

2. [REDACTED]

[REDACTED]

3. Plaintiffs submit that Section 2709 is unconstitutional on its face [REDACTED]

[REDACTED]. Plaintiffs further submit that the gag provision is unconstitutionally vague, overbroad, and imposes an unlawful prior restraint on speech.

Plaintiffs seek a declaration that Section 2709 violates the First, Fourth, and Fifth Amendments;

[REDACTED]

[REDACTED]; and an injunction prohibiting the FBI's [REDACTED] use of Section 2709 against plaintiffs or others.

JURISDICTION AND VENUE

4. This case arises under the United States Constitution and the laws of the United States and presents a federal question under Article III of the United States Constitution and 28 U.S.C. § 1331. The Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412. Venue is proper in this district under 28 U.S.C. § 1391(e).

STATUTORY LANGUAGE AT ISSUE

10. Section 2709 is part of the Electronic Communications Privacy Act (ECPA), which Congress enacted in 1986. *See* Pub. L. 99-508, Title II, § 201[a], 100 Stat. 1867 (Oct. 21, 1986) (codified as 18 U.S.C. § 2510, *et seq.*).

11. In its current form, Section 2709 authorizes the FBI to issue NSLs ordering “electronic communication service providers” to disclose “subscriber information,” “toll billing records information,” and “electronic communication transactional records” upon a certification that the information sought is “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709.

12. An “electronic communication service” is “any service which provides to users thereof the ability to send or receive wire or electronic communications.” *Id.* § 2510(15).

13. Section 2709 empowers the FBI to order the disclosure of a wide variety of sensitive and constitutionally protected information, including the identity of a person who has engaged in anonymous speech on the Internet. *See id.* § 2709(b).

14. Section 2709 does not require the FBI to meet a probable cause or individualized suspicion requirement of any kind before issuing an NSL.

15. Section 2709 does not require the FBI to obtain judicial authorization before issuing an NSL.

16. Section 2709 does not specify any means by which the recipient of an NSL can challenge the letter’s validity.

17. Section 2709 does not require the FBI to provide prior, contemporaneous, or post-deprivation notice to an individual whose information is demanded pursuant to an NSL served on a third party, even if the information is constitutionally protected.

18. Section 2709 does not restrict the FBI's use of the information obtained through the issuance of NSLs. The information may be stored electronically and used for large-scale data mining operations.

19. Section 2709 includes a gag provision that prohibits a person served with an NSL from disclosing to any other person that the FBI has sought or obtained records. *See* 18 U.S.C. § 2709(c) ("No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the [FBI] has sought or obtained access to information or records under this section.").

20. The gag provision, which on its face prohibits even consultation with counsel, applies in every case, whether or not the government can demonstrate a need for secrecy. *See id.*

21. The gag provision is indefinite and persists long after any legitimate need for secrecy has expired. *See id.*

22. As originally enacted, Section 2709 could be used only against people suspected of espionage. The original provision permitted the FBI to issue an NSL only if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; *and* (ii) there were specific and articulable facts giving reason to believe that the subject of the NSL was a foreign power or foreign agent. *See* 18 U.S.C. § 2709 (1988).

23. In 1993, Congress relaxed the individualized suspicion requirement. It authorized the FBI to issue an NSL if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; and (ii) there were specific and articulable facts giving reason to believe that *either* (a) the subject of the NSL was a foreign power or foreign agent, *or* (b) the subject had communicated with a person engaged in international terrorism or with a foreign agent or power "under circumstances giving reason to believe that the

communication concerned international terrorism.” *See* Pub. L. 103-142, 107 Stat. 1491 (Nov. 17, 1993).

24. In adopting the 1993 amendments, Congress recognized that “the national security letter is an extraordinary device,” as it is “[e]xempt from the judicial scrutiny normally required for compulsory process.” *See* H.Rep. 103-46 (Mar. 29, 1993).

25. In 2001, through the Patriot Act, Congress further expanded Section 2709 by deleting the individualized suspicion requirement altogether. *See* Pub. L. 107-56, Title V, § 505(a), 115 Stat. 365 (Oct. 26, 2001).

26. As a result of the Patriot Act, the FBI may now use NSLs to obtain sensitive information about innocent individuals who have no connection to espionage or terrorism. *See* 18 U.S.C. § 2709(b).

FACTUAL BACKGROUND

27. The Internet is a uniquely democratic public forum and a medium through which any individual can broadcast his or her message to millions of other people all over the world.

28. A variety of for-profit and not-for-profit entities enable individuals to access and communicate over the Internet. Such entities are “electronic communication service providers” because they provide individuals with the ability to send or receive electronic communications. Such entities include not only what are commonly known as “Internet service providers,” but also universities, businesses, public interest organizations, and libraries.

29. Electronic communication service providers maintain records relating to their subscribers and clients. Such records may include the date the subscriber’s account was opened or closed; the screen names associated with the subscriber’s account; records relating to merchandise bought or sold; billing information, including a credit card or bank account number;

other e-mail addresses associated with the subscriber; Internet Protocol (IP) numbers assigned to the account; website information registered to the account; and the Uniform Resource Locator (URL) assigned to the account.

30. Electronic communication service providers may also have records indicating a subscriber's name, address, and telephone number.

31. Many of those who communicate over the Internet do so anonymously or pseudonymously. This is particularly true of those who engage in political speech.

32. Debate on the Internet is uniquely uninhibited and robust because participants can easily remain anonymous or pseudonymous if they choose.

33. Those Internet speakers who prefer to communicate anonymously are motivated by a variety of concerns. They may prefer anonymity because they fear retaliation or reprisal; because the subjects they discuss are embarrassing, sensitive, or controversial; because they do not want to disclose personal facts about themselves; or because they fear that readers would otherwise dismiss their speech because of their race or religion or because of some other reason unrelated to the content of the speech.

34. Many of those who engage in anonymous or pseudonymous speech on the Internet would engage in self-censorship if they were not confident that their anonymity could be preserved.

35. [REDACTED] is an Internet access [REDACTED] business located and incorporated [REDACTED].

36. [REDACTED] provides a number of Internet related services for its clients. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

37. [REDACTED] has both paying and non-paying clients.

38. [REDACTED] possesses a wide array of sensitive information about its clients. With respect to any particular client, [REDACTED] may possess [REDACTED]

[REDACTED]

39. Some of [REDACTED]'s clients communicate anonymously or pseudonymously.

40. Some of [REDACTED]'s clients are individuals and political associations that engage in controversial political speech.

41. [REDACTED]

[REDACTED]

42. Some of [REDACTED]'s clients maintain accounts with [REDACTED] specifically because of [REDACTED]'s commitment to security.

43. [REDACTED]

[REDACTED]

44. [REDACTED]

[REDACTED]

45. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

46. [REDACTED]

[REDACTED]

[REDACTED]

47. [REDACTED]

[REDACTED]

[REDACTED]

48. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

49. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

50. [REDACTED]

[REDACTED]

51. [REDACTED]

[REDACTED]

[REDACTED]

52. [REDACTED]

[REDACTED]

53. [REDACTED]

[REDACTED]

54. [REDACTED]

[REDACTED]

55. Section 2709(c) has prevented plaintiff [REDACTED] from disclosing information about [REDACTED] this lawsuit to [REDACTED]'s clients.

56. Section 2709(c) has prevented plaintiff [REDACTED] from disclosing information about [REDACTED] this lawsuit to other ECSPs [REDACTED]

[REDACTED]

57. Section 2709(c) has prevented plaintiff [REDACTED] from disclosing information about [REDACTED] this lawsuit to the press and public.

58. Section 2709(c) has prevented plaintiff ACLU from disclosing information about [REDACTED] this lawsuit to the ACLU's members.

59. Section 2709(c) has prevented plaintiff ACLU from disclosing information about [REDACTED] this lawsuit to the press and public.

60. Notwithstanding widespread public concern about the Patriot Act, the Department of Justice has released very little information about the implementation and use of new surveillance powers. *See, e.g.,* Amy Goldstein, *Fierce Fight Over Secrecy, Scope of Law; Amid Rights Debate, Law Cloaks Data on Its Impact*, Washington Post (Sept. 8, 2003) (noting that debate about the Patriot Act “is playing out in a near-total information vacuum”).

61. The Department of Justice has refused to disclose aggregate statistics indicating the number of times that new surveillance provisions have been used since the passage of the Patriot Act.

62. The Department of Justice has refused to disclose the number of times that the FBI has invoked Section 2709 since the passage of the Patriot Act.

63. In response to a Freedom of Information Act request submitted by the ACLU and other organizations in August 2002, the FBI released a document titled “Transactional Records NSLs Since 10/26/2001,” which appears to list the ECPA NSLs issued between October 26, 2001, and January 21, 2003. The five-page list is almost entirely redacted.

64. In part because of the secrecy surrounding the government’s implementation and use of new surveillance powers, the Patriot Act has been the subject of extraordinary public controversy.

65. Section 505 of the Patriot Act, which amended Section 2709, has been the subject of particular concern and criticism. *See, e.g.,* Editorial, *Too Much Power*, Washington Post (Jan. 4, 2004) (“The use of ‘national security letters’ is not new, but in light of new authorities

provided the FBI in the USA Patriot Act, Congress should be finding ways to curtail their use, not expand it.”).

66. The disclosure of information about the government’s use of Section 2709 would inform public debate about the Patriot Act and allow the public to better understand the nature and necessity of new surveillance powers.

CAUSES OF ACTION

67. [REDACTED]

68. [REDACTED]

69. [REDACTED]

70. Section 2709 violates the First Amendment by categorically and permanently prohibiting any person from disclosing to any other person that the FBI has sought or obtained information with an NSL.

71. Section 2709 violates the First Amendment by authorizing the FBI to order the disclosure of constitutionally protected information without demonstrating a compelling need for the information or tailoring the demand to the need.

72. Section 2709 violates the First and Fourth Amendments by failing to specify any mechanism through which the recipient of an NSL can challenge the letter’s validity.



73. Section 2709 violates the First, Fourth, and Fifth Amendments by authorizing the FBI to order the disclosure of constitutionally protected information without providing prior

notice to individuals whose information is disclosed or requiring the government to justify the non-provision of notice on a case-by-case basis.

74. Section 2709 violates the Fifth Amendment because it is unconstitutionally vague.


PRAYER FOR RELIEF

WHEREFORE Plaintiff respectfully requests that the Court:

1. Declare that Section 2709 violates the First, Fourth, and Fifth Amendments to the United States Constitution.
2. 

3. Permanently enjoin defendants from using Section 2709 against plaintiffs or any other person or entity.
4. Award plaintiffs fees and costs.
5. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

JAMEEL JAFFER (JJ-4653)
ANN BEESON (AB-2082)
SHARON MCGOWAN (SM-5846)
National Legal Department
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500


ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

April 6, 2004