UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MUSLIM COMMUNITY ASSOCIATION OF ANN ARBOR, *et al.* Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, *et al.*, Defendants.	Civil Action No. 03-72913 Honorable Denise Page Hood Magistrate Judge R. Steven Whalen

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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INTEREST OF *AMICI CURIAE*

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation, chartered by the State of New York, tracing its roots to 1909. The nation's oldest and largest civil rights organization, the NAACP has in excess of 500,000 members and over 2,200 units in the United States and overseas. At times, the NAACP's struggle to vindicate the rights of minorities and eradicate racial discrimination has depended upon its ability to protect its membership lists from disclosure. Indeed, in a series of cases before the United States Supreme Court, it was the NAACP that successfully established the principle that the First Amendment protects an organization's right to maintain the confidentiality of its membership list. Section 215 of the USA Patriot Act directly threatens that principle.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a New York-based non-profit organization that defends the civil rights of Asian Americans nationwide through legal advocacy and community education. After the September 11th tragedy, AALDEF provided legal representation and advice to over one thousand South Asians and Muslims on immigration matters. To inform the public about its services, AALDEF organizes educational presentations and participates in public meetings convened by other groups, including religious organizations. The names, addresses, and telephone numbers of meeting participants are often collected so that AALDEF can contact them later by mail or phone with additional information. AALDEF is also a membership organization, with thousands of members and contributors. An order to AALDEF under Section 215 of the Patriot Act would have a devastating impact on the organization, its members, and the people it seeks to assist.

The Japanese American Citizens League ("JACL"), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry. Prior to the outbreak of hostilities between the United States and Japan during World War II, U.S. military intelligence services and the FBI conducted clandestine surveillance of Japanese American communities, claiming that this

segment of the American population posed a potential threat to national security. During the war, Japanese Americans were denied their constitutional rights and were interned in camps by the U.S. government based solely on their ethnicity and nationality. At that time, the government confiscated JACL files containing the names of members and other confidential information, undermining the organization's activities. Section 215 of the Patriot Act jeopardizes the survival of grass-roots organizations and threatens a repetition of the type of unwarranted government surveillance that helped lead to the mistreatment of Japanese Americans during World War II.

Amici submit the within brief by unopposed motion, which is incorporated by reference herein.

PRELIMINARY STATEMENT

The First Amendment protects the right of individuals to associate with others in pursuit of a wide variety of goals. Freedom of association is essential to protecting unpopular beliefs and, more broadly, to sustaining the vibrant civil society that is so fundamental to our nation's democracy. Regrettably, history shows that government authorities have sometimes chilled the exercise of this right by conducting extensive and unchecked investigations into groups and individuals engaged in lawful expressive activity. *Amici* recognize the government's legitimate needs in countering international terrorism, but maintain that Section 215 of the USA Patriot Act[1] sweeps far too broadly and unnecessarily sacrifices precious First Amendment freedoms by granting the government investigatory powers that are nothing short of terrifying.

Specifically, Section 215 grants the Federal Bureau of Investigation ("FBI") almost limitless authority to investigate innocent individuals and to compel disclosure of such highly confidential information as an organization's list of members and contributors without any meaningful standards, safeguards, or opportunity for review. Even if no Section 215 orders have been issued -- something the target of a Section 215 order would never know for certain because of the Act's permanent gag order provision -- the statute chills the expressive activity that is the

[1] Pub. L. No. 107-56, § 215, 115 Stat. 272 (Oct. 26, 2001) ("Patriot Act" or "the Act").

lifeblood of organizations like *amici* and their members and contravenes long established Supreme Court precedents guaranteeing the First Amendment right of freedom of association.

STATEMENT OF FACTS

Plaintiffs and their members, clients, and constituents ("members") engage in a broad spectrum of protected First Amendment activity. They sometimes advocate on behalf of unpopular ideas and individuals, including even those suspected of terrorist activity. Compl. ¶¶ 46-48, 64-66, 81-82. As a result, plaintiffs and their members have experienced numerous reprisals since the World Trade Center attacks, including discrimination, threats, and violence. *Id.* ¶¶ 75, 85. They have also been targeted, investigated, questioned, and harassed by the FBI. *Id.* ¶¶ 54-57, 92-93, 117-18, 128-33, 139, 142-47. Indeed, plaintiffs themselves have been singled out by law enforcement officials and have received grand jury subpoenas seeking information about their members. *Id.* ¶¶ 111, 140.

Plaintiffs promise their members that the information those members provide will remain confidential, including the fact of membership itself; members, in turn, rely on that assurance in providing information and engaging in associational activity. *Id.* ¶¶ 74-75, 102-06, 149-50. By compromising the confidentiality of this information, Section 215 exposes plaintiffs' members to further reprisals and to additional harassment by the government. *Id.* ¶¶ 76, 135, 150-51. Based on their associational activities, plaintiffs and their members credibly fear that the FBI will obtain their records and other personal information through Section 215 orders. *Id.* ¶¶ 45, 58, 72-73. Even if no Section 215 orders have yet been issued,[2] the threat of enforcement has chilled their core First Amendment rights in concrete and important ways. *Id.* ¶¶ 41, 77, 119, 140, 152.

[2] For nearly two years after the passage of the Patriot Act, the Attorney General refused to provide the public with even the most basic information about Section 215, including whether any orders had been sought and, if so, on how many occasions. On or around September 18, 2003, the Attorney General declassified that the FBI had not sought any Section 215 orders since the Act's effective date on October 26, 2001. Baker Decl. ¶ 3. The government maintains, however, that it may use Section 215 orders under appropriate circumstances in the future. Defs.' Mem. at 1. Indeed, in light of Section 215's gag order provision, 50 U.S.C. § 1861(d), it is

As civil rights organizations whose members consist largely of racial and ethnic minorities, *amici* have experienced firsthand the harmful effects of discrimination by other members of society and investigation by the government for engaging in lawful associational activity. *Amici* share plaintiffs' concerns about the paramount importance of protecting confidential membership information from disclosure and believe that Section 215 jeopardizes the First Amendment rights not only of plaintiffs but of all organizations and their members. It is for that reason they file this brief in opposition to defendants' motion to dismiss and in support of plaintiffs' response thereto.

ARGUMENT

I. ORGANIZATIONS MUST HAVE STANDING TO CHALLENGE SECTION 215 TO VINDICATE FIRST AMENDMENT RIGHTS

It has long been established that organizations have standing under Article III of the Constitution to challenge restrictions on their freedom of association and that of their members. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 428 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958). Organizations, including *amici*, have strenuously opposed attempts to force them to disclose information about their members because of the chilling effect on the associational activity that is so vital to their goals. *E.g.*, *NAACP v. Alabama*, 357 U.S. at 462. This injury is rooted in the confidentiality of the information shared by organizations and their members, *id.*, the fact that organizations sometimes represent disfavored groups or viewpoints, *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539, 556-57 (1963), and the risk of reprisals against members based on First Amendment activity. *Id.* at 557; *see also Bates v. Little Rock*, 361 U.S. 516, 523-24 (1960). Constitutional protections of freedom of association were established to remedy these harms, and these protections have proved essential to the survival of civil rights and other organizations that espouse unpopular views and operate in hostile climates.

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impossible even to know whether the FBI has sought a Section 215 order since the Attorney General's recent declassification.

As described below, government investigation of the lawful activity of organizations and their members has historically chilled freedom of association and led to other grave abuses of constitutional rights. While the Foreign Intelligence Surveillance Act originally attempted to avoid these abuses by imposing restrictions on foreign intelligence investigations, Section 215 lacks any such meaningful constraints. Instead, it gives the government almost limitless authority to obtain an order compelling disclosure of highly confidential membership information without providing the recipient any opportunity to challenge the order and mandating total secrecy through a permanent gag order provision that further insulates the government's actions from legal challenge or public scrutiny. Section 215's chilling effect on the lawful activities of organizations like plaintiffs and their members cannot be overstated. Certainly, it has resulted in a sufficient injury on which to mount a First Amendment challenge. Indeed, for some organizations, Section 215's mere existence could ultimately prove fatal.

A. Government Investigations of Lawful Activity Have Historically Jeopardized Freedom of Association and Resulted in Grave Abuses

Intelligence gathering has long served as a means of repressing dissent. F. Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System* 30 (1980). Although intelligence activities in the United States date to the nineteenth century,[3] broad federal surveillance powers first emerged after World War I, triggered by a series of bombings in U.S. cities, including one that damaged the Washington home of Attorney General A. Mitchell Palmer. *Id.* at 33. Under the leadership of then-future FBI Director J. Edgar Hoover,

[3] Intelligence played a key role in efforts to undermine labor protest and union organization during the late nineteenth century. Donner, *supra*, at 31. Employers' use of private detectives, such as the Pinkerton Agency, quickly expanded from attempts to quell labor strife to broader attacks on all forms of union organizing, wholly unrelated to any law enforcement purpose. *Id.* ("In effect, private detectives became secret auxiliaries of employers, charged with waging guerilla warfare by any means necessary against labor organization."). Physical surveillance, the use of agents provocateurs, and the development of files and dossiers, were used to taint the labor movement and generate private reprisals against union members and supporters. *Id.* at 31-32. Before long, these techniques were adopted by law enforcement officials, and by the time of World War I, "a network of police and private detective agencies girdled urban America," engaging in a broad spectrum of surveillance activities. *Id.* at 32.

the Justice Department's newly formed General Intelligence Division ("GID"), also known as the Alien Radical Division, created an investigatory apparatus to uncover alleged "radicals" and "subversives." Attorney General Palmer explicitly praised its chilling effect, noting that anti-subversive intelligence work "does not always show in arrests . . . but it does show in a remarkable collection of facts, available for future use . . . [and] in the knowledge that it imparts to th[o]se persons of revolutionary design, *that the government is watching*." *Id*. at 35 (quoting annual report of Attorney General) (emphasis added). Under Hoover, the GID helped plan and implement the notorious Palmer Raids, in which several thousand aliens were rounded up, detained, often abused, and, in over 500 cases, deported -- despite the absence of any evidence linking them to the bombings. Final Report of the Select Committee to Study Governmental Operations with Respect To Intelligence Activities, S. Rep. No. 94-755, Bk II, at 23 (1976) ("Church Committee Report");[4] Donner, *supra*, at 36-38; D. Cole, *Enemy Aliens* 118-23 (2003).

Even after the Red Scare, lawful First Amendment activity continued to provide the predicate for intelligence investigations. The Bureau of Investigation, the forerunner of the FBI, opened investigative files on such individuals as Acting Secretary of Labor Louis Post for his criticism of the Red Scare, D. Williams, "The Bureau of Investigation and its Critics, 1919-1921: The Origins of Federal Political Surveillance," *68 J. Am. Hist.* 560, 569-70 (1981), and then-Harvard law professor Felix Frankfurter for his participation as *amicus curiae* in a habeas corpus proceeding challenging a prisoner's conviction for involvement in a terrorist bombing. *Id.* at 572-73.[5] The Bureau's investigations posed particular dangers to political and legal advocacy by ethnic and religious minorities whose ideas it saw as contrary to U.S. interests. *Id.* at 577 ("[T]he [B]ureau's reports insinuated that Irish-Americans who favored Irish independence, Jews who

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[4] The Church Committee, named for its chairman, Senator Frank Church, conducted an extensive investigation of government intelligence operations following allegations of substantial wrongdoing by intelligence agencies on behalf of the administrations they served. Church Committee Report, *supra*, preface, at v.

[5] After an investigation into the Palmer Raids, the Bureau's surveillance was "limited strictly to investigations of violations of law" until 1936, when domestic surveillance was reinstituted. Church Committee Report, *supra*, at 23-24 (quoting Attorney General Harlan Fiske Stone).

advocated the establishment of a national homeland in Palestine, civil libertarians who defended the rights of dissidents, and anyone who argued that the United States should recognize the Soviet Union were engaged in 'subversive' activities.").

During the Cold War, investigation of organizations and their members expanded dramatically. The House Committee on Un-American Activities, created in 1938, compiled an index of more than one million suspects over the next several decades, Cole, *supra*, at 129, interrogating over 3,000 witnesses in 230 hearings and issuing more subpoenas and contempt citations than all other House committees combined. *Id.* at 150. The attorney general maintained a list of subversive groups not only as a formal guide for a federal employee loyalty program initiated in 1947, but also as a "semiofficial blacklist" that was used by the Treasury Department to deny tax exemptions, immigration authorities to deny entry to aliens associated with specified groups, states to deny public employment, and the film industry to blacklist artists and performers. *Id.* at 145-46. The list, which was compiled through a secret administrative process, *id.* at 145, chilled associational freedom. *Id.* at 146 ("[A]nyone who worked for the government, thought they might want to work for the government in the future, or might be in a position to obtain a government contract or grant, effectively had to steer clear of all associations not only with the listed groups, but with any groups that might potentially be listed in the future."); *see also* F. Zacharias, "Flowcharting the First Amendment," 72 *Cornell L. Rev.* 936, 991 (1987) ("The process of stifling speech [during the McCarthy era] adversely affected expression in society as a whole, not only the targets' expression."). The FBI's indexing of national security information gained from its surveillance operations provided a foundation for the Emergency Detention Act of 1950,[6] which authorized the preventative detention of anyone suspected of

[6] Pub. L. No. 81-831, Title II, §§ 101-16, 64 Stat. 987, 1019 (Sept. 23, 1950) (codified as amended in scattered sections of 50 U.S.C.), *repealed by* Act of Sept. 25, 1971, Pub. L. No. 92-128, § 2, 85 Stat. 347, 348. *See* A. Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* 40-41, 46 (1978). Although this provision of the Internal Security Act was never used, at least 26,000 individuals were designated to be rounded-up in case of a "national emergency." Church Committee Report, *supra*, at 7.

having the potential for espionage or sabotage -- not unlike the internment of over 120,000 Japanese Americans during World War II.

The FBI also worked closely with the Immigration and Naturalization Service ("INS") to uncover "subversive aliens." E. Schrecker, "Immigration and Internal Security: Political Deportations During the McCarthy Era," 60 *Science and Society* 393, 399 (1996-1997). Yet, while the INS rounded up thousands of noncitizens under its expanded deportation powers, few were ever found to be "subversives." *Id.* at 412; *see also* R. Schmidt, *Red Scare: FBI and the Origins of Anti-Communism in the United States, 1919-1943*, at 366-67 (2000) (FBI's methods during the 1940s and 1950s mirrored on a much larger scale its activities during the Red Scare and Palmer Raids). In some instances, the goal was not to deport noncitizens, but rather to harass them and instill fear among immigrant communities. *See* Schrecker, *supra*, at 408-09 & n.9.

The more the Bureau insulated itself from outside control, the wider its investigative net became. Church Committee Report, *supra*, at 22. By 1955, FBI investigations encompassed "'the entire spectrum of the social and labor movement in the country.'" R. Goldstein, *Political Repression in Modern America: From 1870 to the Present* 394 (1978) (quoting annual report of the Attorney General). The FBI increasingly targeted peaceful civil rights and anti-war protest groups. Church Committee Report, *supra*, at 22; *see also id.* at 240-41 ("[T]he Bureau chose sides in the major social movements of the [era], and then attacked the other side with the unchecked power at its disposal."). For example, *amicus* NAACP remained under FBI surveillance for over twenty-five years, even though nothing was ever found to rebut a report issued during the investigation's first year concluding that the organization steered clear of communist activities. *Id.* at 8, 175. The FBI's investigations were based on "vague standards whose breadth made excessive collection [of information] inevitable," *id.* at 5, and led to violations of constitutionally protected activity. *See id.* at 10 (anonymous attacks on political beliefs of targets to induce employers to fire them, attempts to provoke IRS investigations to deter protected political activity, and dissemination of "misinformation" to disrupt political protests); *see also id.* at 215 (attempts to deter membership in target groups); *id.* at 261

(unnecessary dissemination of information about the political beliefs and associations of candidates for federal employment to federal agencies).

These abuses stemmed at least partly from the FBI's ability to obtain membership lists and other confidential information from organizations, *id.* at 197-98, and the secrecy on which the Bureau relied out of "frustration with Supreme Court rulings limiting the Government's power to proceed overtly against dissident groups." *Id.* at 211. By the early 1970s, the FBI had accumulated over 500,000 intelligence files, which each typically contained information on more than one individual or group. *Id.* at 6. In perhaps its most infamous probe, the FBI conducted an extensive surveillance campaign of Dr. Martin Luther King, Jr., to "neutralize him as an effective civil rights leader" and "reduce him completely in influence." *Id.* at 11 (internal quotation marks omitted). These abuses were not, however, the result of any illegitimate or malicious purpose -- indeed, FBI agents genuinely believed they were protecting the country against national security threats -- but rather flowed from the Bureau's unchecked power to investigate First Amendment activity. *Id.* at 14. Although the rationale for FBI surveillance activity has increasingly emphasized investigating "terrorism" and "foreign intelligence" rather than subversive activity, the political beliefs of targeted individuals and groups continue to shape surveillance policy. *See* A. Theoharis, "FBI Surveillance: Past and Present," 69 *Cornell L. Rev.* 883, 884 (1984).

B. Section 215 Invites a Repeat of Past Abuses

In response to growing concerns about these surveillance activities, Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA"). Pub. L. No. 95-511, 92 Stat. 1790 (Oct. 25, 1978) (current version codified at 50 U.S.C. §§ 1801-1811). FISA originally established a framework for conducting electronic surveillance to obtain foreign intelligence information that sought to balance national security and civil liberties and to avoid the chilling effect of unrestricted surveillance that had so dangerously eroded political freedom in the past. S. Rep. No. 95-604, pt. 1, at 8-9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909-3910. For example, the statute provided that the government could obtain an *ex parte* order to conduct electronic

surveillance if it demonstrated, *inter alia*, "probable cause" to believe that the target was "a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3); *see also id.* § 1824(a)(3) (analogous "probable cause" requirement for conducting a physical search under FISA).

In 1998, Congress amended FISA to authorize the issuance of *ex parte* orders to obtain "business" records from specific entities (a common carrier, public accommodation facility, physical storage facility, and vehicle rental facility) by demonstrating, *inter alia*, "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power." Pub. L. 105-272, § 602, 112 Stat. 2411 (Oct. 20, 1998) (currently codified at 50 U.S.C. § 1861). These four entities were selected because Congress had determined that they were frequently used by subjects of FBI foreign intelligence and international terrorism investigations. S. Rep. No. 105-185, at 29 (1998). Section 215 of the Patriot Act, however, radically expands that limited grant of authority, mandating the production of: (i) "*any tangible things* (including books, records, papers, documents, and other items)" (ii) from *anyone*, including a law-abiding organization and its members (iii) based solely on the FBI's assertion that the items are "sought for" (iv) foreign intelligence, clandestine intelligence, or an international terrorism investigation. 50 U.S.C. § 1861(a), (b)(2) (emphasis added); *see also* 147 Cong. Rec. S11022 (2001) ("[Section 215] is truly a breathtaking expansion of police power.") (statement of Sen. Feingold).[7] Section 215 thus enables the government to easily obtain a vast amount of confidential information, ranging from medical and legal records to membership and contribution lists. Section 215 does not require the government to demonstrate

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[7] Defendants suggest that the issuance of a Section 215 order is more like the use of pen registers and trap and trace devices (which trace incoming and outgoing telephone calls) than electronic surveillance and physical searches. Defs.' Mem. at 4-7. This ignores the magnitude of the danger Section 215 poses to freedom of association. Pen registers and trap and trace devices, while not without concerns of their own, enable the government to obtain phone numbers dialed for outgoing calls and originating numbers for incoming calls (now including a similar type of information for internet communications), but not the contents of the communications themselves. *See* 18 U.S.C. § 3127(3)-(4); *see also ACLU v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 23 n.3 (D.D.C. 2003). Section 215 orders, in contrast, require disclosure of the contents of even the most confidential information and records shared by an organization and its members.

probable cause or even allege any individual wrongdoing. Nor does it give the FISA court any authority to examine the foundation of the FBI's assertion or to reject it as unfounded. The Act further fails to provide any procedures by which an individual or group served with a Section 215 order may challenge it before turning over the desired information or records.[8] Those who do not promptly comply face sanctions, including possible imprisonment. *See generally* 18 U.S.C. § 401 (criminal contempt); 28 U.S.C. § 1826 (civil contempt). Section 215, moreover, not only fails to require that the FBI notify surveillance targets that it has obtained their records or other personal information even after the investigation is completed, but also prohibits any entity or person from *ever* disclosing this information, thus telling organizations -- including *amici* -- what they may and may not tell their own members. 50 U.S.C. § 1861(d). At the same time, the Act imposes no limits on the government's use of information obtained through a Section 215 order, lacking even the "minimization" provisions restricting the dissemination of information obtained through electronic surveillance under FISA. *See id.* §§ 1801(h), 1805(a)(4). In short, section 215 does not even pretend to strike a balance between national security and civil liberties, but instead embraces the kind of unrestricted, open-ended investigation that has led to so many abuses in the past. Indeed, it would be difficult to conceive of a statute that posed a greater danger to freedom of association without directly prohibiting it.

C. Section 215's Chilling Effect Provides a Basis for Standing.

It is well established that a statute's chilling effect justifies relaxation of normal Article III standing requirements. *E.g.*, *Virginia v. American Booksellers*, 484 U.S. 383, 392-93 (1988); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); Notes, "The Chilling Effect in Constitutional Law," 69 *Colum. L. Rev*. 808, 820 (1969) (concept of chilling effect developed "to give first amendment freedoms breathing space") (citation and internal quotation marks omitted);

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[8] It is not even certain that the recipient of a Section 215 order would know for what purpose the order was issued or even that it was issued pursuant to Section 215 itself. *See* 50 U.S.C. § 1861(c)(2) ("An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).").

see also Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) ("[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."). A potential target need not wait for a statute to be used against him if the threat to First Amendment rights is sufficient. *E.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301-02 (1979) (standing to challenge statute where plaintiffs showed "a realistic danger of sustaining a direct injury as a result of [its] operation or enforcement"). In the First Amendment context, moreover, litigants may "challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others . . . to refrain from constitutionally protected speech or expression." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984) (internal quotation marks and citation omitted).

Organizations have thus been permitted to challenge statutes based on their chilling effect on associational activity alone. *E.g.*, *NAACP v. Button*, 371 U.S. at 434-35 ("It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes."); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (apartment owner's racial steering practices caused "concrete and demonstrable injury" to housing organization's associational activities); *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1120-21 n.48 (D.C. Cir. 1969) (chilling effect of draft deferment directive may cause organization to lose members). Indeed, the injuries caused by indirect restrictions on freedom of association were at the heart of legal challenges brought by *amicus* NAACP during the civil rights movement. State and local governments had chilled the activities of the NAACP and its members by compelling disclosure of membership lists, inhibiting legal advocacy, and conducting investigations by legislative committees. These measures were justified then as necessary steps to thwart communist subversion, M. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1931-1961*, at 295 (1994), much as the government today claims Section 215 is necessary to counter al Qaeda supporters and sympathizers. The NAACP feared its members would lose their jobs and be attacked physically if their membership were disclosed. *Id.* at 284. And indeed, the

disclosure requirements caused membership to decline throughout the South, threatening the organization's survival. *Id.* at 290-91 (membership in Louisiana dropped from 12,000 to 1,700); W. Murphy, "The South Counterattacks: The Anti-NAACP Laws," 12 *W. Pol. Q.* 371, 389 (1959) (overall membership fell by 38,000 from 1956 to 1957); *see also* Tushnet, *supra*, at 283 (organization shut down in Alabama despite the State's repeated legal defeats); *id.* at 289 (attempts to compel disclosure of membership lists "caused serious operating difficulties even where the organization remained at work").

In a series of landmark decisions, the Supreme Court invalidated these attempts to compel disclosure of membership information based on the palpable harm to the NAACP's activities. *See, e.g.*, *Gibson*, 372 U.S. at 556-57 ("immediate and substantial" impact of requiring disclosure of member names); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (compelling teachers to detail organizational membership "chill[s] that free play of the spirit which all teachers ought especially to cultivate and practice") (citation and internal quotation marks omitted); *NAACP v. Alabama*, 357 U.S. at 462-63 (disclosure of membership lists could "induce members to withdraw" and "dissuade others from joining"); *see also NAACP v. Button*, 371 U.S. at 434 (statute restricting legal advocacy presents "gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority"). Acknowledging the importance of considering the context in which an organization operates in assessing the injury to its associational activities, the Supreme Court has emphasized that the "mere existence" of a statute "could well freeze out of existence all [group] activity." *NAACP v. Button*, 371 U.S. at 435-36; *see also Gibson*, 372 U.S. at 556-57; H. Kalven, Jr., *The Negro and the First Amendment* 120 (1965) ("[T]he Court has been notably explicit about recognizing that disclosure may become a sanction in a hostile community and that freedom may require anonymity."). Without the protections of the Constitution, and the standing to invoke those protections, the NAACP could not have survived in the South. *See* W. Eskridge, Jr., "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," 100 *Mich. L. Rev*. 2062, 2092 (2002).

Defendants rely on the Supreme Court's narrow holding in *Laird v. Tatum*, 408 U.S. 1 (1972), in an attempt to deny the real harms caused by Section 215. *Laird* was a suit brought by individuals and did not squarely raise the issue of associational rights, as this case does. Even more importantly, *Laird* involved a challenge to lawful army surveillance and data-gathering activities, prompting Chief Justice Burger to quote with approval the determination of the Court of Appeals that "the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." *Id.* at 9 (quoting *Tatum v. Laird*, 444 F.2d 947, 953 (D.C. Cir. 1971)). *Laird* did not involve a statute, like Section 215, mandating disclosure of highly confidential information such as an organization's membership list. Nor did it involve a First Amendment challenge to a statute that also violates Fourth (and Fifth) Amendment rights by authorizing searches without probable cause, notice, and an opportunity to be heard. *See* Compl. ¶¶ 153-54; *see also Dalia v. United States*, 441 U.S. 238, 255 (1979); *Zweibon v. Mitchell*, 516 F.2d 594, 634 (D.C. Cir. 1975) (prior judicial review protects not only the privacy interests of those whose conversations the government desires to overhear but also the "free and robust exercise of the First Amendment rights of speech and association by those who might otherwise be chilled by the fear of unsupervised and unlimited Executive [surveillance] power"). Indeed, the *Laird* plaintiffs "cast considerable doubt on whether they themselves [we]re suffering from *any* such chill." 408 U.S. at 14 n.7 (emphasis added). At bottom, *Laird* involved a policy dispute,[9] not an attempt to remedy the immediate injuries flowing from forced disclosure of confidential membership information to a domestic law enforcement agency.

[9] The thrust of plaintiffs' claim challenged the appropriateness of the army's conduct of domestic surveillance activity in light of the traditional separation between the military and civilian authorities. *Laird*, 408 U.S. at 13 (suggesting that the alleged chilling effect arose from plaintiffs' "very perception of the [surveillance] system as inappropriate to the Army's role under our form of government, or as arising from [plaintiffs'] beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector").

Defendants' reliance on *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), is equally misplaced. There the court held that the plaintiffs lacked standing to challenge an Executive Order authorizing intelligence gathering. *Id.* at 1377. Again, the case did not involve the concrete harms resulting from the threat of mandatory disclosure of an organization's membership list, but rather information-gathering activity that did not "*even relate*[ ] to any direct governmental constraint upon the plaintiffs." *Id.* at 1380 (emphasis added); *see also id.* (plaintiffs fail to allege that "any specific action is threatened or even contemplated against them"). The court, moreover, recognized the distinct standing issue presented where, as here, an individual or entity challenges a scheme of compulsion that is otherwise effectively insulated from judicial review. *See id.* ("[T]here is no reason why [plaintiffs] would be unable to challenge any illegal surveillance of them when (and if) it occurs."); *see also Hershey*, 412 F.2d at 1119 (standing to challenge draft deferment policy based on its chilling effect where statute effectively insulated draft board's classification from meaningful review).

In sum, a chilling effect on an organization's activities remains a sufficient injury for standing purposes. *See, e.g.*, *Social Workers Party v. Attorney General*, 419 U.S. 1314, 1319 (1974) (Marshall, Circuit Justice) (allegation by political party of concrete effects of investigative activity sufficiently specific to satisfy requirements of Article III);[10] *see also Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523 n.6 (9th Cir. 1989) (decrease in church membership is concrete harm that distinguishes the case from *Laird* and provides a basis for standing); *Philadelphia Yearly Meeting v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) (absence of safeguards on dissemination of information to non-law enforcement agencies constitutes an "immediately threatened injury" and provides a basis for standing); *cf. Al-Owhali v. Ashcroft*, __ F. Supp. 2d __, No. 02-883, 2003 WL 22047639, at *n.11 (D.D.C. Aug. 29, 2003) (plaintiffs do not allege they are actually being chilled by regulations authorizing monitoring of attorney-client

[10] As Justice Marshall noted, whether the claimed chill is sufficient to sustain the underlying First Amendment challenge is a matter to be reached on the merits, not a threshold jurisdictional question. *Social Workers Party*, 419 U.S. at 1319.

communications, but rather assert only the general proposition that the potential for monitoring chills the attorney-client relationship).

Section 215 not only injures plaintiffs and their members in the concrete ways alleged in the complaint, but also chills the protected activity of other groups that do not predominantly or expressly advocate on behalf of individuals of Arab, Muslim, and South Asian backgrounds. Some, like *amicus* NAACP, contain numerous Muslim members. Others, like *amicus* AALDEF, often work with immigrants who fear they too will become the targets of Section 215 orders. Indeed, the Patriot Act goes so far as to authorize the issuance of Section 215 orders for investigations of certain immigrants and noncitizens[11] conducted "*solely* upon the basis of activity protected by the first amendment." 50 U.S.C. § 1861(a)(1) (emphasis added).[12] Section 215's chilling effect on immigrants is increased by other provisions of the Act expanding the class of deportable offenses to include association with disfavored political organizations.[13]

Section 215 gives the government *carte blanche* to engage in fishing expeditions of unparalleled scope and to compel under threat of possible criminal sanctions the immediate

[11] This category includes all those who are not "United States person[s]," defined in relevant part as citizens or aliens admitted for lawful permanent residence. *See* 50 U.S.C. § 1801(i). The category of non-"United States person[s]" thus encompasses all other immigrants and noncitizens, including not only those lawfully here on student or business visas, but also the thousands of individuals with pending applications to become lawful permanent residents based, for example, on their marriage to a United States citizen. *See generally* 8 U.S.C. § 1255(a).

[12] While the Act states that no Section 215 orders may be issued for an investigation of a "United States person" conducted "solely upon the basis of activity protected by the first amendment," 50 U.S.C. § 1861(a)(1), alarmingly, defendants maintain that in the absence of that statutory restriction, the government could indeed conduct such an investigation based solely on activities protected by the First Amendment. Defs.' Mem. at 40.

[13] *See* 8 U.S.C. §§ 1182(a)(3)(B)(iii)-(iv), 1227(a)(4)(B) (defining as deportable offense the solicitation of members or funds for, or the provision of material support to, any group designated as terrorist (which can include any group that uses or threatens to use violence or provides material support to further terrorist activity), even if the noncitizen demonstrates his support was unintentional and did not further terrorism). For example, had the Patriot Act been in effect at the time, thousands of noncitizens, including legal permanent residents, could have been deported for supporting the African National Congress's lawful, non-violent anti-apartheid activity, as the State Department consistently labeled it a terrorist organization before it came to power in the 1990s. Cole, *supra*, at 6l.

disclosure of confidential information about an organization and its members without providing any procedures to challenge the order. Moreover, it prohibits any recipient from ever informing the target of a Section 215 order of its existence, thus permanently barring any organization, including *amici*, from telling its own members that it has handed over their confidential information and records to the FBI. Plaintiffs' current challenge to Section 215 seeks to vindicate the First Amendment rights on which all organizations and their members depend. To close the courthouse doors by denying plaintiffs standing would sanction -- indeed, would encourage -- the type of untrammeled government investigation that has historically chilled so much important expression and advocacy on behalf of disfavored groups and beliefs.[14]

II. SECTION 215 UNCONSTITUTIONALLY ABRIDGES FREEDOM OF ASSOCIATION

In seeking to dismiss plaintiffs' First Amendment claims under Rule 12(b)(6), defendants advance a truly radical argument: that the issuance of a Section 215 order to compel disclosure of an organization's members, list of contributors, and other confidential information is entirely free from First Amendment scrutiny. Defs.' Mem. at 37-40. The Supreme Court, however, has repeatedly subjected attempts to compel disclosure of membership information to searching review, invalidating any attempt that is not based on a compelling interest or that sweeps too broadly. *See, e.g.*, *Gibson*, 372 U.S. at 556-57 ("slender showing" and lack of "adequate foundation" insufficient to compel disclosure). Even if the government's purpose in seeking disclosure of membership information is "legitimate and substantial," it cannot pursue that purpose "by means that broadly stifle [freedom of association] when the end can be more narrowly achieved." *Shelton*, 364 U.S. at 488; *see also Talley v. California*, 362 U.S. 60, 64 (1960) (upholding facial challenge to ordinance requiring that handbills disclose names and

[14] Similarly, the complaint should not be dismissed on ripeness grounds, Defs.' Mem at 17-19, because Section 215 has chilled the associational activities of plaintiffs and their members, and, in that regard, is not based on an anticipated future event even if no Section 215 orders have yet been issued. *See, e.g.*, *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville*, 274 F.3d 377, 399-400 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002).

addresses of persons who prepared, distributed, or sponsored them despite lawful purpose of preventing fraud). Moreover, even where the government has sought to compel disclosure of membership information from groups allegedly engaged in illegal or violent activities, it has relied on statutes that were based on substantial legislative findings, *see Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 5-8 (1961), and, even more importantly, that contained significant procedural safeguards, including an opportunity to challenge the attempt to compel disclosure in an administrative hearing subject to judicial review *before* any disclosure order became final or any sanctions could be imposed. *See id.* at 11-14, 19-21, 105.[15]

Where a group espouses unpopular beliefs, as plaintiffs and their members sometimes do, ensuring the privacy of membership information becomes truly "indispensable" to preserving freedom of association. *NAACP v. Alabama*, 357 U.S. at 461-62; *see also Watkins v. United States*, 354 U.S. 178, 197 (1957) ("forced revelations [that] concern matters that are unorthodox, unpopular, or even hateful to the general public" may have "disastrous" consequences for expressive activity); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 98 (1982) (compulsory disclosure of names of recipients of a minor party's campaign expenditures could "cripple [its] ability to operate effectively"); *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (campaign disclosure requirements can "deter contributions [to minor parties] to the point where the movement cannot survive"). The restriction on freedom of association is exacerbated where, as here, there are neither procedures to challenge an order to compel disclosure of confidential membership information, *cf. United States v. Dionisio*, 410 U.S. 1, 12 (1973) (First Amendment

[15] In response to arguments that its decision would authorize the imposition of similar requirements on any group that pursues unpopular political objectives or expresses an unpopular political ideology, the Court declared that "[n]othing which we decide here remotely carries such an implication." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. at 104; *see also Gibson*, 372 U.S. at 549 ("concededly legitimate groups do not forfeit their right to privacy of association simply because the general subject matter of the legislative inquiry is Communist subversion or infiltration"); *cf. New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 76-77 (1928) (upholding forced disclosure of membership in Ku Klux Klan based on legislative findings that the organization was engaged in a crusade of terror and violence against racial, religious, and ethnic minorities).

requires that "[g]rand juries are subject to judicial control and subpoenas to motions to quash."), nor limits on the government's power to disseminate that information once it obtains it. *See Shelton*, 364 U.S. at 486. Courts, moreover, must "give deference to an association's view of what would impair its expression." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). And these crucial constitutional protections of associational freedom are not limited to citizens but extend to organizations and their members in immigrant communities. *See generally Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 n.5 (1953) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First [Amendment]. . . .") (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).[16]

In giving the FBI virtually unrestricted access to an organization's confidential information, Section 215 unconstitutionally abridges the First Amendment rights of organizations and their members.[17] Its chilling effect is increased not only by the absence of any

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[16] Relying on *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"), defendants mistakenly argue that if the government may deport noncitizens based partly on their affiliation with a particular group, the First Amendment imposes no limits on its power to investigate noncitizens, including lawful permanent residents, for completely lawful associational activities. Defs.' Mem. at 39-40. In *AADC*, however, the Court merely stated in dictum that "an alien *unlawfully in this country*" may not assert a selective enforcement defense against his deportation. 525 U.S. at 488 (emphasis added); *see also id.* at 497 (Ginsburg, J., concurring) (question of constitutionality of selective enforcement of deportation laws remains an "open one," and there is "more to the other side of the ledger . . . than the Court allows") (internal quotation marks and citation omitted). At most, *AADC* suggests that when a noncitizen's continuing presence violates the immigration laws, the government may deport him "*for the additional reason* that it believes him to be a member of an organization that supports terrorist activity," 525 U.S. at 491-92 (emphasis added), though even there the conduct may be sufficiently outrageous to support a selective enforcement claim. *Id.* at 491. Plainly, *AADC* does not eliminate all constraints on the government's ability to investigate noncitizens lawfully present in the United States for exercising their First Amendment right of freedom of association. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 690 (6th Cir. 2002) ("[T]here is ample foundation to conclude that the Supreme Court would also recognize that non-citizens enjoy unrestrained First Amendment rights in deportation proceedings.").

[17] In their attempt to shield Section 215 from constitutional scrutiny, defendants rely principally on *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1015-16 (7th Cir. 1984), and *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 460, 471 (D.C. Cir. 1991). Defs.' Mem. at 37-39. But those cases merely state that the government may initiate an

meaningful standards, safeguards, or procedures to challenge a Section 215 order before turning over confidential information and records, but also by Section 215's gag order provision that prevents any organization from *ever* telling its own members that the FBI has sought the highly confidential information those members had once entrusted to it. The danger for self-censorship under Section 215 is startling. As the Supreme Court warned long ago, the power to compel disclosure of membership information must "be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas" as freedom of association. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). Section 215 flouts that warning. Indeed, its very existence jeopardizes the right to freedom of association that has always been a pillar of our democratic society, and the statute should be struck down as unconstitutional on its face.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss should be denied.

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investigation based on statements that advocate criminal activity or indicate an apparent intent to engage in crimes, particularly crimes of violence, even if such statements would not themselves be punishable under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). They in no way hold, as defendants assert, that the First Amendment imposes no limits on the government's power to compel disclosure of confidential information from organizations whose members are engaged in entirely lawful expressive activities.