Case No. 13-16732
UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY LETTER,

UNDER SEAL,
Petitioner-Appellee (No. 13-15957),
Petitioner-Appellant (No. 13-16731),

v.

ERIC H. HOLDER, Jr., Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION,
Respondents-Appellants (No. 13-15957),
Respondents-Appellees (No. 13-16731),

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PETITIONER UNDER SEAL AND IN SUPPORT OF REVERSAL

Hannah Bloch-Wehba
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002
Telephone: (713) 229-1341
Facsimile: (713) 229-7741
Attorney for Amici Curiae

This brief is filed on behalf of the following law professors:

Katherine J. Strandburg
Alfred B. Engelberg Professor of Law
New York University School of Law

Jordan M. Blanke
Professor of Computer Information Systems and Law
Mercer University Stetson School of Business and Economics

Marc J. Blitz
Professor of Law
Oklahoma City University School of Law

Danielle Citron
Lois K. Macht Research Professor of Law
University of Maryland Francis King Carey School of Law

Julie Cohen
Professor of Law
Georgetown University Law Center

Susan Freiwald
Professor of Law
University of San Francisco School of Law

Jennifer Granick
Director of Civil Liberties
Stanford University Center for Internet and Society

Anne Klinefelter
Associate Professor of Law and Director of the Law Library
University of North Carolina School of Law

Mark A. Lemley
William H. Neukom Professor of Law
Stanford Law School

Lyrissa Barnett Lidsky
Stephen C. O'Connell Professor
University of Florida Levin College of Law

Hiram Melendez-Juarbe
Associate Professor
University of Puerto Rico Law School

Burt Neuborne
Inez Milholland Professor of Civil Liberties
New York University School of Law

Neil Richards
Professor of Law
Washington University School of Law

Jorge R. Roig
Assistant Professor of Law
Charleston School of Law

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
Berkeley Law School

Albert E. Scherr
Professor of Law
University of New Hampshire School of Law

Peter M. Shane
Jacob E. Davis and Jacob E. Davis II Chair In Law
Ohio State University Moritz College of Law

Christopher Slobogin
Milton R. Underwood Chair In Law
Vanderbilt Law School

Daniel J. Solove
John Marshall Harlan Research Professor of Law
George Washington University Law School

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the undersigned amici states that it is not a corporation that issues stock and has no parent corporation.

STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach and write in the areas of information privacy law, constitutional law and national security law. Amici support Petitioner's position that 18 U.S.C. § 2709, the national security letter provision of the Electronic Communications Privacy Act, is unconstitutional. Amici believe that current debates about the legality of surveillance based on so-called "metadata" have paid insufficient attention to serious First Amendment freedom of association concerns related to government acquisition of communication transactional records. In particular, amici argue here that Section 2709 violates the First Amendment because it imposes an inappropriately low threshold for acquiring communication records and lacks judicial oversight, thus giving the government unconstitutionally broad and sweeping access to associational information.

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[1] All parties have consented to the filing of this brief. Amici write in their individual capacities and not on behalf of their institutions. Affiliations are provided for informational purposes only.

SUMMARY OF THE ARGUMENT

18 U.S.C. § 2709 ("Section 2709") violates the First Amendment right to freedom of association because its mere relevance standard and lack of judicial oversight imposes insufficient constraints on government access to the associational information embedded in telephone call data and other "electronic communication transactional records." If an individual communicates with organized religious, political or other groups engaged in expressive activity, such records can be used to identify those groups and even to infer how intensely the individual is involved with each. Similarly, an organization's communication records can identify likely members of the group. Government access to this information is likely to have substantial chilling effects on association. Moreover, communication transactional records also can be used to make inferences about informal, exploratory or tentative associations. The potential for erroneous inferences provides incentives to steer well clear of anyone who might be affiliated with a controversial group or seems otherwise likely to come under suspicion.

The First Amendment encompasses a right to be free from unwarranted government intrusion into associational activities. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Government authority to make associational inquiries of "unlimited and discriminate sweep" substantially burdens that right. *Shelton v. Tucker*, 364 U.S. 479, 490 (1960). When freedom of association is

burdened by government-compelled disclosure of associational information, strict, or "exacting," scrutiny applies, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159–60 (9th Cir. 2010), and the First Amendment imposes what amount to particularity requirements. "When First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Bursey v. United States*, 466 F.2d 1059, 1088 (9th Cir. 1972). Thus, when freedom of association is implicated, the relevance standard usually applied to subpoenas and discovery orders is unconstitutionally lax. *Perry*, 591 F.3d at 1164–65. The requested information must be "highly relevant," the request must be "carefully tailored to avoid unnecessary interference with protected activities," and "the information must be otherwise unavailable." *Id*. Moreover, the First Amendment standard applies even when associational information is obtained from a service provider. *See, e.g.*, *In re First Nat'l Bank*, 701 F.2d 115, 118 (10th Cir. 1983).

Section 2709 authorizes government officials to demand communication transactional records by merely certifying relevance, without judicial oversight. It thus affords the government virtually unfettered discretion to inquire into associations of United States citizens. Section 2709 is thus objectively likely to produce "an impact on, or chilling of, associational rights," *Perry*, 591 F.3d at 1160, particularly for the disfavored and marginal political, religious, and other groups that are of central First Amendment concern.

Section 2709's mere relevance standard does not meet the First Amendment's particularity requirements. Its tepid rule banning requests relevant to investigations that are based *solely* on First Amendment activities does not cure this deficiency. Moreover, the secrecy necessarily surrounding the issuance of national security letters precludes those whose records are requested from triggering judicial scrutiny by asserting their freedom of association rights. In these circumstances, ex ante judicial oversight is essential to maintaining the vitality of those rights.

Government authority to obtain communication transactional records under such a low standard and without ex ante judicial authorization acts as an end run around the First Amendment right to freedom of association. Section 2709 is unconstitutional and should be invalidated.

ARGUMENT

The national security letter provision of the Electronic Communication Privacy Act, 18 U.S.C. § 2709 (2012) ("Section 2709"), grants law enforcement officials unconstitutionally broad authority to obtain telephone call data and other "electronic communication transactional records" in violation of the First Amendment right to freedom of association. Moreover, unlike records collected under the controversial Foreign Intelligence Surveillance Court ("FISC") orders authorizing the bulk collection of telephony metadata, records acquired using

national security letters are not subject to judicially-imposed minimization requirements.

I. Section 2709 Authorizes Nearly Unconstrained Government Acquisition of Associational Information.

A. Because of its mere relevance standard and lack of judicial oversight, Section 2709 imposes minimal constraints on government access to communication transactional records.

Section 2709 permits certain FBI officials to issue national security letters ("NSLs") to communication providers requesting the telephone call data and other "electronic communication transactional records" of a "person or entity" by certifying that the records are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities," provided that "such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment . . . ." 18 U.S.C. § 2709(b)(1). No judicial approval is required. An NSL may be opposed only by the service provider, which ordinarily is prohibited from disclosing that it has received the request.[2] 18 U.S.C. § 2709(c).

The government has interpreted the generally permissive relevance standard especially broadly when applied to communication transactional records. In relation to the bulk collection of telephony metadata under Section 215 of the USA

[2] Whether Section 2709's nondisclosure provisions meet First Amendment standards for imposing constraints on a service provider's speech is, of course, a central issue in this appeal, but is not addressed here.

PATRIOT Act, Pub. L. No. 105–76, § 215, 115 Stat. 272, 287 (codified at 50 U.S.C. § 1861 (2012)), the government argued that "communications metadata is different from many other kinds of records because it is inter-connected and the connections between individual data points, which can be reliably identified only through analysis of a large volume of data, are particularly important to a broad range of investigations of international terrorism."[3] *Administration White Paper: Bulk Collection of Telephony Metadata under Section 215 of the USA PATRIOT Act* 2 (2013) [hereinafter "White Paper"], http://i2.cdn.turner.com/cnn/2013/images/08/09/administration.white.paper.section.215.pdf. More generally, the government argued that "'relevance' is a broad standard that permits discovery of large volumes of data in circumstances where doing so is necessary to identify much smaller amounts of information within that data that directly bears on the matter being investigated." *Id.*

From this perspective, which was adopted by the FISC, communication transactional records need not have even a minimal substantive connection to an investigation to be "relevant;" all telephony metadata is "relevant" simply because "the terrorists' communications are located somewhere in the metadata." *In re*

[3] In fact, communications metadata is not unique in its interconnectivity. Financial records, locational data and many other types of transactional information can, in the aggregate, shed light on the existence and nature of associations between individuals. Indeed, communication *content* also is interconnected and useful for tracing associations.

Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], BR–1309, at 21 (FISA Ct. 2013) [hereinafter "FISC Order"]. *See also* Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* 60–80 (January 23, 2014) (critiquing this broad interpretation of Section 215's relevance standard).[4]

Section 215 orders "may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum . . . or with any other order issued by a court . . . directing the production of records or tangible things," 50 U.S.C. § 1861(c)(2)(D). An NSL is a type of administrative subpoena. Gov't's Opening Br. 5, *In re National Security Letter*, Nos. 13–15957 & 13–16731 (9th Cir. Jan. 1, 2014); President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* 24 (2013) [hereinafter "President's Review Group Report"].[5] The FBI thus seems likely to adopt a similarly broad interpretation of Section 2709's relevance standard. Indeed, the FBI has used Section 2709 to obtain "community of interest" or "calling circle"

[4] *Available at* http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf.

[5] *Available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

data in the past. Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Information Requests for Telephone Records* 54–63, 75 (2010).[6]

Moreover, unlike records obtained pursuant to Section 215, records acquired using NSLs are not subject to judicially-imposed minimization requirements. Section 215 orders must "direct that minimization procedures" be followed. 50 USC § 1861(c)(1). Thus, the orders authorizing the bulk telephony metadata program require intelligence officials to determine, before querying the data, that "based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are facts giving rise to a reasonable, articulable suspicion (RAS) that the selection term to be queried is associated with [a particular foreign terrorist organization]." *FISC Order* at 7. Section 2709 imposes no such standard, permitting acquisition and use of particular individuals' communication records based on mere relevance.

Section 2709 pays lip service to the First Amendment by prohibiting demands for records "relevant to an authorized investigation" if that investigation is "conducted *solely* on the basis of activities protected by the first amendment to the Constitution … ." 18 U.S.C. § 2709(b)(1) (emphasis added). That standard not only is weak, but, by focusing on the purpose of the investigation, it takes *no*

[6] *Available at* http://www.justice.gov/oig/special/s1001r.pdf.

account whatsoever of collateral burdens on the First Amendment rights of those whose communication records are collected.

Section 2709's low substantive standards and lack of judicial oversight leave it ripe for abuse. Indeed, "extensive misuse" of the NSL authority has been uncovered in the past, including "the issuance of NSLs without the approval of a properly designated official and the use of NSLs in investigations for which they had not been authorized," and the issuance of NSLs "after the FISC, citing First Amendment concerns, had twice declined to sign Section 215 orders in the same investigation." Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of Section 215 Orders for Business Records in 2006* 5 (2008).[7] The FBI has since "put in place procedures to reduce the risk of noncompliance." President's Review Group Report at 92 n.79; *see also* Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* 14 (2008).[8] Nonetheless, sweeping government discretion in interpreting and applying the substantive standard remains intrinsic to Section 2709.

[7] *Available at* http://www.justice.gov/oig/special/s0803a/final.pdf.

[8] *Available at* http://www.justice.gov/oig/special/s0803b/final.pdf.

B. Communication transactional records reveal detailed information about expressive associations.

Communication transactional records can be used to infer detailed information about individuals' associations. If an individual communicates with organized religious, political or other groups engaged in expressive activity, her communication records can be used to identify those groups and even to infer how intensely she is involved with each. Similarly, an organization's records can identify likely members of the group.

Moreover, the network of communication transactional records can be used to make inferences about informal, exploratory or tentative associations that have not solidified into formal affiliation. Individuals cannot be fully aware of the networks in which their communications are embedded, nor are they privy to the models and assumptions that government officials may employ in making inferences from communication records. They thus are left to guess about which of their communications might lead government officials to suspect them of affiliation with criminal, terrorist, or otherwise "questionable" groups. This uncertainty provides incentives not only to avoid direct associations with controversial or unpopular groups, but also to steer well clear of anyone who seems likely to be affiliated with such groups or otherwise to come under suspicion. *See* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance,* 49 B. C. L. Rev. 1,

9–12 (2008). The chilling is likely to be particularly severe for members of minority ethnic, religious, political, or otherwise disfavored communities. *See, e.g.*, Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. Md. L.J. Race, Religion, Gender & Class 375 (2007); Linda E. Fisher, *Guilt by Expressive Association*, 46 Ariz. L. Rev. 621 (2004).

II. Unconstrained Government Authority to Compel Disclosure of Associational Information Violates the First Amendment.

The First Amendment encompasses a right to be free from unwarranted government intrusion into associational activities. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). When freedom of association is burdened by government-compelled disclosure of associational information, strict, or "exacting," scrutiny applies. *See, e.g.*, *id*. at 460–61 ("state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny"); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010); *see also* Under Seal's Opening Br. 46.

Sweeping and unfettered government access to associational information substantially burdens freedom of association and generally fails First Amendment scrutiny. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960). When government-mandated disclosure implicates freedom of association, the mandate must be

appropriately tailored so that there is "a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson*, 372 U.S. at 546; *see also Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 350 (9th Cir. 1988); *Perry*, 591 F.3d at 1159–60.

A. Government-compelled disclosure of expressive association must meet strict or "exacting" First Amendment scrutiny.

The Supreme Court has emphasized that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). This right of "expressive association" is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas," and in "preserving political and cultural diversity." *Id.* at 647–48 (internal quotation marks omitted).

Government actions that burden freedom of association must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. Moreover, "the government must justify its actions not only when it imposes direct limitations on associational rights, but also when governmental action would have the practical effect of discouraging the exercise

of" those rights. *Perry*, 591 F.3d at 1159 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393 (1950)).

As the Supreme Court noted in its seminal opinion on the subject, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462 (1958). Because of this "vital relationship between freedom to associate and privacy in one's associations," government-compelled disclosure of associational information also is subject to strict or "exacting" scrutiny. *Perry*, 591 F.3d at 1160; *see also Gibson*, 372 U.S. at 546; *Shelton*, 479 U.S. at 488; *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP*, 357 U.S. at 460–61.

B. Sweeping and unfettered government access to associational information substantially burdens freedom of association and generally fails First Amendment scrutiny.

In *Shelton v. Tucker*, the Supreme Court struck down a state statute compelling teachers to make annual disclosures of all organizations to which they had belonged within the preceding five years because of its "unlimited and indiscriminate sweep." 364 U.S. 479, 490 (1960). As the Court explained:

> The scope of the inquiry required by [the statute] is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires

> him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious.

Id. at 488.

The breadth of the government's inquiry into associational activities in *Shelton* burdened freedom of association by leaving teachers uncertain as to which of their associations might be displeasing to someone in a position of power, so that "the pressure upon a teacher to avoid any ties which might displease those who control his professional life would be constant and heavy." 364 U.S. at 486. A state bar committee's demand that applicants list all of their association memberships was similarly impermissible since "[l]aw students who know they must survive this screening process before practicing their profession are encouraged to protect their future by shunning unpopular or controversial organizations." *In re Stolar*, 401 U.S. 23, 28 (1971). *See also Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("Broad and sweeping state inquiries into [a person's beliefs or associations] discourage citizens from exercising rights protected by the Constitution."); *Britt v. Superior Ct.*, 20 Cal. 3d 844, 855 (Cal. 1978) ("In view of the sweeping scope of the discovery order at issue, we think it clear that such order is likely to pose a substantial restraint upon the exercise of First Amendment rights.").

Government authority to make associational inquiries of "unlimited and discriminate sweep," *Shelton*, 364 U.S. at 490, "objectively suggests an impact on,

or chilling of associational rights," *Perry*, 591 F.3d at 1160 (internal quotation marks omitted), and rarely survives First Amendment scrutiny.

C. Government demands for associational information must be appropriately tailored to compelling government interests.

While the "right to associate for expressive purpose is not . . . absolute," *Perry*, 591 F.3d at 1159 (citing *Roberts*, 468 U.S. at 623), the government must "demonstrate[] an interest in the disclosures it seeks which is sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association." *Id.* at 1161(quoting *NAACP*, 357 U.S. at 463). Moreover, government interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Brock*, 860 F.2d at 350 (quoting *Shelton*, 364 U.S. at 488). The First Amendment thus imposes what amount to particularity requirements on government disclosure mandates. *See* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 84 N.Y.U. L. Rev. 112, 158 (2007). "When First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Bursey v. United States*, 466 F.2d 1059, 1088 (9th Cir. 1972).

In *NAACP*, for example, the state's request for the identities of rank-and-file members was insufficiently tailored to the state's acknowledged interest in enforcing its foreign corporation registration statute. 357 U.S. at 462. To determine whether the NAACP was conducting intrastate business within the

meaning of the statute, the Court permitted requests for the names of directors and officers, the number of members, and the amount of dues collected. *Id.* at 465. The state's request for the names of rank-and-file members ran afoul of the First Amendment, however, because those names had no "substantial bearing" on the statute's applicability. *Id*. at 464.

Similarly, in *Shelton*, while there was "no question of the relevance of a State's inquiry into the fitness and competence of its teachers," the state's broad demand that teachers list their organizational affiliations was not tailored closely enough to that inquiry:

> The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period.

364 U.S. at 485, 487–88; *see also Britt*, 20 Cal. 3d at 861 ("The very breadth of the required disclosure establishes that the trial court in this case . . . did not heed the constitutional mandate that precision of disclosure is required so that the exercise of our most precious freedoms will not be unduly curtailed.") (internal quotation marks omitted).

Legitimate government interest in the "broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. In *Gibson*, a legislative committee subpoenaed a list of NAACP members, purportedly as part of a general inquiry into "the subject of Communist infiltration of educational or other organizations," *id*. at 549, but was unable to show "a substantial connection between the [NAACP branch] and Communist activities." *Id.* at 551. Because such a nexus was "an essential prerequisite to demonstrating the [necessary] immediate, substantial, and subordinating state interest," the subpoena was quashed. *Id*.

Courts sometimes satisfy First Amendment particularity by limiting disclosure requests. Thus, in a case alleging that longshoremen were coerced into authorizing payroll deductions for contributions to a union-related political organization, the Second Circuit modified a subpoena requesting contributors' names. The court limited the disclosure to the names of a random ten percent sample of individuals who, having signed up relatively late for the deduction, were presumably most likely to have been coerced). The modifications ensured that disclosure would "impact a group properly limited in number in light of the governmental objective to be achieved." *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 273 (2d Cir. 1981). *See also, e.g. United*

States v. Citizens State Bank, 612 F.2d 1091, 1094 (8th Cir. 1980) (suggesting a graduated series of disclosures of associational information); *FEC v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (ruling that the FEC was justified in obtaining names of contributors, but not in obtaining names of those who solicited contributions); *In re Deliverance Christian Church*, No. 1162306, 2011 WL 6019359, at *5 (Bankr. N.D. Ohio Dec. 1, 2011) (replacing donors' names with numbers to protect their identities).

III. The Mere Relevance Standard Ordinarily Applicable to Subpoenas and Discovery Orders is Insufficient for Compelling Disclosure of Associational Information.

When freedom of association interests are at stake, the relevance standard usually applied to subpoenas and discovery orders is unconstitutionally lax. Moreover, the First Amendment standard applies even when associational information is obtained from a third party service provider.

A. Courts apply First Amendment scrutiny to subpoenas and civil discovery orders requesting associational information.

Courts routinely apply strict or exacting scrutiny to ensure proper tailoring of administrative and grand jury subpoenas and civil discovery orders that implicate associational rights. This Court has held in the context of civil discovery that, after a "prima facie showing of arguable first amendment infringement" based on evidence that "objectively suggest[s] an impact on, or chilling of, associational rights," *Perry*, 591 F.3d at 1160, a "more demanding standard of relevance than

that under Federal Rule of Civil Procedure 26(b)(1)" applies. *Id.* at 1161. The requested information must be "highly relevant," the request must be "carefully tailored to avoid unnecessary interference with protected activities," and "the information must be otherwise unavailable." *Id.*

The heightened standard also applies in the grand jury context, where this Court has held that "the Government's burden is not met unless it establishes that the Government's interest in the subject matter of the investigation is 'immediate, substantial, and subordinating,' that there is a 'substantial connection' between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest." *Bursey*, 466 F.2d at 1083 (quoting *Gibson*, 372 U.S. at 557 and citing *Shelton*, 364 U.S. at 487–90). "The fact alone that the Government has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific question." *Id.* at 1086; *see also, e.g.*, *In re Grand Jury Proceeding*, 842 F.2d 1229, 1234 (11th Cir. 1988) (applying First Amendment scrutiny to grand jury request for associational information); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1103–04 (2d Cir. 1985) (same); *In re First Nat'l Bank*, 701 F.2d 115,

118 (10th Cir. 1983) (same); *Ealy v. Littlejohn*, 569 F.2d 219, 226 (5th Cir. 1978) (same).

When freedom of association is implicated by an administrative subpoena, a mere relevance standard is equally inadequate. As the Third Circuit explained in *EEOC v. University of Pennsylvania*, "[e]ven when a subpoena is authorized by statute and relevant to the agency's investigative mission, different considerations come into play when a case implicates first amendment concerns. Protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny. . . . Thus, when a nonfrivolous first amendment concern is raised, an agency is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation." 850 F.2d 969, 980 (3d Cir. 1988) (internal quotation marks omitted). *See also, e.g.*, *Larouche Campaign*, 817 F.2d at 234–35 (2d Cir. 1987) ("[W]here the disclosure sought will compromise the privacy of individual political associations, and hence risks a chilling of unencumbered associational choices, the agency must make some showing of need for the material sought beyond its mere relevance to a proper investigation."); *Citizens State Bank*, 612 F.2d at 1094 (applying First Amendment scrutiny to administrative subpoena); *Local 1814*, 667 F.2d at 271 (same).

B. First Amendment scrutiny applies to subpoenas to third party service providers.

When subpoenas directed to service providers implicate the freedom of association rights of their subscribers, they also are subject to First Amendment scrutiny. *See, e.g.*, *Local 1814*, 667 F.2d at 270; *In re Grand Jury Proceeding*, 842 F.2d at 1233; *Citizens State Bank*, 612 F.2d at 1095; *In re First Nat'l Bank*, 701 F.2d at 118. First Amendment rights are not subject to a "third party doctrine." Indeed, in *United States v. Miller*, 425 U.S. 435 (1976), which held that a depositor had no Fourth Amendment complaint when financial records were obtained from his bank, the Supreme Court specifically noted that the depositor had not contended that the subpoenas at issue intruded into associational activities. *Id*. at 444 n.6.

As the Tenth Circuit explained in rejecting an argument that third party access undercut a First Amendment challenge to a subpoena, "the constitutionally protected right, freedom to associate freely and anonymously, will be chilled equally whether the associational information is compelled from the organization itself or from third parties." *In re First Nat'l Bank*, 701 F.2d at 118 (also collecting cases). In *In re Grand Jury Proceeding*, 842 F.2d at 1233, the Eleventh Circuit opined that applying a third party doctrine to a freedom of association challenge would be inconsistent with the Supreme Court's summary affirmance of *Roberts v. Pollard*, 393 U.S. 14 (1968) (per curiam). *Pollard* "applied the principles of

NAACP v. Alabama to the facts of the case, including the fact that the relevant records were held by the bank, not the party or its contributors." 842 F.2d at 1234.

The Second Circuit similarly explained that "First Amendment rights are implicated whenever government seeks from third parties records of actions that play an integral part in facilitating an association's normal arrangements for obtaining members or contributions." *Local 1814*, 667 F.2d at 271. The Second Circuit recently reaffirmed its approach in *New York Times v. Gonzales*, 459 F.3d 160 (2d Cir. 2006), which involved grand jury subpoenas for reporters' telephone records. Because the telephone plays an "integral role" in journalism, any "First Amendment protection that protects the reporters also protects their third party telephone records sought by the government." *Id.* at 168.

In the Section 215 context, the government has relied on *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), for the proposition that "the Government's good faith inspection of defendant telephone companies' toll call records does not infringe on plaintiffs' First Amendment rights, because that Amendment guarantees no freedom from such investigation." White Paper at 22, quoting 593 F.2d at 1051. *Reporters Committee* is shaky grounds upon which to conclude that subpoenas for communication records do not implicate subscribers' freedom of association rights, however. First, *Reporters Committee* appears to conclude that there can be no infringement

on First Amendment rights as long as an investigation is conducted in "good faith," 593 F.2d at 1055 n.82, a proposition that is at odds with precedent. *See, e.g.*, *Gibson*, 372 U.S. at 545 (holding that a legitimate government interest in the "broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands.") Second, it concerns the question of "reporters privilege," relying heavily on *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Court held that journalists have no "special First Amendment right" to be exempted from appearing before a grand jury. 593 F.2d at 1050. Freedom of association rights in communication records do not depend on any such "special" status. Third, *Reporters Committee* relies on the unusually narrow view that cognizable "chilling effects" must "arise from the present or future exercise, or threatened exercise, of coercive power." 593 F.2d at 1052. For these and other reasons, the *Reporters Committee* approach to third party service providers is an outlier and should be rejected by this Court.

IV. Section 2709 is Unconstitutional Because It Authorizes Broad Government Access to Associational Information Without Imposing First Amendment Particularity Standards

By authorizing government officials to demand communication transactional records merely by certifying relevance, Section 2709 affords the government broad and virtually unfettered discretion to inquire into the associational activities of

United States citizens. Section 2709 thus is objectively likely to produce "an impact on, or chilling of, associational rights," *Perry*, 591 F.3d at 1160, especially for the disfavored and marginal political, religious, and other groups that are of central First Amendment concern.

Section 2709's mere relevance threshold does not meet the First Amendment's particularity requirements, however. Its tepid rule banning requests relevant to investigations that are based *solely* on First Amendment activities does not cure this deficiency. Moreover, the secrecy necessarily surrounding the issuance of NSLs precludes those whose records are requested from triggering judicial scrutiny by asserting their freedom of association rights. In these circumstances, ex ante judicial oversight is essential to maintaining the vitality of freedom of association rights.

A. Government acquisition of communication transactional records implicates freedom of association because associational information can be inferred from those records.

Because communication transactional records easily can be used to infer membership lists of expressive organizations and lists of expressive organizations with which a particular individual associates, as well as informal networks of associations among individuals, government access to such records has the potential to chill association. Moreover, the probabilistic and potentially erroneous

nature of inferred associational information heightens the potential chilling effects and freedom of association burdens of government access.

Courts have recognized that government access to information from which associational activity can be inferred can burden freedom of association. In *Buckley v. Valeo*, for example, the Supreme Court subjected the disclosure of names of contributors to exacting scrutiny. 424 U.S. 1, 64 (1976). The Court explained that "the right to join together for the advancement of beliefs and ideas is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective," while "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for financial transactions can reveal much about a person's activities, associations, and beliefs." *Id.* at 65–66 (quoting *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring)) (internal quotation marks omitted). *See also In re First Nat'l Bank*, 701 F.2d at 118; *Citizens State Bank*, 612 F.2d at 1094; *Local 1814*, 667 F.2d at 271.

Drummond Co. v. Collingsworth similarly recognized a freedom of association interest in email "subscriber and usage information" obtained from an internet service provider because the information could be used to draw inferences about associational activities: "[w]hile the subpoena does not technically seek a

list of individuals with whom [the subscriber] has associated, . . . it certainly seeks information that will enable [the subpoenaing party] to discover just that." Nos. 13–mc–80169–JST, 13–mc–80171–JST, 2013 WL 6074157, at *13 (N.D. Cal. Nov. 18, 2013).

Exempting government demands for disclosure of communication transactional records from freedom of association scrutiny would allow the government to sidestep, and effectively vitiate, the First Amendment's freedom of association protections. Like pooling money through contributions, *Buckley*, 424 U.S. at 65–66, telephone and electronic communication often are "essential" to group expressive activities. Communication providers thus play an "integral role" in associational activities, just as they do in the collection of information by reporters. *New York Times*, 459 F.3d at 168; s*ee also Katz v. United States*, 389 U.S. 347, 352 (1967) (relying on "the vital role that the public telephone has come to play in private communication"). Moreover, communication transactional records, like financial records and location tracking data, "can reveal much about a person's activities, associations, and beliefs." *Buckley* at 65–66; *see also United States v. Jones*, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring) ("Awareness that the Government may be watching chills associational and expressive freedoms.").

B. Section 2709's broad and unfettered authority to compel associational information is objectively likely to produce a substantial impact on, or chilling of, freedom of association.

While the potential chilling effect of a government demand for associational information often depends upon particular facts about the organization or associational activity under scrutiny, broad government authority to inquire into associational affiliations is an independent source of chilling effects. *See, e.g.*, *Shelton*, 364 U.S. at 486–87. Records obtained using Section 2709's sweeping authority can be used to infer organizational membership lists, as in *NAACP v. Alabama*, lists of individuals' organizational affiliations, as in *Shelton*, as well as information about informal and tentative associations. When such a low barrier shields their associational activities from government scrutiny, citizens will be motivated to "shun[] unpopular or controversial organizations," *In re Stolar*, 401 U.S. at 28, and even, given the potential for erroneous inferences, to shun anyone they think might be engaged in unpopular or controversial activities.

Section 2709's permissive standard for dissemination of acquired communication records only exacerbates its chilling effects. Section 2709(d) authorizes the Attorney General to create guidelines for dissemination for foreign intelligence purposes, but imposes no constraints on those guidelines. Dissemination to other federal agencies is permitted as long as the "information is clearly relevant to the authorized responsibilities of such agency." 18 U.S.C. §

2709(d) (2012). The large numbers of NSLs deployed annually, along with the government's record of improper use of the national security letter authority, can only further amplify the chilling effects. *See* President's Review Group Report at 93 (noting that the FBI issues an average of 60 NSLs every day).

In sum, Section 2709 invests the FBI with such broad discretion to intrude into protected associations that substantial chilling effects are virtually inevitable. Its "unlimited and indiscriminate sweep," 364 U.S. at 490, makes Section 2709 objectively likely to produce a "substantial impact on, or chilling of, . . . associational rights." *Perry*, 591 F.3d at 1160.

C. Section 2709 does not provide the tailoring necessary to meet First Amendment requirements.

Section 2709's mere relevance standard obviously does not comport with this Court's requirement that, when compelling disclosure of information that impinges upon associational rights, the government must show that the information is "highly relevant," the request must be "carefully tailored to avoid unnecessary interference with protected activities," and the necessary information must be "otherwise unavailable." *Perry*, 591 F.3d at 1161.

The Supreme Court's treatment of the Fourth Amendment's particularity requirements in *Berger v. New York*, 388 U.S. 41 (1967), is instructive. In the Court's view, the statutory requirement that wiretapping orders "particularly describ[e] the person or persons whose communications, conversations or

discussions are to be overheard or recorded and the purpose thereof," *id*. at 54, did no more than "identify the person whose constitutionally protected area is to be invaded." *Id.* at 59. Because the statute provided law enforcement with "a roving commission to 'seize' any and all conversations" and left "too much to the discretion of the officer executing the order" *id.* at 58–59, it was unconstitutional. Section 2709's mere relevance standard similarly grants the FBI a "roving commission to seize any and all" communication transactional records, *id.* at 58–59, that does not meet First Amendment tailoring requirements.

Section 2709 cannot be salvaged by law enforcement promises of restraint. Compliance with the First Amendment is not a matter for law enforcement discretion. Like the Fourth Amendment, the First Amendment prescribes "a constitutional standard that must be met before official invasion is permissible." *Berger*, 388 U.S. at 64. Just as the Supreme Court struck down the statute in *Berger* because it concluded that "[a]s it is written," the statute's "language permits [an invasion] contrary to the command of the Fourth Amendment," this Court should invalidate Section 2709 because its language *as written* permits intrusions into freedom of association contrary to the command of the First Amendment. *Id.*

D. Ex ante judicial oversight of national security letters is necessary to ensure compliance with the First Amendment's requirements.

Despite their secrecy, Section 2709 requests are issued without judicial authorization. It is, of course, unremarkable that Section 2709 requests are kept secret from the individuals whose records are requested. National security letters, like wiretaps and pen registers, are intended for surveillance during ongoing investigations. The secrecy means, however, that targets of NSLs, unlike the targets of subpoenas and discovery orders in the cases discussed above, have no opportunity to obtain judicial scrutiny of the constitutionality of the requests.

Of course, a service provider recipient may petition a court to "modify or set aside [a section 2709] request if compliance would be unreasonable, oppressive, or otherwise unlawful," 18 U.S.C. § 3511(a), as the service provider has done in this case. However, such challenges have been exceedingly rare (especially in light of the large numbers of NSLs issued on a regular basis). Moreover, there is no reason to expect service providers to be either able to identify instances in which a request is insufficiently tailored to government interests or adequately motivated to assert subscribers' freedom of association rights. Indeed, the idea that service providers can serve as proxies for their subscribers in challenging insufficiently tailored requests is ludicrous given that the service providers have no information about the government's rationale for the requests. Section 2709's lack of ex ante judicial

oversight thus is an independent basis for finding that it unconstitutionally burdens freedom of association.

CONCLUSION

Explicit statutory standards combined with ex ante judicial oversight are the only way to uphold the constitutional rights of those who are placed under surveillance, as *Berger* recognized in the Fourth Amendment context. If the First Amendment's guarantee of freedom of association is to retain any force, disclosure of communication transactional records must be compelled only upon judicial authorization that takes into account the potential freedom of association burdens and the First Amendment's tailoring requirement. Because Section 2709 imposes an inadequate mere relevance standard and requires no ex ante judicial scrutiny, it is unconstitutional.

STATEMENT OF RELATED CASE

This case is related to *Under Seal v. Holder*, Nos. 13-15957 and 13-16731, which involves the same legal issues but a different NSL recipient. This Court has ordered that No. 13-16732 be briefed separately from, but on the same briefing and oral argument schedule as, Nos. 13-15957 and 13-16731. Amici have filed a substantially similar brief in Nos. 13-15957 and 13-16731.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,716 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 this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

Dated: April 8, 2014

/s/ Hannah Bloch-Wehba
Hannah Bloch-Wehba

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by certified mail on April 8, 2014.

I certify that the Clerk of the Court will effect service on all parties.

Dated: April 8, 2014

/s/ Hannah Bloch-Wehba
Hannah Bloch-Wehba