05-0570-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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 MARION E. BOWMAN, in his official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants-Appellants,

—against—

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

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE OF THE DISTRICT COURT

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Amicus Association of the Bar of the City of New York, a non-governmental corporation, states that it has no parent corporation and no publicly held corporation holds 10% or more its stock.

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CONSENT OF THE PARTIES

All parties have hereby consented to the filing of this *amicus curiae* brief by the Association of the Bar of the City of New York.

The Association of the Bar of the City of New York respectfully submits this brief in support of Appellees' opposition to the appeal.

INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York was founded in 1870 and has been dedicated since that date to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. With its nearly 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving, and promoting civil liberties, civil rights, and the democratic process. Through its standing committees, including those on Civil Rights, Immigration and Nationality Law, Federal Courts, Federal Legislation, International Security Affairs, Military Affairs and Justice, and International Human Rights, the Association is interested in the need to balance the fundamental interests of civil liberties and individual freedom with the needs of national security, and to assure that concerns for national security do not undermine the guarantees of civil liberties that are the hallmark of our constitutional democracy and a beacon to the world.

The Association submits this brief, as a Friend of the Court, in support of Appellees and the Decision by the District Court.[1]

PRELIMINARY STATEMENT

The Association submits this brief to highlight the particular threat that 18 U.S.C. § 2709 poses to the essential role of the courts in defining and protecting constitutional rights.[2] Section 2709 provides the Executive branch, through the Federal Bureau of Investigation (FBI), with unprecedented power to obtain customer information protected by the First Amendment from communication firms through National Security Letters (NSLs). NSLs are issued and executed in the complete absence of any judicial oversight. NSLs are issued solely on the basis of the FBI's internal judgment that the NSL recipient possesses information "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b). No provision is made in Section 2709 for judicial review at any stage and, most importantly, the statute imposes on the recipient of the NSL an absolute prohibition, of unlimited duration, on disclosing to "any person" that the FBI has sought or obtained information or records pursuant to an NSL.

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[1] Jameel Jaffer, a member of the Association's Civil Rights Committee, took no part in drafting this brief, but as Appellee's counsel, offered comments.
[2] 18 U.S.C. § 2709 is set forth in a statutory addendum at the end of this memorandum of law.

In an effort to save its constitutionality, the Government seeks to read into Section 2709 a provision for judicial view not included in the statute. However, the section's flat, unequivocal ban on disclosure to "any person," together with the procedures followed by the FBI in issuing NSLs, effectively prohibit all but the most courageous from consulting counsel or seeking judicial review. Meanwhile, the unlimited duration of the ban on disclosure deprives third parties, to whom the information or records covered by the NSL pertain, of any opportunity to seek judicial review to protect against abuses that might affect the exercise of their First Amendment rights. This unlimited ban also deprives the public of any opportunity to invoke democratic processes to curb any such abuses.

As we discuss below, history shows that judicial review is an essential check on abuse of power, and is necessary to the protection of constitutional guarantees, especially where heightened concerns about national security tempt both the Executive and Legislative branches to disregard our most cherished rights and liberties.

As the Supreme Court only recently observed, "[i]t is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."

Hamdi v. Rumsfield, 542 U.S. 507, --, 124 S. Ct. 2633, 2648, 159 L. Ed.2d 578 (2004). There will certainly be times when the proper balance may come down on the side of government efficiency or security, rather than individual freedom. However, as the framers of the Constitution clearly intended, that decision is one that must be made by the courts.

In the end, it is the judiciary that must stand as a check on the Executive and Legislative branches when they overstep constitutional bounds. There is nothing more fundamental to our democratic constitutional system than the ability to have one's grievances heard and liberties protected by a neutral tribunal. Section 2709, both on its face and as applied, plainly violates the Constitution by effectively precluding judicial review of any kind. The right to have a constitutional challenge heard by an independent judiciary is a fundamental right protected by the Fourth Amendment, the Due Process Clause of the Fifth Amendment, the First Amendment, the doctrine of separation of powers and the underlying principles of *Marbury v. Madison*, 5 U.S. 137 (1803). Although Section 2709 is ostensibly intended to provide the Executive branch with a tool to protect the United States from harm from "international terrorism or clandestine intelligence activities," the statute, on its face and as applied, effectively precludes *any* judicial oversight and is harmful to our Constitutional democracy that it is

supposedly designed to protect. The District Court's decision should therefore be affirmed.

ARGUMENT

POINT I

SECTION 2709 EXCEEDS THE RESTRAINTS ON THE EXERCISE OF GOVERNMENTAL POWER IMPOSED BY THE CONSTITUTION

The Association rejects the idea that civil liberties and civil rights are at odds with national security. The Association recognizes that a certain degree of secrecy is necessary for effective investigations of international terrorist activities. Thus, some ban on disclosure of the existence and nature of a government investigation for some period of time may be needed to prevent the destruction of evidence, the flight of suspects, or the protection of information sources. However, any nondisclosure order would have to be (i) issued by a court on the basis of particularized findings, *see Globe Newspapers v. Super. Ct. for Norfolk County*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed.2d 298 (1982), (ii) narrowly tailored in scope, and (iii) limited in duration, *see Butterworth v. Smith*, 494 U.S. 629, 110 S. Ct. 1376, 108 L. Ed.2d 572 (1990). Moreover, that secrecy can and must be limited in ways that will achieve the legitimate ends of national security without

compromising the safeguards for individual rights provided by judicial review, and ultimately by public oversight through the democratic process.

The absolute and unlimited secrecy provided by Section 2709, effectively barring any judicial oversight or eventual public scrutiny, cannot be justified by appeals to national security. History proves that such secrecy and lack of judicial oversight are not only inimical to individual liberties guaranteed by our Constitution, but do not further national security.

A. We Depend on the Courts to Protect Against Unconstitutional Tactics Conducted in the Name of National Security

From time to time, in periods of perceived crisis or threats, the Executive and Legislative branches have employed, in the name of national security, various tactics that are antithetical to our nation's commitment to civil liberties and civil rights. These include: (a) guilt by association, stereotyping, and targeting people by race, ethnicity, political beliefs, and religion; (b) unwarranted secrecy; and (c) shielding governmental action from oversight and accountability. *See generally Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, David Cole and James X. Dempsey 2ed. (New Press 2002). Although initially viewed as necessary and appropriate, these tactics fundamentally

alter the power of the government, weaken the role of the judiciary, and have proven to be ineffective in identifying or preventing actual criminal activity.

A brief examination of our history in times of national crisis reveals a troubling pattern of sacrificing civil liberties in the name of security. On such occasions, the courts have been called upon to protect against infringements upon civil liberties and governmental excesses committed in the name of expediency. Judicial oversight is necessary not only to correct errors of constitutional magnitude, but also to provide a less impassioned, more objective analysis of the balance between civil liberties and legitimate national security concerns.

During the Civil War, President Lincoln took various measures to curtail civil liberties, including arresting individuals for speech critical of the administration. The most egregious act, however, was the suspension of the writ of habeas corpus. *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755. With habeas corpus suspended, Lincoln detained tens of thousands of people without charges, simply because they were suspected of being disloyal, dangerous, or disaffected. *See generally* Daniel Farber, *Lincoln's Constitution* at 157 (2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991). They remained detained

indefinitely, some receiving no trials at all, others receiving a military trial that lacked basic procedural safeguards.

The Supreme Court, in *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866), rejected the proposition that wartime—even a civil war—justified a departure from our founding values. *Milligan* involved the detention of one man without process. President Lincoln supported his actions on the ground that, as commander-in-chief of the Armed Forces during a time of war, he had the power to detain people at will. The Supreme Court disagreed:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Id. at 120-21. The Court concluded that "the very time when a constitutional provision is wanted, is the time of war, and that in time of war, of civil war especially, and the commotions just before and just after it, the constitutional provisions should be most rigidly enforced." *Id.* at 104.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed.2d 644 (1963), the Supreme Court found unconstitutional statutes divesting an American of his citizenship for leaving or remaining outside the United States at time of war and national emergency for purpose of evading military service. The Court noted that "under the pressing exigencies of crisis[ ] . . . there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action." *Id.* at 165. Notwithstanding this temptation, the Court recognized that it is precisely such times that demand heightened vigilance by the judiciary.

More recently, when the Supreme Court was called upon to address the reach of the President's authority to indefinitely detain "enemy combatants," it declared: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens." *Hamdi,* 124 S. Ct. at 2650; s*ee also Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426, 54 S. Ct. 231, 235, 78 L. Ed. 413 (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.")

These cases illustrate the critical role of the judiciary to stand as a check against government excess and the needless denial of constitutional rights, even during times of national crisis. In each example, the courts played a significant role in ensuring that the government's actions were both essential to national security and consistent with the Constitution.

B. Government Conduct Cloaked in Secrecy, Absent Judicial Review and Public Oversight, Can Lead to Unconstitutional Tactics Conducted in the Name of National Security

As discussed above, when, in times of crisis, the government has sought to curtail civil liberties in the name of national security, the public has depended on the courts to reign in unconstitutional action. Where, however, government conduct escapes judicial review and public oversight, there is great danger and opportunity for abuse.

In 1976, a Senate Select Committee considered covert executive action and concluded that the absence of judicial review and public oversight increased the risk of abuse. The Committee, led by Senator Frank Church, was charged with investigating the "conduct of domestic intelligence, or counterintelligence operations against United States citizens." S. Res. 21, sec. 2 (12), 94th Cong. (1975). The "critical question" before the Committee was whether "the fundamental liberties of people can be maintained in the course of the Government's effort to protect their

security." *See* Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Final Report, S. Rep. 755, 94th Cong., 2d Sess., Book II (1976) (the "Church Committee Report"), at 1, available at:

http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm.

The Committee concluded that "intelligence activity in the past decades has, all too often, exceeded the restraints on the exercise of governmental power which are imposed by our country's Constitution, laws, and traditions." *Id.* at 2. In summarizing its findings, the Committee wrote:

> Too many people have been spied upon by too many Government agencies and too much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. . . . Investigations of groups deemed potentially dangerous – and even of groups suspected of associating with potentially dangerous organizations – have continued for decades, despite the fact that those groups did not engage in unlawful activity. . . . Investigations have been based upon vague standards whose breadth made excessive collection inevitable.

Id. at 5.

More recently, senior members of the Senate Judiciary Committee issued a bipartisan report expressing deep frustration with the United States Department of Justice's refusal to submit to public oversight concerning its implementation of the Patriot Act. *See* FBI Oversight in the 107th Congress

by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report by Senators Patrick Leahy, Charles Grassley, & Arlen Specter (February 2003) ("the Leahy Report"), available at http://www.fas.org/irp/congress/2003_rpt/fisa.pdf. The Leahy Report was issued "so that . . . information is available to the American people and Members of Congress as we evaluate the implementation of the USA PATRIOT Act amendments to the FISA [Foreign Intelligence Surveillance Act] . . . ." *Id.* at 7. Among the Leahy Report's conclusions was that:

> The secrecy of individual FISA cases is certainly necessary, but this secrecy has been extended to the most basic legal and procedural aspects of the FISA, which should not be secret. This unnecessary secrecy contributed to the deficiencies that have hamstrung the implementation of the FISA.

Id. at 6.

The Leahy Report also noted the need for accountability and oversight as a prophylactic against government abuse:

> So, too, is oversight important in order to protect the basic liberties upon which our country is founded. Past oversight efforts, such as the Church Committee in the 1970s, have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence that these abuses have come after extended periods when the public and Congress did not diligently monitor the FBI's activities. . . . Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and FBI are critical to explaining the actions to the citizens to whom these agencies are ultimately accountable.

Id. at 8.

As the Church and Leahy Reports note, past governmental abuses arose when agencies were permitted to conduct secret activities outside of the view of either the public or the courts. These reports demonstrate that in the absence of public accountability, and especially judicial review, our nation risks infringing on fundamental liberties without material increases in security.

C. Section 2709 Effectively Precludes Judicial Review of Constitutional Claims

The Government argues that, notwithstanding the provisions of Section 2709, NSLs issued under Section 2709 are in fact reviewable by a court. *See* Appellants' Brief at 18-20. However, the Government's contention is untenable as a matter of law, as it would require this Court to rewrite Section 2709 to provide that no one "shall disclose to any person *except to an attorney or to obtain judicial review*...." This interpretation is also premised on the unrealistic assumption that an NSL recipient—not likely an attorney—would ignore the express terms of Section 2709 and the NSL itself, and instead cobble together a theory of judicial review premised on various provisions scattered throughout the United States Code. Moreover, as amply demonstrated in the District Court opinion, the Government's interpretation contrasts sharply not only with the text of the statute, but also with the reality of its application by the FBI.

Section 2709(c) clearly announces a gag provision that is coercive on its face, regardless of any theoretically available avenues for judicial review. *See* 18 U.S.C. § 2709(c) in the Statutory Addendum. No mention is made of exceptions to allow for judicial review by an NSL recipient or for judicial enforcement against an NSL recipient, despite the Government's arguments to the contrary.[3] Indeed, a number of amendments have been proposed in Congress to remedy this problem, including most recently the *Electronic Communications Privacy Judicial Review and Improvement Act of 2005*, introduced by Senator John Cornyn, which proposed amending Section 2709 to expressly provide for judicial review in a secure proceeding. S. 693, 109th Cong. (Apr. 4, 2005). However, this amendment has not been enacted.

The FBI's application of Section 2709 in practice also "exerts an undue coercive effect on NSL recipients," effectively deterring the judicial review that the Government now purports to find in Section 2709. *Doe v. Ashcroft*, 334 F. Supp.2d 471, 494 (S.D.N.Y. 2004). Indeed, the Government's position in this case contradicts the FBI's prior position that there is no mechanism for judicial enforcement against an NSL recipient

[3] The legislative history of Section 2709 also confirms this, stating that NSL are "[e]xempt from the judicial scrutiny normally required for compulsory process...." H. Rep. 103-46, 103rd Congress (March 29, 1993).

who has failed to comply with the request for information. *See id.* at 493, n. 111 (quoting the statement of Thomas J. Harrington, Deputy Assistant Director of the FBI's Counterterrorism Division, to a House subcommittee on May 18, 2004). In practice, an NSL is preceded by an FBI phone call, during which the recipient is directed to personally provide the information to the FBI and to discuss this with no one. At no point is the availability of judicial review ever mentioned orally or in writing. *See id.* at 494. It is hardly surprising, then, that out of the hundreds of NSLs issued over the years, only one recipient—Doe—actually challenged the request. *See id.* at 502 (referring to a document listing hundreds of NSLs issued between October 2001 and January 2003, and concluding that hundreds more must have been issued under Section 2709 prior to that). Nor is it surprising that there is no indication that the FBI has ever had to resort to a judicial enforcement proceeding for any NSL or that any recipient, other than Doe, has ever resisted an NSL request in court. *See id.* at 502, nn.145 and 146.

Moreover, the absolute ban on disclosure, unlimited in time, prevents the real parties in interest—the subscriber whose information is sought—from having an opportunity to challenge abuses that may violate his or her First Amendment rights, especially since the recipient has little incentive to challenge the NSL and defy the broad and absolute ban on disclosure. Thus,

the NSL provision permits the government to secretly gather broad categories of confidential information about individuals who may never learn of the disclosure. There is similarly no mechanism to prevent the FBI from using NSLs to gather information about lawful political or religious activities that are protected under the Constitution. The District Court therefore correctly concluded that the FBI's authority to issue NSLs is "neither restrained by the FBI's *own* internal discretion nor reviewable by *any form* of judicial process." *Id.* at 519 (emphasis added).[4]

The District Court properly rejected the proposition that such unfettered power could be lodged in the executive agency, writing: "In general, as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom." *Id.*

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[4] Recognizing the inherent constitutional issues involved in a ban on judicial review of the constitutionality of a congressional enactment, the courts have routinely found that various congressionally enacted prohibitions on judicial review did not also encompass a prohibition on the review of constitutional questions. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 366-67, 94 S. Ct. 1160, 1165, 39 L. Ed.2d 389 (1974). However, as the District Court stated in *Doe*, "the courts cannot press statutory construction to the point of disingenuous evasion...to avoid a constitutional question." 334 F. Supp.2d at 498 (quoting *United States v. Locke*, 471 U.S. 84, 96, 105 S. Ct. 1785, 85 L. Ed.2d 64 (1985) (internal quotation marks omitted)). This was not a decision lightly made by the District Court, but one that recognized that rewriting Section 2709 to allow for judicial review would not solve the problem of the coercive nature of the statute, both as read by an ordinary NSL recipient and as applied by the FBI, *see id.* at 499-502.

As discussed above, our nation's history demonstrates the need for judicial review to prevent government infringements on civil liberties in times of national security crisis. The Government wishes this Court to salvage Section 2709 by reading into it such a review procedure. However, that reading is at odds with the plain language and legislative history of the statute and is inconsistent with the Government's own actions under the statute. Nor would such a reading remedy the inherent problems with Section 2709 because it would not alter the fundamentally coercive nature of the statute both on its face and as applied. Therefore, this Court should affirm the District Court's decision.

POINT II

THE COURTS MUST BE AVAILABLE TO FULFILL THEIR ESSENTIAL ROLE IN DEFINING AND PROTECTING CONSTITUTIONAL RIGHTS

As the above history demonstrates, when the Executive and Legislative branches overstep their constitutional bounds, the Judicial branch is the only remaining check. There is nothing more fundamental to our democratic constitutional system than the ability to have one's grievances heard and liberties protected by a neutral tribunal. As amply demonstrated by the Appellees' brief and by the district court opinion, Section 2709—both as drafted by Congress and as applied by the Executive branch—undermines

this constitutional order by effectively depriving affected persons of access to the courts to protect their constitutional rights.

The fundamental right to have constitutional challenges heard by an independent judiciary stems from several different Constitutional sources, including the Fourth Amendment, the Due Process Clause, and the First Amendment. *See Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986) (citations omitted); *see also Allah v. Seiverling*, 229 F.3d 220, n.4 (3d Cir. 2000); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983). This right also is protected by the doctrine of separation of powers, and the underlying principles of *Marbury v. Madison.*

The Association fully agrees with the District Court's determination that in this case the right to judicial review rests primarily on the Fourth Amendment and the subscriber's First Amendment rights. However, because the First and Fourth Amendment issues are being addressed by the Appellees and other *amici curiae*, the Association confines itself to a discussion of the right to judicial review under the Due Process Clause of the Fifth Amendment, the doctrine of separation of powers, the underlying principles of *Marbury v. Madison* and the NSL recipient's rights under the First Amendment.

The right to have one's day in court is the most fundamental manifestation of democracy. "'Meaningful access to the courts is a fundamental right of citizenship in this country.' Indeed, all other legal rights would be illusory without it." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (citations omitted); *see also Winters v. Miller*, 446 F.2d 65, 71 (2d Cir. 1971). This essential component of the rule of law has been deeply enmeshed in our national consciousness since the Republic's founding. As John Marshall wrote in *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
> * * *
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. 137, 163 (1803).

While statutes and Executive acts have been challenged and reviewed countless times for their constitutionality, there has not been anything comparably audacious enough to preclude not only judicial review of Executive branch action, but also any discussion at all, with anyone, of that action. Indeed, the D.C. Circuit has found that "in the entire history of the United States, the Supreme Court has never once held that Congress may

foreclose all judicial review of the constitutionality of a congressional enactment." *Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987).

A. Due Process Requires the Availability of Judicial Review

The right of access to the courts is a basic constitutional guarantee protected by the Due Process clause. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 523, 124 S. Ct. 1978, 1988, 158 L. Ed.2d 820 (2004); *Simmons*, 804 F.2d at 183; *Allah*, 229 F.3d at n.4; *Ryland,* 708 F.2d at 971-72.

Not surprisingly, the area of the law providing the most discussion of the right to judicial review based on due process involves those whose rights are most marginalized: prisoners. Prisoners, convicted of a variety of anti-social behaviors, live apart from society, with many rights suspended while incarcerated. It is telling that courts have tirelessly defended prisoners' rights to petition the courts.

The right of access to the courts is so strong, in fact, that states must not only allow prisoners access, but must "shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds v. Smith*, 430 U.S. 817, 824, 97 S. Ct. 1491, 1496, 52 L. Ed.2d 72 (1977). Such affirmative obligations may include providing adequate law libraries or legal assistance. *Id.* at 828; *see also Morello v. James*, 810 F.2d 344, 346 (2d Cir.

1987). In *Morello*, this court indicated that the right of access to the courts is "substantive rather than procedural." *Id.*

Although the right of access is litigated most frequently by prisoners, this right is not limited to their special circumstances. When fundamental or constitutional rights are at issue, courts must be available to consider and protect those rights. In *Boddie v. Connecticut*, the Supreme Court considered a state statute that charged a fee to commence divorce litigation. 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed.2d. 113 (1971). The plaintiffs, indigent welfare recipients, were not able to pay the fees, were unable to get a waiver, and thus were unable to access the courts for their divorce. The Court held the statute unconstitutional because marriage (and divorce) was a "fundamental human relationship," 401 U.S. at 383, and prohibiting access to the courts to address such a right, where the state holds a monopoly on adjusting that right, violated due process. In discussing the requirements of due process, the Court emphasized the importance of judicial resolution to a functional society:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later

> those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.

Id. at 375.

The Court noted that "this Court has seldom been asked to view access to the courts as an element of due process" because litigation seeking basic access to the courts generally involved defendants whose rights have been infringed, rather than plaintiffs. *Id.* at 375. The Court concluded that due process also protected plaintiffs because the courts were the only forum available to resolve the dispute. *Id.* at 377. The Court noted that due process does not require "that the defendant in every civil case actually have a hearing on the merits.... What the Constitution does require is 'an opportunity * * * granted at a meaningful time and in a meaningful manner, for (a) hearing appropriate to the nature of the case." *Id.* at 378.

Although the right at issue in *Boddie* was the adjustment of marriage, courts have been consistent that when *any* right protected by the Constitution is at issue—as it clearly is in the instant case—Congress cannot restrict the courts' jurisdiction so as to deny a judicial forum to enforce constitutional

rights. For example, in *Battaglia v. General Motors*, 169 F.2d 254 (2d Cir. 1948), which considered overtime provisions in the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947, this Court emphasized that although Congress may restrict the jurisdiction of the federal courts in accordance with Article III of the Constitution, it must do so in accordance with due process:

> We think, however, that the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.

Id. at 257; *see also Bartlett*, 816 F.2d at 705-06 (the Second Circuit in *Battaglia* "explicitly recognized that congressional power over the jurisdiction of the courts is limited by the due process clause").

Likewise, in *Morrison v. Lipscomb*, 877 F.2d 463 (6th Cir. 1989), the court held that due process protected a landlord's constitutional right to petition a court in order to retrieve delinquent rent. In *Lipscomb*, the landlord was successful in one of his state court suits, and sought a writ of restitution to gain possession of his property. In observance of the holiday season, the chief judge declared a temporary moratorium on issuing writs of restitution. The plaintiff filed a federal case, alleging that the moratorium

was an establishment of religion in violation of the First Amendment, and also violated his Fourteenth Amendment equal protection and due process rights. The court held that the moratorium violated the plaintiff's right to seek judicial redress to his constitutional claim, and grounded this concept of due process in the Magna Carta, the writings of John Locke, the Declaration of Independence, and, of course, Supreme Court precedent:

> [T]he defendants, as well as the district court, misunderstood both the nature of [the plaintiff's] right to judicial process for the recovery of his property and the potential seriousness of the burden the moratorium places on that right. The defendants seem to interpret the provision of a judicial process for the recovery of property a favor that the government grants its citizens, rather than a right to which they are entitled. In other words, the state has free rein to decide if and when it will allow citizens to obtain judicial orders to recover their property.
>
> This view is contrary to both the avowed principles and the spirit of the American polity. It is a prime tenet of our American political philosophy that government has a responsibility to protect the lives, liberties, and property of its citizens, and part of that responsibility includes the provision of courts where individual citizens can seek the vindication of their rights. [Plaintiff] has the right to go to court to recover his property; it is not a privilege that can be granted or denied him at the government's whim. It is this right to vindicate one's rights in court that is the heart of the constitutional right to due process of law.

Id. at 467 (citations omitted). In contrast to the temporary moratorium in *Lipscomb*, Section 2709(c) effectively works a permanent ban on litigating

(or even discussing) the NSLs. As such, Section 2709(c) similarly violates the recipients' due process rights.

In *Bartlett*, Judges Skelly Wright and Harry T. Edwards of the D.C. Circuit, in dicta, analyzed the question of the constitutionality of complete bars to judicial review. Although the court determined that the Medicaid Act's jurisdictional bars did not preclude judicial review of a constitutional challenge to the Act, the court found an analysis to be necessary because the dissenting opinion, written by then-Judge Robert H. Bork, had "suggested that Congress may foreclose *all* judicial review of the constitutionality of a federal statute." 816 F.2d at 697 (emphasis in original). In rejecting this claim, the court stated:

> The question we ask is whether *due process* places any limits on Congress' power, and we conclude, narrowly and rather uncontroversially, that it does and that these limits are broached when Congress denies *any* forum—federal, state or agency—for the resolution of a federal constitutional claim.

Id. at 704 (emphasis in original); *see Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S. Ct. 2133, 2141, n.12, 90 L. Ed.2d 623 (1986) ("all agree that Congress cannot bar all remedies for enforcing federal constitutional rights") (citation omitted).[5] The D.C.

[5] The statute in issue in *Bowen* was superseded by the Omnibus Budget Reconciliation Act of 1986, as codified at 42 U.S.C. § 1395ff, which defined

Circuit went on to state that "Congress may not deny to a person attacking a statute 'the independent judgment of a court on the ultimate question of constitutionality.'" 816 F.2d at 706 (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84, 56 S. Ct. 720, 740, 80 L. Ed. 1033 (1936) (Brandeis J., concurring)). As it is clear that Congress has denied the independent judgment of a court to an NSL recipient under Section 2709, the statute must be found unconstitutional on due process grounds.

B. The First Amendment Requires the Availability of Judicial Review

Section 2709 also violates the fundamental right of access to the courts as grounded in the First Amendment. The First Amendment states in relevant part that "Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. Courts have consistently and reasonably held that this clause protects the fundamental right to access to the courts. The Supreme Court has stated that "the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America v. Illinois State Bar Assn.*, 389 U.S. 217, 222, 88 S. Ct.

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the requirements for seeking judicial review under that statute. *See Cosgrove v. Sullivan*, 999 F.2d 630, 632, n.1 (2d Cir. 1993).

353, 356, 19 L. Ed.2d 426 (1967). The Court continued that we "have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *Id.*

Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422 (8th Cir. 1986), involved a blueberry farmers' suit against a water and sewer commission for sewage discharges that polluted the only irrigation source, damaging the blueberry crop. The commission maliciously filed a counterclaim to condemn the farm, the only purpose of which was to pressure the farmers to settle their claims against the commission. The court held that the farmers stated a claim for "infringement of their constitutional right of access to the courts, in violation of their First Amendment right to petition the government for redress of grievances[.]" *Id.* at 1427. The court continued that "[a]s an aspect of the First Amendment right to petition, the right of access to the courts shares this 'preferred place' in our hierarchy of constitutional freedoms and values." *Id.* "It has been noted in this Circuit that 'access to the courts is a fundamental right of every citizen.'" *Id.* The court also noted that this claim was "somewhat novel," because "[m]ost of

the cases involving this right have arisen in the context of a prisoner's right of access to the courts." *Id.*

Section 2709 prohibits recipients of NSLs from petitioning "for a redress of grievances" and must be declared unconstitutional as a violation of the First Amendment as well.

C. The Separation of Powers Doctrine Requires the Availability of Judicial Review

"Basic to the constitutional structure established by the Framers was their recognition that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57, 102 S. Ct. 2858, 2864, 73 L. Ed.2d 598 (1982) (quoting *The Federalist No. 47*, p. 300 (H. Lodge ed. 1888) (J. Madison)). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.

Ct. 612, 683, 46 L. Ed.2d 659 (1976) (per curiam)); *see Benjamin v. Jacobson*, 172 F.3d 144, 159-60 (2d Cir. 1999).

As stated above, Section 2709 effectively denies judicial review as guaranteed by the Constitution in clear violation of the doctrine of separation of powers. Not only does Section 2709 fail to provide any avenue for review, but Section 2709(c) affirmatively prohibits the recipient of an NSL from revealing even the *existence* of that NSL to any person, a necessary predicate for challenging on constitutional grounds the Executive branch's actions in issuing an NSL, the Legislative branch's enactment of the statute, or both, in court. Congress may not create such a bar without raising serious constitutional questions. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed.2d 632 (1988); *Bowen*, 476 U.S. at 681, n.12; *Johnson*, 415 U.S. at 366-67; *see also Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C.Cir. 1997); *Bartlett*, 816 F.2d at 703.

As explained above, in *Bartlett*, the D.C. Circuit examined the constitutionality of complete bars to judicial review because this issue posed a question of "great significance." 816 F.2d at 703. In addition to discussing this issue in the context of due process, as detailed above, the court also examined this issue through the lens of the doctrine of separation of powers. *Id.* The court concluded that, because in that case the agency

had no authority to hear constitutional challenges to the Medicaid Act, to read the jurisdictional bars in that Act as barring judicial review would leave a person wishing to challenge the constitutionality of the Act with "*no forum at all* for the pursuit of her claims." *Id.* at 703 (emphasis in the original). The court found that "a statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers...." *Id.* (emphasis in the original). This is because the "delicate balance implicit in the doctrine of separation of powers would be destroyed if Congress were allowed not only to legislate, but also to judge the constitutionality of its own actions." *Id.* at 707. There can be no question that Congress has created just such a situation. Section 2709's gag provision effectively precludes judicial review of any kind, including the pursuit of a colorable constitutional claim, and it is therefore a violation of the doctrine of separation of powers. For this reason too, the District Court's decision that Section 2709 is unconstitutional should be upheld.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Respectfully submitted,
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Dated: August 1, 2005

STATUTORY ADDENDUM

18 U.S.C. § 2709. Counterintelligence access to telephone toll and transactional records

(a) Duty to provide.--A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification.--The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may--

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought 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 to the Constitution of the United States; and

(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is 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 upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Prohibition of certain disclosure.--No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(d) Dissemination by bureau.--The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(e) Requirement that certain congressional bodies be informed.--On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,997 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 proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

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August 1, 2005

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BRIEF OF AMICUS CURIAE

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE OF THE DISTRICT COURT

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Howard Daniels

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