Security Letters.” Beeson Decl. Exh. 11. Notably, neither memorandum states (or even suggests) that a service provider may contest the validity of an NSL in court.

² As plaintiffs noted in their opening brief, subpoena statutes that include gag provisions expressly except disclosures to attorneys. *See, e.g.*, 18 U.S.C. §3486(a)(6)(A) (stating that non-disclosure obligation excludes disclosures to “an attorney to obtain legal advice”); *see also* Anti-Terrorism Tools Enhancement Act of 2003 (“ATEA”), H.R.

The plain language of the statute, then, could not be clearer: it prohibits a service provider from contesting the validity of an NSL in court. Because the plain language is unambiguous, the government's strained construction of the statute must be rejected. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (noting "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written"); *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive") (internal quotation marks omitted); *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) ("unless otherwise defined, [statutory] words will be interpreted as taking their ordinary, contemporary, common meaning") (internal quotation marks omitted).

For several reasons, it would be particularly inappropriate to disregard the statute's plain language here. First, as plaintiffs noted in their opening brief, legislative history shows that Congress, in amending Section 2709 in 1993, understood NSLs to be "extraordinary device[s] . . . [e]xempt from the judicial scrutiny normally required for compulsory process." Pl. Br. 24-25 (quoting H. Rep. 103-46 (Mar. 29, 1993)) (emphasis added).³ Notably, the government's discussion of legislative history, relegated to a

3037, 108th Cong. §3(a) (Sept. 9, 2003) (proposed legislation containing similar exclusion).

³ A recent Congressional Research Service report reaches the same conclusion. *See* Charles Doyle, *Libraries and the USA PATRIOT Act*, Congressional Research Service (Feb. 26, 2003), available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/CRS215LibrariesAnalysis.pdf> at 2 (last visited July 28, 2004) (contrasting National Security Letters, which allow the FBI to obtain information "without recourse to the courts," with "judicially-assisted" investigative powers); *id.* at 3 ("The Patriot Act amended and generally expanded the judicially-assisted criminal and foreign intelligence investigative powers and the NSL authority as well.").

footnote, fails even to mention this clear language, let alone reconcile it with the construction of the statute that the government now urges upon this Court. Far from contradicting the plain language of the statute, legislative history confirms that the statute means what it says. *See United States v. Holroyd*, 732 F.2d 1122, 1125 (2d Cir. 1984) (“when the express language of a statute is clear, a court will not adopt a different construction absent clear legislative history contradicting the plain meaning of the words”).

Second, the language that the government would have this Court read into the statute – language providing for a motion to quash – is language that Congress has included in other otherwise similar statutes. The omission of such language from Section 2709 distinguishes the provision from the rule governing grand jury subpoenas, *see* Fed. R. Crim. P. 17(c)(2); from the rule governing civil trial subpoenas, *see* Fed. R. Civ. P. 45(c)(3); from statutes governing administrative subpoenas used in criminal investigations; *see, e.g.*, 18 U.S.C. §1968(h) (administrative subpoenas issued in racketeering investigations); 18 U.S.C. §3486(a)(5) (administrative subpoenas issued in investigations of health care fraud); and from proposed legislation that would provide the FBI with administrative subpoena authority in terrorism cases, *see* ATEA, H.R. 3037, 108th Cong. (Sept. 9, 2003). Pl. Br. 27. In effect, the government contends that each of these statutes is needlessly verbose – that, in each of these statutes, Congress’s inclusion of motion-to-quash language was unnecessary.

Third, the government’s construction of the statute would oblige this Court not simply to add language that Congress has omitted – that is, language permitting the recipient of an NSL to file a motion to quash, but also to delete language that Congress

has included – the language that prohibits a service provider from disclosing the existence of an NSL “to any person.” In other words, the government invites this Court to engage in a wholesale rewriting of the statute. Needless to say, the Court should reject this invitation. See *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991) (“[I]t is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional ‘forgetfulness’ cannot justify such a usurpation.”); *United States v. Rutherford*, 442 U.S. 544 (1979) (“Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”); *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) (“[The statute’s] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.”); *In re Int’l Business Machines Corp.*, 687 F.2d 591, 603 (2d Cir. 1982) (“[W]e are powerless to amend an Act of Congress to provide what litigants desire; we may only order enforced what an Act lawfully provides.”).

2. Section 2709’s effect is to permit the FBI unilaterally to compel the production of records.

The government argues that, notwithstanding the plain language of Section 2709, the FBI cannot actually *compel* a service provider to disclose records without enlisting the aid of a court. Govt Br. 21. This argument is entirely without merit. While it is true that the government cannot obtain a *court order* requiring a service provider to produce records without enlisting the aid of a court, the government need not obtain a court order

to compel a service provider to disclose records. As a practical matter, an NSL *itself* compels the production of records. An NSL is written on FBI letterhead, served personally upon the service provider by an FBI agent, and states that the FBI's demand is connected to an ongoing terrorism investigation. As discussed above, *see* Section I.A.1, *supra*, the NSL states clearly that the recipient has a legal obligation immediately to produce the records sought by the FBI. Through a gag provision, the NSL expressly prohibits the service provider from challenging the validity of the letter, consulting an attorney, or even disclosing the mere fact that it has received an NSL. In this light, the government's argument that an NSL does not itself compel the production of records is wholly divorced from reality.

The reality, of course, is that virtually every service provider served with an NSL will immediately produce the records that the FBI demands. Records obtained by the ACLU through the Freedom of Information Act suggest that the FBI issued hundreds of NSLs between October 2001 and January 2003 alone. Beeson Decl. Exh. 9. Yet the government fails to cite *even one case* in which a service provider has challenged the validity of an NSL in court. In fact, in answer to oversight questions submitted by the House Judiciary Committee, the DOJ acknowledged in May 2003 that "[t]here has been *no challenge* to the propriety or legality of National Security Letters." Second Beeson Decl. Exh. 16 (emphasis added). The proposition that Section 2709 does not allow the FBI to compel the production of records, then, is formalistic at best. As a practical matter, Section 2709 allows the FBI unilaterally to compel the production of records.

Unable to point to any other case in which a service provider has challenged the validity of an NSL, the government proposes that "plaintiffs' own actions" demonstrate

that a service provider can file such a challenge. Govt Br. 23. What the government neglects to mention is that plaintiff ██████ filed such a challenge only after seeking and obtaining the FBI's permission to consult an attorney. ██████ Decl. ¶16. What "plaintiffs' own actions" demonstrate, then, is *at most* that a service provider may seek legal advice and ultimately file suit *if it is informed by the FBI that it can consult an attorney*. But the government nowhere states that the FBI routinely informs service providers that they can consult attorneys or file challenges to particular NSLs. On the contrary, it states that even plaintiff ██████ should not have been so informed. Govt Br. 11.

The government's contention that its actions must remain exempt from constitutional scrutiny until it seeks judicial enforcement of an NSL is, in essence, an argument that the government's actions in this context should be exempt from any constitutional scrutiny whatsoever. As the government knows, NSLs are themselves so coercive that most service providers simply hand over the records that the FBI demands. In the ordinary case, there is no need for the government to seek a court order; the FBI obtains the records it seeks simply by serving the NSL. The result is that the government conducts its activities in this context entirely free from judicial scrutiny. And the gag provision ensures that the government's activities are conducted free from public scrutiny as well.

The Supreme Court has rejected the argument that the government can insulate its coercive actions from constitutional scrutiny in this way. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court considered the practice of a legislative commission, the Rhode Island Commission to Encourage Morality in Youth, of notifying

distributors that certain books or magazines distributed by them were objectionable for sale to minors. Although the Commission had no power to sanction distributors, the typical notice was sent on official stationery, thanked the distributor in advance for its cooperation, and reminded the distributor of the Commission's "duty to recommend to the Attorney General [the] prosecution of purveyors of obscenity." *Id.* at 62. The Supreme Court rejected the government's argument that the notices did not in themselves compel the distributors to take any action:

This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions -- the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation -- the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may . . . inhibit the circulation of publications

Id. at 66-67. The Court recognized that the distributor was "'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law." *Id.* at 68. The Court noted, however, that the distributor's "compliance with the Commission's directives was not voluntary."

People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and [the distributor's] reaction, . . . was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police investigations, in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naïve to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity.

Id. at 68-69.

It would be equally naïve to credit the government's assertion here that NSLs do not coerce service providers to surrender their records. Indeed, NSLs are, if anything, *more* coercive than were the letters at issue in *Bantam Books*. Whereas the letters at issue in *Bantam Books* were written on the stationery of a legislative commission, *id.* at 61, an NSL is written on the stationery of the FBI. Whereas the letters at issue in *Bantam Books* were sent by mail, *id.*, an NSL is served personally by an FBI agent. Whereas the letters at issue in *Bantam Books* were "phrased virtually as orders," *id.* at 68, the government concedes that NSLs *are* orders, Govt Br. 21 ("To be sure, a service provider's obligation to produce records requested in an NSL is mandatory."). Whereas the letters at issue in *Bantam Books* were not themselves authorized by statute, an NSL cites statutory authority for the FBI's demand, ████████ Decl. Exh. 1 ("Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 . . ."). And whereas the letters at issue in *Bantam Books* did not foreclose the recipients from obtaining legal advice, an NSL references a statutory gag provision that prohibits the service provider not only from consulting an attorney but from "disclos[ing] to any person" that the FBI has sought or obtained information, 18 U.S.C. §2709(c).

The Second Circuit addressed a similar issue in *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991). In that case a village official sent a letter to the local Chamber of Commerce objecting to the publication of the plaintiff's advertisement in the Chamber's newspaper. The advertisement had criticized the village's elected officials. The official's letter stated that the advertisement "raises significant questions and concerns about the objectivity and trust which we are looking for from our business friends" and

asked the Chamber to disclose, among other things, the name of the article's author and "a list of those members who supported the inclusion of this article." *Id.* at 206. The Second Circuit rejected the government's argument that the letter was simply "a plea to the Chamber to rid itself of political affiliates." *Id.* at 209. Overturning the district court's grant of summary judgment to the government, the Court wrote, "[w]here comments of a government official can reasonably be interpreted as intimating some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim [for First Amendment rights] can be stated." *Id.* at 208 (internal quotation marks omitted).

Other courts have affirmed this same principle in circumstances closely analogous to those presented here. For example, *In re Grand Jury Proceedings (Fernandez Diamante)*, 814 F.2d 61 (1st Cir. 1987), involved a grand jury subpoena served on a travel agency. The subpoena was accompanied by a letter from an Assistant United States Attorney containing the following language:

You are not to disclose the existence of this subpoena or the fact of your compliance for a period of 90 days from the date of the subpoena. Any such disclosure could seriously impede the investigation being conducted and thereby, interfere with the enforcement of the federal criminal law.

Id. at 63-64. Appellants claimed that the letter imposed an obligation of secrecy in violation of Federal Rule of Criminal Procedure 6(e)(2); in response, the government argued that the letter did not itself compel the recipient to do anything. The First Circuit rejected the government's argument:

The document at issue . . . is from the United States Attorney's office informing its recipient that a particular course of action could "impede" a criminal investigation "and, thereby, interfere with the enforcement of the federal criminal law." Absent a clear showing to the contrary, we fail to see how a reasonable, law-abiding person who received such a letter

would think anything other than that he was being told that he was legally obligated not to engage in that course of action.

Id. at 70; see also *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1360 (5th Cir. 1980); *Drive In Theatres v. Huskey*, 435 F.2d 228 (4th Cir. 1970).

NSLs are phrased as orders, written on FBI stationery, and served personally by FBI agents. They reference an ongoing foreign intelligence or terrorism investigation and cite statutory authority for the FBI's command that the recipient service provider disclose its records. They also include language prohibiting the recipient from disclosing "to any person" that the FBI sought or obtained information, and they fail to specify any means through which a service provider may challenge the FBI's demand. It cannot seriously be argued that NSLs do anything less than compel the disclosure of records. No "reasonable, law-abiding person" could conclude that he had any choice but immediately to comply with the FBI's demand.

3. The government has not justified Section 2709's failure to comply with the Fourth Amendment.

In answer to the statute's defects, the government offers three additional arguments, none of which has merit. First, the government argues that Section 2709 is actually *more* protective than a subpoena because it "imposes the additional requirement of a written certification of relevance." Govt Br. 2. While Section 2709 does indeed require the FBI to "certify" that the records sought are relevant, the certification is made not to a judge but rather to the FBI itself. The FBI's own conclusion that the documents it wants are relevant can be no substitute for the usual requirements of the Fourth Amendment. It is no more protective of constitutional rights than would be a requirement that an FBI agent, before issuing any NSL, dance a little jig. See *ICC v.*

Brimson, 154 U.S. 447, 478 (1894) (“Neither branch of the legislative department, still less any merely administrative body, established by congress, possesses, or can be invested with a general power of making inquiry into the private affairs of the citizen.”). As plaintiffs stated in their opening brief, Pl. Br. 28, the problem with the challenged statute is that no *judge* is asked to determine whether the FBI’s demand satisfies constitutional requirements. The good faith of the FBI is simply not a substitute for judicial oversight.

Second, the government implies that Section 2709 does not abridge Fourth Amendment rights because the statute is subject to extraordinary Congressional oversight. Govt Br. 24. General congressional oversight has never been an adequate substitute for the judicial review required by the First and Fourth Amendments every time the government demands protected records. *See Brimson*, 154 U.S. at 478-79. Moreover, the Justice Department has failed even to cooperate with congressional oversight of implementation of the Patriot Act. For example, a bipartisan report issued in February 2003 by senior members of the Senate Judiciary Committee stated:

[W]e are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee.

*See FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report by Senators Patrick Leahy, Charles Grassley & Arlen Specter (February 2003), at 13.*⁴ In light of the Justice Department’s failure to

⁴ See <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (last visited July 29, 2004). With respect to written questions submitted by the Senate Judiciary Committee to the DOJ, the report stated:

cooperate with congressional oversight, the suggestion that such oversight is an adequate substitute for judicial review is particularly unpersuasive.

Finally, throughout its brief, the government attempts to defend Section 2709 by suggesting that an NSL is analogous to a grand jury subpoena. Govt Br. 19, 47-48, 60. In fact, there is no resemblance between the two powers. Unlike Section 2709, the grand jury rule expressly states that the recipient of a subpoena may challenge the demand in court. *See* Fed. R. Crim. P. 17(c)(2) (“On motion made promptly, the court may quash or modify the subpoena . . .”). The grand jury rule also states where such a challenge must be filed, when it must be filed, and on what grounds the government’s demand may be challenged. *See* Fed. R. Crim. P. 17(a) (“[a] subpoena must state the court’s name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies”); Fed. R. Crim. P. 17(c)(2) (“the court may quash or modify the subpoena if compliance would be unreasonable or oppressive”). In addition, as noted above, the grand jury rule does not prohibit the recipient of a subpoena from consulting counsel or disclosing “to any person” the mere fact that a subpoena has been served. And of course a grand jury subpoena is issued by the grand jury, not by the FBI. *See United States v. Williams*, 504

Unfortunately, the [DOJ] refused to respond to . . . many of these legitimate questions. Indeed, it was only after [House Judiciary Committee] Chairman Sensenbrenner publicly stated that he would subpoena the material that the Department provided any response at all to many of the questions posed, and to date some questions remain unanswered. . . . In addition, the DOJ attempted to respond to some of these requests by providing information not to the Judiciary Committees, which had made the request, but to the Intelligence Committees. Such attempts at forum shopping by the Executive Branch are not a productive means of facilitating legitimate oversight.

Id.

U.S. 36, 47 (1992) (“the whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people”).

B. Section 2709 violates the First Amendment.

1. Section 2709 reaches information protected by the First Amendment.

Despite the government’s tortured arguments to the contrary, Section 2709 clearly reaches information protected by the First Amendment. The statute permits the FBI to obtain the identity of a person who has engaged in anonymous or pseudonymous speech on the Internet. 18 U.S.C. §2709(b)(1); Garfinkel Decl. ¶32; Govt Br. 25. The statute also permits the FBI to obtain a list of the websites that a particular person has visited, a list of e-mail addresses with which a particular person has corresponded, or a list of people who have e-mail accounts with a particular advocacy or political organization. 18 U.S.C. §2709(a); Garfinkel Decl. ¶¶32-37. All of this information is protected by the First Amendment. Pl. Br. 29-32.

The government first argues that the statute does not implicate the First Amendment because it reaches only information that has been entrusted by individuals to third party service providers. Specifically, it argues that Section 2709 does not implicate the rights of “anonymous” Internet speakers because Internet users disclose their names to service providers in order to communicate on the Internet. Govt Br. 25. This argument is specious. Indeed, if it were correct, a member of the NAACP would surrender her right to anonymity by providing her name to the organization, and an anonymous pamphleteer would surrender her right to anonymity by providing her name to a publisher or printer. This is clearly not the case. *See NAACP v. Alabama*, 357 U.S.

449 (1958); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995). In fact, the Supreme Court has on numerous occasions extended First Amendment protection to information entrusted to third parties. *See, e.g., Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 546 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

The government attempts to distinguish *NAACP v. Alabama* and other membership list cases by arguing that NSLs are narrow demands for “particular subscriber information,” whereas the demands at issue in the membership list cases were relatively broad.⁵ Govt Br. 29. In fact, because Section 2709 no longer includes an individualized suspicion requirement, Pl. Br. 15, the FBI can now use the statute to obtain information not just about a single individual but about large numbers and broad classes of people. For example, it can use an NSL to order a service provider to disclose the names of all subscribers who have visited the website of a particular advocacy organization. Garfinkel Decl. ¶34. Indeed, it appears that the FBI has already relied on this amendment to the NSL statutes. *See* Rod Smith, *FBI Gathered Visitor Information Only in Las Vegas*, *Las Vegas Review-Journal* (Jan. 7, 2004) (“Casino operators said they turned over the names and other guest information on an estimated 270,000 visitors after a meeting with FBI officials and after receiving national security letters requiring them to

⁵ The government also suggests that the membership list cases are inapposite here because plaintiffs have not submitted evidence that any particular Internet users have suffered injury from the FBI’s use of NSLs. The Supreme Court has held, however, that “in the First Amendment context, litigants . . . are permitted to challenge a statute . . . because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 392-93 (1988). Even if a showing of injury were required, which it is not, the extraordinary secrecy surrounding the FBI’s use of §2709 makes it impossible for plaintiffs to gather and submit evidence regarding the impact of the statute on the rights of other speakers.

yield this information”).⁶ Thus, the FBI may use NSLs to obtain precisely the kind of information the Supreme Court sought to protect from compelled disclosure in both the membership list and anonymous speech cases.⁷

In fact, because of the nature of online communication, adopting the government’s argument would virtually eviscerate *any* right to anonymous communication on the Internet. To communicate over the Internet, an individual must set up an account with a service provider. Garfinkel Decl. ¶19. Setting up such an account ordinarily requires the individual to provide the service provider with identifying information. Garfinkel Decl. ¶32. Holding that an individual surrenders her right to anonymity by providing identifying information to a service provider would make it virtually impossible for most people to communicate anonymously over the Internet. *Id.* It would also profoundly alter the character of this new communications medium. Garfinkel Decl. ¶20 (“A unique aspect of the Internet, and the communications made over the Internet, is that it is common for many Internet users to communicate on the Internet anonymously, utilizing pseudonyms rather than true identities Those who

⁶ Plaintiffs assume that this NSL was issued under 18 U.S.C. §3414(a)(5), which allows the FBI to obtain records from “financial institutions.” The definition of “financial institution” was recently expanded to reach travel agencies and casinos.

⁷ Contrary to the government’s suggestion, *Branzburg v. Hayes*, 408 U.S. 665 (1972) is inapplicable here. *Branzburg* held only that the First Amendment does not grant news reporters an “absolute privilege” not to testify when called before a grand jury. *Id.* at 682. In fact, the *Branzburg* Court distinguished the membership list cases on grounds relevant here: the grand jury in *Branzburg* had not “attempt[ed] to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed.” *Id.* at 709 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)). The Court emphasized that grand juries must remain “subject to judicial control and subpoenas on motions to quash. . . . [and] must operate within the limits of the First Amendment.” *Id.* at 708; *see also id.* at 724 (Powell, J., concurring) (noting the “limited nature” of the Court’s holding).

choose to use these pseudonyms do so for a number of reasons, including the fact that this anonymity encourages the uninhibited exchange of ideas and opinions that the users might not otherwise feel comfortable discussing.”).

The government offers no rationale for overturning a centuries-long tradition of protecting anonymity simply because individuals now routinely communicate on the Internet rather than on paper. Recognizing the democratizing and speech-enhancing nature of the Internet, the Supreme Court has held that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Numerous other courts have recently held that the First Amendment protects those who communicate anonymously over the Internet. In *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003), the Supreme Court of Pennsylvania held that a discovery order authorizing plaintiffs in a defamation suit to obtain the identity of an Internet user from an Internet Service Provider warranted interlocutory appeal because of its serious First Amendment implications. The court wrote: “[T]he court-ordered disclosure of Appellants’ identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy.” *Id.* at 50. Similarly, noting that “[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously,” a federal district court in Washington held that “discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.” *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (granting motion to quash subpoena issued to Internet Service Provider to obtain the identity of an Internet user); see also *Dendrite Int’l, Inc. v.*

Doe No. 3, 775 A.2d 756, 771 (N.J. App. 2001) (requiring defamation plaintiff to make heightened showing to justify discovery of Internet user's identity); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) (requiring plaintiff in trademark infringement case to make heightened showing to justify subpoena to service provider for disclosure of Internet user's identity). None of these courts has even entertained the suggestion that individuals who communicate over the Internet surrender their First Amendment right to anonymity simply by providing identifying information to a service provider.

The government's second argument is that the statute does not implicate the First Amendment because it does not authorize the FBI to obtain the "contents" of communications. Govt Br. 25-26 & n.7. This argument is also unsound. As an initial matter, the statute does not prohibit the government from using NSLs to obtain "content" information, whatever the meaning of that term. Recognizing this, the government points not to the statute but to the ██████████ NSL. The ██████████ NSL, however, simply shows how the government used Section 2709 in a particular case. In any event, the information that Section 2709 reaches is plainly protected by the First Amendment. *See, e.g., McIntyre*, 514 U.S. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

In support of its argument that Section 2709 implicates only "non-content" information, the government also asserts that the information that the statute reaches is analogous to information that can be obtained from telephone companies through pen registers and trap and trace devices. Govt Br. 25. Neither of these procedures, however,

can be used to obtain a person's identity. In fact, the Supreme Court underlined this point in the case on which the government principally relies. In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court explained:

[Pen registers] disclose only the telephone numbers that have been dialed – a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers.

Id. at 741 (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977)). The government's reliance on a case upholding the use of a mail cover is similarly misplaced. Govt Br. 24-25 (citing unpublished district court decision). Mail covers intercept the mail of a person whose identity is already known to the government. Unlike NSLs, neither pen registers nor mail covers seek information about persons who have affirmatively chosen to communicate anonymously.

It is difficult to make sense of the government's third argument – that the First Amendment protects only against the “simultaneous disclosure of both a speaker's identity *and* the content of his or her speech.” Govt Br. 27. For one thing, it is difficult to understand why the First Amendment would prevent the government from compelling a person to disclose his identity and speech *simultaneously* but permit the government to compel him to disclose his identity *after* he has spoken. On the government's theory, the First Amendment prohibits it from requiring an author to sign his anonymous work but permits it to obtain the author's name after the anonymous work has been published. The government offers no rationale for such a rule, and the Supreme Court does not share the government's radically constricted understanding of the First Amendment. Neither *NAACP v. Alabama* nor *Watchtower Bible & Tract Society of New York v. Vill. of*

Stratton, 536 U.S. 150 (2002), to take only two examples, involved government attempts to compel the disclosure of a person's identity and speech simultaneously.

Finally, the government takes issue with the scope and quantity of protected speech that may be at risk of disclosure under Section 2709. Govt Br. 12-14. The government asks the Court to ignore evidence submitted by the plaintiffs that describes, first, the array of organizations that provide electronic communication services, and, second, the array of information that service providers typically retain about Internet users. Garfinkel Decl. ¶¶21-38. Specifically, the government argues that the Garfinkel Declaration is improper on the grounds that it contains legal conclusions about the scope of the statute and is irrelevant to plaintiffs' challenge. Both arguments are meritless. Mr. Garfinkel's testimony is offered not as a legal argument about the actual scope of the statute, but as purely factual description based on Mr. Garfinkel's knowledge of the industry and of the technical meaning of the terms used in the statute. *Cf. Tropea v. Shell Oil Co.*, 307 F.2d 757, 763 (2d Cir. 1962) (expert witness may testify to custom and usage in trade); *Travelers Indem. Co. v. Scor Reinsurance Co.*, 62 F.3d 74, 78 (2d Cir. 1995) (allowing expert testimony as to "industry custom and practice"). Notably, the government has not disputed the facts set forth in Mr. Garfinkel's testimony. The Garfinkel Declaration is also clearly relevant to plaintiffs' facial challenge because it shows that the FBI may use the challenged statute to force disclosure of a wide range of protected speech. Garfinkel Decl. ¶¶32-38. While plaintiffs would have been happy to provide additional evidence about the government's *actual* use of the statute, the extraordinary secrecy surrounding the government's use of the statute makes the

gathering of such evidence impossible. Especially given this impediment, the facts in the Garfinkel Declaration are entirely proper for the court's consideration.

2. Section 2709 allows the FBI to obtain constitutionally protected information without demonstrating a compelling need or narrowly tailoring its demand to that need.

The First Amendment requires a heightened showing where a government request for records implicates First Amendment concerns. That heightened scrutiny, though variously described by the courts, clearly requires much more than a showing of mere relevance. *See, e.g., Gibson*, 372 U.S. at 546 (government has burden of establishing “substantial relation between the information sought and subject of overriding and compelling state interest”); *McIntyre*, 514 U.S. at 347 (government must establish that challenged action is “narrowly tailored to serve an overriding state interest”). No court has exempted counter-terrorism investigations from this scrutiny, and grand juries have successfully investigated counter-terrorism cases without an exemption from ordinary constitutional requirements.

The government misconstrues plaintiffs' argument that §2709 must be invalidated on its face. Govt Br. at 33. Plaintiffs are not arguing that any statute authorizing requests for records must include a specific requirement that the government establish a compelling need and tailor its demand to that need. *See id.* Rather, plaintiffs argue that §2709 is facially invalid because, unlike other statutes authorizing requests for records, it authorizes the FBI to demand records implicating First Amendment rights *without judicial oversight*, thus foreclosing *any* application of the heightened scrutiny that the government concedes the Constitution requires. Pl. Br. 34-36.

C. Section 2709 violates the First and Fifth Amendments by failing to require the FBI to justify the non-provision of notice on a case-by-case basis.

As plaintiffs discussed in their opening brief, Pl. Br. 37-39, Section 2709 violates the Fifth Amendment by failing to require the FBI to notify subjects of NSLs or to justify the non-provision of notice on a case-by-case basis. The government's contention that plaintiffs' claim is "squarely foreclosed by Supreme Court and Second Circuit precedent," Govt Br. 36, is simply wrong. In fact, none of the cases the government cites addresses the issue presented here.

SEC v. O'Brien, 467 U.S. 735 (1984), involved a subpoena for financial records; it did *not* involve a demand for records implicating First Amendment activity or a Fifth Amendment liberty interest. Plaintiffs do not contend that the subject of a subpoena is entitled under the Fourth Amendment to notice of the subpoena, as was contended by the respondent in *O'Brien*. Plaintiffs argue that the right to notice arises where the government demands records that implicate the *First* Amendment. *SEC v. O'Brien* simply does not address this point.

Reporters Committee for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978), is similarly inapposite. In that case, plaintiffs contended that "the First and Fourth Amendments require that prior notice be provided to them before defendants turn over their long distance telephone billing records to Government law enforcement officials." *Id.* at 1036. Plaintiffs did not contend, however, that the telephone records at issue implicated the First Amendment. Rather, they argued that "as journalists, they [were] entitled under the First Amendment to prior notice of toll-call-record subpoenas . . . even if citizens in general have no such right." *Id.* at 1046. The case simply did not raise the question presented here, which is whether the subject of a

subpoena has a right to notice where records sought by a subpoena implicate the First Amendment right to communicate anonymously.

In fact, the Supreme Court has repeatedly recognized that the First Amendment provides procedural rights, not just substantive ones. *See, e.g., Freedman v. State of Maryland*, 380 U.S. 51, 57 (1965) (holding that “a state is not free to adopt whatever procedures it pleases . . . without regard to the possible consequences for constitutional protected speech”) (internal quotations and citations omitted); *Bantam Books*, 372 U.S. at 65 (“freedoms of expression must be ringed about with adequate bulwarks”); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) (holding that seizure of allegedly obscene materials prior to an adversarial hearing is unconstitutional). The Fifth Amendment provides similar rights. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Goss v. Lopez*, 419 U.S. 565, 57 (1975) (notice and an opportunity to be heard are the “very minimum” content of the due process protection).

Section 2709 fails to afford the process that the Constitution requires, because it allows the FBI to compel the disclosure of records implicating First Amendment activity without ever notifying the person whose rights are compromised. Pl. Br. 38-39. While the courts have sometimes permitted the government to delay the provision of notice on the basis of a particularized showing of necessity, Section 2709 does not require the government to make any such showing. *See, e.g., Berger*, 388 U.S. at 60-61 (striking down state wiretap statute in part because it “ha[d] no requirement for notice . . . nor [did] it overcome this defect by requiring some *showing of special facts*”) (emphasis added); *National Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208 (D.C. Cir. 2001) (stating that the government must afford pre-deprivation notice and opportunity to

be heard unless it “can make a showing of *particularized* need) (emphasis added). On the contrary, it allows the government to deny notice altogether in every case.

Section 2709’s failure to provide notice is particularly problematic because the statute not only fails to require the *government* to provide such notice but prohibits the *recipient* of the NSL – the service provider – from providing such notice. *See* 18 U.S.C. §2709(c). The effect of the statute is permanently to deprive even innocent people of the right to challenge a violation of their rights. The Constitution clearly forecloses the government from depriving individuals of their First and Fifth Amendment rights in this way.

D. Section 2709’s defects cannot be cured absent facial invalidation.

The government argues that plaintiffs’ facial challenge to Section 2709 is “misplaced” because any constitutional challenge “must be made in the context of a particular record request.” Govt Br. 4, 19, 32. The problem with this contention is that the statute simply does not allow for challenges to “particular records request[s].” As discussed above, *see* Section I.A, *supra*, the statute expressly prohibits such challenges; no service provider served with an NSL would understand such a challenge to be possible; and, unsurprisingly, it appears that until now no service provider has ever filed such a challenge.⁸ None of the cases cited by the government involved a statute that not only failed expressly to provide for case-by-case challenges to individual demands for records but expressly foreclosed such challenges. Govt. Br. 19. Thus, the government’s

⁸ Plaintiff ██████ was able to file this challenge only because FBI Agent ██████ who served ██████ with the ██████ NSL, informed the company’s president that he could consult an attorney. *See* Section I.A.2, *supra*. The government now argues that ██████ should not have been so informed.

argument that this Court should not consider the facial validity of the statute is essentially an argument that the statute should be altogether immune from constitutional scrutiny.

Facial invalidation is necessary here because service providers served with NSLs in the future will be denied any opportunity to protect their rights on a case-by-case basis. The Supreme Court has recognized that facial invalidation is appropriate in such circumstances. For example, in *Berger*, a criminal defendant challenged a wiretapping statute that did not include any requirement that the surveillance target receive notice – even delayed notice – of the surveillance. The Supreme Court invalidated the statute on its face, finding that “the [challenged] statute’s blanket grant of permission to eavesdrop [was] without adequate judicial supervision or protective measures.” 388 U.S. at 60. According to one commentator, the Court’s decision to address the facial validity of the statute was based on a determination that people affected by the statute would otherwise have no opportunity to vindicate their rights. *See The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 186, 188 (1967) (“it is by no means certain that all important issues would be litigated if a case-by-case approach were required, [because] the secrecy of eavesdrops makes it unlikely that issues arising out of unproductive eavesdrops would ever reach [the] court”). In a similar vein is *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), in which the Court considered the constitutionality of a city ordinance that invested the city’s mayor with the discretion to grant or deny permits for annual newsrack permits. Here again, the Court struck the statute down on its face, basing its decision in part on the recognition that “the difficulty and delay inherent in an ‘as applied’ challenge can itself discourage litigation” and “the eventual relief may be ‘too little too late.’” *Id.* at 758. Of course, the argument for facial invalidation applies with

even more force where, as here, an as-applied challenge is not simply “difficult” but foreclosed altogether.⁹

Facial invalidation is also necessary because the very existence of the challenged statute inhibits the exercise of First Amendment rights. As discussed above, *see* Section I.B.1, *supra*, Section 2709 permits the FBI virtually unchecked access to records of First Amendment activity. The provision allows the FBI to compel a service provider to disclose, for example, the name of a person who has engaged in anonymous speech on the Internet, the names of people who have e-mail accounts with a particular advocacy or political organization, a list of websites that a particular person has visited, or a list of e-mail addresses with which a particular person has corresponded. It is beyond dispute that such intrusive investigative powers can have a profound chilling effect on activity protected by the First Amendment. In *United States v. Rumely*, 345 U.S. 41 (1953), the Supreme Court considered the authority of a congressional committee to compel a private organization to disclose the names of individuals who had purchased particular books. The Court, noting the “doubts of constitutionality” that would accompany a contrary conclusion, *id.* at 46, found that the congressional committee did not have the authority to compel the disclosure of the names. Justice Douglas elaborated:

Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. . . . Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be

⁹ In the context of ripeness analysis, the courts have recognized a similar principle where an issue is “capable of repetition but evading review.” *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986); *ABC, Inc. v. Stewart*, 360 F.3d 90, 97 (2d Cir. 2004); *Van Wie v. Pataki*, 267 F.3d 109, 113 (2d Cir. 2001).

dislike. . . . [F]ear will take the place of freedom in the libraries, bookstores, and homes of the land.

Id. at 57-58 (Douglas, J., concurring).

As plaintiffs noted in their opening brief, Pl. Br. 36-37, Section 2709 is likely to have a similarly chilling effect on First Amendment activity. The statute's potential chilling effect on individuals not before the court supplies an independent reason for invalidating the statute on its face. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (rights protected by the First Amendment are "of transcendent value to all society, and not merely to those exercising their rights"); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988) ("in the First Amendment context, litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (plaintiffs may challenge statute to "prevent the statute from chilling the First Amendment rights of other parties not before the court"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions").¹⁰ Facial invalidation, then, is both necessary and appropriate in this case.

¹⁰ The statute's chilling effect is likely to be particularly severe now that the statute can be used to obtain information about people who have no connection to terrorism, espionage, or criminal activity of any sort. *See* Pub. L. 107-56, Title V, §505(a), 115 Stat. 365 (Oct. 26, 2001) (removing individualized suspicion requirement).

II. THE GAG PROVISION IN SECTION 2709(C) SHOULD BE INVALIDATED ON ITS FACE.

A. The gag provision in Section 2709(c) imposes an unconstitutional prior restraint.

As plaintiffs discussed in their opening brief, Pl. Br. 6-10, the gag provision set forth in Section 2709(c) imposes a prior restraint on the communications of service providers served with NSLs. Accordingly, the provision must be subjected to the most exacting scrutiny. *See Nebraska Press Association v. Stewart*, 427 U.S. 539, 558-59 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

First, the provision does not merely impose a penalty for a general category of speech but rather stifles speech before it occurs. Whereas a criminal statute may specify penalties for the communication of information not entitled to First Amendment protection, Section 2709(c) states that speech indisputably entitled to First Amendment protection must not be spoken at all. *Compare* 18 U.S.C. 2709(c) (“No [service provider] shall disclose . . .”) *with, e.g.*, N.Y. Penal Law §235.07 (McKinney 1999) (stating that person who promotes obscenity is guilty of felony). Because Section 2709 throttles protected speech before it occurs, the statute constitutes a prior restraint. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *Near*, 283 U.S. at 714 (distinguishing “previous restraints upon publications,” which the Constitution prohibits, from “subsequent punishment,” which the Constitution permits).

The government’s principal argument in response is that “a statute prohibiting categories of disclosures” cannot constitute a prior restraint. Govt Br. 51. The

government offers no rationale, however, for excepting such statutes from the prior restraint rule. In any event, the Supreme Court squarely rejected the argument that legislative restraints are exempt from the prior restraint rule over seventy years ago:

[T]he great and essential rights of the people are secured against legislative as well as against executive ambition. . . . This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.

Near, 283 U.S. at 714 (internal quotation marks omitted).¹¹ Since *Near*, innumerable courts have analyzed “statute[s] prohibiting categories of disclosures” as prior restraints. See, e.g., *Doe v. Gonzalez*, 723 F. Supp. 690, 693 (S.D. Fla. 1988); *First Amendment Coalition v. Judic. Inquiry and Review Bd.*, 784 F.2d 467, 477 (3d Cir. 1986); *Dove Audio, Inc. v. Lungren*, 1995 WL 432631, *2 (C.D. Cal. 1995); *ACLU of Mississippi v. Mabus*, 719 F. Supp. 1345, 1358 (S.D. Miss. 1989); *Gardner v. Bradenton Herald, Inc.*, 413 So. 2d 10, 11 (Fla. 1982); *People v. Denver-Publ’g Co.*, 597 P.2d 1038 (Colo. 1979).

Section 2709(c) must be analyzed as a prior restraint for the additional reason that the statute effectively operates as a licensing scheme. See, e.g., *Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 984 (S.D. Fla. 1990) (“legislation which acts as a prior restraint on expression must be evaluated with a particularly heavy presumption of unconstitutionality”) (emphasis added). As plaintiffs explained in their opening brief, Pl. Br. 18-23, and as discussed further below, see Section II.C, *infra*, Section 2709(c) fails to provide a person of ordinary intelligence a reasonable opportunity to know what speech is prohibited. The consequence is that a service provider is forced to seek the government’s

¹¹ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), is not to the contrary. The challenged statute did not gag speech before it was spoken but rather imposed after-the-fact criminal penalties for certain prohibited disclosures.

permission before engaging in any speech that the government might conceivably understand to implicate the gag provision. In other words, “[t]he statute not only operates to suppress [speech], but to put the [speaker] under an effective censorship.” *Near*, 283 U.S. at 712.

The provision is also subject to strict scrutiny as a content-based restriction on speech. *See Smith v. Daily Mail Publ’g Co.*, 443 U.S. 98, 101-02 (1979) (“Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.”). The government’s contention that the statute is not content-based because it does not discriminate on the basis of viewpoint, Govt Br. 51-52, is founded on a fundamental misunderstanding of the law. A statute is a content-based restriction on speech if it “prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses,” that is, where [one] must examine the content of the speech to determine the applicability of the [statute].” *Savago v. Vill. of New Paltz*, 214 F. Supp. 2d 252, 257 (N.D.N.Y. 2002) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992)). Section 2709 clearly fits this definition. To determine whether a service provider has violated the gag provision, “[one] must examine the content of the speech.” *Id.* It is impossible to know whether a service provider has violated the gag provision without knowing the content of the service provider’s speech.

The fact that Section 2709(c) is not viewpoint discriminatory, then, does not remove it from the realm of strict scrutiny. In *Baugh v. Judicial Inquiry and Review Comm’n*, 907 F.2d 440, 443 (4th Cir. 1990), the state defended a challenged confidentiality statute as content-neutral “because it [did] not bar criticism of judges and

applied equally to a judge's supporters and critics." Rejecting this argument, the Fourth Circuit explained that the Commission "misconstrued the thrust of content-neutrality analysis and confused that analysis with the distinct concept of viewpoint neutrality." *Id.* Rather, the court recognized that an "outright, direct ban on speech concerning [a] single topic can only be justified by the content of the speech," and therefore by definition is not content-neutral. *Id.* at 444.

Unsurprisingly, other courts that have considered the constitutionality of non-disclosure provisions have analyzed them as content-based restrictions on speech. *See, e.g., Kamasinski v. Judicial Review Council*, 44 F.3d 106, 109 (2d Cir. 1994) ("[w]e agree that the restrictions here are content-based, and that strict scrutiny is the correct standard"); *Doe v. Supreme Court of Florida*, 734 F. Supp. at 985 ("confidentiality provision, which absolutely bars certain speech, cannot simply be characterized as a time, place, and manner restriction"); *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 854 (D.R.I. 1989) (observing that non-disclosure provisions are "content-based regulations in the purest sense of the word").¹²

Whether viewed as a prior restraint or a content-based restriction on speech, then, Section 2709(c) must be subject to the most exacting scrutiny.

¹² The government writes that *Butterworth*, *Hoffman-Pugh*, and *First Amendment Coalition* "did not invoke strict scrutiny . . . making it clear that the traditional strict scrutiny urged by Plaintiffs is inappropriate." Govt Br. 52 n.18. This statement is misleading, to say the least. None of those cases explicitly addressed the question of which level of scrutiny should apply. To the extent that the cases include any discussion of the appropriate standard to apply, the language suggests that strict scrutiny is the appropriate standard. *See, e.g., Butterworth*, 494 U.S. at 632 ("where a person lawfully obtains truthful information about a matter of public significance, . . . state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order").

B. Section 2709(c) fails strict scrutiny.

Because Section 2709(c) is subject to strict scrutiny, the government has the burden of establishing that the gag provision is a narrowly tailored means of addressing a compelling government interest. *See, e.g., Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004); *Reno v. ACLU*, 521 U.S. at 874; *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). As plaintiffs' opening brief makes clear, Pl. Br. 10, plaintiffs readily acknowledge that the government has a compelling interest in protecting national security. Once again, however, the mere invocation of that interest cannot justify wholesale restrictions on constitutional rights. *See, e.g., New York Times*, 403 U.S. at 719 (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment); *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* by 469 U.S. 1200 (1985).

The government does not satisfy strict scrutiny by merely invoking its compelling interest in national security; it must prove that Section 2709(c) is narrowly tailored to advance that interest through means least restrictive of First Amendment rights:

Any restriction on First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Carroll v. President and Comm'rs of Princess Anne County, 393 U.S. 175, 183-84 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). As plaintiffs discussed in their opening brief, Pl. Br. 13-18, Section 2709(c) suppresses far more speech than can be

justified by the government's legitimate interest in protecting national security, however generously that interest is conceived.

Section 2709(c) fails narrow tailoring for at least three reasons. First, it imposes a gag with respect to every NSL, rather than requiring a judicial determination of whether secrecy is necessary in any particular case. Second, it imposes an indefinite gag, rather than one that is tied in duration to the need for secrecy. Third, it suppresses a broad range of non-sensitive information.

1. Section 2709(c) fails narrow tailoring because it does not require the government to justify the imposition of a gag on a case-by-case basis to a court.

The First Amendment generally requires that prior restraints on speech be imposed, if at all, on a case-by-case basis to a court. *See* Pl. Br. 11; *The Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (rejecting publication ban in part because it imposed “categorical prohibitions” upon media access); *Capital Cities Media Inc. v. Toole*, 463 U.S. 1303, 1307 (1983) (“In an extraordinary case such a restriction might be justified, but the justifications must be adduced on a case-by-case basis . . . and less restrictive alternatives must be adopted if feasible.”). Section 2709(c) requires no such case-by-case determination. Rather, the statute imposes a broad and indefinite gag with respect to every NSL issued by the FBI.

Section 2709(c) is particularly invidious because the gag is imposed without judicial oversight of any kind. When the FBI issues an NSL under Section 2709, the gag applies as a matter of course. No judge is asked to determine whether the gag is necessary in the particular case or whether the gag is tailored to the government's need for secrecy in the particular case. Nor is any judge asked to determine how long the gag

should persist. Section 2709 cedes all authority to the government to determine whether, and to what extent, constitutional rights must be restricted to accommodate the government's asserted security needs. Govt Br. 15-16, 55-56. Ironically, the Supreme Court emphatically rejected this kind of unchecked exercise of executive branch power on the same day that the government filed its brief in this case. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (holding that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens"); *id.* (noting that, whether the executive is directing a conventional war or a "war" on terrorism, the Constitution "envisions a role for all three branches when individual liberties are at stake."); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting) ("Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law.").

The government furnishes no justification for a broad and indefinite gag that applies uniformly in every case without judicial oversight. Instead, it offers a series of hypotheticals that might justify non-disclosure orders in particular cases.¹³ Govt Br. 56-57. The relevant constitutional question, however, is whether the *blanket* gag imposed by Section 2790(c) is a narrowly tailored means of addressing a need for secrecy that will arise in only some cases. The government never explains why its interests could not be

¹³ The government points to a considerable amount of legislative history indicating Congress's fear that disclosure of an NSL could jeopardize the underlying foreign intelligence investigation. Govt Br. 38-39. All of the legislative history to which the government points, however, relates to *pre*-Patriot Act provisions that could be used only against people who were *themselves* suspected of being terrorists or spies. The government cites no legislative history indicating that Congress even considered the implications of retaining the gag provision once the individualized suspicion requirement had been removed.

accommodated in a less restrictive manner – that is, through a provision that allowed it to obtain judicial non-disclosure orders on a case-by-case basis. Notably, even the government appears to concede that the need for secrecy in fact varies depending on the case. Govt Br. 58 [REDACTED]

The few administrative subpoena powers that authorize the FBI to restrict the speech of those served with subpoenas all require case-by-case determinations of whether secrecy is necessary. *See* 18 U.S.C. §3486(a)(6)(B) (administrative subpoenas in health care fraud investigations); ATEA, §3(d)(1), (e). Under these statutes, the government cannot silence a person served with a subpoena unless a judge determines that secrecy is necessary in the particular case. As plaintiffs noted in their opening brief, Pl. Br. 11-12, most administrative subpoena statutes do not contemplate non-disclosure orders at all.

As the government acknowledges, Govt Br. 60, the grand jury subpoena rule similarly forecloses the government from silencing a witness except on a case-by-case showing of necessity to a court. *See, e.g., United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996); *Fernandez Diamante*, 814 F.2d at 70. This is true even though grand juries routinely investigate the most serious crimes, including crimes related to terrorism. *See, e.g., United States v. Awadallah*, 349 F.3d 42, 45 (2d Cir. 2003) (“In the days immediately following September 11, 2001, the United States Attorney for the Southern District of New York initiated a grand jury investigation into the terrorist attacks.”). Even the proposed Anti-Terrorism Tools Enhancement Act, which would extend the FBI’s administrative subpoena authority, permits the FBI to impose a non-disclosure obligation

only upon a case-by-case determination that secrecy is necessary. *See* ATEA, §3(d)(1). This is true even though the new authority is to be used *only* in terrorism cases. *Id.* §3(a) (stating that authority may be invoked “[i]n any investigation concerning a Federal crime of terrorism”).¹⁴

The government argues that Section 2709(c) is justified because foreign intelligence and terrorism investigations are different in kind from other types of investigations. It ominously warns that without Section 2709, the FBI would face a “Hobson’s choice” – that is, a choice between “(1) pursuing an investigative lead with a third party, with the risk that the third party notifies the target of the investigation, and (2) foregoing the investigative lead.” Govt Br. 44, 60. This argument, however, once again fails to justify a categorical gag. Requiring the FBI to make a case-by-case showing before broadly gagging those served with NSLs would not force the FBI into a choice between tipping off a target and foregoing an investigation. Even without Section 2709(c)’s categorical gag, the FBI could still obtain a judicial orders requiring particular service providers to keep narrow categories of information confidential. As noted above, the FBI sometimes obtains such orders in grand jury investigations.

The government’s only other argument for a broad and indefinite gag that applies uniformly in every case is that “the disclosure of even seemingly ‘non-sensitive’ or innocuous information concerning a particular NSL can undermine the integrity of a foreign counterintelligence or counter-terrorism investigation.” Govt Br. 43. The courts

¹⁴ In an attempt to show that Section 2709(c) is not extraordinary, the government points to the gag provisions associated with the wiretap and physical search sections of the Foreign Intelligence Surveillance Act. Govt Br. 39-41. But the FBI cannot conduct surveillance under those provisions without the prior approval of a judge. *See* 50 U.S.C. §1805 (electronic surveillance); *id.* §1824 (physical searches).

have never accepted this “mosaic” argument in circumstances analogous to those presented here. Most of the cases on which the government relies involve requests for information under the Freedom of Information Act. See *CLA v. Sims*, 471 U.S. 159, 178 (1985); *Center for Nat’l Sec. Studies v. U.S. Department of Justice*, 331 F.3d 918, 929 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004). In that context, however, the government invokes the “mosaic” argument as a *shield* – as a means of withholding information. Here, by contrast, the government invokes the mosaic argument as a *sword* – as a means of compelling a private citizen not to speak. The government simply may not gag in advance all persons who receive NSLs from disclosing “even seemingly . . . innocuous” information on the basis of a categorical, non-particularized claim that some future disclosure might harm an investigation. Indeed, were this theory to be adopted by the courts, it is difficult to conceive of speech that the government could not suppress.¹⁵

Because the gag provision does not require the government to make a case-by-case showing that secrecy is necessary, the gag imposed with respect to any particular NSL is not tailored in any way to the government’s need for secrecy. The one-size-fits-all philosophy codified in Section 2709(c) cannot be reconciled with the First

¹⁵ Notably, at least one court that has found the “mosaic” theory “compelling” has rejected its invocation to justify a blanket secrecy rule – in that case, the blanket closure of immigration hearings. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). The Court found that the “Government [had] offer[ed] no persuasive argument as to why [its] concerns [could] not be addressed on a case by case basis.” *Id.* Accordingly, the Court found that the blanket closure was not “narrowly tailored.” *Id.*

In a handful of cases, courts have accepted the mosaic argument to allow the government to gag CIA employees. See, e.g., *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972). Obviously, plaintiff ██████ is not a government employee, let alone a CIA agent. These cases have no application, then, in the present context. See *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (“As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.”).

Amendment's requirement that restrictions on speech be narrowly tailored. *See, e.g., In re Grand Jury Subpoena*, 103 F.3d 234, 242 (2d Cir. 1996) (finding district court's sealing order to be narrowly tailored because the order was of limited duration and did not prevent the witness from disclosing the mere fact that he had been subpoenaed and had appeared before the grand jury); *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993) (striking down district court's gag on defense attorneys on the grounds that a gag order must be "no broader than necessary" to achieve the compelling interest of ensuring a fair trial); *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987) (finding that "no comment" order preventing defendant from publicly discussing his case was not narrowly tailored).

2. Section 2709(c) fails narrow tailoring because the gag it imposes is indefinite.

Section 2709(c) also fails strict scrutiny because the gag it imposes is indefinite. Almost by definition, a gag that is *never* lifted cannot be narrowly tailored. The Supreme Court has expressly held that such indefinite restraints are impermissible. *See Butterworth v. Smith*, 494 U.S. 624 (1990); *see also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 708 (6th Cir. 2002); *see also* Pl. Br. 16. Again, any legitimate need for secrecy could easily be accommodated in a less restrictive way through a time-limited restraint. Other statutory gag provisions do not impose indefinite restraints on speech, but instead place the burden of restricting speech on the government, where it belongs. *See, e.g.*, 18 U.S.C. §3486(a)(6)(A); 18 U.S.C. §2705(b); *id.* §2705(a)(1); *see also* Pl. Br. 16-17.

The government's chief response is to suggest that the gag is not *really* indefinite. It argues that a service provider, "believing that there is no longer a need for non-disclosure in a particular case," could "pursu[e] an 'as applied' challenge to the continued

application of the non-disclosure provision to it.” Govt Br. 61 n.24. This argument, which the government understandably relegates to a footnote, is no answer to the statute’s constitutional defects. It is not the citizen’s burden to show that his speech is permitted; it is the government’s burden to show that a restriction on speech is necessary. *See, e.g., Ashcroft v. ACLU*, 124 S. Ct. at 2791; *Transp. Alternatives, Inc. v. City of New York*, 218 F. Supp. 2d 423, 426 (S.D.N.Y. 2002), *aff’d*, 340 F.3d 72 (2d Cir. 2003); *Nakatomi Inv. v. City of Schenectady*, 949 F. Supp. 988, 991, 996-97 (N.D.N.Y. 1997). The government’s proposal is also unworkable as a practical matter. Service providers will generally have no idea when secrecy is no longer required, because almost all of the relevant information is in the government’s possession. The government’s proposal would require a service provider to file “as applied” challenges periodically in the hopes that whatever government interest justified the gag in the first place has since disappeared.¹⁶ Plainly, such a system is not consistent with the First Amendment.

3. Section 2709(c) fails narrow tailoring because it unnecessarily suppresses a broad array of non-sensitive information.

Finally, Section 2709(c) is not narrowly tailored because it unnecessarily suppresses a broad array of non-sensitive information. In their opening brief, plaintiffs identified numerous ways in which the statute suppresses far more speech than necessary. Pl. Br. at 13-18. For example, the statute prevents a service provider from disclosing the mere fact that the FBI sought or obtained information from it, from disclosing the categories of information sought by an NSL, and from disclosing generic language in the NSL unrelated to any particular investigation. It also prohibits a service provider from

¹⁶ As discussed above, the gag itself also prohibits such challenges. *See* Section I.A, *supra*.

consulting an attorney and from *ever* notifying the subject of the NSL that the FBI has obtained information about him – even if the subject of the NSL is not himself the target of any investigation. The way in which Section 2709(c) has been applied in this case makes clear the wide range of innocuous information that the provision suppresses. *See* Section III.B, *infra*. The government has offered no justification for restricting such a broad range of speech, and it has certainly not offered a justification for restricting such a broad range of speech in every case.

Perhaps the most egregious and unjustified censorship imposed by the statute relates to the category of information that is most clearly gagged: no service provider may disclose – *ever* – the mere fact that the FBI has sought information from it. Suppressing this information keeps the public entirely in the dark about the exercise of an intrusive government power and prevents innocent people from ever learning that their rights may have been violated. Yet disclosing the mere fact that the government has exercised its power will rarely, if ever, reveal any detail that could jeopardize an investigation. The government insists that disclosing the fact that an NSL has been served would run the risk of alerting the target of the NSL to the existence of the investigation. Govt Br. 57. But this risk does not exist if, for example, the subject of the NSL is not the target of the investigation, the service provider does not reveal the target's name, the investigation has been closed, the existence of the investigation is already known to the target, or the government itself has publicized the investigation. In other words, in most cases the risk simply does not exist.

The government's objection to the disclosure of the general categories of information sought by an NSL and the generic language of an NSL is also unjustified.

Notably, the ban on such disclosure prevents service providers not simply from criticizing the FBI's use of the statute in particular cases but from criticizing the manner that the FBI is using the statute more generally. [REDACTED] Decl. ¶30 ("I find it ironic that before I received the NSL, I freely engaged in political debate on the government's use of the Patriot Act. But now that I have received one of these letters and I know much more about the way the Patriot Act works, I am prevented from talking."); *id.* ¶¶26-29. Because of the gag provision, the public does not know, for example, how the FBI has interpreted the term "electronic communication transactional record." 18 U.S.C. § 2709(a) (stating that the FBI may demand "subscriber information and toll billing records information, or electronic communication transactional records"). In other words, the public does not know what kinds of records the FBI can secretly demand under the statute.

Section 2709(c) is particularly problematic because the speech it suppresses is speech concerning government conduct. The government contends that "the statute does not prohibit a person or entity from . . . criticizing the authority that the statute grants the FBI." Govt Br. 45. Yet Section 2709 clearly gags service providers from criticizing the actual *exercise* of government authority. *See* Section XX, *infra*. As the Supreme Court has emphasized, "[t]here is no question that speech critical of the *exercise* of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (emphasis added); *see also Butterworth*, 494 U.S. at 632 ("information relating to alleged governmental misconduct" is "speech which has traditionally been recognized as lying at the core of the First Amendment"). The Constitution does not permit the government to edit the script of public debate, as it has

done in this case. See Section III.B, *infra*. “[S]peech critical of the government is precisely the kind of speech that the First Amendment was designed to protect” from state interference. *Piesco v. City of New York Dep’t of Personnel*, 933 F.2d 1149, 1157 (2d Cir. 1991), *cert. denied*, 502 U.S. 921 (1991).¹⁷

The government insists that similarly broad gags have been upheld by other courts, relying principally on *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), and *Kamasinski*. Both cases are easily distinguished. First, each of these cases imposed a gag that was limited in duration, not permanent. See *Rhinehart*, 467 U.S. at 22; *Kamasinski*, 44 F.2d at 108. Second, each of these cases involved a gag imposed only after the subject of the restriction had affirmatively and voluntarily invoked the process of a court. See *Rhinehart*, 467 U.S. at 22 (“continued court control over . . . discovered information does not raise the same specter of government censorship that such control might suggest in other situations”); *id.* at 34 (“judicial limitations on a party’s ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context”); *Kamasinski*, 44 F.2d at 208.¹⁸ Section 2709(c),

¹⁷ On its face, Section 2709(c) also prohibits a service provider from disclosing a national security letter even to an attorney. The government offers no justification for such a gag but instead argues, implausibly, that the statute exempts such disclosures. With no express exemption in the statute, the statute is at best unconstitutionally vague. See Section II.C, *infra*.

¹⁸ *Rhinehart* is distinguishable on the additional grounds that (i) the protective order in that case was issued by a judge, see 467 U.S. at 27; and (ii) the protective order in that case was issued on a particularized showing of necessity, see *id.* at 26-27.

Kamasinski is also distinguishable because the speech suppressed did not involve information about government activity. Indeed, the Second Circuit expressly noted that the statute would have been unconstitutional had it restricted a person from speaking about government activity. See *id.* at 110 (“Penalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of

by contrast, gags service providers who have not sought a court's assistance in any way. Section 2709 conscripts service providers into the FBI's service and then bars them from discussing the coercion and even from disclosing the exercise of government power in the most general terms.

In summary, Section 2709(c) is far from narrowly tailored, and the government offers no persuasive argument to the contrary. Any legitimate security concerns could easily be accommodated by allowing the government to obtain judicial non-disclosure orders on a case-by-case basis.

C. Section 2709(c) is unconstitutionally vague.

As plaintiffs noted in their opening brief, Pl. Br. 18-23, Section 2709(c) is unconstitutionally vague because it fails to provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited and fails to provide explicit standards to those who apply and enforce the provision. The government insists that the statute permits a service provider to consult an attorney, Govt Br. 64, to file a motion to quash, Govt Br. 23, and to file an as-applied challenge to the gag provision, Govt Br. 61 n.24. None of this, however, can be divined from the face of the statute. On the contrary, the plain language of the statute conveys to the service provider that it is prohibited by federal law from disclosing – “to any person” – that the FBI sought or obtained information from it.

The government's principal argument is that “[t]he only proper and rational reading of the word ‘disclose’ in §2709(c) excludes a confidential, privileged communication to an attorney – who cannot divulge the information further – for the

the First Amendment . . . and we agree with the district court that such a prohibition would be unconstitutional.”).

purpose of securing legal advice with respect to an FBI request for records.” Govt Br. 64. But obviously the word “disclose” is not ordinarily used in this way. *See American Heritage Dictionary* (3d ed., 1992) (defining “disclose” as “to expose to view” or “to make known”); *see also Black’s Law Dictionary* (defining “disclosure” as “the act or process of making known something that was previously unknown”). Moreover, the phrase “any person” clearly encompasses attorneys, judges, and court clerks.¹⁹

The government appears to recognize that the statute is not as clear as it might be. Govt Br. 62 (arguing that Constitution does not require “mathematical certainty”). It contends, however, that any deficiencies in the statute’s wording must be attributed to “limitations inherent in the English language.” Govt Br. 62. But Congress has had no difficulty avoiding Section 2709(c)’s deficiencies in other contexts. Indeed, Congress has drafted numerous subpoena statutes that expressly provide for motions to quash. *See, e.g., Fed. R. Crim. P. 17(c)(2); Fed. R. Civ. P. 45(c)(3); 18 U.S.C. §1968(h); 18 U.S.C. §3486(a)(5); ATEA §3(e).* Where such statutes include non-disclosure provisions, they

¹⁹ Notably, the government has itself exploited the statute’s vagueness. In its brief, the government does not say that the statute permits a service provider to consult an attorney *concerning a possible challenge to an NSL*. Rather, it takes the position that an ECSP may consult an attorney “*to the extent necessary to fulfill the FBI request.*” Govt Br. 64 n.27 (emphasis added). The government recently took the same vulpine position with respect to Section 215 of the Patriot Act, which authorizes the FBI to compel the disclosure of “tangible things” and includes non-disclosure language similar to that of Section 2709(c). In May 2002, the Senate Judiciary Committee submitted a series of oversight questions relating to the surveillance provisions of the Patriot Act, including Section 215. One of the questions asked, “Does the Department interpret [the gag] provision to prohibit a person receiving an order from communicating with a lawyer about how he or she should respond?” Second Beeson Decl. Exh. 15. The Justice Department responded: “We do not interpret this [provision] to mean that an individual or a corporation could not discuss the order with their lawyer, *at least if such discussion was necessary to produce the tangible things.*” *Id.* (emphasis added).

expressly exempt disclosures to attorneys. *See, e.g.*, 18 U.S.C. §3486(a)(6)(A); ATEA §3(a).²⁰

Especially given that the statute restricts speech protected by the First Amendment, Section 2709(c) is simply not drafted with the specificity that the Constitution demands. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974) (“[w]here a statute’s literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.”); *Button*, 371 U.S. at 433 (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).²¹

III. THE [REDACTED] NSL VIOLATES THE FIRST, FOURTH AND FIFTH AMENDMENTS.

Section 2709 is unconstitutional and should be invalidated on its face. Even if the statute is not facially invalid, however, the national security letter issued in this case fails to satisfy constitutional scrutiny. As discussed below, the government has not come close to meeting its constitutional burden – either for obtaining records about an anonymous speaker or for subjecting plaintiffs to a broad and indefinite prior restraint.

²⁰ Section 2709(c) also lacks an intent requirement, which courts have held is relevant in determining whether a statute is unconstitutionally vague. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979). *Compare* 18 U.S.C. §2232(c) (setting out criminal penalties for person who, with intent to obstruct investigation, provides prior notice to subject of lawful search warrant or surveillance).

²¹ Plaintiffs note that an injunction barring use of Section 2709 will not prevent the FBI from obtaining records through other, constitutionally valid procedures, or from seeking judicial orders, upon particularized showings of necessity, that would temporarily restrict disclosures related to individual demands for records. Consequently, enjoining the FBI from relying on Section 2709 will not undermine any legitimate government interest.

A. The [REDACTED] NSL is invalid because the government has not demonstrated a compelling need for the information or shown that the demand is narrowly drawn.

Because the records sought by the [REDACTED] NSL implicate First Amendment activity, *see* Section I.B, *supra*, the letter must be held invalid unless the government can demonstrate a compelling need for the records and show that the demand is narrowly drawn. *See* Pl. Br. 32-34. Though the government disputes the application of this standard, *see* Section I.B, *supra*, even the government concedes that it must establish “some showing of need” when fundamental First Amendment rights are at stake, Govt Br. at 33, 35. Yet the government has offered no justification whatsoever for its demand that plaintiff [REDACTED] disclose, among other things, [REDACTED]

[REDACTED] Decl. Exh. 1. Most importantly, the government offers no justification for its demand that plaintiff [REDACTED]

[REDACTED] *See McIntyre*, 514 U.S. at 342, *Melvin*, 836 A.2d at 50; *2theMart.com*, 140 F. Supp. 2d at 1093; *Dendrite*, 775 A.2d at 771; *seescandy.com*, 185 F.R.D. at 578. The government also fails to justify the demand that [REDACTED] disclose [REDACTED]

The government does not state whether the subject of the NSL is an innocent witness who may have information relevant to another investigation or the actual target of an investigation herself – a fact of obvious relevance to whether the burden on the

speaker's First Amendment rights is justified. Rather than offer a justification for the compelled disclosure of [REDACTED] records, the government offers only arguments to justify *hypothetical* NSLs. See Section II.B, *supra*. Because the government offers no justification for the [REDACTED] NSL, the letter is unconstitutional and plaintiffs are entitled to judgment as a matter of law.²²

B. The gag imposed by the [REDACTED] NSL must be invalidated because the government has not satisfied the strict constitutional scrutiny required to justify such a broad and indefinite restraint on protected speech.

1. The gag imposed by the [REDACTED] NSL has required plaintiffs to seek permission from the government before engaging in speech protected by the First Amendment.

As discussed above, gag orders imposed by Section 2709(c) are subject to the most exacting scrutiny because they are content-based regulations of speech and operate as prior restraints. See Section II.A, *supra*. Despite the government's arguments to the contrary, see Govt Br. at 50-51 & n.16, the gag imposed by the [REDACTED] NSL has clearly operated as an unconstitutional licensing scheme. Plaintiffs have had to seek permission from the government before disclosing – to any person – even innocuous information unrelated to the underlying investigation. The breadth of the gag led plaintiff [REDACTED] to seek prior permission before even speaking with an attorney about the NSL. [REDACTED] Decl. ¶16. The government has insisted that the gag mandates prior

²² The government states, without elaboration, that “there can be no question that [REDACTED] Govt Br. 35. It cites to an “Ex Parte FBI Declaration” which plaintiffs of course have not seen. As plaintiffs discuss in detail in the accompanying motion to exclude the *ex parte* declaration, the submission of secret evidence in support of summary judgment is manifestly unjust and improper, particularly in a case alleging a constitutional violation. See Plaintiffs’ Motion to Exclude *Ex Parte* Declaration Filed in Support of the Government’s Cross Motion to Dismiss the Complaint or for Summary Judgment.

government review of every word in virtually every document written by the plaintiffs concerning this case. *See* Beeson Decl. Exh. 5. Plaintiffs may not disclose or discuss *even information about their facial challenge to the statute* in these documents before getting explicit government approval to do so. *Id.* This pre-screening arrangement, which the gag effectively imposes, has all of the earmarks of an unconstitutional licensing scheme. *See* Section II.A, *supra*. Under the strict constitutional scrutiny required for such prior restraints, the government has not overcome the strong presumption that the gag violates the First Amendment.

2. The gag imposed by the [REDACTED] NSL has suppressed a wide array of non-sensitive speech in this case and is far from narrowly tailored.

As detailed in plaintiffs' opening brief and the accompanying declarations and exhibits, the gag has suppressed a broad range of protected speech in this case.²³ The vast majority of the information gagged *reveals nothing whatsoever about the details of the underlying investigation*. Plaintiffs have been prohibited from disclosing the mere fact that the government has used the NSL power, from describing the general categories of information sought by the NSL, and from informing the public, press, and Congress about the FBI's use of a controversial federal statute. Plaintiff [REDACTED] has been gagged from telling anyone that it has challenged the constitutionality of Section 2709. Plaintiff ACLU Foundation has been gagged from telling anyone that it represents a service provider that was served with an NSL. Since the filing of plaintiffs' motion for summary

²³ In addition to restricting far too much speech, the gag fails narrow tailoring because it is indefinite, and will gag the plaintiffs far beyond any particular need for secrecy in this case. *See* Section II.B, *supra*. Even assuming that an indefinite gag is ever justified, which plaintiffs dispute, *see* Section II.B, *supra*, the government offers no specific justification for an indefinite gag in this case.

judgment, the government has continued to rely on the gag to justify a prior restraint even on speech that could not possibly pose any threat to national security if disclosed. *See generally* Second Beeson Decl., at ¶¶3-16. In perhaps the most extreme recent example, the government insisted on redacting the following direct quote from *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 314 (1972), which appeared in a letter from plaintiffs to the Court:

The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Second Beeson Decl. ¶9; *see also* Second Beeson Decl. Exh. 6. The government changed its position only after plaintiffs disputed the redaction. *See* Second Beeson Decl. ¶9; Second Beeson Decl. Exh. 7-8. Quite apart from the irony of this particular restraint on speech, this episode starkly illustrates the danger of the pernicious and standardless licensing scheme authorized by the gag.

The government has also insisted that plaintiffs may not publicly refer to "the government's use of" the NSL power or reference the simple fact that the gag has had an effect in this case. *See, e.g.,* Second Beeson Decl. ¶4 (noting the government's redaction of this sentence: "The facts in the instant case illustrate the problem."). In addition, plaintiffs were forced to redact a portion of the Romero affidavit recounting a conversation between Mr. Romero and an ACLU donor. *See* Second Beeson Decl. ¶12 ("He then asked me, theoretically, whether we could challenge the NSL power at all if we did not represent an entity that had already been served with one."). Though the donor can recount his conversation with Mr. Romero to the world, Mr. Romero is inexplicably gagged from recounting the same conversation.

The government has also insisted on gagging plaintiffs from disclosing the mere fact that an NSL was served *even after the government itself inadvertently disclosed this simple fact to the public*. See Second Beeson Decl. ¶¶17-18 (noting that government disclosed the words “the challenged NSL” in document filed on the public docket and sent to attorneys for *amici*). Once speech is in the public domain, there is no conceivable justification for gagging others from discussing it. *Florida Star*, 491 U.S. at 535 (once truthful information is in the public domain, its dissemination cannot be constitutionally constrained).

The gag has also prevented plaintiffs from criticizing the government, despite the government’s arguments to the contrary. Govt Br. at 52-53. Specifically, the gag has prevented plaintiffs from criticizing the government’s exercise of the NSL authority in this case and even from mentioning that the government has used the power. Though disclosure of this information poses no threat to national security or any particular investigation, disclosure is crucial to the public debate about whether new Patriot Act powers are justified. Romero Decl. ¶¶18-21, 26-27; [REDACTED] Decl. ¶¶29-30. To illustrate the problem, the gag would prevent plaintiffs from saying: “I believe that the government has not justified the broad gag provisions in the Patriot Act because I myself have been gagged. In my opinion, the information that I am prevented from disclosing poses no conceivable threat to national security.”

Though plaintiffs acknowledge that the government may sometimes have a compelling need for a temporary restraint to prevent disclosure of a narrow category of information about an NSL, the government has not even attempted to justify the need for

the broad and indefinite gag that has been imposed in this case.²⁴ The government offers only general and conclusory justifications, not particular to this case, that come nowhere close to meeting the compelling need standard. See Section I.B.2, *supra*. What conceivable threat is posed by a generic criticism, as described above, of the government's use of the gag? How could speaking the words "as evidenced by the effect of the gag in this case" or "the government's use of [a dangerous new power]" possibly threaten national security when such words do not convey any information about an underlying investigation? See Second Beeson Decl., ¶3. How could Mr. Romero's theoretical discussion with a donor provide any clue to terrorists? See Second Beeson Decl., ¶12. How could uttering facts already known to the public possibly jeopardize national security? See Second Beeson Decl., ¶¶3-4, 12, 18. The imposition of a broad and indefinite gag in this case is a classic example of an irresponsible invocation of national security to justify unnecessary secrecy. *United States v. United States Dist. Court for the Eastern Dist. of Mich.*, 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."). It minimizes real threats to national security to suggest that innocuous information must be kept from the public.²⁵ The government has utterly failed to

²⁴ For the reasons explained in footnote 22, *supra*, the government's reliance on secret evidence is flatly prohibited.

²⁵ As the 9/11 Commission recently observed, "Secrecy, while necessary, can also harm oversight. The overall budget of the intelligence community is classified, as are most of its activities. Thus, the Intelligence committees cannot take advantage of democracy's best oversight mechanism: public disclosure. This makes them significantly different from other congressional oversight committees, which are often spurred into

establish a compelling need that would justify the broad gag that has been imposed in this case.

3. The gag imposed by the [REDACTED] NSL is unconstitutionally vague.

As plaintiffs pointed out in their opening brief, the government's actions in this case show that even the government does not know what the gag provision means. Pl. Br. at 20-21. Since plaintiffs filed their opening brief, the government has taken further inconsistent positions over what plaintiffs may and may not say under the gag. Initially, for example, the government told plaintiffs that the gag provision prohibited disclosure of the mere fact that the ACLU represents another plaintiff in this lawsuit. See Beeson Decl. ¶11. The government later allowed disclosure of portions of [REDACTED] declaration, submitted in support of plaintiffs' summary judgment motion, that confirm the existence of another client, and the fact that the client is an Internet Service Provider. See Second Beeson Decl. ¶13.

In addition, the government has adopted numerous inconsistent positions on whether plaintiffs may disclose the mere fact that the gag provision has had an effect in this case. Second Beeson Decl. ¶¶3-7. For example, plaintiffs are gagged from disclosing the following sentence, which appeared in their opening brief: "That the gag provision is exceedingly broad is evident from the effect of the provision in this case." Second Beeson Decl. ¶4. Yet plaintiffs are allowed to disclose the following sentences from the declarations, which discuss the gag's specific effects: "The gag is preventing us from communicating information that is relevant to the public debate about the Patriot

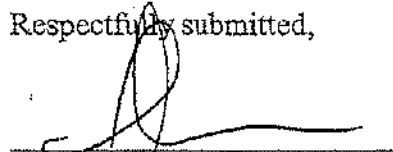
action by the work of investigative journalists and watchdog organizations." The 9/11 Commission Report at 103, available at <<http://www.9-11commission.gov>> (last visited July 29, 2004).

Act.”; “Because of the gag provision, I have not disclosed information about [redacted] this lawsuit to the press and the public.” Second Beeson Decl. ¶15. Plaintiffs can make no sense of the government’s inconsistent positions and consequently, for fear of incurring criminal penalties, they have had to steer far wide of *any* disclosure regarding the effect of the gag in this case. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Even in those truly exceptional circumstances in which the courts have recognized that a compelling government interest may justify a prior restraint on speech, the courts have recognized that the First Amendment requires that the restraint be formulated with a “great[] degree of specificity.” *Goguen*, 415 U.S. at 573. The gag imposed on plaintiffs here clearly fails this test.

CONCLUSION

For the reasons stated above, plaintiffs are entitled to judgment as a matter of law and respectfully urge the Court to enter judgment in their favor.

Respectfully submitted,



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