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

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

**BRIEF OF *AMICI CURIAE* FIRST AMENDMENT ORGANIZATIONS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES AND RULES**



**MISCELLANEOUS**

*Amici curiae* American Booksellers Foundation for Free Expression, Association of American Publishers, Association of American University Presses, Center for First Amendment Rights, Comic Book Legal Defense Fund, Electronic Frontier Foundation, Feminists for Free Expression, First Amendment Project, Freedom to Read Foundation, PEN American Center (collectively, "First Amendment Organizations"), through undersigned counsel, submit this brief in support of plaintiffs' challenge to Section 215 of the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272. All parties have consented to the filing of this brief.

## INTRODUCTION

*Amici* include associations of bookstores, libraries, publishers and other media and expressive organizations devoted to the continued vitality of First Amendment values.[1] Although *amici* have grave constitutional concerns about Section 215 generally, they submit this brief to highlight the severe threat to First Amendment protections posed by Section 215.

Section 215 of the Patriot Act provides the government with an unchecked and unprecedented power to obtain materials protected by the First Amendment whenever the government states, without more, that the materials are sought "to protect against international terrorism." 50 U.S.C. § 1861(a)(1). Going far beyond the government's carefully circumscribed search warrant and subpoena power, Section 215 requires no showing of relevance or need to obtain the requested material and provides no means of challenging an order once issued. Furthermore, the statute imposes an automatic gag order on the recipient of a request, barring the recipient from telling anyone – including the subject of the records – about the request.

This Court should deny the government's motion to dismiss. Section 215 of the Patriot Act violates the First Amendment in two respects. First, Section 215 authorizes the production

[1] A brief Statement of Interest for each *amicus* is attached hereto at Tab A.

of First Amendment materials without any governmental showing that the information would actually further a terrorism investigation. In both the search warrant and subpoena contexts courts consistently have held the government to a higher standard when it seeks to obtain First Amendment-protected information. Because the Patriot Act makes no such provision – indeed, it contains far fewer safeguards against government abuse than even the subpoena process – it must be struck down. Second, Section 215's automatic gag rule violates the First Amendment because it unjustifiably imposes a blanket ban of secrecy upon recipients of orders in the absence of any showing of need by the government for such secrecy.

## I. SECTION 215 IMPLICATES CORE FIRST AMENDMENT VALUES.

Section 215 of the Patriot Act substantially expands the provisions of the Foreign Intelligence Surveillance Act in two ways that pose a serious threat to expressive activity. First, where the pre-Patriot Act provisions allowed the government to seek records only from "common carriers" and similar entities, *see* 50 U.S.C. § 1861 (2000), Section 215 now authorizes orders requiring the production of "*any* tangible thing (including books, records, papers, documents, and other items)." 50 U.S.C. § 1861(a) (2003) (emphasis added). Second, the Act no longer requires a showing of "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agency." 50 U.S.C. § 1862(b)(2)(B) (2000). Instead, Section 215 now requires only that the government state that the materials are sought to "protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2) (2003).

Section 215 authorizes the government to obtain records – including bookstore and library patron records – that lie at the heart of the First Amendment. Bookstores and libraries serve as "a mighty resource in the free marketplace of ideas." *Minarcini v. Strongsville City Sch.*

*Dist.*, 541 F.2d 577, 582 (6th Cir. 1976). Indeed, the well established constitutional right to receive information, *see, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997),[2] is vigorously enforced in the context of these institutions, which are "quintessential loc[i] of the receipt of information." *Kreimer v. Bureau of Police of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992).

The right to engage in expressive activities anonymously – without revealing one's identity to the government or the public at large – is critical to the protection of First Amendment rights because of the inherent chilling effect of such disclosures. As the Supreme Court has made clear, "[a]nonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Courts thus have long recognized the importance of anonymous expressive activity generally,[3] and, in particular, the need to safeguard the privacy and confidentiality of one's reading habits, as discussed below.

Because Section 215 authorizes the production of bookstore and library records, it threatens the core constitutional rights of *amici* and their patrons. If this Court dismisses plaintiffs' complaint, the government's ability to obtain confidential, private information about a bookstore or library patron's reading practices likely will have a dangerously broad chilling effect on the exercise of basic First Amendment liberties. Patrons will curtail their expressive activity if they fear that their reading habits might be scrutinized by the government and

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[2] *See also, e.g., Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (First Amendment right to receive ideas "follows ineluctably from the sender's . . . . right to send them" and is also "a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Stanley v. Georgia*, 394 U.S. 557, 563-64 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[3] *See McIntyre*, 514 U.S. at 341-43 (discussing history and importance of anonymous expressive activity).

possibly, as is evidently the case here, form the basis of a criminal investigation. As Justice Douglas explained:

> A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. . . . Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. . . . If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press.

*United States v. Rumely*, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring).[4]

"[G]overnmental inquiry and intrusion into the reading choices of bookstore customers will almost certainly chill their constitutionally protected rights." *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053 (Colo. 2002); *see also, e.g.*, *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599, 1600 (D.D.C. 1998) (reviewing subpoenas served on several bookstores and noting a decline in sales caused by customer fears that the stores had "turned documents over to the [government] that reveal a patron's choice of books"). This is equally true in the context of public libraries, where nearly every State across the country has accorded individual private reading habits heightened statutory protection. As noted by one court, quoting the statutory history of its State's library confidentiality law:

> The library, as the unique sanctuary of the widest possible spectrum of ideas, must protect the confidentiality of its records in order to insure its readers' right to read anything they wish, free from the fear that someone might see what they

[4] *Cf. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (concluding that requirement that viewers affirmatively request certain cable programming "will further restrict viewing by subscribers who fear for their reputations should the [cable] operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel"); *Lamont*, 381 U.S. at 307 (invalidating requirement that mail recipient file written request with post office to receive communist literature because such requirement "is almost certain to have a deterrent effect").

> read and use this as a way to intimidate them. Records must be protected from the self-appointed guardians of public and private morality and from officials who might overreach their constitutional prerogatives. Without such protection, there would be a chilling effect on our library users as inquiring minds turn away from exploring varied avenues of thought because they fear the potentiality of others knowing their reading history.

*Quad/Graphics, Inc. v. Southern Adirondack Library Sys.*, 664 N.Y.S.2d 225, 227 (Sup. Ct. 1997) (quoting Mem. of Assemblyman Sanders, 1982 N.Y. Legis. Ann., at 25).

*Amici*'s fears of government surveillance of library and bookstore records are not mere speculation. In fact, the federal government has a long and infamous history of monitoring public libraries and intruding into the reading habits of the public. A notable example is the FBI's Library Awareness Program, which first came to light in 1986, under which FBI agents would approach library "public service desks, ask attendants (often students) about library use by 'suspicious looking foreigners' and sometimes ask to see library circulation records." Barbara M. Jones, *Libraries, Access, and Intellectual Freedom* 89 (1999). Recent years have seen similar tactics in the aftermath of September 11. A University of Illinois study reports that in the year after the September 11 attacks government authorities visited libraries at least 545 times seeking information about patrons. *See* Leigh S. Estabrook, *Public Libraries And Civil Liberties* (2003) (available at http://alexia.lis.uiuc.edu/gslis/research/civil_liberties.html). And former Assistant Attorney General Viet Dinh stated in testimony before Congress in May 2003 that the government had visited libraries approximately 50 times in 2002 to obtain records and information. *See* Eric Lichtblau, *Justice Dept. Lists Use Of New Power To Fight Terror*, N.Y. Times, May 21, 2003, at A1.

Indeed, although the government has trumpeted the fact that it has not yet used Section 215, it has been equally brazen in announcing that it intends to use it. According to the Department of Justice, because terrorists used public libraries prior to the September 11 attacks,

libraries have become a logical target for surveillance. Once the government decides someone is a terrorist, the Department has explained, "We would want to know what they're reading." Bob Egelko & Maria Alicia Gaura, *Libraries Post Patriot Act Warnings*, S.F. Chron., Mar. 10, 2003, at A1; *see also, e.g.*, Diana Lynne, *Librarians 'Throw the Book' at Feds*, World Net Daily, Feb. 3, 2003 (available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=30810). However, as noted above, Section 215 is incredibly broad, and can be used to compel the production of records of individuals who are not suspected of any criminal or terrorist activity, simply upon the government's blanket, unsupported assertion of a connection to an ongoing investigation.

In short, government surveillance of reading habits is neither the stuff of mere conjecture nor a trivial matter. Rather, Section 215 poses a grave threat to civil liberties in general, and to library and bookstore patrons' unfettered freedom to read in particular. *Amici* thus ask this Court to keep these values in mind in assessing the constitutionality of Section 215, and to deny the government's motion to dismiss.

## II. SECTION 215 IS PROPERLY SUBJECT TO PLAINTIFFS' PRE-ENFORCEMENT FACIAL CHALLENGE.

A dismissal of plaintiffs' case for lack of standing would effectively insulate the statute from meaningful judicial review. Given the secrecy that pervades the Patriot Act generally, and Section 215 specifically, it will be difficult, if not impossible, to safeguard core First Amendment rights unless this case proceeds to the merits. *Amici* therefore urge the Court not to dismiss this case on standing grounds.

Plaintiffs have standing to bring this lawsuit. Although the government repeatedly stresses its recent representation that Section 215 has not yet been used, the fact that the government intends to use Section 215 in the future, combined with the secretive and otherwise

unreviewable aspects of the statute, provide plaintiffs with standing to bring this suit now. The First Amendment injury alleged by plaintiffs is not merely conjectural but an actual "threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Plaintiffs have alleged with specificity that they have good reason to believe Section 215 will be used to acquire their records, *see, e.g.*, Complaint ¶¶ 45, 83, 90, 123, and the government has indicated that it is ready and willing to use Section 215. *See, e.g.*, Mot. to Dismiss at 1. That is all that is necessary to establish Article III standing. *See, e.g., Virginia v. American Booksellers, Inc.*, 484 U.S. 383, 392-93 (1988); *DeShawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998); *see also United States v. Virginia*, 139 F.3d 984, 987 n.3 (4th Cir. 1998) (finding standing to challenge criminal law where government agency had made it clear that it intended to enforce criminal law).

## III. SECTION 215 UNCONSTITUTIONALLY ALLOWS THE GOVERNMENT TO OBTAIN MATERIALS PROTECTED BY THE FIRST AMENDMENT WITHOUT ANY SHOWING OF NEED OR RELEVANCE.

Section 215 of the Patriot Act violates the First Amendment because it allows the government to obtain information about citizens' reading habits – including library or bookstore records – without adhering to any constitutionally mandated safeguards. The government argues that the First Amendment has no relevance to Section 215 and that any consideration of First Amendment concerns would lead to a parade of horribles in which government efforts to combat terrorism would be utterly thwarted. Mot. to Dismiss at 37-39. This approach, however, conflicts with the long line of cases recognizing that when First Amendment values are implicated by the government investigatory function, the government is held to a higher standard before it may obtain the materials in question. To be sure, the government may be able to satisfy this heightened standard in a particular case depending on the facts of the request. But Section

215 is unconstitutional because it legislatively overrides the heightened standards required by the First Amendment and places no restrictions whatsoever on the government's ability to obtain sensitive First Amendment-protected materials. For this reason, this Court should deny the government's motion to dismiss.

The government concedes, as it must, that Section 215's provisions do not provide the same protection to targets of investigations that the search warrant context requires. Mot. to Dismiss at 20. It is clear that a Section 215 request need not satisfy anything close to a probable cause standard. Instead, to obtain Section 215 authorization, a government agent need only state that the materials are being sought to "protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(b)(2). The statute does not require that the government provide any grounds for why it believes the requested records are relevant to a terrorist investigation.[5] And the government's bare assertion in these circumstances is dispositive because the statute does not give the authorizing judge any independent authority to review its adequacy: the judge is simply directed to enter the order if he "finds that the application meets the requirements of this section," *i.e.*, that the request states that it is part of a terrorism investigation. *Id.* § 1861(c)(1).

The rubber-stamp character of Section 215 contrasts sharply with the familiar probable cause requirements used in the search warrant context. In that setting a detached and neutral magistrate must make an independent determination about whether "there is 'probable cause' to believe that contraband or evidence is located in a particular place." *United States v. Pinson*, 321 F.3d 558, 562 (6th Cir. 2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983)), *cert. denied*

[5] As discussed above, FISA, as amended by the Patriot Act, no longer requires the government to make out "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." 50 U.S.C. § 1862(b)(2)(B) (2000).

No. 03-5494, 2003 WL 21714584 (U.S. Oct. 6, 2003). When the targets of the search are items protected by the First Amendment, this strict standard is heightened further. For example, in *Zurcher v. Stanford Daily*, the Supreme Court declared that "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" 436 U.S. 547, 564 (1970) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). Similarly, when evaluating the legality of searches and seizures of expressive materials, courts have held that more stringent procedural safeguards apply than to searches and seizures of non-expressive materials, such as drugs. *See, e.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211-12 (1964); *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731 (1961). Obviously, Section 215 does not provide for even the standard probable cause analysis, let alone the heightened one mandated by *Zurcher* and other cases in the First Amendment context.

The government argues, however, that Section 215 need not satisfy the dictates of the probable cause framework. Instead, it maintains that an order under Section 215 is analogous to a grand jury subpoena and thus need only satisfy a "general reasonableness standard" that merely requires that the subject of the order be "relevant to the inquiry." Mot. to Dismiss at 20. But a comparison of the subpoena power to Section 215 shows that the latter has a far lower threshold for the production of information and lacks the subpoena power's safeguards against government abuse.

First, the breadth of the subpoena power is tempered by the availability of procedures to quash it. *See* Fed. R. Crim. P. 17(c) ("The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."). The government cites the Sixth Circuit's decision in *Doe v. United States*, 253 F.3d 256, 263-64 (6th Cir. 2001), for the

proposition that mere relevance is all that is necessary to support a subpoena request. But that case, like others, recognizes that the lower standard for obtaining a subpoena – relative to a search warrant – is justified only because procedures exist to prevent its abuse. *See id.* at 264 ("One primary reason for this distinction [between the search warrant and subpoena standards] is that, unlike 'the immediacy and intrusiveness of a search and seizure conducted pursuant to a warrant[,]' the reasonableness of an administrative subpoena's command can be contested in federal court before being enforced." (quoting *In re Subpoena Duces Tecum,* 228 F.3d 341, 348 (4th Cir. 2000) (second alteration in original)).

Notably, no such opportunity to quash is provided by Section 215, which simply requires that an order issue upon the requisite statement that it is connected to a terrorism investigation. This absence stands in stark contrast to the FISA provisions for electronic surveillance, physical searches, and pen registers, all of which establish at least some process to challenge the legality of such operations if the information acquired therefrom is introduced at trial. *See* 50 U.S.C. § 1806(f) (*ex parte* review by a district court is available to "determine whether the surveillance of the aggrieved person was lawfully authorized and conducted . . . . whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State . . . to discover or obtain applications or orders or other materials relating to electronic surveillance" conducted under FISA); *id.* §1825(g) (same for physical searches); *id.* § 1845(g) (same for pen registers). No comparable procedure exists to ensure the review of Section 215 orders for business records.[6]

[6] Although the government suggests that the recipient of an order would have an opportunity to challenge that order before the FISA Court, Mot. to Dismiss at 21 n.8, it points to no statutory authority that would allow such a challenge. And *In re Sealed Case*, 310 F.3d 717, 736-46 (Foreign Intel. Surv. Ct. of Rev. 2002), cited by the government for the proposition that the FISA court would be available to hear a constitutional challenge to a Section 215 order, is inapposite.

Second, unlike a subpoena, Section 215 imposes no heightened standard on the government when the requested material is protected by the First Amendment. It is well established that when a subpoena could have the effect of chilling First Amendment rights, the government must make a heightened showing to justify the request. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 12 (1973) ("'[G]rand juries must operate within the limits of the First Amendment.'") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1103 (2d Cir. 1985) ("[J]ustifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." (quoting *Branzburg*, 408 U.S. at 680-81)); *Kramerbooks*, 26 Med. L. Rptr. at 1601.[7] As the Tenth Circuit has explained in a related context, in order to enforce a grand jury subpoena implicating First Amendment rights, "the government must demonstrate a compelling interest, and a substantial relationship between the material sought and legitimate governmental goals." *In re First Nat'l Bank*, 701 F.2d 115, 117 (10th Cir. 1983) (internal quotation marks and citations omitted); *see also, e.g., Kramerbooks*, 26 Med. L. Rptr. at 1601. Section 215, which does not even provide a basis for a judge to question the government's claim of relevance in the

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Although the court in that case did consider the constitutionality of a surveillance request, it recognized that it had jurisdiction only because 50 U.S.C. § 1803 provided for review when a government surveillance request was *denied*. And in any case, FISA's surveillance provisions already provide for judicial review, 50 U.S.C. § 1806(f), and Section 215 conspicuously does not.

[7] *See also, e.g., SEC v. McGoff*, 647 F.2d 185, 191 (D.C. Cir. 1981) (concluding that "some balancing or special sensitivity is required" in view of First Amendment implications of agency subpoena duces tecum directed at newspaper publisher);*United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) ("[W]hen the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought."); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (grand jury subpoena to appear and testify implicating First Amendment rights to freedom of the press and to association); 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 8.8(d) at 156-63 (2d ed. 1999) (reviewing cases).

normal case, *a fortiori* fails to hold the government to the constitutionally required higher showing. Thus, Section 215 goes far beyond even the subpoena power in its ability to force targets to turn over First Amendment materials without recourse to oppose the request and without any requirement that the government justify its imposition on free-speech values.

Perhaps recognizing the unprecedented reach of Section 215, the government argues that any First Amendment concerns are resolved by the Section's requirement that no order be directed against an American citizen "solely" upon the basis of First Amendment activities. 50 U.S.C. § 1861(a)(1). As an initial matter, this supposed safeguard is utterly porous. So long as a Section 215 order is based on other incriminating information, however slight or dubious, the "solely" requirement is satisfied. And the government's citations on this point fail to rescue the statute. Those cases merely demonstrate that the government is not barred from investigating illegal activity simply because the basis for investigation implicates the target's exercise of First Amendment rights. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491-92 (1999). That proposition is irrelevant to the constitutional infirmities of Section 215. Section 215 is invalid not simply because it can be used to require the production of First Amendment-sensitive documents, but because it can be used to require the production of those documents without any sort of meaningful judicial oversight or the heightened standards that are required in other investigatory contexts. Just as the government would be required to make a heightened showing in obtaining a search warrant or subpoena *duces tecum*, it must make an elevated showing of need when it seeks the production of First Amendment-protected material. Section 215 employs no such heightened standard, and thus it must be struck down as violative of the First Amendment.

## IV. SECTION 215'S AUTOMATIC GAG RULE VIOLATES THE FIRST AMENDMENT.

The constitutional defects in Section 215 identified above are further compounded by an automatic statutory "gag rule," 50 U.S.C. § 1861(d), that prohibits anyone from disclosing that a order has issued. The gag rule provides:

> No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

*Id.* The provision is little more than a blunt law enforcement tool that recklessly infringes on First Amendment rights.

As a content-based speech restriction, the gag rule is subject to, and cannot survive, strict scrutiny. Because it applies automatically to any Section 215 order – absent any showing of need by the government – the provision fails to serve a compelling state interest and is unconstitutionally broad. Moreover, the gag rule is completely open-ended and applies in perpetuity; it takes no account of the speaker's intent; and it restricts anyone with knowledge of the order. That certain narrow disclosure limitations apply to grand jury proceedings does not, as the government suggests, save Section 215's gag rule from invalidation.

As shown below, the automatic gag rule has a direct unconstitutional effect on expressive rights. In addition, *amici* fear the provision will magnify the severe chilling effect of Section 215 discussed above. If the government has ready access to information on individuals' reading habits, they are likely to steer clear of unusual, provocative, or controversial speech. That chilling effect will be far greater where, as here, a person's reading habits are subject to compulsory production *without that person ever knowing it.*

### A. The Gag Rule Is Subject to Strict Scrutiny.

Contrary to the government's claims, the gag rule is subject to strict scrutiny. "[T]he Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (citation omitted); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). Indeed, the Supreme Court has made clear that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 98, 102 (1979).

The gag rule, moreover, regulates speech based on its content. That the statute is content-based is plain by its very terms: it focuses only on the content of a disclosure – that the FBI has issued a Section 215 order. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321 (1988). Consequently, for the provision to survive constitutional challenge, the government must demonstrate that it serves a compelling interest, is narrowly tailored, and is the least restrictive means of serving the asserted governmental interest. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Section 215's gag rule fails that test.

### B. The Gag Rule Is Not Necessary to Serve a Compelling State Interest.

The government attempts to satisfy its burden by explaining that the gag rule serves the general interest in protecting national security, *see* Mot. to Dismiss at 28-29, and serves the specific interest of preventing "the disclosure of information the release of which would compromise foreign intelligence and international terrorism investigations . . . ." *Id.* at 26; *see also id.* at 27. These assertions are constitutionally insufficient.

While it theoretically may be permissible, in certain circumstances, to impose a narrow disclosure restriction where there is a specific showing of threatened harm, Section 215's gag

rule applies automatically. Unlike in the context of a search warrant or a grand jury subpoena, the government need not demonstrate that a particular Section 215 order might threaten national security or an ongoing investigation. The purported "compelling" interest, therefore, is merely speculative.

Although *amici* recognize the importance of safeguarding the Nation against international terrorism, the simple invocation of "national security interests" hardly satisfies the government's heavy burden here. Indeed, courts historically have expressed a degree of skepticism regarding proclamations that legislation is necessary as a matter of national security:

> The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.

*New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring); *see also, e.g.*, *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984) ("Even the country's interest in national security must bend to the dictates of the First Amendment."), *aff'd*, 469 U.S. 1200 (1985).

The government offers nothing in the legislative record to justify imposition of the automatic gag rule in all circumstances. Rather, the government simply cites to summary congressional statements suggesting that the statute is "necessary to protect the FBI's foreign intelligence investigations from disclosure to hostile powers or international terrorism organizations." Mot. to Dismiss at 29 (quoting S. Rep. No. 105-185 (1998)).[8] The Supreme

[8] The Government undercuts its own asserted need for Section 215 generally – including the gag rule – by advising the Court that, in the two years since the September 11, 2001 terrorist attacks, it has never used Section 215. *See* Mot. to Dismiss at 9; Declaration of James Baker ¶ 3.

Court, however, continually has warned against precisely these types of vague statutory justifications. "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) (citation omitted).[9]

In addition, even if the government could somehow establish that the mere disclosure that the FBI had sought a Section 215 order could *possibly* lead to further serious harm, the Supreme Court has made clear that "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)); *see also, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). Indeed, "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Bartnicki*, 532 U.S. at 529-30; *see also, e.g., Worrell*, 739 F.2d at 1223 ("[W]hile we recognize the state's interest in apprehending criminals, we do not think it is sufficiently compelling to justify the prohibition of publication by *any* person . . . of the contents of a sealed document.").

The government's references to cases applying First Amendment analysis to statutory offenses such as treason, sabotage and espionage cases are entirely inapt. As the Court well knows, each of those offenses contains mental elements that require proof beyond a reasonable

[9] *See also, e.g., Playboy*, 529 U.S. at 822-23 (striking down statute on First Amendment grounds where legislative record was "barren" of evidence of problem that would justify speech ban and holding that "Government must present more than anecdote and supposition").

doubt that, for example, an individual intentionally seeks to undermine the interests of the United States. By contrast, the gag rule prohibits disclosure without a showing of any such intent.

### C. The Gag Rule is Not Narrowly Drawn.

Even were the government able to demonstrate a compelling need for a prohibition on certain disclosures in order to protect national security or to prevent the disruption of foreign intelligence investigations, the government has failed to show that the automatic gag rule in Section 215 is narrowly drawn to serve that interest. *See, e.g.*, *Playboy*, 529 U.S. at 813. The gag rule is unconstitutionally broad because, rather than eliminating "the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 487 (1988), it instead prohibits a substantial amount of constitutionally protected speech.

First, as noted above, the rule applies automatically to all Section 215 orders, regardless of the particular harm threatened in any given instance. This fact alone casts serious doubt on the statute's constitutionality. Second, the statute contains no time limit and, therefore, its terms apply in perpetuity. As a result, the statute prohibits individuals with knowledge of an FBI search from disclosing that information long after the investigation has concluded. The permanent suppression of information that could have no bearing on national security is unjustified. *See, e.g.*, *Butterworth*, 494 U.S. at 632-33, 635 (striking down statute that prevented disclosure of grand jury testimony "into the indefinite future" and holding that once investigation is at an end there is no reason for grand jury secrecy); *Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir. 1994).

Second, because the statute prohibits *anyone* from disclosing knowledge of a Section 215 order, it applies not just to the original recipient of the court order mandating the search, but also to anyone who subsequently may learn of the order. This would include, for example, the media.

Even if the government could establish a basis for suppressing the initial disclosure, that justification is nonexistent as to others who subsequently learn of the search and, in turn, disclose the information to additional individuals. *See, e.g.*, *Florida Star*, 491 U.S. at 535 ("[I]t is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities . . . .").

**D. The Government's Analogy to Grand Jury Testimony is Entirely Inapt.**

The Government attempts to justify the gag rule by analogizing to the secrecy restrictions surrounding grand jury proceedings. Rather than support the validity of the gag rule, however, the grand jury analogy highlights the statute's constitutional infirmities.

First, federal law in no way bars a grand jury witness from disclosing testimony that the witness has provided to the grand jury. Federal Rule of Criminal Procedure 6(e), which sets the boundaries for the confidentiality of grand jury proceedings, is careful not to bring grand jury witnesses within its scope. *See* Fed. R. Crim. P. 6(e)(2) (prohibiting disclosure of grand jury matters by grand juror, interpreter, court reporters, etc.). "[T]he secrecy provision in Rule 6(e) applies, by its terms, only to individuals who are privy to the information contained in a sealed document by virtue of their positions in the criminal justice system. Indeed, a federal district court has held recently that if Rule 6(e) was construed to apply to witnesses who testify before grand juries it would violate the First Amendment." *Worrell*, 739 F.2d at 1223. There simply is no reason why a witness testifying before a grand jury in a matter involving international terrorism should be free to discuss substantive testimony, but an individual who knows nothing more than that the FBI has compelled the production of ostensible evidence of international terrorism must remain silent.

Second, were there a federal rule automatically prohibiting grand jury witnesses from revealing the substance of their testimony or even what they learned in the grand jury, such a restriction would still be far narrower than the gag rule, which by its terms prohibits even a general statement that the FBI issued a Section 215 order. The equivalent of such a rule in the context of grand juries would be one that prohibited a grand jury witness from even generally mentioning to anyone that the witness appeared before a grand jury. Again, any perceived threat of disclosure in a given circumstance could be addressed by a government showing, *in that specific case*, that disclosure limitations may be warranted. But without such a particularized showing applicable to *every* Section 215 order, the gag order cannot stand.

## CONCLUSION

Section 215 of the Patriot Act gives the government nearly unbridled authority to compel the production of records that reveal the private, confidential reading habits of the public. The statute thus will have a dangerous chilling effect on the exercise of core First Amendment rights. Because Section 215 subverts the requisite substantive and procedural protections typically accorded First Amendment-protected material, and because the statute automatically imposes an indefinite gag order absent any heightened showing of need by the government, *amici* respectfully request that the Court deny the government's motion to dismiss.

Respectfully submitted,

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October 31, 2003

**TAB A**

## INTERESTS OF *AMICI CURIAE*

*Amicus* THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION ("ABFFE") was organized in 1990 by the American Booksellers Association, the leading association of general interest bookstores in the United States. ABFFE's purpose is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship, and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

*Amicus* THE ASSOCIATION OF AMERICAN PUBLISHERS ("AAP") is the national trade association of the United States book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents and industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

*Amicus* THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES is an organization whose 125 members are nonprofit publishers affiliated with research universities, research institutions and scholarly societies who publish 10,000 books and 700 scholarly journals a year. First Amendment rights and the protection they convey to freedom of inquiry and expression are fundamental to carrying out their core mission of publishing the results of scholarly, post-doctoral research.

*Amicus* THE CENTER FOR FIRST AMENDMENT RIGHTS INC ("CFAR"),

a 501(c)(3) public educational foundation, was founded in 1993 to enhance the knowledge, appreciation and understanding of the First Amendment among all citizens through various educational programs and activities in the greater Connecticut area. Important to its mission are programs and activities that address issues concerning banned books, the free use of libraries and the internet by students and citizens alike, the freedom to read and write, the protection of the free and open expression of ideas, the dangers of censorship and gag orders, and the history of and historical setting of the First Amendment and its application today to assure all basic First Amendment rights

*Amicus* THE COMIC BOOK LEGAL DEFENSE FUND ("CBLDF") is a non-profit organization dedicated to defending the First Amendment rights of the comic book industry. CBLDF members include comic book retailers, librarians, authors, artists, distributors, publishers, and readers located throughout the United States and the world. The CBLDF was founded in 1986 on the principle that comics are an expressive medium deserving of the same First Amendment liberties afforded to film, literature, and art. The ability of the CBLDF's members to produce, sell, and read content addressing a wide variety of themes, topics, and concerns depends upon the recognition and exercise of rights guaranteed by the First Amendment.

*Amicus* ELECTRONIC FRONTIER FOUNDATION ("EFF") is a nonprofit, member-supported civil liberties organization working to protect privacy and free expression in the digital world. Founded in 1990, EFF represents the interest of Internet users both in court cases and in the broader policy debates surrounding application of the law in the digital age, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world.

*Amicus* FEMINISTS FOR FREE EXPRESSION ("FFE") is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Since 1992 it has worked actively to oppose the misapprehension that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality in inextricably linked with the values enshrined in our Constitution's free speech clause.

*Amicus*, THE FIRST AMENDMENT PROJECT ("FAP") is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

*Amicus* FREEDOM TO READ FOUNDATION ("FTRF") is a nonprofit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to set legal precedent for the freedom to read on behalf of all citizens.

*Amicus* PEN AMERICAN CENTER, the professional association of over 2,600 literary writers, is the largest in a global network of 131 Centers around the world comprising International PEN. PEN's mission is to promote literature and protect free expression whenever writers or their work are threatened. To advocate for free speech in the United States, PEN mobilizes the literary community to apply its leverage through sign-on letter campaigns, direct

appeals to policy makers, participation in lawsuits and amicus curiae briefs, briefing of elected officials, awards for First Amendment defenders, and public events.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served, this 31th day of October, 2003, by first-class mail, postage prepaid on the persons specified below:

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