

UNDER SEAL

05-4896-cv

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiffs-Appellees,

v.

**ALBERTO GONZALES, in his official capacity as Attorney General of the United States,
ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation,
and JOHN ROE, Federal Bureau of Investigation,**

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

REPLY BRIEF FOR THE DEFENDANTS-APPELLANTS

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ARGUMENT

**I. This Court's Decision in *Kamasinski* Provides the Framework
for Determining the Constitutionality of Section 2709(c)**

The federal statute at issue in this case prohibits a private party from disclosing information about a secret government investigation that the party learns only through its own participation in the investigation. In our opening brief, we showed that this

Court and other courts have repeatedly sustained the constitutionality of similar statutes. See *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994); *Hoffman-Pugh v. Keenan*, 338 F.3d 1136 (10th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004); *In re Subpoena to Testify before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir. 1989); *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.3d 467 (3d Cir. 1986) (*en banc*); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). We further showed that Section 2709(c) readily passes constitutional muster when judged against the standards employed in *Kamasinski* and its companion decisions.

In response, the plaintiffs devote considerable effort to distinguishing this case from *Kamasinski*. Given the obstacles that *Kamasinski* places in their path, that effort is unsurprising. But it is also unavailing.

The plaintiffs argue that *Kamasinski* involved restrictions on persons who affirmatively invoked the government's investigatory powers, while Section 2709(c) applies to persons who are drawn into the investigative process on the government's initiative. Br. 33-34. The plaintiffs make no attempt to explain why this distinction has any constitutional significance. In any event, the distinction is inconsistent with *Kamasinski* itself. The statute sustained by this Court in *Kamasinski* prohibited disclosures not only by persons who initiated judicial misconduct inquiries, but also

by “any individual called by the [investigating] council for the purpose of providing information * * * .” 44 F.3d at 109 (quoting statute). The statute thus applied to persons who, like Doe in this case, were called on by the government to provide relevant evidence – and this Court upheld the state’s power to restrict disclosures by those persons as well. *Id.* at 110-12; accord, *Huffman-Pugh*, 338 F.3d at 1139-40 (grand jury witnesses); *In re Subpoena*, 864 F.2d at 1564 (same); *First Amendment Coalition*, 784 F.2d at 478-79 (judicial misconduct inquiry witnesses).

The plaintiffs also argue that *Kamasinski* actually “disallowed the government from suppressing the kind of communication at issue here – speech about government activity.” Br. 34 (emphasis in original). *Kamasinski* did nothing of the sort. *Kamasinski* held that the government could not prohibit disclosure of an individual’s independent knowledge of judicial misconduct, but could restrict disclosure of information learned by the individual through participation in the investigation, and could also restrict disclosure of the fact of the individual’s participation. 44 F.3d at 110. As explained in our opening brief, the information that Doe wishes to disclose – the fact that it is the recipient of an NSL under Section 2709 – falls squarely into the latter two categories of information.

The plaintiffs try to force this case into *Kamasinski*’s first category by arguing that Doe is seeking to “complain[] about government action.” Br. 35 (quoting

district court opinion). But as explained in our opening brief, and as discussed further below, nothing in Section 2709(c) prohibits Doe from complaining about any government action. Doe and the other plaintiffs are free to criticize the government for serving an NSL on a member of the American Library Association that maintains library records – and they have already done just that. The only thing at issue in this appeal is Doe’s desire to disclose the fact that it, rather than some other library institution, happens to be the recipient of the NSL. That fact alone casts no additional light on the wisdom of Section 2709 or the propriety of its use in this case, and prohibiting Doe from disclosing it does not interfere in any way with Doe’s professed desire to criticize the government’s use of its investigative powers under Section 2709.

The plaintiffs argue that Section 2709(c) should not be judged under the constitutional framework provided by *Kamasinski*, but instead should be treated as a presumptively unconstitutional prior restraint. As pointed out in our opening brief, Section 2709(c) lacks the basic attributes of a prior restraint.¹ In any event, if Section

¹ As we have explained, the bare fact that Section 2709(c) makes particular speech unlawful does not turn it into a prior restraint, any more than libel and obscenity laws are prior restraints because they make libelous and obscene speech unlawful. The plaintiffs argue that those laws subject violators to post-speech punishment, while Section 2709(c) does not. Br. 19-20. Under the plaintiffs’ reasoning, *adding* criminal penalties to Section 2709(c) would make it less constitutionally suspect than it is now. The logic of that reasoning is, to say the least,

2709(c) constitutes a prior restraint, then so does the statute that this Court upheld in *Kamasinski*. Because that statute passed muster under the First Amendment, so does this one, regardless of what constitutional label the plaintiffs may wish to attach to it.

II. The Government Has a Compelling Interest in Preventing Doe From Disclosing its Identity

In our opening brief, we explained why counter-terrorism and counter-intelligence investigations are jeopardized by an NSL recipient's disclosure that the government has asked him for information under Section 2709, and why those risks are present in this case. In response, the plaintiffs do not dispute that the government has a compelling interest in preserving the secrecy of NSLs as a general matter, nor do they dispute that those interests would ordinarily be sufficient to sustain the constitutionality of Section 2709(c). Instead, they argue that this case is the exception to the rule. As we now show, that argument is incorrect.

A. The plaintiffs first argue that the government no longer has any legitimate interest in preventing Doe from publicly disclosing its identity because that information was the subject of a *New York Times* article and also appeared

elusive. It is not the *absence* of post-speech sanctions that turns a law into a prior restraint, but the presence of a pre-speech licensing process or a judicial order restraining speech – neither of which is present here.

temporarily on web sites maintained by the federal courts. Br. 22-27. That argument is misconceived both legally and factually.

To begin, the plaintiffs' argument regarding the *New York Times* article assumes that the target has actually *seen* the article. The plaintiffs offer nothing more than speculation for that assumption. They provide no reason to assume that the target reads the *New York Times* at all, much less that he happened to read the *Times* on September 21 and saw the article in question. The *New York Times*'s own circulation data suggest that the opposite assumption is more likely to be correct. For example, the weekday circulation of the *Times* in the Hartford and New Haven markets is less than 22,000, meaning that the great majority of residents in two of Connecticut's largest population centers do *not* read the *Times*. See <<http://www.nytadvertising.com/was/circulation/pages/contentCirculation/0,1067,00.html?l1Id=5&l2Id=23>>. Thus, there is a very real likelihood that the target has never even seen the article on which the plaintiffs place so much weight.

Moreover, even if the target *had* seen the article, the plaintiffs' argument requires one of two further assumptions: either that the target gave the article credence without any confirmation, or that he sought and obtained confirmation from the unnamed judicial web site referenced in the article. At a time when public confidence in the accuracy of news reporting has reached historic lows, and when

only 21 percent of readers in a recent media study stated that they believe most or all of what the *New York Times* reports,² the first assumption is dubious at best. And as explained in our opening brief, the second assumption is even more improbable – because the information was removed from PACER within hours after the article appeared, because the target could not access PACER without disclosing a substantial amount of personal information that he would be unlikely to want to disclose to a government-operated web site, and because the article did not identify PACER as the database in the first place.

Nor is it likely that the target of the investigation learned of Doe’s identity simply because a single document containing unredacted references to Doe was available on the district court’s electronic docket for several weeks prior to September 21. The few unredacted references in that document evidently were never discovered by the news media, despite the close attention that the *New York Times* and other newspapers paid to the case, and there is no evidence whatsoever that they were discovered by anyone else, particularly by the target of the NSL. The plaintiffs do not seriously suggest that the target is likely to have registered with PACER (as required to access the district court’s electronic docket), scoured the hundreds of pages of

² See <<http://people-press.org/reports/display.php3?PageID=838>> (results of study by Pew Research Center for the People and the Press, June 2004).

redacted filings in search of an accidental omission, and discovered this particular one prior to the publication of the *Times* article. And because the document was removed from the electronic docket the same day that the *Times* article was published, the likelihood that the target read the article and then accessed the document is even more improbable.

In short, there is no reason to assume that the target of the NSL in this case actually *is* aware of Doe's identity. In contrast, if the plaintiffs themselves undertake to publicize Doe's identity "to Congress and the public" (Br. 16) as part of a general lobbying campaign against the Patriot Act, as they are seeking to do, the likelihood that the target will become aware of that disclosure will increase dramatically. That prospect amply justifies the continued application of Section 2709(c) in this case.

In conjunction with their factual arguments regarding the disclosure of Doe's identity, the plaintiffs point to a number of cases in which courts have overturned disclosure restrictions on the ground that the information in question had already been made public (Br. 23-24). But in each of those cases, the anticipated harms underlying the disclosure restrictions were ones, such as invasion of privacy, that would result from dissemination of the information to the public at large, regardless of whether

any particular individual learned of the information.³ Those decisions are inapposite here, where the most important reason (although not the only one) for the application of Section 2709(c) is to prevent one person in particular from learning that the government is investigating his actions, and there is no reason to assume that he has become aware of that fact.

B. Apart from the foregoing events, the plaintiffs point to only one other circumstance that is claimed to place this case outside the scope of the concerns animating Section 2709(c): the number of persons who make use of the NSL

³ See *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (statute prohibiting disclosure of rape victim's identity in order, *inter alia*, to protect "the privacy of victims of sexual offenses" and to "encourag[e] victims of such crimes to report these offenses without fear of exposure"); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, J., in Chambers) (order prohibiting disclosure of juror's identities to protect juror privacy and insulate jurors from public pressure); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 608 (1982) (statute closing trials for "the protection of minor victims of sex crimes from further trauma and embarrassment" and "the encouragement of such victims to come forward and testify in a truthful and credible manner"); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) (statute prohibiting public disclosure of identity of juvenile offenders to avoid "encourag[ing] further antisocial conduct and also may[be] caus[ing] the juvenile to lose future employment or suffer other consequences for this single offense"); *Oklahoma Pub. Co. v. District Court*, 430 U.S. 308 (1977) (*per curiam*) (similar judicial order); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (judicial order prohibiting disclosure of inculpatory information about defendant in order to avoid influencing potential jurors); *Virginia Department of State Police v. Washington Post*, 386 F.3d 567, 572-73, 578-79 (4th Cir. 2004) (judicial orders sealing records about identity of incarcerated suspect and evidence linking him to crime).

recipient's electronic communication services. Like the district court, the plaintiffs argue that the target of the NSL in this case is unlikely to be put on alert by the disclosure of Doe's identity because he is only one of a large number of persons who use those services. The plaintiffs suggest that, because the target of an NSL need not himself be engaged in terrorism or espionage, "[t]he universe of potential targets of an NSL * * * is as large as the universe of Doe's users" (Br. 29), and Doe will have no reason to think that he is the particular object of the government's investigative interest.

That argument is misconceived at two different levels. First, contrary to the plaintiffs' suggestion, the overwhelming majority of Doe's users are entirely beyond the reach of Section 2709. Only a tiny number of them are likely to have engaged in activities that would make their transactional records relevant to an authorized counter-terrorism or counterintelligence investigation – the statutory prerequisite for resort to an NSL. The fact that there are many *other* users who are not engaged in such activities will offer little reassurance to the few who are. Second, with respect to the particular individual who is the target of the NSL in this case, the classified declaration makes clear why he will have reason to think that the government is interested in him, rather than someone else, if he learns that the NSL has been served

on this particular institution. We urge the Court to review the classified declaration if it has any doubts on this score.

C. As we showed in our opening brief, a recipient's disclosure of non-public information about an NSL under Section 2709 creates categorical risks that inhere in the conduct of counter-terrorism and counterintelligence cases and are present in all cases. Having made that showing, the government is under no additional obligation to prove that the circumstances of each individual case confirm those risks.

The plaintiffs insist that First Amendment requires the government to make a case-specific showing of harm whenever it wishes to restrict private parties from disclosing information in their possession. To support this proposition, they point to the Supreme Court's decision in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). But *Globe Newspaper* holds nothing of the sort.

In *Globe Newspaper*, the Supreme Court was presented with a First Amendment challenge to a state statute that required the automatic closure of criminal trials during testimony by juvenile victims of sexual crimes. 457 U.S. at 598. In relevant part, the state's justification for the automatic closure rule was "safeguarding the physical and psychological well-being of a minor." *Id.* at 607. The Supreme Court held that, while this interest was a compelling one, it did not justify an

automatic closure rule. Instead, the Court held that the need for closure had to be determined on a case-by-case basis. *Id.* at 607-609.

Far from establishing a universal First Amendment rule, the holding in *Globe Newspapers* is carefully limited to the specific issue before the Court. In *Globe Newspaper*, the state was seeking to close a class of judicial proceedings – criminal trials – that have long been open to the public, both as a matter of historical tradition and constitutional mandate. See *id.* at 605-606. Here, in contrast, both the tradition and the constitutional framework point in the opposite direction. Counter-terrorism and counterintelligence investigations are conducted in secret, not in public view, and cases like *Kamasinski* make clear that the First Amendment does not presumptively entitle persons who participate in secret investigations to destroy the secrecy of the proceedings by publicizing what they have learned. Nothing in *Globe Newspaper* suggests that the case-specific justification needed to overcome the constitutional tradition of open public trials is likewise required in the radically different context of preserving the secrecy of counter-terrorism and counterintelligence investigations.

Moreover, the particular governmental interest that the Court addressed in *Globe Newspapers* – “the protection of minor victims of crime from further trauma and embarrassment” (457 U.S. at 607) – was one that invited case-specific scrutiny, for as the Court emphasized, there might well be cases in which the victims

themselves did not wish to have the trial closed. *Id.* at 608-609. Indeed, the record before the Court suggested that the victims in *Globe Newspapers* itself were not necessarily interested in excluding the press and public. *Id.* Here, in contrast, there is no reason to expect that the government's interest in preserving the secrecy of counter-terrorism and counterintelligence will vary materially from case to case. To the contrary, as explained in our opening brief, the need for secrecy in these investigations is categorical and pervasive. Nothing in *Globe Newspapers* even remotely suggests that this need must be proven over and over again each time an NSL is served.⁴

The plaintiffs also suggest that the government itself conceded that it is obligated to provide case-specific proof in *Doe v. Gonzalez*, No. 05-0570. That suggestion fundamentally misreads our briefs in that case. Our position there, as here, is that the categorical interests underlying Section 2709(c) render it

⁴ In our opening brief, we noted that *Kamasinski* rejected a First Amendment challenge to Connecticut's judicial non-disclosure statute on the basis of the state's general interests without requiring proof that those interests were in jeopardy in the particular circumstances before it. The plaintiffs respond that *Kamasinski* involved a facial rather than an as-applied challenge to the statute. But the Court's decision sustains the constitutionality of the statute in *all* of its applications, including its application to the complainant who brought the suit. While the opinion is not limited to the application immediately before it, it manifestly includes that application. Nothing in the Court's opinion suggests that the Court would have ruled differently if the complainant had sought relief solely for himself.

constitutional in all of its applications. See No. 05-0570, Brief for Defendants-Appellants at 50-54; No. 05-0570, Reply Brief for Defendants-Appellants at 21-24. We went on to argue *in the alternative* that, *if* the government’s interests were assumed not to justify Section 2709(c) in all cases, the appropriate course of action would not be to invalidate the non-disclosure requirement in its entirety, but instead to permit NSL recipients to challenge the requirement on a case-by-case basis. See No. 05-0570, Brief for Defendants-Appellants at 55. Even then, the government emphasized that the burden should be on the plaintiff to demonstrate that the categorical concerns underlying Section 2709(c) are *not* present in a particular case, rather than obligating the government to make the opposite showing. See No. 05-0570, Reply Br. at 25 (relief from non-disclosure requirement permissible only where “it can be shown that the compelling governmental interests underlying the non-disclosure requirement are *not* in jeopardy”) (emphasis added). Our position in No. 05-0570 thus is entirely consistent with our position in this case.

III. The Non-Disclosure Requirement Is Not Preventing Doe from Taking Part in Public Debate about the Patriot Act and Section 2709 Itself

The plaintiffs’ brief paints a vivid picture of Section 2709(c) as an engine of political censorship. In the plaintiffs’ account, the statute (which the plaintiffs insist on describing as an “FBI-imposed gag” rather than an Act of Congress) is

“irreparably harming Doe’s right to engage in core political speech.” Br. 17. It “is preventing Doe from providing a vital firsthand account to Congress and the public,” one that is “necessary for a fully informed debate” about the government’s powers under the Patriot Act. *Id.* at 16. Because of the law, Doe cannot “participat[e] in the Patriot Act debate” and cannot “advocat[e] against the law before Congress and the public.” *Id.* at 38. But for the law, Doe would be free to “immediately lobby Congress for additional safeguards to be added to the Patriot Act” and to “personally mobilize the library community to amend the Patriot Act to address their concerns.” *Id.* at 47.

One can, in principle, imagine a statute that places this kind of draconian restraint on the ability of a private citizen to participate in an ongoing public debate. Such a statute would almost certainly be unconstitutional. But Section 2709(c) is not that statute.

As we discussed at length in our opening brief, the non-disclosure requirement does *not* prohibit Doe from expressing its views about the scope of Section 2709 or from lobbying Congress to revise the statute. Doe is free to criticize the investigative powers conferred on the FBI under Section 2709. Doe is welcome to call the attention of the public and Congress to the fact that libraries can qualify as “electronic service communication providers,” and thereby come within the reach of those

powers. Moreover, nothing prevents Doe from warning that this prospect is not just theoretical but real. Doe is free to tell the world that a member of the American Library Association actually has been served with an NSL under Section 2709. Not only *can* Doe do that, but Doe *has* done it. See A-102-104 (plaintiffs' press release). Having brought this development to the attention of the public and Congress, Doe is likewise free to lobby Congress to add any "safeguards" to Section 2709 that Doe thinks the public interest demands.

For present purposes, the *only* thing that Section 2709(c) prohibits Doe from disclosing is the fact that it, rather than another member of 64,000-member ALA, happens to be the recipient of the NSL in this case. What the plaintiffs have failed to show, despite their efforts, is how and why *that* fact is germane to the public debate over the Patriot Act. Congress may (or may not) regard it as significant that Section 2709 can be used to ask libraries for electronic communication transactional records that are relevant to authorized counter-terrorism and counterintelligence investigations. Congress may (or may not) regard it as significant that Section 2709 has been used for that purpose in this case.⁵ But it is implausible at best that

⁵ The plaintiffs argue that the government's service of an NSL on Doe is inconsistent with past public representations by the government regarding the use of the Patriot Act to obtain library records. We encourage the Court to review the classified declaration to see for itself whether the information being sought here is a "library record" in any conventional sense of that term, and in particular, whether the

Congress would find it significant that this particular institution, rather than some other one, has received the NSL. Indeed, the plaintiffs themselves make no claim that there is anything unique about Doe or that Doe's identity makes the NSL in this case more significant than it would be if another library institution had been served.

The plaintiffs argue that the preliminary injunction will permit them to "provide Congress and the public with a first-hand account of the use of Patriot Act powers." Br. 41. But by its terms, the injunction permits the plaintiffs to disclose only a single fact about this case – Doe's identity. See SPA-31 ("the defendants are hereby stayed from enforcing 18 U.S.C. § 2709(c) against the plaintiffs with regard to Doe's identity"). The plaintiffs themselves emphasize that they are "*not* seek[ing] to disclose any information about the subject of the NSL or any other specific details about the NSL's issuance." Br. 9-10 (emphasis added). Thus, this appeal is not about whether the plaintiffs will be allowed to give a "first-hand account" of the government's use of the NSL in this case, or whether they can fill what they claim are *lacunae* in Congress's knowledge of Section 2709's operation and reach. They have already been permitted to tell the world that an NSL has been served on a library institution, and they are not seeking to disclose more specific details about the case.

government is seeking any information about a patron's borrowing or reading activities.

The plaintiffs suggest that, even though Section 2709(c) does not actually prohibit them from criticizing the FBI's resort to an NSL in this case and from lobbying Congress to restrict the use of NSLs in similar cases in the future, Doe's representatives nevertheless cannot speak publicly because they might be asked whether Doe is the recipient of the NSL in this case. But even if that question were to be asked, merely declining to answer it would not (as the plaintiffs claim) "clearly establish" that Doe is the recipient (Br. 48) and would not violate the non-disclosure requirement. The plaintiffs are therefore free to speak without fear that they will run afoul of the law simply by declining to say whether Doe is the recipient. Moreover, because Section 2709 does not impose any penalties for violations of the non-disclosure requirement, the plaintiffs will not be acting at their peril: even if it were subsequently determined that a refusal to answer a question about Doe's identity did constitute an unlawful disclosure, the plaintiffs would not be in jeopardy of being sanctioned for that action.⁶

⁶ In an effort to suggest that any public statement would place them in jeopardy, the plaintiffs take issue with a variety of redactions to their filings that have been made or proposed by the government. Whether or not the redacted information would "*directly* disclose Doe's identity" (Br. 48), it provides indirect evidence of Doe's identity, and it is for that reason that the government sought the redactions in question. Nothing about these redactions even remotely suggests that Doe would find itself in violation of the non-disclosure requirement by challenging the application of Section 2709 to libraries and lobbying Congress to amend the statute.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be reversed.

Respectfully submitted,

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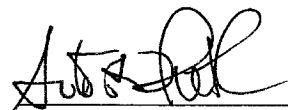
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October 11, 2005

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,502 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in 14-point Times New Roman.

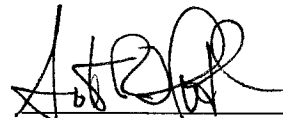


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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2005, I filed and served the foregoing sealed REPLY BRIEF FOR THE DEFENDANTS-APPELLANTS by causing ten copies to be sent to the Clerk of the Court by Fedex overnight mail delivery and by causing two copies to be sent in the same manner to:

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