

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